

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR
WHISTLEBLOWER EMPLOYEES**

At Sydney on Monday 1 December 2008

The Committee met at 10.00 a.m.

PRESENT

Mr F. Terenzini (Chair)

Legislative Council

Mr T.J.B. Khan
Reverend the Hon. F. J. Nile

Legislative Assembly

Mr D. R. Harris
Mr R. S. Amery
Mr N. Khoshaba
Mr J. R. O'Dea
Mr G.E. Smith
Mr R. G. Stokes

MR GRANT MARLEY, Senior Manager, Serious Misconduct Investigation Team, Department of Education and Training, 35 Bridge Street, Sydney, and

MS JANE LOUISE THORPE, Director, Employee Performance and Conduct, Department of Education and Training, affirmed and examined:

CHAIR: Good morning and welcome. I thank all members for their attendance at this third day of hearing into the effectiveness of current laws, and practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament. Both Houses of Parliament referred the inquiry to this committee on 26 June 2008. On 24 November 2008 the committee heard from a number of agencies, including the New South Wales public service and the Leader of the Opposition, Mr Barry O'Farrell. Today is a continuation of that line of inquiry with further agencies being called.

Mr Marley or Ms Thorpe, would either of you wish to make an opening statement?

Ms THORPE: I would like to pass around some documentation that may be helpful and which we omitted to send when we provided our original documentation. I am handing around copies for the committee of the code of conduct within the Department of Education and Training and TAFE New South Wales, and our complaints handling policy guidelines. The reason I have passed those around is because they provide some information and guidance to staff in relation to protected disclosures and how to make those sorts of complaints. The documentation provides a broader context, even though we also have internal reporting procedures.

CHAIR: We have received your submission from the Department of Education and Training. Do you wish that to be included as part of your evidence today?

Ms THORPE: Yes, I do.

CHAIR: Ms Thorpe, do you wish to add anything further to what you were saying?

Ms THORPE: No, thank you.

CHAIR: On looking through your submission there have been a range of protected disclosures or internal disclosures I assume over the past five years?

Ms THORPE: That is correct.

CHAIR: I noted that about 30 per cent of them are internal disclosures and another 70 per cent fall in to other categories, which are not protected I assume. Can you give the committee a picture of what the 30 per cent were about? Who were they received from? What percentage was investigated and what were the outcomes? What did they generally entail?

Ms THORPE: All of those matters referred to there were investigated, and they came to us in a variety of ways. I cannot break them up into specific percentages, except to say that some came to us via the Independent Commission Against Corruption [ICAC] but the majority would have come to us internally from staff members. They do not form any sort of particular pattern. I took some examples from the last couple of years and they tend to be a mixture of allegations. The majority of them were financial mismanagement, allegations of misuse of public assets or of corrupt conduct.

CHAIR: I take it all employees within your department, from the material you have provided, would be aware of the policies and guidelines that are in place? What is the procedure to ensure they know who to go to if they have a disclosure to make?

Ms THORPE: We are a very large department and one of the particular challenges is ensuring that teachers in school and the people on the ground have the ability to know what the processes are. That is why we refer to the process in a number of our documents. Things like the code of conduct and the complaints handling guidelines are on both our intranet and Internet websites. The code of conduct in particular is made available to employees when they are inducted into the department. There is also an expectation that managers will provide annual updates as well in relation to that. That would cover areas including how you might make a complaint or how you would take further processes if you have a concern and wanted protected disclosure status. Going into

specific detail with employees on the ground is, as you would appreciate, a challenge in an organisation of our size.

CHAIR: What were the 70 per cent of disclosures about? I take it they were not protected but just internal disclosures?

Ms THORPE: I cannot give you a lot of detail because I have not got that information to hand but from my experience of having seen the investigations and supervising that area, they would be of a similar nature basically. Some would be more focused on staff grievances and concerns of those sorts of nature, some of them may be criminal matters that we have dealt with through the police, or had to be subsequently investigated that would not necessarily have been of a protected disclosure status, and some would be other sorts of conduct matters that would not necessarily have been accorded the status.

CHAIR: Are the teachers, office workers and clerks on the ground in your organisation fully aware of whom to go to if they have a disclosure to make?

Ms THORPE: We have certainly made every effort to get material to and make our processes very clear and explicit to our staff. I would not be confident that everybody on the ground would know exactly what to do, but certainly we would hope so. We have done a lot of targeting at our management level so that if someone comes to you with a complaint or concern you know that these are the sorts of processes that you should be advising them about. I could not be confident that everybody on the ground would know exactly what to do.

CHAIR: One of the issues we are looking at is whether people feel confident that they can come forward with things they have seen in the workplace, whether it be waste, corruption or any other matter, and that their complaints are going to be kept confidential, as far as they can be, and they will be protected from any reprisals. Are you satisfied that the system you have in place gives that confidence to people in your department?

Ms THORPE: I am satisfied that we have a system in place that provides a framework for doing that. I could not be confident that everybody on the ground, about 130,000-odd employees—we have a very large casual workforce as well—would know exactly what to do in all circumstances in relation to those sorts of complaints. The message that we get out very clearly through employee performance, conduct and training is very much that the way we deal with complaints and concerns anyway, whether they go to an investigative status, is that we hold confidentiality very important. With other matters, for example our child protection matters, which are the majority of our investigations, the complainant is always held confidentially and we have a process where we have got the message out to staff, I think, that wherever possible we will treat people's complaints confidentially. Clearly, there are some limits even with protected disclosures if you go to disciplinary proceedings or court proceedings, where there may need to be procedural fairness to the person. Sometimes it is just impossible for the person not to know who made the complaint because of the nature of the complaint.

CHAIR: Have you had any experience of having to deal with reprisals throughout your department after someone has made a disclosure?

Ms THORPE: We have had a very small number of complaints about reprisal action, yes.

CHAIR: How have you dealt with those?

Ms THORPE: At the moment we have one matter that we are currently reviewing and re-investigating because it has been investigated once already and there was a determination that the conduct had occurred but it was not in reprisal for a protected disclosure. Further questions were raised by the New South Wales Ombudsman in relation to that matter and a further investigation and some further detail are being looked at the moment.

CHAIR: So that is being investigated at the moment?

Ms THORPE: Yes.

CHAIR: Are you aware of section 20 of the Protected Disclosures Act and the penalties in that?

Ms THORPE: Yes, I am.

CHAIR: Is that made known to people who want to come forward and disclose things?

Ms THORPE: Yes it is. Within our education employment legislation we also have penalties for internal disclosures as well. Where a detrimental action as a result of someone making an internal complaint that may not have been taken as a protected disclosure can be demonstrated it will be considered to be misconduct under our legislation.

CHAIR: Have you ever had any experience with people coming forward with a disclosure and you have found out that it is really attached to a grievance? For example, they have used this protected disclosure system after they have had a grievance with the department or someone else in the department.

Ms THORPE: That is a very difficult area to answer, I think, because the level of investigation that you have to be able to do sometimes to prove that someone has made a disclosure because they are upset and angry about other things—people's intent is sometimes very difficult to determine. We have not had a lot of people complain about detrimental action. I am not sure what all the reasons for that would be but certainly there have been times when we have had people request protected disclosure status where the matter seems to be very much a staff-on-staff grievance matter.

CHAIR: How have you dealt with that?

Mr MARLEY: Because I am the protected disclosure coordinator for the department, a lot of times when I receive a protected disclosure I will actually make contact with the individual and before accepting it as a protected disclosure we will often discuss the circumstances of the case to get more detail to identify, firstly, whether it does satisfy the requirements of protected disclosure and, secondly, to find out what the person making the disclosure wants the outcome to be or their reasons for making the disclosure. At that time there is a filtering out process of some of those matters that quite easily could be declared to be grievances rather than protected disclosures.

CHAIR: Why is it your view that the protected disclosures unit would be more onerous administratively? I have noted that in your submission. One of the things we are looking at is that very thing—a unit to take care of a few things that at the moment we think are not being looked at.

Ms THORPE: It is less the matter of the unit than of multiple lines of reporting on a particular issue. For example, the majority of the investigations my directorate handles are child protection investigations and we have requirements to report a huge amount of material, including full files, to the New South Wales Ombudsman. We also have extensive quarterly reporting to ICAC in relation to their legislation, so we report on outcomes of matters, current matters and new matters for the previous quarter et cetera. We also now report some of the child protection matters that we believe would fall under ICAC's jurisdiction to them as well. If there was some way of streamlining those lines of reporting—one of my concerns is there is a huge amount of pressure on a directorate like ours with an organisation of our size simply to get investigations done in a timely way, but also to be very accountable. You can get to the point where the administrative requirements almost overwhelm your ability to be able to undertake the investigations. I suppose one of our concerns has been about needing to be very clear to people about what constitutes a protected disclosure because even we find that confusing internally at times, and being able to streamline processes so that we can deal with people effectively and well and not get caught up in what could potentially be a very cumbersome administrative process.

CHAIR: Finally, you have said in your submission, and it is not an uncommon comment to make, that you find it difficult to strike a balance between confidentiality and investigation of the matter, and you have noted that some people have withdrawn their complaints because they could not be guaranteed confidentiality. Is this a big problem? How do you think this could be addressed?

Ms THORPE: Our difficulty is that if someone makes a complaint to us we need to investigate, so despite the fact that someone might want to withdraw an allegation, if the matter is serious enough and the evidence is there we are required to investigate. The difficulty I often find is that the person who is subject to the allegations is the person who breaches confidentiality. That is quite understandable, it is human nature. People are anxious and worried and we have had situations where protected disclosants tell everybody, despite being given all the warning and support. That becomes a significant issue. I think it is about how we provide better

and clearer support to people. We have a support unit separately in our human resources area and we also have councillors within my unit. Again, it is about following up with people and making sure that they understand that just because they have not heard from someone for two or three days does not mean that absolutely nothing is happening. Confidentiality is a major issue because human nature being what it is people talk about their worries.

CHAIR: And you find you still have to maintain that confidentiality even though out there it is known who has disclosed it? This is a matter brought up with a previous witness that we had, that it is an artificiality. Do you find that?

Ms THORPE: We find that that can be very difficult at times and that often when you are talking to the complainant or it might even be the complainant's family in some circumstances where the matter is fairly complex you have to explain to them about confidentiality and why it is important for their protection but also for the investigation to go ahead. People sometimes confuse confidentiality with departments covering up things as well.

CHAIR: Thank you, Ms Thorpe.

Mr DAVID HARRIS: I want to explore what you were talking about. Mr Marley, you said that sometimes when people have protected disclosures they are referred to you. At what level is the decision made that it is a protected disclosure? How early is the person making the disclosure informed?

Mr MARLEY: As you would see in our submission, there is a fairly extensive list of nominated disclosure options across the department. As you have heard, we have close to 130,000 employees. So to have one single point of nomination would be almost unworkable. The list has been designed to provide people at particular levels of an organisation and geographically available to people so that they can actually make their disclosure to someone more local, although they have the alternative to make it to me directly if they want to. Normally that first point of call the person makes the disclosure to or contacts is the nominated disclosure officer. The nominated disclosure officer will make some assessment through a discussion with the complainant to determine whether it actually meets the criteria. So there is a general filtering out stage at that level. That is a fairly important one because that is the one that breaks down the issue of grievance versus protected disclosure and some of those other things. Once the person who is the nominated disclosure officer accepts that it could be a protected disclosure, they refer it to me in writing—most of the time it is verbally by phone call but then a follow-up with some form of formality. I get that and then I make the decision as to whether it actually meets the criteria. Once again, I may have to talk to the person who is making the protected disclosure or a claim for protected disclosure before making that decision because the detail just may not be there to enable me to make that call.

Mr DAVID HARRIS: Do you have to sometimes seek advice from outside agencies, such as the Independent Commission Against Corruption, when you are making that decision?

Mr MARLEY: I have been in this role for 12 months now and I think I have had one occasion where I have wanted to seek some assistance from the Independent Commission Against Corruption, just about the interpretation of a particular matter. That ended up being accepted as a protected disclosure. In most cases it is reasonably clear, especially after talking to the individual and getting a little bit more detail. Trying to make that assessment from the first-up notification is often difficult without that detail, but once we get that it seems to fall into place pretty well.

Mr DAVID HARRIS: Your submission says that sometimes if people find out it is not a protected disclosure they seek to withdraw the allegation. How does that work if they have already told you what has happened and it is something you possibly cannot let go?

Mr MARLEY: I think in our submission we were talking about people who would not necessarily be guaranteed confidentiality if it was a protected disclosure because of the need to investigate. It is an interesting discussion. Some people will make a disclosure and then basically hand it over to you and do not want to know anymore about it; they believe they are doing the right thing and do not care for their own personal needs or what the outcome is. Other people are quite concerned and want to know the outcome. Other people are quite obvious that they want a definite outcome and they are quite clear on the outcome they want. It is almost bordering on the vexatious at that point, even though I would not say it. At that point when they are worried about their protection and about their confidentiality, we have fairly lengthy discussions about how we could go

about protecting that confidentiality. Most of the time people who actually make protected disclosures are officers in our investigation anyway, so we would talk to them. During those discussions we get to the bottom of the protections that we are able to provide to them and the fact that we can provide confidentiality by still involving them in the investigation. On one or two occasions in the past 12 months we have had to agree to basically accept the notification anonymously on the proviso that the person would be talking to us as a witness anyway. But most of the time through consultation and discussion we can pretty comfortably move on and continue that person in the process.

Mr DAVID HARRIS: Ms Thorpe, you mentioned that the department is required to report quarterly to the Independent Commission Against Corruption.

Ms THORPE: That is correct.

Mr DAVID HARRIS: Is that just a requirement for the Department of Education and Training? Why have we not heard of that before?

Ms THORPE: I am not sure; I think that is the process that we have developed in agreement with the Independent Commission Against Corruption. But there is certainly a requirement that there are a number of matters that need to be reported to them and that they seek responses on through the Director General as part of their legislative requirements. Because we probably have larger numbers than a lot of other organisations, we have a process that works reasonably well where we can provide them with all the material in a document every quarter. If there was something significantly contentious or with very serious public interest implications, we would obviously contact them and notify them immediately, if it had come through us first. They will re-contact us and if there are any particular matters they want to monitor they will advise us of that once they get our quarterly report.

Mr DAVID HARRIS: Does your directorate have regular checkups with both the Ombudsman and the Independent Commission Against Corruption just to make sure that the processes are on track and everything is working?

Ms THORPE: The Ombudsman certainly. The Ombudsman monitors us very closely. They see most investigations in their entirety and they audit us every six months and provide us with an audit report and we respond to any recommendations. I would say that they have generally quite publicly indicated they are satisfied with our systems. The Independent Commission Against Corruption tends to contact us in relation to specific cases or they might have a particular complaint. It is a less clear relationship.

Reverend the Hon. FRED NILE: In your submission on page 3 you make the point:

It would be beneficial if greater clarity was provided by legislation and guidelines regarding the types of complaints which may be accorded protected disclosure status.

Have you prepared any submission on how that should be done? What do you want to achieve?

Ms THORPE: No, we have not gone to that extent of detail. We would certainly be interested in considering that, but we did not put that in as part of our submission at this stage. You certainly do not want a prescriptive list because I think those are quite dangerous in that there will always be something that no-one has ever thought of in relation to that. While I agree that Grant is very experienced at sorting out what does constitute a protected disclosure, the nature of a number of disclosures of any sort or any complaint is such sometimes that it can be quite unclear and it can be a mix of all sorts of issues that people have. Certainly we have seen bullying and harassment, for example, as fitting more into a grievance category than a protected disclosures category. But we have noticed that in the Ombudsman's guidelines they do refer to bullying and harassment. So I think there is a need at least to clarify to some extent the broader range of examples that may fall into maladministration, for example, because it could be a catchall for anything really.

Reverend the Hon. FRED NILE: Do you have a protected disclosure form that people fill in, which would have basic headings where they would put the information that you require? Is it by letter or email? How do you get the information of the complaint?

Ms THORPE: We have tried to be very flexible in how we get complaints. In fact, that was the change to our complaints handling guidelines because we had become very administratively onerous in terms of saying everyone has to write a complaint. Obviously we want to encourage people, where they need, to be able to

complain. So we also will accept verbal complaints from people as well. Otherwise you prevent a whole lot of people being confident to make complaints, particularly in the nature of our work. In the child protection area we have a very clear intake form where we have a checklist. Our intake officers are actually nominated disclosures officers and they are considerably more junior than most of the other managers making those decisions. We have a checklist so that they can be very clear that they are thinking about all of the issues at the time. In relation to our other processes, because you can get such a variety of complaints, we have not had a checklist.

Reverend the Hon. FRED NILE: You state also that sometimes when staff are told that you cannot guarantee confidentiality they have withdrawn their disclosures. Are there many in that category—where so many people come to you and then 1 per cent or 5 percent withdraw?

Ms THORPE: I have never had anybody withdrawing a complaint. During investigations people have tried to withdraw complaints for different reasons. Confidentiality is often a major issue for people. I have often had confidentiality discussions with people, not necessarily simply about protected disclosures but any sort of anxiety about making a complaint. Grant might be able to answer that question from his perspective.

Mr MARLEY: As I said before, the consultation that I have with those who are making the disclosures often gets to the bottom of their concern. It would also depend on the seriousness of the allegation. If the allegations were more serious and someone wanted to withdraw from the process we would be in a dilemma in that we would have some information and the person who had given us that information wanted to withdraw from the process. How would we, as an organisation, respond to such a request, given that it is a serious issue that needs to be addressed? That is the discussion that I have with each individual.

In the past we have been successful in encouraging the person at least to continue to participate in the process. I do not think anyone has totally withdrawn from the process or refused to cooperate. A couple of people withdrew when we started talking about the tests through which their allegations might be put. On those occasions I can recall that two people who made the allegation were on a bit of a fishing expedition and were probably wondering what would be the level of scrutiny. When you start talking to people who have done that, you have some doubt in the back of your mind as to the seriousness of a complaint. In most cases we have been able, satisfactorily, to get that person to continue with the process.

Reverend the Hon. FRED NILE: When complainants are nervous about confidentiality aspects and about their names being revealed is that because they fear reprisals? Do they use that as one of the reasons?

Mr MARLEY: There are two main reasons and one relates to reprisals. Often a large number of complaints about senior staff come from more junior staff. It does not necessarily relate to reprisals. Our organisation is spread right across the State and it has offices in some small local communities. The person who made the complaint might not fear reprisals from the person against whom he or she made the complaint, but often there is a level of dissatisfaction in the community once community members find out who made the complaint. There can be a couple of reasons. We can help to manage some of those things but we cannot help to manage them all. That forms part of the discussion that I have with the person at the time.

Mr RICHARD AMERY: I wish to ask a follow-up question. Ms Thorpe, you made a comment about complaints in writing as opposed to verbal complaints and so on. Would you accept a verbal complaint if the person who was making the complaint named someone? For example, someone might ring up and say, "No matter how many times I raise this matter someone keeps leaving on the sprinklers", which is not a big problem. However, someone might make a serious allegation against a principal or someone like that.

Do you accept those sorts of verbal complaints? When you are investigating such a complaint the person who made the complaint could easily say, "I did not say that at all." What is the cut-off point for such verbal complaints? You also said that requiring complaints to be made in writing might restrict the number of people making such complaints. I did not think there would be such restrictions within the Department of Education and Training.

Ms THORPE: I think the issue is that parents and members of the community also make complaints.

Mr RICHARD AMERY: You were not just referring to employees?

Ms THORPE: Not just to employees, no. Our complaints-handling guidelines apply to members of the community and to employees. We try to make them as accessible as possible for those who might have a serious complaint to make about a school but who want to come in and talk about it to a senior staff member. However, if a matter is to go to investigation we have different levels—we have informal complaints handling and we have mediation-style negotiation procedures. I imagine this committee is talking about serious matters that go to investigation.

In those circumstances you would normally have some material in writing from those people. As Grant alluded to earlier, you often get a letter from someone. That is a complaint in writing—a vague litany of all sorts of things that might not clearly identify the staff member about whom someone was complaining. We often seek detailed and verbal information from that person to clarify the complaint and to determine what sort of action, if any, needs to be taken.

Mr RICHARD AMERY: Let us restrict it to members of the public and to parents who come into the offices of local members, who take down the details and get the local office or the principal to chase up these matters. Coming back to whistleblowers, I assume that the Department of Education and Training is not saying that serious complaints about the performance of senior officers in the department would not be dealt with if they had not been made in writing. I would be a bit concerned if serious allegations against somebody in the department were not supported by a signed statement indicating that those allegations were accurate.

Ms THORPE: The difference is that it is only an allegation at that stage. A serious complaint might be made and you might have sufficient evidence because the complainant had come in to see you. At that stage you would take a taped interview or even a statement from complainants. When people are making complaints and raising issues with us we allow them to contact us verbally to discuss those issues. Clearly, we would then get further and better particulars from them that would enable us to determine what to do. The difficulty with entirely anonymous notifications is that we often receive complaints in writing. We do not know who the person is and we cannot clarify that. It therefore makes it difficult to establish whether or not you are dealing with a serious matter.

Mr MARLEY: When a verbal complaint is made to a disclosure officer at a local level our policy requires nominated officers to formalise into a written statement the disclosure that was made to them. That is what is forwarded to me for my assessment, so there is some formal acceptance of the complaint.

Mr RICHARD AMERY: You state in paragraph 4.1.1 of your submission that all employees are encouraged to report matters, et cetera. Let us assume that an incident involves the local principal. Are employees of the Department of Education and Training required to report such incidents in an attempt to have those matters resolved at the local level, either by a principal or by a district inspector, if that is his or her current title, before they go your organisation or to the head office of the department? If I were a teacher at a school would I be required to take up that matter with the principal? Would the matter go further only if the principal did not address that problem?

Ms THORPE: Our complaints guidelines certainly refer to that. It is our view that lower level matters, grievances, and those sorts of issues would be better resolved quickly and effectively locally. We do not want to ramp up the level of complaints to be centrally managed, as that usually results in more time delays and probably will not result in a satisfactory outcome. We believe that day-to-day matters should be handled informally at the level at which they occur. Generally, some of the matters that come to us are those that we believe to be more serious, or those involving people who have made those attempts and the issues have not been resolved. If we felt that the matter would be better resolved by school principal, or by a school education director if the matter involved a principal, clearly we would refer them back.

Mr RICHARD AMERY: I refer to grievances as opposed to protected disclosures. If I, as a teacher within the education system, made a complaint and your unit or your director general said, "We consider this to be a grievance", could I dispute that decision and ask someone outside your unit to determine or define the matter as a grievance as opposed to a protected disclosure? Some people might say, "I do not agree with this decision. It is not just a dispute between me and someone else at the workplace. I think this matter is more significant." Earlier you referred to the much-abused term of "covering it up" or something like that. If the person making the complaint was told, "This is not a protected disclosure" would he or she have a right of appeal?

Ms THORPE: I have not found that people question the course of action that is being taken. Generally, they appeal or take it further if the outcome does not satisfy them. If a matter has been dealt with and they are not happy with the outcome they have the right to take it to the next level within the organisation. They can also go to the Ombudsman or to other agencies. People tend to go to the Ombudsman if they believe that their complaint has not been handled appropriately. But usually it is less of a debate about whether it was a grievance or whether it was investigated as when that first response happens whether they are unhappy with the outcome after that first response, I find.

Mr RICHARD AMERY: Who or at what level in the organisation determines it is a grievance as opposed to a protected disclosure?

Ms THORPE: If it goes to a nominated disclosure and they are unsure—and this is one of the areas that we are looking at at the moment—we would hope that they would come and get some advice from either Grant or myself about the matter, because we know about the matters where people accept it as a protected disclosure or discuss it with us. One of the areas where there may be a gap is where perhaps it goes to a TAFE Institute director; the person asks for a protected disclosure status; they do not believe it requires that but then they may not speak to us immediately either if it was considered to be a less serious matter that the TAFE was not dealing with themselves, and in those cases we will sometimes get people contacting us to ask about their matter.

The Hon. TREVOR KHAN: Your submission generally seems to deal with protected disclosures. You would understand that this inquiry deals with the concept of whistleblower employees?

Ms THORPE: Yes.

The Hon. TREVOR KHAN: You would envisage, would you not, that the term "whistleblower employees" extends well beyond people who would currently be covered by protected disclosure legislation?

Ms THORPE: I have always seen it in terms of the protected disclosure legislation being there and available to support whistleblower employees. But I do understand the concept of employees being absolutely entitled to make a whole series of complaints about anything.

The Hon. TREVOR KHAN: Mr Marley, you seem to be nodding slightly. Do you agree that the concept is wider than simply protected disclosures?

Mr MARLEY: I think, as Jane said, people will make complaints about a number of things that happen in a workplace, which may fall into that grievance category or may fall into some other category, but they may not fall into the categories that are covered by protected disclosures. I agree with the concept.

The Hon. TREVOR KHAN: Let us deal with this circumstance: Your department is a service delivery department, is it not? Delivering the service of education to the community?

Ms THORPE: That is right, yes.

The Hon. TREVOR KHAN: In part I am envisaging Reverend the Hon. Fred Nile's previous inquiry into Royal North Shore Hospital, amongst other things, and some of the complaints that nurses made there. Let us deal with teachers at a local high school that have been for a period of time making complaints, for instance, that the electrical system in the school is shot. Not having achieved an outcome within the departmental lines they go public and make disclosures that the school is just a wreck—embarrassing for a government, embarrassing for the department, embarrassing for a principal but perhaps legitimate in terms of dangerous wiring. What protections exist for the teachers in those circumstances who have dumped the bucket?

Ms THORPE: That is a very good question.

The Hon. TREVOR KHAN: I have been thinking of it for 40 minutes, you see.

Ms THORPE: I suppose our unit is really established to deal with misconduct by individual employees, and out of some of those issues, as you would appreciate, systemic issues come out at times. So you may get a complaint that appears to be about the action of an employee but then is either a policy or a resourcing issue, et cetera. So I have to be honest and say the matter of the wiring in the school has not come to my

attention unless, for example, it injured a child or there was some other negligence issue that may come to our attention. So I do not know that I can answer your question very successfully.

The Hon. TREVOR KHAN: Do I take it from that—and, again, I would do not seek to be putting words in your mouth—you were not aware of a policy that provides protection for whistleblower employees in the broader sense that fall outside the protected disclosure legislation?

Ms THORPE: I am aware that there is some advice in our code of conduct about making public comment, et cetera, that while there are some issues around, that does not preclude people from making public comment about things that genuinely concern them and I am also not aware of any circumstances where we have taken action against anyone who has made public comment of that sort of nature.

The Hon. TREVOR KHAN: But there are ways, are there not, that in a sense action can be taken against a teacher who makes such a disclosure without it being taken by the department? For instance, the principal makes it more difficult for them in their classroom or their school environment?

Ms THORPE: And it may well be, if that was the circumstance, that we may then get a subsequent complaint from that teacher and that that would be the aspect that we would either investigate or be working with the region to address in terms of bullying or harassment if that was what was occurring.

The Hon. TREVOR KHAN: But it may not be in the nature, you would agree, of bullying or harassment; it may be simply in regards to allocation of classes or other more subtle ways of effecting a result of saying, in essence, "You have done the wrong thing by me or the department". Is that not right?

Ms THORPE: Indeed that would be possible. I am aware that there are quite a few complaints of that nature as well—and dealt with and looked at as well.

The Hon. TREVOR KHAN: Might I suggest to you that the sort of circumstance that I have described is the sort of circumstance that I have, in a sense, experienced in terms of teachers coming and telling me things but saying not only "You can't identify me because I am fearful of the retribution" but "You can't identify the school because I am fearful of the retribution that will befall the school as a whole". If that is correct there is a problem within the department, is there not?

Ms THORPE: I suppose there is always a problem if someone is being treated badly as a result of something they have done. We have certainly dealt with a range of issues where there have been grievances or concerns about things that have happened in schools, but I think there will always be circumstances where you are not going to be able to protect every instance. What you try and do is provide a framework of how you treat your employees and how you deal with issues. If someone chooses to do something like that, unless it comes to our attention we are not going to be able to cover for every piece of bad behaviour.

The Hon. TREVOR KHAN: I think you are missing the point, with respect. What I am suggesting to you is that there is a culture, in essence, of fear that, for instance, teachers are not prepared to disclose some issues for fear that there will be retribution against them. It is at an earlier stage there is an uncertainty about what they can do.

CHAIR: Mr Khan, I do not think that is a relevant question. I will let you explore that, but it has been dealt with, I think.

The Hon. TREVOR KHAN: I do not believe it has. I do not believe this witness answered the question.

CHAIR: That is what I am going to. The witnesses are here to tell us about what they have in place. They have given ample information on that—the policies they have in place, how they have dealt with the disclosures. I think you are drifting off now outside the parameters by asking those sorts of questions about an opinion on the culture. I will ask you if you can to stick to the terms of reference on current laws, procedures and practices to protect whistleblowers.

The Hon. TREVOR KHAN: That is precisely the point and that is precisely what you have attempted to do, to limit where we go—

CHAIR: You can ask these witnesses their way of dealing with the practices and procedures they have in place. You can ask them if they have had any experience in grievances and reprisals. Maybe they want to put forward a general case they have had to deal with like the professor in the university, et cetera, and how they have dealt with it; whether they think it is adequate or not. You can ask that. That is what they are here for.

The Hon. TREVOR KHAN: You have asked this witness to give her impression as to the understanding of employees. That was part of your line of questioning.

CHAIR: I asked this witness what information is out there for employees—

The Hon. TREVOR KHAN: That is not what you asked.

CHAIR: —and is she confident that people out there are aware of their policies and procedures.

The Hon. TREVOR KHAN: You went further than that, Chair.

CHAIR: I do not think I did. Would you like to stick to the topic?

The Hon. TREVOR KHAN: I am. I ask this witness to answer the question that I just put.

CHAIR: What was the question? You put to her that there is a certain culture?

The Hon. TREVOR KHAN: No. What I put was that you missed the point of the question, that is, that teachers are not prepared to make disclosures in some circumstances because they are fearful of retribution that will be taken against them?

Ms THORPE: I can only answer that in my opinion and experience in the position I have been in. My opinion is that there may always be individuals in certain circumstances who are fearful for a range of issues: some of them may be real fear, some may be imagined fears, depending on their personality. I do not believe personally that there is a culture of fear within the organisation. We get so many issues raised and so many concerns raised from very junior staff. Over the wide geography of the State my experience would be that I think in fact departmental officers do understand their right and their ability to make complaints and in general make use of that procedure very effectively.

Mr GREG SMITH: The figures you have produced, or Mr Coutts-Trotter has produced, showed two columns of investigations. One is into serious misconduct ranging from 126 in 2006-07 down to 84 last year, and protected disclosures ranging from 33 in 2003-04 down to the lowest figure 25 last year. Is that correct?

Ms THORPE: That is correct.

Mr GREG SMITH: The protected disclosures would be into matters dealing with serious fraud or serious maladministration, matters of that sort, is that right?

Ms THORPE: That is correct, largely.

Mr GREG SMITH: It will not include allegations of sexual assault or sexual misconduct?

Ms THORPE: In some circumstances it may. Some of those matters would be matters that would be criminal matters that would be dealt with in a different way. It would depend on the nature of the matter essentially on its criminality on what the person was requesting and the information that they provided. In relation to staff on children, as you would appreciate, there is a whole different process under the child protection procedures.

Mr GREG SMITH: Yes.

Ms THORPE: But it would really depend on the nature of the matter. There is a very different applicability, I guess, between perhaps some lower—and I do not mean to minimise this at all because it is not meant to at all—level sexual assaults as opposed to someone who sexually assaults someone where you would be providing to people support and advice about going to the police.

Mr GREG SMITH: Yes, but the sexual assault or indecent assault allegations would be part of the serious misconduct column, would they not?

Ms THORPE: Absolutely, yes.

Mr GREG SMITH: What protections do you give to whistleblowers in the system who make allegations against either other teachers or the executive of the school in relation to sexual misconduct?

Ms THORPE: Apart from the obvious protections around the protected disclosures requirements, as I was saying earlier, we try to maintain confidentiality wherever possible and we also provide support and advice, including counselling support and advice for the person making the complaint so that they feel as supported as they can in making those allegations, and not only in making the allegation but where people are often very stressed is during any sort of process that might occur.

Mr GREG SMITH: If you were aware that one of your teachers was a witness with the police in an investigation that had not led to the charging of a more senior person in the school, would you consider moving that person to another school?

Ms THORPE: We would always talk to the person about what they required and wanted in those circumstances because sometimes people can feel very punished themselves if they are the one that gets moved. So, in any circumstance like that we would be talking to the complaining person and finding out what it is that they needed to make them feel safe. If it was a move, then we would certainly be looking at supporting that. It really depends on the nature of the case. In some circumstances people feel, "Well, why should I have to move?"

Mr GREG SMITH: Would it be your practice when there is such a police investigation to tell the person the subject of the allegation that this other teacher has complained about him sexually assaulting someone?

Ms THORPE: If it was a police investigation, absolutely not without clearance from the police. We work very closely with the police. If it is their investigation, it is their investigation and we are required to work with them. If, for example, the matter was so serious that we had undertaken a risk assessment and thought that the person who had been complained about needed to be removed from teaching duty or from the school, for example placed on alternative duties, we would then need to formally advise them that there was an investigation. But even in those circumstances we would be liaising with the police about the extent of information that we could provide to them.

Mr GREG SMITH: In relation to cases where students and parents as well as a teacher complained about the conduct of another teacher, would you protect the identities of those parents and pupils as well as the teacher?

Ms THORPE: If it was conduct that was a child protection matter, we always protect, keep confidential the complaint information.

Mr GREG SMITH: If you were told that there has been retaliation such as a defamation action brought against the parent, would you seek to intervene?

Ms THORPE: If someone took defamation action, we would be in a very difficult situation to seek to intervene. That is their civil right to do so. But certainly in relation to child protection matters, we have some very clear processes for providing advice to the teacher once they are aware that a complaint has been made about what they can and cannot do. A breach of that could also be misconduct. So, we do our very best to protect everyone and make it very clear to the person who is subject to the complaint that they do not contact or speak to those people et cetera. If they breach that, they can be removed from classroom duty.

Mr GREG SMITH: But do you see a defamation action as potential retaliation against someone who has made a bona fide complaint?

Ms THORPE: I do not think I am in a position to be able to really comment or prevent people who may take defamation action. I am not aware of a lot of defamation cases being taken. I am aware that some have where a person has been fairly put upon. Generally when we are doing an investigation and the teacher is aware that they are being investigated and we have gone through the process, they are not usually taking defamation

action at that stage. They generally respond and go through the process. But at the end of the day it would be fairly dangerous for me to start trying to intervene I think in someone else's civil rights to undertake personal action.

Mr GREG SMITH: Would the department fund legal advice for the person who is being set upon, as it were, by this defamation action?

Ms THORPE: I could not answer that. I am not from the legal services unit. I know they certainly have provided advice to staff in relation to their rights and responsibilities.

Mr GREG SMITH: Would that be extended to parents who are retaliated against?

CHAIR: How is that relevant Mr Smith?

Ms THORPE: I am not sure I understand.

Mr GREG SMITH: I am talking about a combined complaint by parents, students and another teacher about a sexual matter and the retaliation is that there is an action for defamation against the parent whose name is disclosed.

Ms THORPE: Given that in general in child protection matters we hold our complainants confidential and most of the complaints come through to us via principals—it is very rarely a parent contacting us directly, it is usually a principal taking their responsibility saying, "I had a complaint made, " it would be unusual for the teacher to know who the complainant was. There may be a number of witnesses. They would not necessarily know where the complainant themselves were.

Mr NINOS KHOSHABA: Given the time I will ask one question. Out of the 84 investigations carried out in 2007-08 do we know the percentage or number of those that were actually substantiated, that is, cases that were actually proved, and what action was taken against those people?

Ms THORPE: I can tell you that. The numbers do not add up the same, I am afraid. I cannot give you the numbers of those 84. I can tell you the number of matters that have been finalised in 2007-08 because some of those would be still ongoing, as you can appreciate.

Mr NINOS KHOSHABA: Okay.

Ms THORPE: We have had 23 matters finalised from the 2007-08 year and 12 of those were not proven in any way whatsoever. Another five ended up in separation from the department, that is, dismissal, medical retirement or something like that. Four others received disciplinary action, one received remedial action and in one case no action was taken.

Mr NINOS KHOSHABA: You said 13 were not proven.

Ms THORPE: Twelve were not proven.

Mr NINOS KHOSHABA: That leaves 13 that were.

Ms THORPE: In 13 cases the allegations were either sustained or some elements were sustained. That may not necessarily admit that the person engaged in wrongdoing, but there might have needed to be some system improvements.

Mr NINOS KHOSHABA: In cases where there is obviously a problem in the system, will your office then go in and make the necessary adjustments so in future these things do not happen?

Ms THORPE: We are solely investigators. However, we will liaise with the senior management in that area and provide them with advice about the systems issues that we think are problematic or we might refer on. For example, if the allegation involved financial mismanagement that appeared to be more about a lack of clarity in the system, we would get on to the audit area and say that these are some of the areas they might like to look at and remedy.

Mr JONATHAN O'DEA: My first question flows in part from a question Mr Smith asked. You mentioned that your guidelines essentially apply to members of the school community, not just employees in a general sense. Have there been any examples or instances where a parent or school student has complained—effectively has been a whistleblower, perhaps in conjunction with a teacher or public service employee, or perhaps not—and there has been in your view an inappropriate restriction on the type of referral you could make or the type of protection you could provide to that person?

Ms THORPE: I may not have made it clear that our complaints policy is much broader in that anyone can complain—a member of the community or staff member. Our job is to investigate staff members who are complained against. There is a heap of complaints that come in at the regional and school level that I and Mr Marley would never see because they are not matters in which we need to be involved—they are day-to-day things that might be able to be resolved, such as classroom reallocation, being spoken to unfairly by the principal or something like that. It is difficult to comment because we would not see or be involved in the majority of those sorts of day-to-day school-based matters.

Mr JONATHAN O'DEA: I am not looking necessarily at your responsibility but rather your observations where perhaps there was no referral to the Independent Commission Against Corruption, the Ombudsman or another organisation or there was not a level of protection and that the matter perhaps fell through the cracks, whatever the nature of the system.

Ms THORPE: I see what you mean. It would be foolish to say that has never happened. Often parents have contacted us really unhappy about the way the principal or another staff member has handled a complaint or concern. In those circumstances at times we will refer those matters to the senior officer in the region if they have no particular relevance to our area, or we might try to negotiate and mediate. Usually it is more about people not feeling listened to, that their complaint has not been taken seriously or that they are not happy with an outcome—they wanted something to change and the school has not been prepared to do so. We will give them the appropriate contact person and explain to them their rights to take a matter further if they need to do so. In some cases, if it is around the area of our work—like child protection—we have also liaised with the school and tried to mediate different outcomes for parents.

Mr JONATHAN O'DEA: My second line of questioning relates to nongovernment schools. I know it is not your responsibility, but what equivalent system exists for nongovernment employees? Do you have a view about whistleblower employees or other employees in the nongovernment sector and whether there should be a significant difference between what you do and what occurs in that system?

Ms THORPE: The difference is that with one you are dealing with a large centralised system and with the other you are dealing with very independent schools—I know that sounds trite. In terms of child protection investigations and allegations against employees, there are already systems in place in the private school sector. The Catholic schools have their investigations units and they must adhere to the same Ombudsman's requirements that we must adhere to. In relation to the broader issue of employees, I have not thought enough about the situation in the private sector. You would want a process where people felt protected, but you may have to look at a different systemic approach given that you are not dealing with the same centralised system.

Mr JONATHAN O'DEA: My third and final question relates to union involvement. The union movement is obviously deeply involved in the education sector. Have you found that that involvement helps or hinders the process? What involvement does the union have? I ask you for a frank answer—both good and bad.

Ms THORPE: You are correct in saying it is a strong union. We deal with several unions, but a lot of our work relates to teaching, so the Teachers Federation is the major union involved. The union plays a very active role in protecting employees' rights and sometimes reminding us of our responsibilities when we may be taking too long or not providing enough information. In that way it plays an active and valuable role. We try to work with them very closely to ensure that we are treating employees as well as possibly can be expected under the circumstances. It is unfortunate that sometimes it becomes an us-and-them situation with other complainants who are not employees. It is about these awful complainants who are being unfair to teachers. At the end of the day, we must provide the fairest service, and listen to all parties and try to find out the facts. The union certainly has a role to play in ensuring that we are being as responsive as possible to employees. In a unit like this you are often treading a fine line walking between the different parties.

Mr JONATHAN O'DEA: Would they generally take a role in defending a complaint rather than assisting someone to make a complaint?

Ms THORPE: They would generally be defending a complaint.

Mr JONATHAN O'DEA: Do you have any comment about that or whether more active assistance should be provided to someone endeavouring to make a complaint, regardless of whether they are members of the union?

Ms THORPE: I do not think I have a particular comment. I can understand the union's point of view. Our complaints policy is designed to have a much more informal focus as well as to deal with the more serious matters and to encourage people to complain if they feel they have a legitimate complaint. We will do everything we can in our unit to support them in doing that.

Mr JONATHAN O'DEA: That is what I am saying. If the union is actively promoting fear or discouraging people making a complaint, I would question whether this is appropriate.

Ms THORPE: I would never say that they would discourage someone from making a complaint.

Mr ROB STOKES: If someone makes a protected disclosure or another complaint or grievance that might fit within the broader term of whistleblowing, as the Hon. Trevor Khan has described it, is a record kept of that in some sort of central repository or is it kept separate?

Ms THORPE: It is kept absolutely separate from their personnel file, but we have a centralised and very secure recordkeeping system within the organisation. We have an electronic system as well as paper files, which are securely held. The only record that goes on someone's personnel file is a note in the event that allegations of misconduct have been sustained and they have been dealt with. We will put a very brief record on their personnel file with a reference to a file being held. That is fairly important.

People often raise the issue about how unfair it is that records are kept, particularly if a matter is not sustained. I think it is incredibly important because we are aware of other inquiries where investigations have occurred and records have not been kept. If the same complaint is made subsequently, the person has no protection because you have no record that you have actually dealt with the matter. I think it is an employee's protection for records to be kept and that they have to be handled very well.

Mr ROB STOKES: Following on from that, is it possible, if a search were carried out under a particular staff member's name or number, to find the fact that they had made a complaint or protected disclosure without being able to see the substance of that complaint? Is the very fact that they had raised something discoverable?

Ms THORPE: Yes, if they were the complainant within our internal secure system, you could. You could not on the department's broader system. You could not, on the personnel system, in any way.

Mr ROB STOKES: You can probably see where I am heading in one sense. If someone was going for another position or something—

Ms THORPE: Absolutely not, no way.

Mr ROB STOKES: The very fact that they had even raised a complaint?

Ms THORPE: Would not be something that anyone else could have access to.

Mr ROB STOKES: Right. My next question, which is entirely unrelated to that question, is broader in terms of the department's obvious range of responsibilities under a lot of different pieces of legislation. In relation to the requirement to protect whistleblowers, aside from what you have already said, is there anything you would like to say to us about the way that you feel all these legislative protections dovetail? Do you think there are areas of significant conflict in relation to child protection matters and responsibilities under, say, the Protected Disclosures Act? Are there areas of conflict other than anything that you have specifically raised?

Ms THORPE: Not really. Even though we have slightly different processes for child protection because of the particular needs of the area and some of the requirements, we undertake our investigations very similarly. While there might have been different reporting lines for different types of matters, we tend to work

on procedural fairness, confidentiality, not releasing the names of complainants, and all of the sorts of processes and things that are part of our systemic response. In a way, protected disclosure, as we have said in our outline, should not be all that different in the way we treat people, except that we will provide them with some information on the protections. We really emphasise confidentiality and also provide some additional support.

I think the thing that concerns me to some extent is that, as an investigator—I run an investigations unit—I want to treat people fairly and well, find out the facts, and get the matters dealt with. My concern is that if you have too many fingers in the pie all wanting bits and I am trying to work out to whom I am reporting with this sort of thing, that is why I was talking about my concern about the suggestion of a completely separate unit being set up. If there is some streamlined process whereby we can be held accountable through to an external body and have our system audited, what you would not want is an organisation of our size, which deals with the number of matters we deal with and about 1,200 child protection matters a year which we have not even touched on, you do not want to be spending your time working out to whom I am reporting and what sort of report I have to get the system to generate to keep the Independent Commission Against Corruption happy as compared to this new unit, et cetera. You want to be able to use the system effectively so that you can get on with your work, really.

CHAIR: Thank you, Ms Thorpe and Mr Marley, for attending and for giving us your time and your evidence.

(The witnesses withdrew)

PETER THOMAS PRIMROSE, President, Legislative Council, Parliament House, Macquarie Street, Sydney, on former affirmation;

LYNN CAROL LOVELOCK, Clerk of the Parliaments, Legislative Council, Macquarie Street, Sydney, sworn and examined:

CHAIR: Thank you for appearing at the inquiry. We certainly appreciate your time and your decision to attend. We have received your submission. Would you like your submission to be treated as part of your evidence today?

The Hon. PETER PRIMROSE: Yes, please.

CHAIR: Before I commence asking questions, would any one of you wish to make an opening statement to the Committee?

The Hon. PETER PRIMROSE: No. We are happy to take questions.

CHAIR: The first thing that attracted my attention in your submission was the ambiguity that you raise with regard to the coverage of staff for protected disclosures. You cite section 4 of the Public Sector Employment Management Act 2002 and you raise that as an ambiguity in the sense of whether or not parliamentary staff are covered. We also note section 3 of the Independent Commission Against Corruption Act which includes staff of the Speaker and the President for each House of Parliament. Do you have any comments to make on that ambiguity, Mr Primrose and Ms Lovelock, and what you think could clarify that as far as clearing up whether or not parliamentary staff or electorate officers are protected?

Ms LOVELOCK: It is an ongoing issue in relation to the employment of staff here. We are not employed under the Public Sector Management Act. We maintain that distinction on the grounds that at the end of the day we are not answerable to the Premier, who oversees the Public Sector Management Act. Whether we should have our own legislation is something that has been discussed from time to time, but at the moment what we do is abide by all policies that we receive through circulars that come out from the director general, and we abide by all policies. But we do not do so under that Act, so that leaves us in the position of its being vague.

CHAIR: Has it caused you any difficulties? I note that you have had two protected disclosures. One has been withdrawn and one has had substantial disciplinary action. Did that raise any problems? Would you like to see a change to clear that up?

Ms LOVELOCK: I do not think it is necessary as part of this inquiry. We have not had any difficulties in dealing with any of the issues that have related to public sector policies and any of the legislation. There has not been a problem. We just follow the guidelines that are available and we abide by them, as a public sector agency, voluntarily. It has not been an issue.

CHAIR: The people who came forward in relation to the two matters you had, were they fully aware of the policy that you have in place? What procedures do you have to ensure that parliamentary staff and electorate officers are aware of that policy?

Ms LOVELOCK: The policy that we have in place has been in place for a number of years for the Legislative Council. Both of those issues came out of other departments and they did not have in place the same procedures that we have in place. So they were not as aware of their rights at that time as staff that would have been employed within the Council itself would have been at that time. We walked them through the process and explained to them what the situation was at that time. Subsequently we have taken steps to ensure that the policies are in place across the Parliament and applied to all staff, and that all staff go through the same induction processes and receive the same level of information, but at that time I believe that the policy may not have been in place at least for one of them.

CHAIR: The case where you say there was substantial disciplinary action, was that a consequence of a reprisal? What was the nature of that? How did that come about? Was that linked to a reprisal or detrimental action as we call it?

Ms LOVELOCK: I am sorry, I am just having a little trouble hearing you.

CHAIR: You state in your submission that there were two protected disclosures. One was withdrawn; the other one involved disciplinary action. Was that disciplinary action as a result of a reprisal or detrimental action? How did that come about?

Ms LOVELOCK: The eventual dismissal was fairly public and came after a very long process. We went through natural justice and through the courts and eventually came to an agreement for the separation. Does that answer your question?

CHAIR: Yes. How did you find your procedures and practices and how you applied them worked in that instance? Were you happy with how you applied them? Did you conduct a review? Were there any improvements that you made as a result of that?

Ms LOVELOCK: It was the first instance where we had a protected disclosure, I think, and it was in some respects a practical learning experience. Even though we had gone through and put the policies in place, there is nothing quite like going through the real motions to work it through but it turned out to be a very educative process. We did put in substantial changes to the way we operate that came out of the whole process and there are still ongoing things that we are doing. In both the cases where people brought information to us we actually implemented management changes and procedural changes within the areas that had led, I think, to the problem. So in some respects we could take some blame at the management level for not having tighter procedures that led to the problems. Having gone through the two experiences, we are more aware of the sorts of things that we need to be on top of to ensure that there is not an issue.

CHAIR: Members of the Legislative Council employ staff. In your experience, do any members employ staff other than through the appropriate legislation or the appropriate procedures through Parliament, for example, on a voluntary basis? If they do, are they covered by this if they want to bring forward a protected disclosure?

Ms LOVELOCK: It is an interesting question.

CHAIR: Have you ever had that?

Ms LOVELOCK: We have had no volunteers who have been whistleblowers and we do have a number of staff who are employed by members, not by the Parliament. I do not believe they would be covered by our policy on the grounds that they do not have to abide by our rules on some levels. If the member employs a staff member separate to us, we have certain procedures in place to ensure that they follow policies that are universal, such as occupational health and safety, and we have done that with members who have chosen to employ somebody away from the Parliament, to ensure that they are actually meeting their requirements of having them work there. If a person who was not employed by the Parliament but was employed by a member or was a volunteer here brought a matter to my attention I would treat it in the same way, even if it may not fall strictly within the limits of our policy on the grounds that it affects our building. So I think that is the situation.

CHAIR: Are members of the Legislative Council given information or in their induction are they told about what the procedure is and what they can do in case one of their staff brought a disclosure about them? Are they given that information?

Ms LOVELOCK: Yes they are. We have an induction process. We have material in the members' handbook which refers to the policies we have in place. We have a guideline for members employing staff that outlines their responsibilities as an employer even though they are employed by the President but as the person who is actually working with the staff member, and there is a code of conduct for the staff that the members are made aware of, which talks about whistleblowing and their rights and responsibilities. So, yes, we try very hard to make members aware of their responsibilities in that regard.

CHAIR: What would be the policies and procedures of the Legislative Council if there was a disclosure about a member of the Legislative Council that related to a serious criminal offence?

Ms LOVELOCK: A serious criminal offence being brought to my attention would be handled as a protected disclosure in the first instance but we would also raise it with the police.

CHAIR: If the police were conducting their investigations what would your position be?

Ms LOVELOCK: I beg your pardon?

CHAIR: If the police were conducting an investigation into the matter what would your position be? Would you let that investigation proceed? Would you have any involvement in it?

Ms LOVELOCK: We have had police investigations involving members. In those instances our role has been to facilitate the police inquiry to assist them in whatever way is necessary with the proviso that parliamentary privilege cannot be breached unless the Parliament itself chooses to waive it. It is a hypothetical for me in terms of a serious criminal offence.

CHAIR: But you allow the police investigation to proceed and you would assist if you are called to assist. It is as simple as that, is it?

Ms LOVELOCK: Yes.

The Hon. PETER PRIMROSE: The reason I am sitting here silent is that there has not been an instance that I have been advised of a whistleblowing disclosure since my time as President. I am familiar with the procedures and the submission that we have made. What I would do in all these instances would be to take the advice of the Clerk and in most of these matters we do try to separate very much the political, which is my job, from the administrative. The only advice that I would give in relation to matters involving the police to the Clerk would be to cooperate, and that is exactly what we would be doing. But we do try in any matters to cooperate with the police, but in relation to my role I try to keep the technically political role out of the administration. I leave that to the Clerk.

Ms LOVELOCK: There has been one case where a police investigation—I did actually stop them and it did make national news—when they sought to, it was to do with a particular member's computer. In order to get data off that computer the police argued that they should have access to our servers, which meant that they would have had access to every member's data and I refused to allow them that. That was reported in the media as me thwarting a police investigation but it was I believe my right to stop them from accessing every other member's data because they wanted to access a member's computer. That is why I say that to the point at which it becomes a matter of parliamentary privilege, I would cooperate 100 per cent, but there comes a point where it did in one instance become an issue. But that was more to do not with the member being investigated but the way they chose to investigate that would have brought every other member's data into the police domain, and I do not think that was an appropriate response.

CHAIR: Have you had any protected disclosures by parliamentary staff or members about a member of Parliament?

Ms LOVELOCK: Not yet.

The Hon. PETER PRIMROSE: No.

Mr DAVID HARRIS: Ms Lovelock, do you get many general grievances from staff?

Ms LOVELOCK: We do get grievances, yes. We get grievances both against members and against managers.

Mr DAVID HARRIS: When you receive a grievance, particularly in the two cases you mentioned about being protected disclosure, is that determination made very early and is it made clearly to the person making the grievance that they are giving a protected disclosure?

Ms LOVELOCK: Yes. It is incumbent upon us, as the people receiving the protected disclosure, to make sure that the person making it is aware of the circumstances in which they are doing so.

Mr DAVID HARRIS: If there were a police investigation happening, would the police inform you as a matter of course, or what point in their investigation would they actually inform you that there was something happening?

Ms LOVELOCK: That is hypothetical, given that we have not had that circumstance arise. I am afraid I cannot answer that.

Mr DAVID HARRIS: That is fine. Finally, in terms of the protected disclosures that you did have or just generally, is there a body that you go to for advice to clarify particular issues and, if so, who, and if not, would you like there to be a body where you could do that?

Ms LOVELOCK: Yes, there are a number of places we go to for advice. For example, when I received information that the ICAC officers were on their way up to execute a search warrant on a member's office, which had not happened—

The Hon. TREVOR KHAN: You did not go to the ICAC for advice?

Ms LOVELOCK: No, I did not go to the ICAC on that particular incident, but I rang the Crown Solicitor, because my first response was, "They can't do that", so I sought legal advice. On other occasions where a matter has been brought to my attention, I have rung people I know in the ICAC. There is a range of people that we have a fairly good working relationship with that we can trust to talk to confidentially about matters, to seek advice on what action we should take.

Mr DAVID HARRIS: So you feel confident that if you need that advice, it is there?

Ms LOVELOCK: Yes, definitely.

Reverend the Hon. FRED NILE: In your submission you said there were two protected disclosures, one was verbal and one was in writing. Did you take any action to have the person put the one that was verbal in writing? Did they put it in writing eventually?

Ms LOVELOCK: I am sorry, was it in writing?

Reverend the Hon. FRED NILE: You said one was verbal?

Ms LOVELOCK: Yes.

Reverend the Hon. FRED NILE: Did you ask that person to put it in writing? Was there any procedure that it should be put in writing to assist your examination?

Ms LOVELOCK: To put something like that in writing, what we would normally do is use one of our senior people who have some experience in this area to assist the person to put into writing what their complaint is. That would be the way we would go about doing it. What I have found is that staff making protected disclosures are usually very frightened of the process and putting something in writing can be quite frightening for them. We try to handle that very delicately to give them every confidence to go forward, but even with every process in place and with every support in place, it is very frightening for possibly a very junior member of staff to be making a disclosure that they feel might affect their lives in the future.

Reverend the Hon. FRED NILE: In your submission you said one complaint was withdrawn and the other one was apparently serious and had to be investigated. I assume the verbal one was withdrawn?

Ms LOVELOCK: The verbal one was withdrawn. I think there were two people who made disclosures and it was withdrawn before we could have investigators look into the matter. I think in this instance it was not a serious thing—when I say serious, it was not a major breach of the law. It was something, which was illegal but it was a small matter. Even before they withdrew, we put procedures in place—it was to do with stock and the loss of stock, so we put procedures in place to tighten that up and to do better audits. We actually responded to it even though the people did not proceed with their complaint.

What I have discovered is that a lot of people will make a complaint if they know you personally. They would just say something to you and if you respond to that and say, "That is a serious matter. I would like you to escalate that". They say, "I don't want to" because they do not want to be personally involved. I think to some extent that is what happened here.

Reverend the Hon. FRED NILE: Do you have many of those that you have just described?

Ms LOVELOCK: No, we do not have a lot of those.

Reverend the Hon. FRED NILE: The ones where people just complain to you. You have indicated there were only two complaints?

Ms LOVELOCK: There have only been two formal complaints.

Reverend the Hon. FRED NILE: But there are other ones that are not proceeded with?

Ms LOVELOCK: You hear staff complain. They will say, "Somebody comes in late every day and it is not looked into. Something is happening in this area." You will say, "Can you tell me what it is?" and they will say, "No, I don't want to". You try and find out. You use management techniques rather than the law to deal with those sorts of issues and in any workplace there are complaints. You hear people complain. Sometimes I might hear them third-hand where somebody has heard from somebody who has heard from somebody and then to try to find out what the complaint is, and once the Clerk starts asking, everybody goes mum and says, "I don't want to know". They are not major issues; they are more like somebody is not pulling their weight at work, somebody is taking too long at lunch and not putting it on their flex sheet; those sorts of issues where I can institute management things to follow up.

Reverend the Hon. FRED NILE: They are administrative matters?

Ms LOVELOCK: Yes.

Mr RICHARD AMERY: Unlike the previous evidence with the Department of Education and Training where they have large volumes of work in this area, if a staff member today were to make a complaint to you or to your office, who determines whether it is a protected disclosure or just a staff grievance, a bit of a gripe between a middle manager or something like that? Who makes that determination?

Ms LOVELOCK: At the end of the day, it would be my determination but I would take advice from my senior officers.

Mr RICHARD AMERY: If a staff member disagreed with your determination, they would have nowhere else to take their complaint, as far as this organisation is concerned, would they? Would the Premier's Department be the next chain of command?

Ms LOVELOCK: If they disagreed?

Mr RICHARD AMERY: If you said it was a grievance and they said it was a protected disclosure?

Ms LOVELOCK: The Act says there are various things they can do if they feel it is not being treated appropriately by the organisation, but I have not had that situation arise.

Mr RICHARD AMERY: You said the limited number of complaints you have had in this area has been a learning curve and you said that you have implemented a number of new procedures. With respect to the learning curve, on what basis did you handle those matters? Would they not be the same guidelines determined by the Premier's Department, the Department of Transport or any other government department? Would not those guidelines already be in place?

Ms LOVELOCK: We did have in place those guidelines and we have the Ombudsman's guidelines that we referred to. For me personally, the difference between reading a policy and seeing this is what I would do and then having somebody come in and give you a protected disclosure, I found it was a learning curve for me about how you handle those. We did not do anything wrong, we made no mistakes, but the practical implementation of the policy was something that was a useful, learning experience.

Mr RICHARD AMERY: You mentioned that you implemented new procedures as a result of that. Can you give us a general outline of those?

Ms LOVELOCK: We completely restructured one department and brought in Deloitte's. We did audits. It was a two to three year process. I can say truthfully that it has informed our management of the

Parliament in general how we look at things. Once we found a significant problem in one area, it is something where the processes we put in place by bringing in the auditors to look at things, the control of stock, the chain of reporting, having more than one person responsible, so that the person who does this stock is not the same person who does ordering, those things have been implemented throughout. In a smaller agency you do have problems when you find you have the same person ordering and then signing off so we have now gone to great measures to ensure we do not have anything like that in any department.

The Hon. TREVOR KHAN: I am interested in your observations with regards to written complaints. Do I take it that you see in a sense the requirement that a complainant make a written complaint as creating a road block in the way of the communication being made?

Ms LOVELOCK: No, I do not think it is even just the written, although I would agree that for somebody who has had very little education and has not been involved in high level matters, never been in management, as soon as you put something in writing that does frighten them. But also once you start investigating a matter that they have raised sometimes I think they feel once they have reported it that should be the end of their involvement and it can be quite a surprising situation for them to discover that, no, we then need to investigate the matter and that means looking at their evidence and that means they then need to give us further information. It is not enough just to say there is a problem here, you should look into it, and that is the end of their involvement.

I do not think it is the writing that is the road block, I just think that it is the very nature of making a formal complaint for some people. I mean it would not bother someone like me, I do not think, because I have been involved in, I appear before committees and I deal with things at a higher level. I guess I am talking about people who have manual labour jobs within this building who might see something that they think is wrong and they raise it in an informal way and then when you try to take it formally they do not want to be involved in the formal process. That is what I was referring to earlier as well. It is not that it is a road block, it is just the very nature of being dragged into a formal investigation. For some people it means they would not want to actually be involved.

The Hon. TREVOR KHAN: For example, in relation to staff who work for me you have talked of an induction process. I have to admit to ignorance: what do you do with them?

Ms LOVELOCK: We were a pilot scheme for an organisation which has developed an induction tape. It has a video.

The PRESIDENT: An iPod.

Ms LOVELOCK: Yes, it is done in iPod. The reason we did that was we found that our inductions were a little ad hoc; it depended who was on the day, there might be a check-list but how deep the induction went varied and it took a lot of time and if someone was busy they might do a more cursory induction. Every person who is now employed, I think within the Parliament now, does this induction. They get the iPod, the headphones and they can walk around the building with it. It tells them about the various things they need to know such as the emergency procedures, where the exits are and a whole range of things that impact on their rights as an employee of the place. It is fairly comprehensive.

The Hon. TREVOR KHAN: If an employee makes a workers compensation claim what happens with the information relating to that claim?

Ms LOVELOCK: The actual information is kept confidential about who is making the claim and what the outcome of it is. Senior management can get access to that—by that I mean very senior management. At general management meetings where we would have all the heads of department we would have information presented that talked about statistics and departments, not about individuals. We do keep that material very confidential.

The Hon. TREVOR KHAN: What about sick leave claims?

Ms LOVELOCK: Even I do not know the extent of that. We have policies in place that say that after five unsupported absences within a 12-month period—that means without a doctor's certificate—I will send a letter to my staff member asking them to please explain. That is a policy that is in place.

The Hon. TREVOR KHAN: In respect of the member, that is, the person I suppose you could say is the putative employer, what is communicated to that person with regards to a workers compensation or sick leave claim?

Ms LOVELOCK: With a sick leave claim the members usually sign them that they have authorised the person's sick leave, and that comes down to us to process through the system. We have informed members about sick leave rights of workers and the number of days and so forth that they have. I am not sure if I understand the drift of your questions.

The Hon. TREVOR KHAN: Let us deal with, say, a workers compensation claim. The person has not come into work, has communicated with their real employer that they are crook, what is communicated to the member?

CHAIR: Mr Khan, I take it this has to do with protected disclosures?

The Hon. TREVOR KHAN: It does.

CHAIR: Workers compensation claims?

The Hon. TREVOR KHAN: Yes.

Ms LOVELOCK: It is a bit hypothetical.

CHAIR: How does it deal with protected disclosures? I thought you are using this as your own induction session.

The Hon. TREVOR KHAN: No, I have gone through that now.

CHAIR: What is the general angle of these questions?

The Hon. TREVOR KHAN: There can be material that is contained, say, in a workers compensation claim that may constitute a protected disclosure or in the nature of it.

CHAIR: Has Ms Lovelock had any experience with that?

The Hon. TREVOR KHAN: With the greatest of respect, I am entitled to develop my line of questioning, and that is what I am doing.

Ms LOVELOCK: I have no experience with there being any protected disclosures coming out of workers compensation. It would depend—I mean it is a hypothetical question.

The Hon. TREVOR KHAN: That is all I am allowed to ask, so you are going to have to allow me to do it that way.

Ms LOVELOCK: I am not supposed to answer a hypothetical. Can I just say, it would depend very much on the nature of the workers compensation claim. If it were a stress claim where they raised issues against a member about why they were not coming to work then we would deal first of all with the staff member to try to counsel them and give them what sort of support they require. We have the Employee Assistance Program which we encourage staff to utilise if they have issues. Depending on how that process goes we may need to deal with the member. We would then talk to the staff member about the fact that we would need to do that. In all instances we try to liaise with the staff member to ensure that their rights are protected in relation to the member if they are claiming stress in relation to the member. But we do not get a lot of those.

The Hon. TREVOR KHAN: I am sure you do not. Is there a written policy that deals with how you cope with those sorts of problems?

Ms LOVELOCK: I do not believe I have a written policy that says what I will tell the member, or not. A lot of it comes through with commonsense and management decisions about how far we would or would not escalate a matter. It would depend very much on the nature of the workers compensation claim.

The Hon. TREVOR KHAN: Does the decision whether the member will be communicated with fall to you?

Ms LOVELOCK: Yes, it definitely does.

The Hon. TREVOR KHAN: Or the President, I take it.

Ms LOVELOCK: The President would not be informed of a complaint against a member. We work in a very unique building.

The Hon. TREVOR KHAN: That was not a trick question. It is just not communicated to the member?

The PRESIDENT: Mr Khan, that is the point I tried to make at the beginning. The reason I am sitting here silently is because a lot of these matters, once the policy is in place, I do not seek nor am I given information about these matters.

Ms LOVELOCK: The only time I would brief the President would be if it became apparent that a member of staff had gone to the media and there was likely to be a story.

The Hon. TREVOR KHAN: That is understandable.

Ms LOVELOCK: At which point I would like my President to be briefed that they are likely to get the media ringing them. But generally that has not been a big issue.

Mr GREG SMITH: For how long have you been the Clerk in the upper House?

Ms LOVELOCK: I was Acting Clerk from the beginning of 2007 and confirmed as Clerk in the middle of 2007.

Mr GREG SMITH: For how long have you worked in Parliament?

Ms LOVELOCK: I have been an employee since 1987. I have been Deputy Clerk since 1990.

Mr GREG SMITH: Have you always been in the upper House?

Ms LOVELOCK: Yes.

Mr GREG SMITH: Several members of Parliament in your House have been the subject of an Independent Commission Against Corruption investigation, is that correct?

Ms LOVELOCK: Yes.

Mr GREG SMITH: One of them was the man who ran the Outdoor Recreation Party who was ultimately expelled from Parliament or resigned?

Ms LOVELOCK: He resigned.

Mr GREG SMITH: As a result of an adverse finding by the Independent Commission Against Corruption?

Ms LOVELOCK: Yes.

Mr GREG SMITH: To your knowledge were their staff involved in the investigation of that man—I have forgotten his name?

The Hon. PETER PRIMROSE: Malcolm Jones.

Ms LOVELOCK: Staff are always involved. We have had a number of issues where staff have been involved and it has left difficult circumstances for them.

Mr GREG SMITH: What, if any, protective arrangements does your office provide for staff who are witnesses against their members?

Ms LOVELOCK: That is always a problem. It is not black and white when it comes to these matters. Within our code of conduct we have confidentiality clauses about what staff members may do with information that they have from a professional perspective. Sometimes there are difficulties there. With the investigation in that instance, the staff members were counselled. We provided them with professional support, emotional support and legal support. It is not always possible to move them around to get them away from the particular member, but we do work with the staffers concerned to ensure that their rights are protected. We utilise the Employees Assistance Program pretty heavily in these matters.

Mr GREG SMITH: Did you disclose to the member under the investigation in that matter that his staff were assisting in the investigation?

Ms LOVELOCK: No, we are very much guided by the people who are doing the investigation when it comes to these matters. When it comes to the Independent Commission Against Corruption a blanket of secrecy comes down and that is one of the difficulties for the staff. When we had a particular complaint going through here I put together a seminar, which I presented the staff of the Council—members and our staff—about what to do when approached by the Independent Commission Against Corruption and what their rights were and who they could go to for help. One of the big difficulties—and this is not a whistleblower thing but a Independent Commission Against Corruption matter—is that they are not allowed to come and ask for advice because they are told they cannot talk to anyone. We found that problematic.

Mr GREG SMITH: Do you agree that they were whistleblowers in the broadest sense—or they may be?

Ms LOVELOCK: Yes, I would agree but I think they should be able to come and talk to management when they are under these sorts of constraints. Unfortunately, in that instance, it was limited very much by what the Independent Commission Against Corruption legislation said that they could do.

Mr GREG SMITH: There was another investigation into Mr Breen, in which he was cleared?

Ms LOVELOCK: Yes.

Mr GREG SMITH: Were there staff involved in that investigation?

Ms LOVELOCK: Yes, very much so.

Mr GREG SMITH: Were they protected as well by your office?

Ms LOVELOCK: Yes, very much so.

Mr GREG SMITH: Mr Breen was not told about their involvement by your office, is that right?

Ms LOVELOCK: That is right. That member only became aware when he read the recent PIC—sorry the recent commissioner's report.

Mr GREG SMITH: Would you consider it appropriate to inform a member of Parliament of an investigation into him or her, in which his or her staff were involved?

Ms LOVELOCK: I am sorry, the point of your question was?

Mr GREG SMITH: Would you consider it appropriate to inform a member of Parliament of the involvement of his or her staff into an investigation into him or her while it was ongoing?

Ms LOVELOCK: No.

Mr GREG SMITH: Why would it not be appropriate?

Ms LOVELOCK: I think that would be self-evident. I can only talk about the investigations that have been conducted within the Council, and in all those instances we did not inform the member that there was an investigation going on in any way shape or form, regardless of whether or not a member of staff was involved.

Mr GREG SMITH: In either of those two cases that I mentioned did you have any complaints of retaliation by the member, or anyone on his or her behalf, towards staff as a result of their involvement in the investigation?

Ms LOVELOCK: These are the Independent Commission Against Corruption investigations rather than whistleblowing?

Mr GREG SMITH: Yes.

Ms LOVELOCK: No, we have had no complaints that there has been any retaliation against the staff by members or by management.

Mr GREG SMITH: Have there been other investigations by, say, the police into members of your House while you have been there?

Ms LOVELOCK: Just the one that involved the supposed hacking into a computer.

Mr GREG SMITH: Were staff involved in that inquiry as far as you know?

Ms LOVELOCK: Staff were not involved. A member's son was involved, and in the long run it turned out our information technology staff were involved.

Mr GREG SMITH: Were you aware of any complaints of retaliation by that member towards anybody?

Ms LOVELOCK: No, there was no retaliation. There was some political fallout between the two parties but it did not affect the staff.

Mr GREG SMITH: Did any of the staff involved in either of the two Independent Commission Against Corruption matters complain that they needed stress leave or matters of that sort?

Ms LOVELOCK: We have provided staff with such stress leave in relation to Independent Commission Against Corruption matters. I have telephoned people at home to check on whether they are okay. I know in one instance I desperately sought to have a member of staff supported to leave the building, I offered to provide transport home, and to take them out through an entrance so that the media would not be able to interview them. I take a great deal of care about the staff.

Mr GREG SMITH: You believe in looking after your staff?

Ms LOVELOCK: Yes. Unfortunately the staff member did not want that at the time and then later said that they were not supported but I would like to put on record that in the Council—I speak for the Council—we go out of our way to protect the staff. That is the nature of our business.

Mr GREG SMITH: Have any of the staff involved ever claimed workers compensation for the stress they have suffered?

Ms LOVELOCK: Can I take that on notice? I would hate to say no and then find that there was some matter.

Mr GREG SMITH: Yes. If they had, consistent with your attitude towards supporting the staff of members, you would not strenuously oppose the application if they appeared to be reasonably based?

Ms LOVELOCK: Would I not strenuously oppose?

Mr GREG SMITH: Would you oppose a workers compensation application for a start in the case of a staffer to a member the subject of investigation complaining of stress?

Ms LOVELOCK: Most certainly not. We do not oppose people seeking workers compensation. When they seek workers compensation that is handled through a third-party. We do not oppose people doing that. What we do is look at it from the management perspective of what we could have done to prevent that situation from occurring.

Mr NINOS KHOSHABA: You mentioned earlier as the Clerk you make the final determination as to whether a claim falls under the Protected Disclosure Act or not. What steps do you take after that? Do you call the person in and let them know that you do not consider it to be a protected disclosure? Do you advise them of other avenues? What is the process?

Ms LOVELOCK: The two matters that we had were, in the first instance, both disclosed to the former Clerk, not to myself. I was involved only from the perspective of assisting.

Mr NINOS KHOSHABA: I will interrupt you there. I am not talking about the previous two matters we have had. I am talking about if someone came to you now and lodged a complaint that you determined did not fall under protected disclosure, what would you do? Would you call that person in and speak to them and tell them there were other avenues? Also, for how long would their complaint be confidential if you said, "You have the right to go to the Independent Commission Against Corruption or the Ombudsman", or whatever, and they wanted to take up that option because they were not satisfied with your verdict?

Ms LOVELOCK: I would definitely call somebody in to brief them on what we were doing in relation to it. If a person has taken the step of making a complaint, then I think it is incumbent upon us to keep them informed of the process. Although there is a six-month process in relation to whistleblowing, we certainly seek to expedite that and even if it does take a long time we make sure staff members are kept apprised of what we are doing. If we were to determine the matter was not a protected disclosure we would certainly give them full and frank advice on what other options they would have and, depending on the nature of the complaint, possibly seek to assist them.

Mr NINOS KHOSHABA: So you would give them some time to take it to the next level if you determined it not to be a protected disclosure but they still felt that it was?

Ms LOVELOCK: But then it might be a grievance and so we would offer to handle it as a grievance.

Mr NINOS KHOSHABA: That is in your opinion.

Ms LOVELOCK: Yes.

Mr NINOS KHOSHABA: What I am saying is that if they were adamant that it was protected status you would take it to the next level.

Ms LOVELOCK: The Act actually handles what they do in that instance, so we would brief them in relation to what their rights were under the Act.

Mr NINOS KHOSHABA: And you would give them enough time to take up those other avenues?

Ms LOVELOCK: Yes. I can tell you in relation to the protected disclosure that we had in 2005 that I had first-hand experience of the stress that staff were under in relation to that. It had been a long time coming, I believe, and none of us was aware of the extent of some of the problems that were endemic within the organisation that these people had been suffering under. At one point I was called out. There were grave concerns that were passed to me by another member of staff that a female member of our staff was having some sort of episode. I was dispatched to go and find them and that is part of what I mean by the learning experience of how horrible this can be. This person did have a psychotic episode and we ended up in a psychiatric unit with them because they were so frightened; having made a protected disclosure they then felt there were going to be repercussions against them. In spite of all our assurances and everything we tried to do I ended up with somebody, who I might add is now perfectly fine—it was in relation to the stress that they were under. I saw first hand what it did to them and it was awful. It did not matter how hard I tried to counsel them, they were terrified.

Mr NINOS KHOSHABA: In general, in your opinion is there anything in the policy that you think should or should not be there?

Ms LOVELOCK: So far I would say the policy has stood us in pretty good stead, so no I do not have any real complaints about the way it is working.

Mr JONATHAN O'DEA: If after a protected disclosure a member of staff felt that they were threatened with or were actually suffering from reprisal action from a member of Parliament, what would you do?

Ms LOVELOCK: First of all we would have to talk to the staff member to find out the details in relation to the matter and, having established that there was definitely some case to answer, whether it be a perception or substantiated, we would then talk directly to the member in relation to the reprisals. It is a hypothetical. Again, it would be something I would need to look at the exact details of. I can talk in practical terms about how we have handled—if you look at a grievance where a staff member has raised a complaint against a member, and we do get those, we first of all have to look at the grievance and see what is motivating it. Sometimes it can be in response to a disciplinary action on the part of the member. They then respond with, "The member is harassing me." We have had complaints against members on a range of issues. We investigate the staff member who is complaining and we then talk to the member and counsel the member and tell them what their rights and responsibilities are, on occasion.

Mr JONATHAN O'DEA: Even if it was a protected disclosure?

Ms LOVELOCK: If it is a protected disclosure, again it would depend on whether the witness has sought absolute confidentiality. If there are reprisals against them one would assume the member then knew that the person was a whistleblower. In that instance, under the law the member is committing an offence, so I think we would take that very seriously.

Mr JONATHAN O'DEA: Perhaps just extending it, could I ask the President what role would you see it appropriate for your position to play in that scenario?

The PRESIDENT: In that scenario I would only be advised by the Clerk and I would take the Clerk's advice as to the appropriate course and role for myself.

Mr JONATHAN O'DEA: Can I ask the Clerk then, what role you would see the President potentially playing in that scenario?

Ms LOVELOCK: It would depend on the point that we were at with the protected disclosure and the investigation, so it is difficult to give you a blanket answer. If it was something that was not yet public, I would not be briefing the President in relation to it, for a whole range of reasons. I would call the member in and personally address them in relation to that matter. If necessary, we would remove the staff member, but if the member is taking action against the staff member and it is of a serious nature it is a breach of the Act and I would seek legal counsel before I did anything.

Mr JONATHAN O'DEA: So if there was a breach of the Act which was evident, what steps would you then take?

Ms LOVELOCK: Again, it would depend what the breach was. I have a whole range of options that I could adopt, including removing the staff member. We have a process in place where the member can get alternative staff that we would pay for. It might cost us a lot of money. Again, I would have to seek legal counsel. If it was a serious breach, that in itself is a crime and I would seek legal advice. I would be phoning the Crown Solicitor and asking Ian what I should be doing.

The Hon. TREVOR KHAN: Assuming the Act applies.

Ms LOVELOCK: The Act does apply. We have not been exempted.

Mr JONATHAN O'DEA: I recognise that you would seek legal advice but at what point do you think it becomes clear you would refer the conduct of the member of Parliament to another authority?

Ms LOVELOCK: I think that would depend on what my legal counsel told me to do. We also deal with the Public Employment Office in relation to what we should be doing and how we should be handling these matters. They have had a bit more experience in some of these areas. We have not yet had a situation where we have had to escalate it along those lines, but if we did I have had personal experience in relation to a different matter. It was not a whistleblower and it was not an ICAC matter, but it did involve a special commission of inquiry. We would handle it appropriately according to what our legal advisers would tell us to do, certainly making sure the staff member is protected and the member is aware of the fact that they are breaching the Act in their conduct. If it was a minor breach, again on legal advice I would have to see whether I had to escalate that. If it was a major breach I think there would be no action other than to escalate it and I would then rely very much on what my legal advice told me to do.

Mr ROB STOKES: I will make a statement, on which I seek a comment. Looking at the nature of the public sector, obviously the Parliament is a particularly unique workplace. It occurs to me that some of the protections in the Act would be much more difficult to achieve in this environment, particularly in relation to section 22 and keeping matters confidential. Obviously when there are only one or two staff per member, it will be difficult to keep a disclosure in relation to a member confidential from the member. Also, when looking at reprisals, a number of staff would be politically involved and presumably would belong to the same political party as the member for whom they worked. As a result, if they were to raise any matters relating to that member or that may involve the party, the main reprisal that would be taken may not necessarily be by the member but by the political party in which they were involved. Such reprisals may be far more damaging for that person, in one sense, than reprisals relating to their work in the long term. Yet there would be very little you would be able to do for the staff member. Is that a possibility you are aware of? Do you have any comment as to how in such a situation people might be protected? I would imagine it would be a great temptation for staff in that situation to contact people within their party before they contacted you.

Ms LOVELOCK: Yes.

Mr ROB STOKES: I will hand it over to you and ask for your comment.

Ms LOVELOCK: I am not aware of any situations like that that involve whistleblowing, mainly because the whistleblowing for us has involved parliamentary staff, not the members. But we are aware of it in relation to grievances and other matters that have come up, even in relation to the investigation of members by the ICAC. It is a difficult area. One of the things that I think it is very important that we never lose sight of is that members are very vulnerable to malicious complaints against them. It is one of the things I counsel all new members on when they start here to be very careful about the employment of staff and the relationship that they have with staff. It is why we have put together the guide for members in employing staff. We have had situations where there has been irreconcilable breakdown between the member and the staff member. Sometimes those people have worked outside this organisation and worked very amicably, but once they have become a member of Parliament things have changed. I think there are a lot of tensions and stresses that can happen in a member's office that do not happen in other workplaces.

So when issues arise within a member's office there are quite a number of things that need to be considered before we jump onto any particular course of action. I am aware of staff members who are politically active working against the member for whom they work rather than a situation where the member and the party would be working against the staffer. So in those circumstances it becomes difficult for us to protect the member in relation to the actions of the staff member. I will go to whatever lengths it takes to protect a staff member against a member who was mistreating them, but I have found myself more often than not dealing with staffers who are disgruntled with a member. Sometimes it comes about because the member is very busy and is not always able to monitor what the staffer is doing and they develop work practices. When the member wants to change the work practice, the staffer might resent that and that can lead to problems.

We have in place a number of procedures that we go through. We have staff who have been trained and have become quite skilled at dealing with these issues. We use mediation between the member and the staffer. We do everything we can and I might say we are very successful at keeping it out of the media. The last thing a member needs is to have this kind of thing being aired in the social columns. It does occasionally end up there. But in the main we have worked really hard. Can I see a way of protecting staff members from political reprisals within a party? Not being a member of a party I cannot really tell you how they operate. I would imagine all of you know how they operate quite well. But I think there is very little that can be done for the subtle things that can happen to a staffer who acts against a member if the party chooses to not give them preselection or not give

them work. It is very difficult to prove a link between an action in the Parliament and what happens within a party. I have got nothing to really help you there.

CHAIR: Mr Primrose and Ms Lovelock, thank you for appearing. We appreciate your attendance today. Your evidence has been of great assistance.

(The witnesses withdrew)

(Short adjournment)

PETER BOWDEN, President, New South Wales Branch, Whistleblowers Australia, 7A Darling Street, Balmain, sworn and

CYNTHIA KARDELL, National Secretary, Whistleblowers Australia, 7A Darling Street, Balmain, affirmed and examined:

CHAIR: Dr Bowden, in what capacity are you appearing before the Committee?

Dr BOWDEN: I am appearing in my capacity as President of the New South Wales Branch of Whistleblowers Australia.

CHAIR: Ms Kardell, in what capacity are you appearing before the Committee?

Ms KARDELL: Today I appear in two capacities—as a member of Whistleblowers Australia and in a personal capacity.

CHAIR: We have received two submissions—one from Whistleblowers Australia and one from Ms Kardell. Would you like those submissions to form part of your evidence?

Dr BOWDEN: Yes.

Ms KARDELL: Yes.

CHAIR: Before we ask questions would you like to make an opening statement to the Committee?

Dr BOWDEN: Yes, I would. The Committee has received a written submission but I would like to emphasise five or six points. This is the second time that I have appeared before a committee such as this. The last time I appeared at an inquiry of the Committee on the Independent Commission Against Corruption was a couple of years ago. I suspect that what you will recommend will be pretty much the same as what was recommended then. Generally, we supported it. We would have taken it much further, but we supported it. I think it is unnecessary to point out that the people of New South Wales are a little disturbed about their Government at present and about some of the issues that confront them.

I urge this committee to do its utmost to ensure that its recommendations are implemented. The second introductory point I would like to make is that I can bring extensive evidence to the committee to reveal that whistleblowing is the most effective method of stopping wrongdoing in organisations. Recent and extensive Commonwealth Government research into whistleblowing—of which I am sure you are all aware—proved that point, but other evidence is available. What you are up to will stop, or at least hinder, a lot of the wrongdoing in this State. As you are well aware, the present Act does not do it.

The principal reason for the Act not doing it is that no organisation has been established to oversight its implementation, which is necessary. Several witnesses have told you that. Your previous incarnation also recommended the establishment of such an organisation. Incidentally, we disagree with the ICAC submission on that point. We are not strongly committed to the location of the agency. I believe, for a number of reasons, that it should be in the Ombudsman's office, but my colleague Cynthia Kardell thinks that it should be independent. You can ask her about that later. Investigations would still be the responsibility of the line agencies. I suspect that one of the reasons such an agency is necessary is that these investigations are pretty awful.

One of the findings of the Commonwealth inquiry was that the ethical management systems across government departments varied tremendously at a Commonwealth level. I expect that the same thing is happening in New South Wales. We need an agency to do the training, to look after the procedures, and to manage what you are trying to do. Over most of my career my field of occupation has been in organisational management and I do not know why this cannot be done. We would knock on the head the six-month requirement on freedom to go to the media. We would make it near immediate, if possible, although each person would go to his or her own agency.

We urge a system of financial compensation similar to that referred to in the Ombudsman's report. We urge the inclusion of all nine protections that you find across Australian States as New South Wales has only six of those protections. We urge that the requirement that a person be protected be removed from a court

requirement to an agency requirement. Agencies would then be able to determine whether or not a person would be protected. That is a summary of the issues that we believe are important.

CHAIR: You referred in your submission to personal grievance issues and said that they should be precluded from protected disclosure. However, you qualified that by stating that they should be in the public interest. What criteria would you use and who would determine what personal grievances were in the public interest? We have heard evidence about people coming forward with personal grievances. The Committee is concerned to ensure that those who have a personal grievance use the protected disclosure system. You submit that personal grievance issues should be precluded unless they are in the public interest. How would that work?

Dr BOWDEN: I think one of the biggest issues that you have to face is define "public interest". In stuff I have written I have had a definition as "an action that is illegal or brings harm or has the potential to bring harm, directly or indirectly, to the public at large now or in the future". So bringing harm to the public at large is the definition that I have used, and the only way to find out whether that whistleblower or potential whistleblower or so-called whistleblower is actually whistleblowing in the public interest is to find out whether the accusation they make is about to cause harm to the public or could cause harm to the public in a broad sense.

Cynthia will verify that we get many, many whistleblowers come through Whistleblowers Australia; perhaps something in the order of 50 or 60 per cent of them are on personal grievance issues—almost half—and the way we find out is to dig in to what is the public interest issue behind the accusation that the whistleblower was making.

CHAIR: Ms Kardell, in relation to your submission. I think in your submission you say that you are critical of employers or agencies who say to people who come forward, "We want to go ahead with the investigation; we can't assure your confidentiality". You mention in your submission that you are critical of employers who say to a discloser, the person coming forward, "We can't go forward because we can't assure your confidentiality". We know that confidentiality is very important to people who want to come forward. Then in your submission you also say that you are in favour of a system where memos can be put out, presumably in a workplace, to give, as you put it, milestones along an investigation, to let people know what is happening.

Do you find that somewhat contradictory? Is it the case that if an employer were to put out a memo giving a progress report on an investigation that the identities might be revealed? Do you think those two parts of your submission sit together well?

Ms KARDELL: Yes, I do. I think the place to start is where you started with Dr Bowden. A good place to start would be section 22. Section 22, as I see it, operates on two levels: it is a constraint on the investigating authority in that it is telling that authority how it should go about the business of investigation and what is involved; second, it makes it the whistleblower's call as to whether or not they would allow their identity to go forward and then if there is a contest between those two things then the public interest issue should be considered. Section 22 very carefully sets out that if the actual facts disclosed by the whistleblower are such that, in a very practical way, if it is a case of he said, she said, and you need to be able to say to the other person, "This is what she said", then there is a public interest alive and at large there in that the person accused should be told what she had said. But step back from that.

At the heart of this is a decision about whether something is a personal grievance or is a public interest disclosure because an investigating authority does not need to identify the person giving them the information if it is a public interest disclosure. It is only if it is a grievance that you need to do that. At the heart of this whole debate, as I see it, is a rethink about what this Act was supposed to do. A grievance is a situation where a person puts forward a claim seeking a redress of some sort for themselves: they want a bully to stop bullying; they want to have their workers compensation claim assessed medically and not administratively, and so the issues go on. But the thing that is the heart of it is the complaint is about something that they need done, that they need for themselves. It is a personal grievance. It is a thing that we are all used to. We are all used to people making complaints, whether it be in a court—that is a personal grievance, whether it be to ICAC as a citizen, and you will probably have ICAC tell you that most of its complaints, and indeed the Ombudsman's office will say the same, are a grievance style of complaint; they are not public interest disclosures.

The difference with a public interest disclosure is that the person making that disclosure is not seeking anything for themselves personally; they are giving you information with a view to you solving some issue—it might be a port; it could perhaps be the government department buys in, it thinks, six containers of goods at any one time and it pays for six containers but it is in reality only getting five containers of goods. That information

is of a public interest character because the person making the complaint is not saying, "I want the balance of the monies. It's not coming to me", they would take that complaint to the reporters and say, "I want a fair kick-in".

If you can understand where I am getting to? It really is a very simple business to think about what does the person making the disclosure want out of it? Do they want something personally for themselves? Do they want compensation for something? They want the bullying to stop—that is personal to themselves; that is a grievance or a workplace complaint. But if they come to you and say, "Mr Terenzini, I have information that a certain professor at the university has put forward research in the public arena about transplantation surgical procedures and he says he has done the work. I know he hasn't because he says I did the research and I didn't do it". What I am trying to get you to see is you can get very clear-cut complaints which are very obviously a grievance; they are not a public interest disclosure: the interest that they serve is the person's self-interest. That is the first thing. Then you might get a mixture of things, like the one I just mentioned, which is the situation in which you have got a complaint that a professor has publicly relied on research, research that has not been done. You would all know that I am referring to the Bruce Hall saga, of which I know quite a bit.

In investigating that issue you do not really need to identify the person who gave you that information; you simply need to go to the research, look at the records, find out what was done and what was not, match that up with the information that was put in the public arena. That is a very practical example, and if you were investigating that you would have no need to tell Bruce Hall who of his staff had actually passed that information; you simply match information in the public arena about transplantation therapy with the research that was done. That is a public interest disclosure—no need to go after the person giving you the information, you just know from that person where to look, they would tell you what was done: "There are the books; that is the information; that is what we did".

There are those things that fall in the middle where some of the information maybe one-on-one and you may need to identify that it was that person who gave you that information. But if it is a public interest disclosure it would be a fraction of it, it would be part of the story and it would not be the heart of the thing. If you look at our Act as it stands, it sets as its primary objective that it should encourage and facilitate disclosures in the public interest. They are not personal grievances, although they may on occasion have some element of personal involvement. The hallmark should be: What does the person seek to do? Do they want anything for themselves? A whistleblower? No. I am not suggesting that these people are holier than thou; they are not. They are ordinary people. If there is one thing I have learned over nearly 18 years, they are all sorts; there is no whistleblower. They are every person. I see no contradiction in what I have said to you because a whistleblower wants it in the open. They want the information to be looked at in the open. They want it to be dealt with in the open. They would prefer it to be out there and in the open, confident in the knowledge that their employer or their organisation or their investigating authority was of the same mind.

So the mindset is the sort of mindset that you would commonly find in a coronial inquiry, something that a coroner might do where you are wanting to expose information and then make sense of it, sort out what should have been done, what could have been done and what was not done, and what should be done now, and also whether there are any persons of interest, as we call them—persons who could be held accountable for what has gone on. So, I see no challenge or difference or conflict there. If we can get authorities or employers in a general sense to publicly back their system and not constrain whistleblowers in the way they have, we would have a much healthier reporting service and we would not have the sorts of things that I have reported to you, namely, that most whistleblowers I have seen over the years—I am not talking about people with grievances—have been asked to keep their mouths shut, some of them on pain of being disciplined.

That has had the effect of putting the whole thing or pushing it underground. When you push it underground, that is a very fertile ground for others to retaliate, to seek you out, to isolate you, to ostracise you, to harass you. That is what happens. It is a relatively simple matter, I think, to reorganise how you approach these things and set up a system that builds on the intention of whistleblowing, which is much like you do in Parliament. Get it out there, put it in the open, let us have a look at it, let us have the facts, let us sort it out. So, I think you should be able to relate to the motivations and intentions of a whistleblower.

Mr DAVID HARRIS: In your submission you have said that the legislation should be extended to cover basically any person and not be restricted to naming particular categories of people. The original legislation was designed to protect people in the public service who come forward and complain. Is it possible to extend that protection for everybody, practically?

Ms KARDELL: Practically, yes. I will give you an example, the one I gave you before of six containers of goods being brought in, being paid for but actually getting five containers. That is not a public sector issue; it is private sector—it is Woolworths and it happened a number of years ago. It was internally investigated there, badly and poorly, and the whistleblower got dealt with badly. So, that person, if they suffered reprisals, depending on the nature of the thing, could perhaps take an action in a court under the Act to say, "I made a disclosure to my executive at Woolworths. I told them about us paying for six containers of goods, we were only getting five containers' worth. This is what happened to me." That could be done under our Act—just put an action in the court and go for it. In the same way as any person would now take action in a court under the Corporations Act having been a witness to an inquiry or a discloser to the Australian Securities and Investment Commission [ASIC]. That is just one example.

You will use the existing frameworks. If you had a PIDA—public interest disclosure agency—which dealt with public interest disclosures, it would be the natural repository for a complaint about Woolworths having ostracised this person, put them in a toilet area, which is what did happen, gave them a desk, no phone, no computer and told them, "We will give you work shortly." It sounds rather funny and amusing, but it is not to that person; it is very heartbreaking.

Mr RICHARD AMERY: I would have thought it would have been in Woolworths' interest to have that information come forward, to senior management level at least?

Ms KARDELL: Depends on who the rorters are. And it depends whether you can get your disclosure to the right person at the right level. If your rorting group is well placed, then you are in a very difficult position. Perhaps that complaint should never have been lodged where it was. But what I am trying to get you to understand is that that is in the public interest. Woolworths' prices are predicated on the basis of its costs and you and I go to a shop and we buy goods. Do we really want to pay for goods that are inflated by virtue of the fact that one container cost is being pushed into our prices? I see that as being in the public interest to have a substantial firm, a business, in our society working well. You would use the existing legal frameworks, wherever they are, plus a PIDA to enhance it and give it focus right across all the private sector. You do not have to build any new laws; they are actually there for that group of people.

One last thing I would like to say is that I find it difficult for governments of all persuasions to argue that somehow the public interest is to be confined to how you good folk spend our money. In my view that is a very old-fashioned view and we have moved on from that. Our government policies have assisted that by outsourcing work and money. We have spread government's accountability out into the private sector, and that in turn has educated people to think more widely about where the public's interest really lies.

Reverend the Hon. FRED NILE: Following up Dr Bowden's remark in the opening statement about disclosure to the media, you are not happy with the period of six months. Based on what you said, that should be immediate, although your submission says three months?

Dr BOWDEN: Three months with a rider, if you read further down. Subsequently I have made a submission to the Federal inquiry. I told them also three months and they took me to task. They said there could be some situations where the agency does not act and, therefore, the public has to know immediately. So I included a rider at the end of the paragraph that in cases of emergency, provided a whistleblower goes up his or her own agency but that his or her agency does not undertake to do anything about it, then the whistleblower can go to the media.

Reverend the Hon. FRED NILE: How do you protect the whistleblower's name if it goes straight to the media?

Dr BOWDEN: That is the whistleblower's decision. Protecting their name or their confidentiality of course is a very difficult thing to guarantee, as I am sure you have already come across. But anyway, the whistleblower has made the decision to go to the media in that case, so they are willing to expose their name.

Reverend the Hon. FRED NILE: There are two new areas in your submission. One is compensation for breaches of protection and the other is rewards for reporting fraud and corruption. Do you believe this would assist the system?

Dr BOWDEN: I am basing that recommendation on the False Claims Act in the United States, which many people have argued is the most effective whistleblower legislation in the world. I use as my argument the

New South Wales RailCorp scams, which I believe the *Sydney Morning Herald* said added up to \$22 million. If some of that money had been offered as a reward, somebody involved in that scam would have spilt the beans. Someone would have come forward and we would have all been saved \$22 million. There are dozens of examples and the RailCorp scam is simply a particularly big one. The reward system is slightly different. If we want to back off from that, we find the bigger issue of implementing legislation along the lines of the False Claims Act, which the Committee should recommend be investigated, and the question of the ability of the whistleblower if he or she is damaged to take proceedings in the court to get compensation for that damage. That is a much smaller issue but, again, it is something the Committee should consider.

Mr RICHARD AMERY: I made a note of that very important point—the issue of financial rewards. Is your view at odds on this point?

Dr BOWDEN: No.

Mr RICHARD AMERY: Ms Kardell just said that whistleblowers are not seeking any personal gain. Obviously they have a public interest issue. If we were to bring in a reward system would that affect situations like the very credible RailCorp issue? In that case it would have saved us a lot of money. If a small percentage of that—perhaps \$1 million—were offered as a reward, would that induce people to make complaints that are either not substantiated or very questionable? I am concerned that if there were a pot of gold at the end of a process that would encourage fraudulent or inappropriate claims. We must recognise that some claimants may not be truthful. In a general sense, I am also concerned about following any United States legislation in New South Wales. We would spend most of our days in court.

The Hon. TREVOR KHAN: There is nothing particularly wrong with that.

Mr RICHARD AMERY: It would be strongly supported by the Law Society. This submission is very comprehensive and you have asked for a dramatic rewriting of the legislation. Bearing in mind that governments are always confronted by the dilemma of what is good policy, good philosophy and high principles and all the other competing legislation—presumption of innocence, investigative requirements in other legislation and so on. Is there any whistleblower legislation elsewhere in Australia that is a glowing example of what New South Wales should do? Another committee of which I am a member received a submission from the Tasmanians that addressed whether that State should establish an independent commission against corruption. I understand that Victoria does not have one. Of course, over the past 25 years New South Wales has applied layer upon layer of investigative processes. Have you spotted anything in legislation enacted by other States that you think would be a good model for our legislation?

Ms KARDELL: I will tackle that in a slightly different order if I may. First, I am asking the Committee to enact something rather fundamentally different. One would be hard pushed to say that the legislation has been a success to this point. It does need a rethink. The Act does not do what it was designed to do and it is obvious that we protect disclosures, not people. Nor do we investigate things properly. Why would I put forward this proposal now? I am taking the long view, but I hope that this time it will be shorter than last time. Whistleblowers Australia was the first organisation to propose that there be a standalone agency in 1996 or 1997. That was our view in the first and the second reviews, of which I was a part and I wrote part—that is not to say that it was my work alone. Now, 10 years on, or whatever it is, I am pleased to say that that idea has gained traction with the Ombudsman, the Independent Commission Against Corruption and other organisations around the traps, which may well get it up. That is great. It is a great idea and it is the thing that will launch this legislation in a positive way. It will give it a chance to facilitate its purpose, which is a public interest purpose. I am pushing for Parliament to take a different view based on what it should know, given what it has been told about this legislation failing.

As to the business of rewards, I have not made myself clear because incorporating a false claim-like situation or a *qui tam* action, as they are called, would not replace or in any way be a substitute for public interest disclosures—which is how I would like them referred to. Those disclosures would, in the main, still come through in a similar way and would ideally be registered by, known about and supported by the Public Interest Disclosure Agency, which would then look out for the whistleblower and also for the process of ensuring everything works well. In saying that, I think a standalone organisation could do the job and take over from what the Independent Commission Against Corruption has been doing in a *de facto* way for nearly 20 years. Indeed, the legislation could recognise the Independent Commission Against Corruption's and the Ombudsman's *de facto* efforts over time to provide some sort of umbrella function. That would push the legislation in the direction of its objects.

As well as being able to make a disclosure in a similar way to the way in which they are made now, the Committee could also make it possible for a person as a relator to file a claim in a court. They are the only actions that I say—like a qui tam action—would be capable of giving the whistleblower compensation, a benefit or a reward. Under the False Claims Act, a qui tam action is based on an old 12th century law—part of our law. Under that legislation, a person is a conduit or a synapse. They are formally called a relator and they stand in the shoes of the Government. They sue for the Government as much as for themselves. That is the nature of a qui tam action.

The False Claims Act does not actually reward the whistleblower. It compensates the whistleblower for the risk of the litigation, because the complainant is standing in the shoes of the Government by taking the matter through the court and subsidising the legal costs to bring it to fruition. It is not like a reward. One could ask why the Government would not compensate an individual who through a qui tam action managed to recoup \$22 million for the State. Why would the Government not feel that it should help to pay that person's costs?

Mr RICHARD AMERY: Are you saying the whistleblower—

Ms KARDELL: Under the False Claims Act—

Mr RICHARD AMERY: That is a huge cost.

Ms KARDELL: Under the False Claims Act, a relator action is first of all filed by the whistleblower. If the Government decides not to take it up within 60 days, the whistleblower is left with mounting that case himself or herself, running it, funding it, and, at the end of the day, it is all to the benefit of the government, primarily. The whistleblower gets money in recognition for the risk of taking that action and to cover their fees. That is how the qui tam action works. The government gets 60 days in which to decide whether it wants to take up the action.

Mr RICHARD AMERY: It is a bit like third party environmental legislation, is it?

Ms KARDELL: There are similar things in our law, such as criminal actions. You can mount a personal criminal action but the Director of Public Prosecutions [DPP] gets a choice about whether to take it over, squash it, or let it go. There are all sorts of things that are presently part of our law that allow us to borrow an idea from the False Claims Act and say that not only may whistleblowers do what they ordinarily do, which is go to their employer, go to ICAC and go to the Ombudsman, but if they are sufficiently motivated, want to take on the risk, have enough information, and feel they can mount a case, they can lodge a claim in the Supreme Court, and give the government 60 days to consider whether it would like to pursue it, which it may well want to, the reason being that the government may want to.

Let us take the RailCorp case. If indeed the government got \$22 million back and would prefer to have more of the \$22 million than not, under the False Claims Act if the government takes the action, they get a bigger portion of the money and that comes back to them. The money that comes back is based on punitive laws. Again, we have lots of areas in our existing law that allow us to claim for and apply punitive damages. Under the False Claims Act, whatever money was falsely claimed from the government, which the whistleblower says should not have been claimed from the government and was actually a rort and a cheat, the law says, "We'll treble that by way of punishing the wrongdoer."

Mr RICHARD AMERY: In that circumstance, how does it work regarding the action in the court, if the third party fails?

Ms KARDELL: It is like any party: you have costs.

Mr RICHARD AMERY: Compensation I suppose and costs are involved?

Ms KARDELL: If you fail, you fail, and you have lost your money. You have done your dough. That is the same for any case. If you have a whistleblower who runs a relator action, which is what they are formally called at law, and you take the whole risk and the government does not want to take it up for you, then you get something like 15 to 30 per cent of what comes out of it. If the government decides to take it over, and again we will use the RailCorp scenario, and they rather fancied having all of the money to themselves or the biggest

share, they will take it over and run it and be at the risk of litigation. That is where the so-called reward comes in. It is compensation for the risk of litigation. It is not a reward.

The actions in the States have been things to do with Medicare fraud, which apparently is a huge area of private authorities rorting government funds through the provision of medical services. The other area is environmental risk, and one example perhaps would be, say, that had a bad spill from a ship in our harbour and it caused devastation. Who is going to clean that up? The government, unless it can find someone who is at fault. Let us just say that the second lieutenant knew that his captain had deliberately discharged that pollution, and that person laid a relator claim as a whistleblower and the government decided, yes, this is good information, this is going to run, it is fairly good, so let us take it over. The government runs with it, that trebles the cost of the clean-up, and goes to court with that action.

This is quite different. It is just another way. It is not rewarding anybody for anything. It is a compensation for risk, and the risks are substantial. There are lawyers with me today and they know that the risks are substantial. You cannot be faint-hearted about this. It is a way of dealing with a particular area of disclosure. It is not all disclosures. It is where someone has made a false claim on the government and got rather more money than they should have.

Mr NINOS KHOSHABA: Do you think there should be a national law?

Dr BOWDEN: A national law?

Mr DAVID HARRIS: Yes, should each state have its own legislation, or should it be national legislation?

Dr BOWDEN: Cynthia can perhaps add to this, but I think you need individual state laws as well as a national law because of the organisations that they are reporting to at different levels—including the private sector, incidentally. We have national corporations and we have state-run corporations. It should be state law and that is the same in the United States. They have state laws as well as national laws.

Ms KARDELL: We are a federation and we need to have state laws as well as Commonwealth laws. That is part of our history and I think it has served us well. This is my own personal view.

The Hon. TREVOR KHAN: And there has to be something for us to do.

Ms KARDELL: Yes. Big is not always beautiful. I actually endorse and approve of our system. I think it forces people to work with one another and find an accommodation. I see the same sorts of mechanisms being in place in terms of statutes in that they should into relate and support one another. There should be similar provisions at different levels and that tension should serve over time to improve our laws. I think it has been the history that often federal laws have been a little bit more generous and perhaps a little bit more insightful in finding a balance at a public interest level. They find a balance better if they are more even-handed. That is my personal view when I look at federal and state laws. There is that tension that keeps us on the path and over time I think they do generally improve. I think, yes, you cannot get out of it. There should be a state law.

Mr DAVID HARRIS: We were just clarifying the matter; it is not a matter of getting out of it.

Ms KARDELL: No, I was pulling your leg.

Mr DAVID HARRIS: It is a matter of when you broaden it to cover private corporations, et cetera, if there was not something at the national level, will the state government be able to cover that because corporations operate outside the state and internationally, and there are a whole lot of things to consider. That is the reason we are asking that question.

Ms KARDELL: All right.

Mr DAVID HARRIS: In New South Wales, could our own legislation encompass everything that it should? That was the intention of the question.

Ms KARDELL: I think that you could, yes. You could.

Dr BOWDEN: I would endorse what Cynthia has said. I think you should try. I realise that when you talk about the private sector you are talking about corporations. There are issues that you will not be able to encompass, but I would tremendously like New South Wales to be the first State to introduce corporations laws that work.

Mr JONATHAN O'DEA: I have one question that arises from observation on which I would invite comment, given that I am asking a question. It strikes me that it might be possible to have consistent laws across all States that are also consistent with federal legislation in a way that is similar to the way in which the Companies Code applies. In a personal sense I think it would not necessarily be a bad thing to have greater consistency and uniformity among the states. I am happy for you to make comments on that, given that I am asking a question, albeit briefly. Then I will get onto my main question.

Dr BOWDEN: The Commonwealth, as you know, has no whistleblower protection law at present. They have an inquiry going on, and from what we hear it will be fairly comprehensive legislation that they will propose. But they are not considering corporations law. The Corporations Act itself is fairly useless as whistleblower protection—in fact, virtually useless. I have put in a freedom of information request to ASIC to find out whether that law has ever been used, and they have refused me on three grounds. Now it will cost me real money to find out and I am not going to go for it. I want to keep the state and the federal level separate. Does that answer your question?

Mr JONATHAN O'DEA: The consistency between states then could be facilitated other than through a corporations law type model. I still, I suppose, ask whether you think there is some value in having some uniformity or consistency between the states, particularly given that a lot of organisations go across State boundaries.

Dr BOWDEN: Of course there could be, but let us get a good law in this State first.

Mr JONATHAN O'DEA: Going on to my main question, you have both been involved in the whistleblower area for some years now. There must be an enormous amount of frustration from the lack of action that has been clear because of New South Wales' lack of will to implement reform to this point.

Mr RICHARD AMERY: Can we object to a leading question?

CHAIR: I am sorry but you cannot. The rules of evidence do not apply.

Mr JONATHAN O'DEA: I would like your comments on why you think there has been a failure to act thus far, how satisfactory that has been and whether there has been prejudice or damage done to society, the community, as a consequence.

Dr BOWDEN: My personal reason for the lack of action—and the lack of action is not only in New South Wales but it is Australia-wide—

Mr JONATHAN O'DEA: We do have Labor Governments almost across Australia.

CHAIR: Strike that comment.

Dr BOWDEN: Oh, I see the question. I do not know everybody's party affiliation. But it is not that issue. It is politicians generally. They do not like whistleblower acts, and I can blame the Labor Party but I can also blame the Liberal Party and quote several examples. I think that the reason in New South Wales as to why—I told the chap who did the Commonwealth inquiry; I said politicians do not like whistleblower acts. You know as well as I do as to why they do not—because the politician has to answer the question when it hits the newspapers. Usually the politician, being a Minister in that case, would prefer not to answer that question. I think that answers your question.

Ms KARDELL: I have a high regard for people who go into politics because I think they are motivated by lofty ideals, and I think you are. I would like to tap into that, and I would like to tap into that for the wider benefit of our community. Party politics gets a bit dirty over time, and from my point of view I do not think either party excels in this area, so I think that just people generally sometimes act badly and sometimes well. That happens in politics and it happens in every corporation, every part of life. The thing is to harness the things that are good in us, all of us, in terms of our responsibilities and our aspirations for our state or our

country. That is the public interest thing. I understand why people are nervous about that. I see it all the time. People do not want to employ whistleblowers if they know you have been a whistleblower because they are inwardly thinking, "When will it be me that is the subject of a whistleblowing exercise shortly?" That is a very ordinary response. We all have that response.

Nobody wants to be embarrassed. Nobody wants to be caught out doing something wrong. But if you then take another deep breath and you think to yourself, "It would be better that I confessed early or got the thing sorted, or we solved the thing before it became a monster of a thing and started to have all sorts of other problems", if we started to approach the business of government running a business, whistleblowing from that perspective, you would get a better result and you would feel better about yourselves. I know that from being around people. Is whistleblowing soul destroying? No, it is not because I am encouraged by what I see around me. I see that people do start to embrace whistleblowing and they have started to understand what it means and how it could work for them. I think I want you all to understand that it can work for you in Parliament and it will work for me as a member of society if we actually all do these things.

So I say take a deep breath. It will serve you well if you put these principles in place and in time you will feel very good about having done that. So that is how I think you should approach this thing—do not pay too much attention to feeling nervous about the future. Rather, put your efforts into getting it right and that will sort you out and sort out the public interest.

Mr JONATHAN O'DEA: Can I ask you to briefly address whether or not you think the delay, particularly over the past two years, since 2006, which was the review previously, has been the cause of—

Ms KARDELL: Hardship to people?

Mr JONATHAN O'DEA: —hardship or damage or whatever?

Ms KARDELL: I think it would be hard, except for a couple of examples, the only one that comes to mind is the Jillian Sneddon matter in terms of a close connection with Parliament's actions or activities or involvement with Parliament, but more widely than that it is very hard to say, and I do not think anybody could do anything else other than make an allegation and hope to make it stick, which is what people do. So if I look at the things that I am posing you should do, if I look at it that way, if I say, "Well, let us just not look at Parliament and what they failed to do or failed to do something, but rather look at the possibilities if they had done something", there is a different question. If some of these things that I am suggesting had been in place two years ago I am sure that some people that I know of would have had a better passage. So I think that is a better way for me to think about it is to say, "If those things had been in place a couple of years ago, would some of those people whom I have come to know in that period have had a better time and would the systems or the organisations who were involved in those things have fared better?" I think yes, it would have. I look at the University of Sydney, the Bruce Hall matter.

I will give you an example, and this is Adelaide, South Australia. I think this is wonderful, and it was in the papers. A disclosure was recently made to the Department of Health in Adelaide that the calibrations and measurements done in relation to a linear accelerator in a radiation oncology department in a hospital in Adelaide had been done badly, wrongly, covered up and the outcome over a year for some 700 patients was that they had been mostly underdosed. Most people would say, "Whoopdee do, underdosed, that can't be a bad thing". It actually can be a bad thing. I must quickly say my background before law was radiation oncology so this is my home patch. Underdosing can be a real problem.

The person who made the disclosure is a well-educated person who was able to respond to my encouragement and put in what amounted to a treatise. She got good information. She went over the top in every way. And you will not get that for every whistleblower, I can tell you. But it is the response of the authorities which I most admire. They instantly or they sat and thought, "What are the ramifications here?" The ramifications here are 700 patients, some of whom might have died, some should have their treatments reviewed, some might need other treatment, some may have had a recurrence of their disease because of undertreatment.

There are people out there and their families who would be anxious and upset about this. This could be a huge minefield. They set up a hotline; they set up people to manage information and people making complaints and they went to the press and put out a media release stating the bare facts—no mention of who said what to whom, just the bare facts as I have basically given them to you—"That we have got a problem;

there could be other issues that flow from it. We want to hear from you. Get in touch with your doctor. Get in touch with this, that and the other."

At the same time they set up a three-person inquiry; a physicist, a radiation oncologist and a radiation therapist from interstate and they were commissioned with the business of going first of all to the department and pulling the records. Pulling the records was the first thing to find out what the likely damage was going to be and looking to see the allegations about wrong calibrations and measurements. That is where you could go. Not only is that a sensible and appropriate thing to do for every reason but also it will stand the Government in good stead in the future. That is where I would like you to get to.

Mr JONATHAN O'DEA: I will ask one final question, but following on from your comments I think it is important, as a precursor to my question, to point out that, yes, I am a member of the Opposition, the Liberal Party in this State and, as such, I am pleased to note that the last Coalition Government actually introduced the legislation in 1994?

Ms KARDELL: That is right.

Mr JONATHAN O'DEA: And we have not been in power since 1995 and it has been our policy for quite some time to seek reform, so I think you are somewhat misguided in lumping everyone in the same bucket.

Ms KARDELL: I will answer that.

Mr JONATHAN O'DEA: In New South Wales anyway. I did want to likewise give my colleague some acknowledgement in that we are now seeing the start of some reform. In fact, last week the Independent Commission Against Corruption Amendment Bill 2008 was introduced into Parliament. Are you aware of that bill and will you be making a submission prior to it being debated in this Parliament?

Ms KARDELL: I am not aware of the bill but I would like to make a submission and I would like to answer your question—and full credit to the Liberal Party and the Government for bringing the bill in the first instance. In 1995 and 1996 we were making submissions about its shortcomings; it was a start, but it had tremendous shortcomings and I think by and large they are still there, so that is a two-edged sword. It is a bouquet but the other side of it. Then we have the Labor Party in the middle and it has responded to some of the reviews in positive ways—to some of the things we have put up. Reverse onus is something that came from whistleblowers back in time and a couple of other things have been done, so full credit to the Labor Government for those amendments that were made.

For sitting around and doing nothing with the report for a year or whatever it is, that is no good. I think it should have been dealt with sooner, not later, but here we are now and I am not about to castigate people for what they should or should not have done. We have an opportunity now and I would like you, as my representatives, to look beyond what you could have done in the past or should have done or might have done. You have an opportunity now and you can act in a bipartisan way and I would like to see it.

Mr ROB STOKES: You indicated that the British model has some application to our review. Are there any models in Australia that you think are ones that we should be following in terms of the structure of an Act or are you aware of any in other jurisdictions completely foreign to us that might have some application?

Ms KARDELL: I would not recommend any of the Australian Acts as the first thing, none of them. The New South Wales Act is not the worst; in fact, it probably is the best out of all of them, but I would not recommend any of them.

Mr ROB STOKES: Could you indicate which you think might be towards the bottom?

Dr BOWDEN: South Australia, without a doubt whatsoever.

Ms KARDELL: South Australia and Tasmania, I think.

Dr BOWDEN: No protections and no action have taken place in 10 years.

Ms KARDELL: Yes. Overseas, I would cherry pick, and that is the happy position that you are in. You do not have to find a model and just say, "Let's rebadge it." I would like to see you do more than that. I

would like to see you think about what you have got in front of you and do something that is worth having. A rebadging exercise is not going to serve you well.

Dr BOWDEN: The reason why we put a British platform up as a model to consider is that it has an easy method by which the whistleblower, if damaged, can appeal and get the situation looked at and get recompensed. It is a British-wide system of local appeals. It works through their Labour Act. We suggested this would work through the Commonwealth—and this is getting back to the Commonwealth-State issue because the Commonwealth has paper Acts and a system of looking after it that operates with regional offices worldwide. Whether New South Wales could set up such a system, I do not know, but it has such a mechanism by which the whistleblower can make an appeal, and that is the beauty of it. A whistleblower has nobody working for him at the present moment.

Mr ROB STOKES: I see a tension in the British system's ability to seek compensation. I understand that your whistleblower's main focus is that public interest disclosures should be made primarily in the public interest not a matter of personal grievance. I am concerned that if you weighted it towards getting compensation, it could then being misdirected into just being another grievance body?

Dr BOWDEN: The British system is not perfect. It is heavily weighted towards personal grievances, as you will see if you look through the cases, and it has that particular weakness to it. Its appeal is because of the national coverage of organisations.

Ms KARDELL: I think there is a confusion of terms here. A civil claim for compensation by a whistleblower would be for the things that you might ordinarily find in a personal injury claim, something of that sort. You are looking to have compensated psychiatric damage, out-of-pocket expenses, those things that are commonly the end gain, the end result of say a couple of years. You might lose your house because you have used it to fund something. When you say, "compensate", I think of it more as being reimbursement. In the course of whistleblowing you have expended all these costs; you have got psychiatric damage, you have got medical costs, you have got ongoing psychological support; that is compensation in the classic sense as we know it in our legal system.

When you talk about civil claims for compensation for a whistleblower, you are talking about no more or less than what is commonly available to someone for personal injury or related things. When you talk about *qui tam* actions, you are talking about something quite different. You are talking about a particular system, which comes out of ancient common law, which is our heritage as much as the United States, and a system that is built on that and punitive law, which allows a court to treble the amount that is claimed as having been rorted from the Government and then, on a percentage basis, allocate a portion of that to a whistleblower, who may, depending on whether they ran the case themselves or whether it was taken up by the Government and they became like the main witness, the main investigator, the person who helped them through the details. In that sense you are not talking about compensation that is personal, you are talking about compensation for the risk of taking up and managing, perhaps having the whole risk of that litigation.

That is a very public-interested act for the reason that you stand to get only a small portion. The bulk of it you say "Whoopie" and you give it to the Government because you are a relator. There is no reward in that either. So whistleblowers are not looking for rewards but compensation and paybacks that reasonably cover their outcomes. What we want under the Act is to avoid those claims ever including things for psychiatric damage, like our Act is supposed to prevent reprisals. If we could do that administratively in our actual work processes we would not have a need for compensation claims because they would not be damaged. So that is where you would like to go but if you fail, or for whatever reason you cannot get to that point, you have got the end game deterrence and opportunities for people to recoup, be reimbursed, to be put back where they were.

But I will ask you something else. Let me take the Woolworths or even the Bruce Hall—I know what has happened to those four whistleblowers and it is not nice! Why would any person in society, be it me or anyone else, not feel obliged to do something to sort out their life whether it is during the process or at the end? The primary whistleblower in that case—this is one of the main reprisals that was taken against—I will tell you about another one, he is a surgeon and a vet. He did the transplantation in the research. He was told he had to do his work but he could not use the lab. He was not allowed in the lab, he had to come to the office and stand outside and knock like a little naughty boy at school and try to do his work through the door. The staff treated him like a dog and barked at him and did bizarre things like that. Then he was disciplined because he had not done his work.

When we talk about preventing reprisals that is the land of prevention. That is where prevention lies. But at the end of the game why would you not—you, me, anyone—feel obliged, duty bound to see that that person's life was put back together. When you talk about rewarding whistleblowers, that is not a reward to want your life back.

Mr ROB STOKES: My question related to compensation, not reward, and compensation means precisely that, to put someone back in the position they would have been but for whatever occurred. I guess my anxiousness comes through that the potential of setting up a whole new class of potential actions. I will ask a couple of specifics about that. At the moment people can only rely on common law tort action which is problematic. As I understand it the British model talks about the equivalent of Supreme Court action here. Would a body such as the State's Administrative Decisions Tribunal or any tribunal be a more effective model? Once you have gone through all the protected disclosures issues and any possible criminal action as a result of that in these actions, on top of that you have civil action. That process could take years and years. Is there any suggestion about the way in which that should happen? Should it be a tribunal, a court?

Ms KARDELL: I had not thought about tribunals but my instinct would be to go to a court and that is based on my experience that there has not been a lot of gain, I think, in the tribunals, not really, in lots of things. It usually comes back to the people involved in the system and how it works, the effort that is made to get the job right, the representation and things like that. You would like to think that tribunals are a forum where people could represent themselves more often than not and perhaps that would reduce costs, and those sorts of things, but in my experience it does not always work because people are intimidated by the process. Whistleblowers are usually in a mess anyway and they need someone else to help. I really do not think there is any cut and dried answers but I think I would head to the courts because I think the tribunals have failed in ways to date in all sorts of areas.

Dr BOWDEN: My own answer to that is my preference when I dream of where we could eventually go is somebody like the Whistleblowers' support agency which may be in the Ombudsman's Office or maybe somewhere else, moving that action forward through the courts on behalf of the whistleblower. That is where I would like to see the thing eventually end up.

Mr ROB STOKES: What about the issue of a choice of action because you have now got someone who potentially would have a choice of action under common law tort under whatever comes through this review, and potentially through employment law as well. What do you say that choice of action remain, if this were the path we headed down, or do you think it would be better to have another choice of action? I am just thinking in terms of employment at the moment where you have thresholds applied so various people can claim unfair contract or whatever up to a certain threshold and then their claim is exhausted. What do you say to a person who had a choice of action?

Ms KARDELL: Should it be possible?

Mr ROB STOKES: Yes.

Ms KARDELL: I think probably better if you were to come down on the side of having a public interest disclosure agency [PDA] to have one path for people to take whistleblower actions. I would do that because over the years that we have had this Act I have noticed a tremendous confusion about, for instance, grievances as against public interest and failures of public education in terms of trying to get people to understand what the distinctions are. A lot of things that you would commonly see as grievances already have their own pathways—they are in place. You need to distinguish a public interest disclosure from those things. I would bring it through its own pathway, for those reasons. As much as anything else it will serve the whistleblower but it will also serve to educate society about what these things are. You will get a cleaner, more solid end result, I think, both for the institutions of government and for the whistleblower as a result.

(The witnesses retired)

(The Committee concluded at 1.47 p.m.)

RUSSELL DAVID GROVE, Clerk of the Legislative Assembly of New South Wales, Parliament House, Macquarie Street, Sydney, sworn and examined:

CHAIR: We have received a submission from you. Do you wish that to form part of your evidence today?

Mr GROVE: I do.

CHAIR: Before I ask you questions, do you wish to make an opening statement to the Committee?

Mr GROVE: No. That is contained in my submission.

CHAIR: You are the Clerk of the Legislative Assembly?

Mr GROVE: I am.

CHAIR: You have held the position for quite some time?

Mr GROVE: I have.

CHAIR: Eighteen years?

Mr GROVE: Eighteen years plus.

Mr RICHARD AMERY: And that was recently recognised.

CHAIR: Thank you. You are in charge of parliamentary staff at the Legislative Assembly?

Mr GROVE: Correct.

CHAIR: There is also electorate staff throughout New South Wales.

Mr GROVE: Correct.

CHAIR: The 93 members of Parliament each have two electorate staff, and if the members are not aligned, they have three members of staff. Is that correct?

Mr GROVE: They do, although quite a few members have job share, so in terms of actual numbers it is more than two times 93 plus the Independents.

CHAIR: We have received attached to your submission the procedures for each of those two categories of staff.

Mr GROVE: Correct.

CHAIR: One is for the electorate officers and one is for parliamentary staff. They each operate to some extent under different rules or policies. With regard to parliamentary staff, they are employed under the Public Sector Management Act 2002?

Mr GROVE: No, they are not.

CHAIR: They are not?

Mr GROVE: Parliamentary staff are employees of the Speaker or the President, or the Speaker and the President jointly. They are specifically excluded from the Act, so that the parliamentary service is seen as separate to the executive service.

CHAIR: What are electorate officers in the members' staff employed under? Is that the same system?

Mr GROVE: They are employed by the Speaker, separate staff to the public service. They are not employed under the same system of merit in terms of selection panels, et cetera, that we would normally go through with a normal parliamentary officer. The member makes the selection, makes the recommendation to the Speaker and the Speaker is actually the legal employer of the staff.

CHAIR: You know that we are here with regard to whistleblowing legislation and the whistleblower rules and procedures, and you have been asked to attend today to explain what procedures are in place within the Legislative Assembly. Do parliamentary staff come under the definition of people who can be protected for protected disclosures?

Mr GROVE: Yes they are.

CHAIR: We are not just talking about protected disclosures; we are talking about people who come forward with information as well.

Mr GROVE: Yes.

CHAIR: Are electorate officers protected if they come forward?

Mr GROVE: They would be deemed to be protected under the Act, yes.

CHAIR: Have you had any people who are parliamentary staff, in the past five years for example, come forward with any matters you have applied your procedures for protected disclosures?

Mr GROVE: In the past six years we have had two protected disclosures.

CHAIR: This is parliamentary staff we are talking about?

Mr GROVE: Yes.

CHAIR: Were those people who came forward fully aware of who they can go to to make those disclosures?

Mr GROVE: That is my understanding.

CHAIR: When they start with the Parliament are they inducted? Are they given those procedures and policies? Does it form part of the induction process?

Mr GROVE: They are.

CHAIR: Are they told who they can go to to do that?

Mr GROVE: Yes.

CHAIR: When electorate officers begin their employment with their member, I understand they attend a two-day induction process.

Mr GROVE: That is correct.

CHAIR: Are they given the policy at that date?

Mr GROVE: They are.

CHAIR: And they would be told or given the information as to who they can go to?

Mr GROVE: Yes.

CHAIR: In the past five or six years have you received any information from an electorate officer that you have classed as a protected disclosure?

Mr GROVE: Probably a moot point. No.

CHAIR: Have you received anything that you have treated as a protected disclosure?

Mr GROVE: No.

CHAIR: The situation with electorate officers is that they are appointed by the member but employed by the Speaker, is that right?

Mr GROVE: Correct.

CHAIR: So their particular situation is that they are there because of the member of Parliament usually—they are answerable to the member of Parliament—but they are employed by the Speaker. It is a funny situation. If the member of Parliament was not re-elected in an election—

The Hon. TREVOR KHAN: This is in his statement.

CHAIR: —then it is a matter for the member of Parliament as to whether or not that staff stays.

Mr GROVE: That is correct. It is part of their award.

CHAIR: And they are aware of that?

Mr GROVE: Yes they are.

CHAIR: Have you ever received information to your attention involving a member of Parliament involving a serious criminal matter?

Mr GROVE: I did.

CHAIR: Was that a protected disclosure? Did you treat that as a protected disclosure?

Mr GROVE: I did not. However, the statement was given to me in confidence and I held that confidence.

CHAIR: If a case comes like that and involves a police investigation, what role would you take in a matter with that?

Mr GROVE: In a hypothetical case?

CHAIR: Yes.

Mr GROVE: If an electorate officer came to me with information that they had received relating to a member that involves some sort of criminal activity, my advice to that officer would be for it to be immediately reported to the police, and I would do the same thing because a matter of criminality is a matter for the police to investigate.

CHAIR: And would you cooperate with the police if they asked you to?

Mr GROVE: I certainly would.

CHAIR: The material that is contained in an electorate office, paperwork and records, who has ownership of those records?

Mr GROVE: They are the private property of the member.

CHAIR: You have already said that you have not received anything that you would class as a protected disclosure. Generally, if any information comes your way about an allegation against a member of Parliament, what procedures do you put in place to deal with that in a general way?

Mr GROVE: Without going into specifics, we have had occasions over the years where allegations have been made against members of Parliament to ICAC, for example, and ICAC has chosen in the first instance not to investigate those matters but refer them back to us for investigation. On some occasions they have asked us to report back to them what the circumstances were and what has been done about it. In other cases they have specifically said, "This is for you to investigate. We don't want to hear back from you."

CHAIR: If an electorate officer had a problem with the member of Parliament—and it could be all sorts of problems that could arise because it is a very close working relationship, given the nature of the job and the closeness in proximity—and came to you with a problem, have you ever had cause to have a situation where you have attempted to find another position or location for the electorate officer? Do you have procedures in place for that? What I am talking about is if an electorate officer feels as though they are having a difficult time in that particular office, do you have procedures in place for that?

Mr GROVE: As is enunciated in the code of conduct for member's staff, loyalty is one of the issues which is one part of the code of conduct. Also, the confidence of the member must continue to be held. We have had occasions over the years where it has become an industrial issue where there has been a breakdown in the relationship either between the member and the staffer or between two staff because of the member—there are all sorts of combinations of triangles here—and we have dealt with that mostly internally but on occasions we have sought the advice of employment specialists, what do you call them?

The Hon. TREVOR KHAN: Mediators.

Mr GROVE: Well, mediators but Davidson Trahaire who provide the Parliament with outside counselling services, which are available to staff and to members both on a private and a work-related basis. And we have worked through those issues over the years. On some occasions we have negotiated an exit and the payment of an agreed exit fee on a commercial basis. On some occasions staff have resigned and walked away from the situation. On other occasions we have attempted to place staff in outside agencies so that they are outside the environment of the very close electorate office which creates a difficulty in itself.

On some occasions we have been successful where those people have—most of these circumstances exist where staff have gone off on stress leave in the first instance, and often parliamentary administration are the last people to hear about these things, so it is very difficult often to retrieve the situation through counselling, mediation, people understanding one another. We have been successful where people have actually transferred to outside agencies. The problem with outside agencies from our perspective is that the staff are not appointed on merit and have no right to sort of direct appointment into a public sector agency. They need to win it on the job. But because the agencies cooperate, we continue to pay the salary. The agencies cooperate, people skill themselves up in another area and they have been successful in winning jobs. All of this, of course, takes quite a deal of time.

CHAIR: I imagine also that the complaints you get do involve grievances between electoral officers and members?

Mr GROVE: Yes. We have a grievance policy.

CHAIR: You have a grievance policy put into effect and, as you said, some of those might come up as a result of stress claims or workers compensation claims?

Mr GROVE: Sometimes grievance complaints come before people go out on stress leave. Often the stress leave follows if you are not successful in settling the grievance on behalf of the griever. I mean, our people will investigate it, talk to both parties, sometimes get outside mediators to talk to people and there are occasions where the grievance is not found justified.

CHAIR: Have you ever had cause to improve your procedures and policies as a result of an issue that has come up? Can you give an example of where you have reviewed the policies and procedures that you have put in place and found that there needs to be improvement or there is an area that you think needs improvement to assist electoral officers when they come across difficult situations?

Mr GROVE: Every case is different. No case is alike. Probably timeliness is one of the things, which is of concern. It is difficult to keep things moving if people have gone on stress leave, for example, and they are not in a particularly good state to be able to come to meetings. We have had cases where we have set up

meetings for conciliations and the person has rung up and said, "We can't come. We're not well enough to come." Or they will want their union representative to represent them and the union will ring up and say, "We need to reschedule that meeting". Part of it is keeping things moving and also attempting to get people back into the workplace somewhere rather than having them sitting at home, worrying about the situation they are in, and, as I pointed out before, the difficulty of getting people into another location outside the office. Our people all the time are looking at the policies and how they are being implemented for improvement.

CHAIR: From the point of view of members of Parliament in the Legislative Assembly, when they are inducted, are they given information on protected disclosures and the relationship with their staff?

Mr GROVE: Yes. I cannot specifically remember what part of it, but I am sure it would be because it is a very important part of the relationship. Members are in a position where their staff have available to them all sorts of information. We have had cases in the past where a staffer actually released information without the consent of the member to another member, which caused political embarrassment to that member, and the Speaker of the day took the view that that was a breach of faith in terms of their relationship and dismissed the person, and that dismissal stood.

Members are also in a difficult position in that they will come to our employee service people saying, "I've got this problem with my staff" because of X, Y or Z, and we unfortunately need to say to the member, "Look, two things: don't go telling the staffer in a heated manner, 'you're sacked' because you don't have the power to sack the person. It is the Speaker's prerogative to actually dismiss someone and there is a process that needs to be gone through." Members often find that difficult because they want the problem solved quickly so they can move on. That is not always possible.

People actually have industrial rights and, as you would well know, if you end up in a court for an unfair dismissal and you have not followed appropriate process and the principles of natural justice, while the circumstance may be deserving of dismissal, quite often you will lose the case because the proper process was not followed. We are very aware of that. We do not want to bring the Parliament into disrepute as an institution and as members of the Committee would well know, quite often a small incident is blown out of all proportion and the institution itself is damaged by that. We are very sensitive to the privacy of people as well.

CHAIR: If the member is having problems with an electoral officer and the member approaches the Parliament about that—you said there is a procedure in place—what say does the member have? If the member says, "I cannot work with this person anymore. There is this and that problem." What weight do you give to the member's voice?

Mr GROVE: We would ask a member what they have done already because the member is the supervisor of this staff person. They need to be communicating with them, letting them know what they want; letting them know if they are not meeting the needs of the member. Has any of that information been documented already? Sometimes it has, sometimes it has not. If it has, that is a very good basis for doing a report on the member making a recommendation that, "I have counselled this staff member on six occasions" and there is a diary entry in relation to that. Having got that, we would be able to fairly quickly do an investigation and make a recommendation to the Speaker for dismissal of a person or a negotiated departure. If the member has not done any of that, you have to start from scratch, so you document what the member's views are; the staff member involved has a right to make a comment about that to verify the accuracy of the information that is given and you go through that process of fairness.

CHAIR: If at any time a member of Parliament ceases to be the member for whatever reason and a new member takes over, is that the same as an election, the new member coming in has the say?

Mr GROVE: In a by-election, for example?

CHAIR: Sorry, in a by-election?

Mr GROVE: Yes.

CHAIR: And that is just the way the system is?

Mr GROVE: It is in the award, an incoming member has the right to choose their own staff. They have three months in which to do that and the staff of that electorate in the third month may also make that

choice, to say, "This is not working with the new member. In the third month I choose to leave" and there is a formula by which people are paid a severance.

CHAIR: Have you ever had an electoral officer come to you and say, "Look, I don't have my job anymore" and made a complaint about that in those circumstances?

Mr GROVE: That is the award. There is no ground for complaint. The member is no longer the member. Under the award the new member has the right to choose the staff. It is not related to the old member; it is related to the new member. He has the choice.

CHAIR: There is nothing that the Parliament is able to do about that?

Mr GROVE: No.

Mr DAVID HARRIS: Are there designated officers in making a disclosure?

Mr GROVE: Yes, there are, the Clerks.

Mr DAVID HARRIS: If someone were making a protected disclosure, they would have to go to the Clerks to do that?

Mr GROVE: What has occurred in the past in practice is someone will come and see a senior officer who works in the employee services area and say, "Look, I've got this problem" and they are advised that this is a matter that would fall under the protected disclosure legislation and they either make an appointment and discuss it or they put in writing their disclosure.

Mr DAVID HARRIS: Is there anybody that the Clerks would consult with when determining whether a disclosure was protected?

Mr GROVE: We would normally talk to our senior human resources people whether or not the particular complaint fell within the legislation.

Mr DAVID HARRIS: Once the decision has been made whether or not it is a protected disclosure under the Act, are people clearly notified that that is the case?

Mr GROVE: They are. They are advised what the implication is for them as someone who has made a disclosure, what the protections are for them and they are also advised that if, in any circumstance, any other person harasses them or treats them in any way differently, they are immediately to report it to us, and that occurred on one occasion and the people who were involved were counselled that they were breaking the law.

Mr DAVID HARRIS: If a member of staff who works for a member of Parliament has an irreconcilable difference, you said you may be able to place them in another agency. Is there a capacity to insist that another member employ that member of staff?

Mr GROVE: No, although that has occurred in the past where someone who has had uneasy relationship with one member has actually gone and worked for another member at that member's request.

Reverend the Hon. FRED NILE: You have just outlined some of the circumstances when a staff member can be given notice over three months. If a new member after an election or by-election wants new staff, what period is applied?

Mr GROVE: They have three months from the date of declaration of the poll. They can advise the Speaker that they no longer wish to retain the services of a particular person and the severance clauses come into play. Three months for the members and in the third month the staffer can make that choice.

Reverend the Hon. FRED NILE: Does that also apply if there is a protected disclosure?

Mr GROVE: Yes, because they are unrelated issues.

Reverend the Hon. FRED NILE: To your knowledge is it usual for most members after an election or by-election to get new staff or would a number of members continue with the experienced staff?

Mr GROVE: Anecdotally after the last election in the Assembly we probably had something like 40 staff leave their former offices with new members. You find even when you have a member replacing a member of the same party quite often they will change the staff. Members feel that in most cases it is a new way for them to make their stamp on the electorate. More often than not staff are reasonably happy doing that because they have worked with members for a very long time and they are burnt out to some extent as well. We normally do not have huge problems with that. Staff who have worked for a long time with a member who is defeated obviously also feel, not to the same extent perhaps, the loss a great deal because they have put in an enormous amount of effort for that particular member over the years. We deal with that.

Reverend the Hon. FRED NILE: It is not unusual to have a turnover of staff? Forty is one-sixth of the total?

Mr GROVE: Yes. We had 25 new members last year.

Reverend the Hon. FRED NILE: I note in your submission you said that you think in regard to electorate officers who have been involved with protected disclosure or a whistleblower electorate officer, it would be better to have a central coordinating agency. How do you see that operating to help find these folk a new position? I note you said you have tried to do this a few times.

Mr GROVE: The committee has received other evidence relating to this issue, as I understand it. It would give a certain amount of certainty if there were a coordinating unit. We do not have direct access to the broader public sector where jobs are available, where temporary positions are available. It is problematic in areas that are non-metropolitan. If you are someone who works in Hornsby and you are on stress leave and we find a job in the Department of Housing in Maroubra, you are hardly likely to want to take up that position.

The Hon. TREVOR KHAN: Is Hornsby non-metropolitan?

Mr GROVE: That is a metropolitan example, my apologies. I mean distance. To find a job in Tamworth in another agency is difficult. You have the issue of confidentiality. If someone leaves the Tamworth Electorate Office and goes and works in another agency in Tamworth, people will say "Why has that person left?" I do not know what I can do as someone who is responsible to ensure that the fact that they have made a protected disclosure and you are moving them out of the situation because the office is very tense, et cetera, when other people draw their own conclusions. The parliamentary environment is reasonably well known for its rumour and suggestion of what is going on when people do not necessarily know all the facts involved. That may be a way of overcoming that.

Reverend the Hon. FRED NILE: The agency would not just be for members of Parliament?

Mr GROVE: No, it would be a sector-wide agency.

Reverend the Hon. FRED NILE: All public servants in New South Wales?

Mr GROVE: Yes. That sort of agency exists to some extent now in terms of displaced persons. In the public sector if there is a reorganisation in a government agency, some people do not take a redundancy but stay on the books are on the displaced persons' schedule. We can access that when we have got a vacant job. We can say "Who is on the displaced persons' list? Who has an expertise in personnel, accounts in relation to whatever?" We can interview those people. If they fit the job they have the right to come into that job above advertisement.

Mr RICHARD AMERY: To your knowledge is the arrangement with the member and their staff unique in the public service of this State? Is it unique in public services around Australia? Is there any other organisation, government department or statutory authority that has these sorts of employment conditions attached to it?

Mr GROVE: It does not, apart from Ministerial staff, of course, who are appointed under the Act as temporary employees and they have even less industrial rights, some people would suggest. They can come in on Monday and for some reason or other the Minister does not like them any more, thank you very much, here is

the schedule of what you get paid, as you would well know as a former Minister—not that you necessarily did that with your staff.

Mr RICHARD AMERY: Absolutely not.

Mr GROVE: The relationship between electorate office staff and their member is unique in that the member is not the employer but is the supervisor and the person who chooses the person whereas the Speaker for administrative purposes is the employer and the Speaker is the person who is named in any industrial action. I am not sure whether members would prefer to be named as the employer and appear in the Industrial Commission—

The Hon. TREVOR KHAN: They still do—

Mr GROVE: Potentially they do, that is true. Certainly in other parliamentary jurisdictions there are similar sorts of arrangements. For example, in the province of Alberta in Canada when the election is called and the Assembly is dissolved, all jobs are declared vacant. The staff are actually finalised and paid out and they are re-engaged at the next election.

Mr RICHARD AMERY: This unique arrangement basically means that employees in that situation do not have all the protections, if that is the right word, of all State legislation? I refer to whistleblower and industrial legislation and workplace rules, workers compensation and so on. Obviously they may be covered or protected by some of those but by the very unique nature of their employment that legislation either does not apply or it is applied with great difficulty? For example, a person making a protected disclosure as an electorate officer involving a member would be completely different to an employee within the Director-General's Department of XYZ making a similar disclosure against the Director-General or one of his deputies. Are they treated differently in how they are protected by legislation?

Mr GROVE: Currently they are not. A member is a public official. An electorate officer is someone in a position who is able to make a protected disclosure. As the chief executive officer for the organisation I have responsibilities to ensure that the Act is complied with and that the person who has made the disclosure is protected. You are not going to be able to overcome the issue where in reality you are not talking about people who are in an equal position. Members of Parliament are in a very important elevated position in relation to the relationship between themselves and their staff. That is where it becomes very difficult for staff who are torn between having received information about their member and the loyalty which they have for their member. Where do they go from there?

Our guidelines provide for them to come to me and I am obliged to keep in confidential the allegations that have been made so they can be investigated appropriately. Sometimes you are in a situation where to keep that confidentiality is very difficult to be able to do the investigation. In an electorate office, for example, you would perhaps need to speak to some of the other electorate office staff to verify the allegation, which had been made. If you cannot do that you really cannot take the investigation any further. Now that can be from the extreme, where you have something reported of a criminal nature down to he said or she said, "The member was rude to me." Staff are used to those sorts of things where members, certainly Assembly members who are out in the electorate come in and want to deal with the issues in the office as quickly as possible so they can get out and around their constituency—and properly so. That is the sort of thing they should be doing: being out there seeing people, while the office runs itself. You get circumstances where electorate office staff will comment on Ministers, for example, not having the time to be able to spend in the electorate office.

Mr RICHARD AMERY: Or when parliamentary committees meet on Mondays?

Mr GROVE: That sort of thing. It is the conflict between your responsibilities as an elected representative and a member of a committee. It falls back on the electorate office staff to fill that gap.

Mr RICHARD AMERY: I want to make a point that follows on from what I said before, and picking up a question by the chairman, if for any particular reason this week I do not remain as the member for Mount Druitt, or a member of Parliament, whether I be hit by the proverbial Bondi bus, struck down by lightning, or for whatever reason, the continued employment of the staff if my office is totally 100 per cent at the discretion of the member who would replace me, is that correct?

Mr GROVE: That is correct. That is in their contract of employment, which they clearly understand when they take on the job—there is no doubt about them being informed of that.

The Hon. TREVOR KHAN: You highlight a fundamental dichotomy that exists in the employment relationship, do you not? The staff are employed by the Speaker but their employment is, in a sense, at the whim of the survivorship of the member?

Mr GROVE: Yes.

The Hon. TREVOR KHAN: Their tenure of office?

Mr GROVE: Yes, it is temporary. While a member continues to be a member they have all the industrial rights that anybody else has but when that member ceases to be a member the incoming member has the right to choose staff. I would not think any member would want it any differently.

The Hon. TREVOR KHAN: That arrangement has existed for what, 100 years?

Mr GROVE: We have had electorate office staff since 1975.

The Hon. TREVOR KHAN: The whistleblower legislation, we will call it, arose in 1994?

Mr GROVE: That is correct.

The Hon. TREVOR KHAN: In a sense that legislation was laid over the pre-existing relationship?

Mr GROVE: That is true, but that applied in relation to anybody else who worked in the public sector. There is nothing unique about the circumstances of the legislation itself. Had someone pre-1974 made a criminal allegation against a member, or an allegation against a member of a criminal activity, the same situation would apply. We all have a responsibility. If you have some knowledge of potential criminal activity you have the obligation to report it to the police.

The Hon. TREVOR KHAN: That may or may not be strictly correct. It depends on whether it is a serious indictable offence I think, but I take your point.

Mr GROVE: It is part of the problem here that people hear rumours of activity or whatever and some people choose to report that sort of thing and some people do not.

The Hon. TREVOR KHAN: What is different under the Public Disclosure Act, however, is that as well as a protection of confidentiality there is, in a sense, a protection against retribution, is there not?

Mr GROVE: Yes.

The Hon. TREVOR KHAN: You talked earlier about how a staff member is torn: torn as to whether they should report a matter and torn in their loyalty to the member. In light of what you have said there is a third tearing, is there not: a loyalty to themselves?

Mr GROVE: They do.

The Hon. TREVOR KHAN: So in the knowledge of what you say—the staff members knows that, if the member goes, in essence they get the bullet—when they weigh up the question of what they should do they have three balls to throw in the air: loyalty to the member, a public morality and a personal self protection mode?

Mr GROVE: Yes.

The Hon. TREVOR KHAN: To that extent that member of staff, or that person, has lost in essence one of the protections that the legislation was designed to create: no adverse impact falling back on them through a protection against retribution?

Mr GROVE: I agree with you but I do not see how that is any different to my circumstances. I mean I could be faced—

Mr TREVOR KHAN: I am not too concerned about your circumstances right now because you are doing fine—you are still here.

Mr GROVE: No, let me continue. Any person who is faced with this situation of whether or not they are going to be a whistleblower has to deal with those very issues: Loyalty to their institution and loyalty to themselves. In my case it could be loyalty to the Speaker with information I have received that I have to make a decision about.

The Hon. TREVOR KHAN: Very true but we talked earlier about the director general. If somebody became alive to information about the director general—we will use the standard of a serious criminal nature—they make a report and it is dealt with in an appropriate way, their employment is not jeopardised by the loss of the director general, is it not?

Mr GROVE: Yes, that is true but in terms of an electorate officer they are two different situations. The relationship between the employment of that person by a member of Parliament and the change in the circumstances of membership for that seat is different to any other situation which exists. It is clearly most unfortunate but they are not connected. To make the connection that someone was sacked because they made a certain allegation against a member is just simply not true.

The Hon. TREVOR KHAN: I did not make that assertion. I was dealing with the fact that because of the different circumstances it has a different impact upon the person.

Mr GROVE: It does.

The Hon. TREVOR KHAN: Would you agree with me that the reason this legislation came in and why I think it generally has support in the community, and I suspect of this Committee, is that it assists in fostering a greater degree of, in a sense, public morality and efficient administration of government in New South Wales?

Mr GROVE: Yes it does, and it also gives some protection to some scurrilous accusations against people as well. Things can be investigated and reported upon without becoming a public issue where people prejudice the outcome of the circumstance. It is very easy to throw mud and members of Parliament are perfect targets. They are high-profile people.

The Hon. TREVOR KHAN: They are. This dichotomy in terms of the employment relationship leads to circumstances, or potentially leads to circumstances, where matters which appropriately would be reported on and investigated may not be because of a legitimate individual concern about the future for that staffer. Is that not right?

Mr GROVE: I imagine that would be something that would play heavily on their mind, yes.

The Hon. TREVOR KHAN: In that sense the intent of the Parliament and one supposes the people of New South Wales in the passing of this legislation is in a sense frustrated by this unusual employment relationship.

Mr GROVE: I would agree but only to some extent. I think other people would find themselves in similar sorts of circumstances where, if they went down a particular track, it would be untenable for them to continue to work in that environment. As we well know, restructuring of government agencies to move people in certain directions rather than for efficiency is not unknown, and political parties of all persuasions from time to time have availed themselves of the opportunity.

The Hon. TREVOR KHAN: That is very true but what we are talking about in terms of this legislation is something different than simply getting rid of a person. It is about achieving a higher moral good: that is, exposing maladministration, corrupt conduct and indeed criminal conduct. It falls into a different category.

Mr GROVE: No, I think criminal conduct is not part of the protected disclosure.

The Hon. TREVOR KHAN: And that was the moot point that you were referring to earlier in the question asked of you by Mr Terenzini.

Mr GROVE: I think they are different things. As I said, if someone reported to me allegations of criminal activity, my immediate reaction would be to tell that person to immediately tell the police and I would also inform the police.

The Hon. TREVOR KHAN: I am not being critical of you in that regard but do I take it that when Mr Terenzini asked you a question before about a potential protected disclosure, or similar words to that, your response with a bit of a smile was, "That is probably a moot point." That was what you were referring to—an allegation of criminal conduct. Is that right?

Mr GROVE: Yes, I think because they can be distinguished.

The Hon. TREVOR KHAN: You do not think that criminal conduct can be corrupt conduct?

Mr GROVE: They are probably not mutually exclusive, no. It can be corrupt and also be criminal at the same time but you could be being corrupt without being criminal.

The Hon. TREVOR KHAN: That is very true, but there is an overlap that would sometimes make it very difficult to distinguish the two, particularly at the time of the initial report.

Mr RICHARD AMERY: Point of order. I am wondering about persisting with asking the Clerk to provide some legal opinion as to what is corruption and issues like that. I do not know whether that is appropriate.

The Hon. TREVOR KHAN: It is his understanding.

Mr RICHARD AMERY: Asking the number one law officer of the State that sort of question would be a fair question but I do not think asking the Clerk of the Assembly questions about whether an issue is either corruption or criminal behaviour or not—

The Hon. TREVOR KHAN: He has answered it.

CHAIR: Are you comfortable with that, Mr Grove? It is your understanding. For what it is worth, we give that the relevant weight.

Mr GROVE: Yes, they are not necessarily mutually exclusive.

The Hon. TREVOR KHAN: I will move on a little. Where in the codes of conduct is there a procedure to be undertaken by, say, an electorate staffer in a case where someone has disclosed an allegation of serious criminal behaviour?

Mr GROVE: Are you talking about a code of conduct for members' staff?

The Hon. TREVOR KHAN: Yes.

Mr GROVE: I think probably you are quite right that it is not there specifically.

Mr GREG SMITH: If you look at point 5.1 on page 8.

CHAIR: There are two documents, one for parliamentary staff—

Mr GROVE: That is the parliamentary code of conduct as opposed to the member's code of conduct. There is provision for what happens in circumstances where you need to make a protected disclosure, which does not include allegations of criminal activity. It is not in the code of conduct for members.

The Hon. TREVOR KHAN: Do you think there should be a particular part that deals with allegations of—let me put this to you—

Mr GROVE: Yes, I think probably that is a very good point. You learn from your experiences.

The Hon. TREVOR KHAN: Don't we all. Would it not be appropriate that there be some, in a sense, failsafe mechanism for parliamentary staff for them not to have to weigh up the nature of the allegation, but where an allegation of serious criminal activity is made there is essentially an immediate trigger: it goes off to somebody else and you do not have to worry about it anymore?

Mr GROVE: Yes. I guess you rely on people using their commonsense as well.

The Hon. TREVOR KHAN: We all learn from our experiences, do we not?

Mr GROVE: Yes, that is right. Most of the people who work in the parliamentary environment, whether they are a member, the Clerk, an employee services person or an electorate officer are reasonably well experienced in dealing with people in the community at large. Very few electorate office staff came down in the last shower. They understand the circumstances and they make choices.

The Hon. TREVOR KHAN: That is precisely right, they do make choices. They have competing loyalties as we have already described. If there were a procedure they immediately had to follow when an allegation of criminal activity was made it would minimise the need to weigh up those competing loyalties.

Mr GROVE: Exactly. I take your point. I might add that the code of conduct for staff of members took a long time to negotiate. There was a three-way situation where there were electorate staff who had very strong views in relations to things like whether you put in the issues of loyalty and confidentiality, the union had a particular view about locking staff in and members had particular views. Some members did not want their staff to have a code of conduct because in a sense that bound a member as well. It was not an easy thing to negotiate. But we felt at the time it was a very important thing that really should be there. I take your point in terms of the criminality.

The Hon. TREVOR KHAN: When I read the document, one of the impressions I got was that there was an interesting competing balance, particularly in the light of circumstances. One could feel that the code of conduct could send messages that perhaps in certain circumstances you would not want sent. I take your point that it is a balancing act that probably ends up a bit like a camel.

Mr GROVE: Yes, you have the situation where people who are employed in electorate offices are not meant to be undertaking direct electioneering, campaigning, supporting in a sort of way for a member. They are being paid from the public purse; that should be a separate sort of thing. But clearly they are working in a political environment, which has as part of that some of those things but in a softer sort of way. Electioneering is part of being a politician.

Mr GREG SMITH: Mr Grove, if you became aware that an electorate staffer was involved in a police investigation of sexual misconduct by her member of Parliament, do you think it is proper that you should inform the member about that information?

Mr GROVE: Is this a hypothetical question?

Mr GREG SMITH: It is hypothetical.

Mr GROVE: Depending upon the circumstances surrounding the situation, reference may be made to the issue. It may not, depending upon the circumstances.

Mr GREG SMITH: Would you agree that it may have the effect of blowing an investigation if you told the member that you had heard that he was under investigation?

Mr GROVE: Not if the member already knew.

Mr GREG SMITH: How would you know that that before you told him?

Mr GROVE: Because of the circumstances in electorate offices and the environment where people talk off the record, counsel people, talk to one another, talk to other electorate office staff, all sorts of circumstances.

Mr GREG SMITH: Do you have someone working for you called Michael Saunders?

Mr RICHARD AMERY: Is this a hypothetical Michael Saunders?

Mr GREG SMITH: No, this is direct.

CHAIR: Mr Smith, it has been going well so far. Why do you want to know that?

Mr GREG SMITH: Because we are all charged with investigating an inquiry into a report on the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament.

CHAIR: That is right.

Mr GREG SMITH: The questions I am proposing to ask directly relate to those terms of reference.

CHAIR: Why do you not ask if there is a particular officer to do a particular job when conducting an inquiry or investigation in the Legislative Assembly? That is what we are here to do. You can read back those terms of reference and I agree with you. We are here to look at the effectiveness of the laws, practices and procedures. You can ask Mr Grove what he would do in a certain case. You can ask Mr Grove if there is an officer to receive protected disclosures or information from potential whistleblowers. You can ask if there is an officer to do a particular job. We do not need to know who the officer is.

Mr GREG SMITH: Was there an officer in your office who told you on 11 September 2006 that a woman called Gillian Sneddon—

CHAIR: Mr Smith—

Mr RICHARD AMERY: Did you not say this is hypothetical?

Mr GREG SMITH: No, I did not. I said this was not hypothetical.

Mr RICHARD AMERY: Earlier you answered the question "yes".

Mr GREG SMITH: I know, that was an earlier question.

CHAIR: That question is out of order. You can ask Mr Grove about the practices and procedures he has in place to deal with people who come forward with information, whether it is protected disclosures or any other kind of information. You can ask about that. Mr Grove has been kind enough to appear before this Committee. We all appreciate that. You can ask him as the Clerk what procedures he has in place to deal with situations. You are well aware of that, I know.

Mr GREG SMITH: Mr Chair, I am asking him as to how he behaved in a particular case.

CHAIR: That is out of order.

Mr GREG SMITH: Why is it out of order if it shows that there is or is not protection for whistleblowers?

CHAIR: Mr Grove should leave while we deliberate on that issue.

(The witness left the hearing.)

The proceedings resumed in the presence of the witness:

Mr GREG SMITH: Mr Grove, if you became aware that a staffer was a witness against a member of Parliament in a sexual assault case would you, on the same day, tell that member of Parliament that there was a police investigation into him?

Mr RICHARD AMERY: Hypothetically.

Mr GREG SMITH: Hypothetically.

Mr GROVE: No, I would not.

Mr GREG SMITH: Would you tell him subsequently to that day that there was a police investigation into him?

Mr DAVID HARRIS: Or her.

Mr GROVE: No, I would not.

Mr GREG SMITH: Would you take action to ensure that such a staffer was protected thereafter by compensation and other benefits?

Mr GROVE: Yes.

Mr GREG SMITH: Would you ensure that any claim she made for workers compensation was not opposed because of the trauma that she had suffered?

Mr RICHARD AMERY: Or him.

Mr GROVE: I would not be in a position to make that decision. In a workers compensation case it would be for the insurers to make that decision.

Mr GREG SMITH: You do not give instructions to counsel or to the lawyers briefed to represent the Parliament in relation to such a claim?

Mr GROVE: We have conferences but, ultimately, it is a matter for the insurers who are the party to the case to make that decision.

Mr GREG SMITH: Thank you. Would you recommend a payout to such a person who apparently has suffered trauma because she has been a witness against her boss?

Mr GROVE: That would be a matter for the Workers Compensation Commission to determine.

Mr GREG SMITH: Do you, as the employer, not have a responsibility to look after your employees when they have given evidence against a member of Parliament?

Mr GROVE: I do.

Mr GREG SMITH: How do you carry out that responsibility?

Mr RICHARD AMERY: In general terms.

Mr GREG SMITH: Yes.

Mr GROVE: That the staff member who was in that situation exercises his or her rights at law. It would be inappropriate for me to exercise some sort of discretion in a hypothetical case and say, "I assess that this person has suffered to this extent. Pay him or her a \$1 million", or, "I think this person has suffered only half that much. Pay him or her \$500,000." That is why you have a system of law and the Workers Compensation Commission determines that. There are two sides to every story. That is what the commission is about.

Mr GREG SMITH: Apart from any claim for compensation would you give support and counselling to that staffer?

Mr GROVE: The Assembly provides that sort of support and it is made available to people who are willing to take it.

Mr GREG SMITH: Thank you.

Mr NINOS KHOSHABA: I would like to add to your comments regarding electorate officers. I can tell you, firsthand, that I was employed as an electorate officer for a Federal member and I was fully aware of the terms and conditions. I want to confirm that the same policy applies to all electorate staff, whether or not they are federal or state, and whether or not they are located in New South Wales, Queensland or Victoria.

Mr GROVE: A similar policy, yes. Our policy, which is quite a generous policy, is known as the Murray amendment.

Mr NINOS KHOSHABA: I can state firsthand that I was fully aware of the situation I was in. Going back to protected disclosures, who has the final say when it comes determining whether or not a claim is a protected disclosure claim? Who has the final say in this place?

Mr GROVE: Provided the person who makes the disclosure is making it according to the law, and provided those criteria are filled, there is really no discretion. It is a matter of ticking off the things that make it a protected disclosure, or do not make it a protected disclosure, in terms of the law.

Mr NINOS KHOSHABA: Who makes that determination?

Mr GROVE: In relation to Assembly staff I would make that determination in consultation with the Speaker.

Mr NINOS KHOSHABA: If the person who made the claim was not happy with the decision is there a review process that can be followed? If he or she thought it was a protected disclosure and either you or the Speaker determined that it was not, would the person making the claim have the right to request a review, or could someone else look at it?

The Hon. TREVOR KHAN: To whom would you go—the Queen?

Mr NINOS KHOSHABA: That is my question.

Mr GROVE: That is a legal question. It would depend on the process used outside whether or not the decision of the Parliament was in any way up for review by the Administrative Appeals Tribunal. It would depend upon the claim. Where an issue of privilege was involved it could relate to the determinations that had been made and you would not proceed down that track because of a matter of privilege. I do not envisage that circumstance existing because we would probably err on the side of the person who made the claim. With the potential protection of that person in mind we would probably go down the track of protected disclosure rather than to say it was not protected disclosure. If that person was not satisfied he or she could get a member to move a motion in the House, or he or she could go to a journalist and have the story told. There are all sorts of avenues available to people.

Mr RICHARD AMERY: Does that happen?

Mr GROVE: From time to time that sort of thing happens. It is part of the price that you pay for living in the public domain. People do what they feel they need to do.

Mr DAVID HARRIS: Does the Act not state that if the agency or body does not act on it after a certain time that person can go to the media, to other members of Parliament, or to someone else?

Mr GROVE: Yes.

CHAIR: On behalf of the Committee, thank you very much for attending today.

Mr GROVE: I trust that my evidence has been of assistance to you.

CHAIR: It has been of much assistance.

(The witness withdrew)

The Committee adjourned at 4.58 p.m.
