REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE OMBUDSMAN, THE POLICE INTEGRITY COMMISSION AND THE CRIME COMMISSION

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

At Jubilee Room, Parliament House, Sydney on Tuesday, 27 September 2016

The Committee met at 10:00 am

PRESENT

Mr Lee Evans (Chair)

The Hon. Scott Farlow
The Hon. Trevor Khan
Mr Paul Lynch
Dr Hugh McDermott
Ms Eleni Petinos
The Hon. Adam Searle

PHIL MINNS, Acting Public Service Commissioner, Public Service Commission, sworn and examined

CAROLYN STRANGE, General Counsel, Public Service Commission, sworn and examined

The CHAIR: I declare open the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission hearing on the review of the Public Interest Disclosures Act 1994. I thank all witnesses who will appear before the Committee today, and I welcome Mr Minns and Ms Strange. As you have no questions about the hearing process and no opening statements, we will proceed to questions.

The Hon. ADAM SEARLE: Given that you have asked or suggested that the legislation should be changed so it is no longer possible for a non-Public Service Commission public interest disclosure [PID] to be made to the commissioner, can you give us some insight into what kind of problem this has proved to be recently? How many of those were received, and what have you had to do with them?

Mr MINNS: I think in total we are talking about seven PIDs that have been referred to the PSC in its life. I think the issue is that the commissioner would sometimes wonder about the value that he adds and does not add to the process and, because of the particular way that a PID needs to be handled, it creates a lot of process requirements that need to be adhered to. His point would be that in many instances the role of the commission is to assist the PID in finding its right investigatory organisation. The commission itself, although it does have investigative powers which are probably more aligned to issues around organisational performance, culture and like matters, is not resourced to be a standing investigatory organisation and it is not a standing investigatory organisation. In a sense you are trying to find where the utility and the involvement of the commission is sometimes in this process.

The Hon. ADAM SEARLE: Often people who make disclosures do not really know where they should go, or sometimes they think they do but they might end up in the wrong place. Surely there is no harm, if the commission receives these, in being able to assist the potential complainant to find the relevant authority.

Mr MINNS: Ms Strange and I were talking about that outside the meeting room. I guess in that confusion about where to send it there can be utility in the commission assisting in that process to say, "It should go to the Ombudsman, it should go to ICAC, it should go to the Auditor-General", or whatever.

The Hon. ADAM SEARLE: Getting back to what you said about the role of the commission in regard to systems and organisations across the public sector, some of the material that we have received in relation to this review has indicated that more systematic work needs to be done across the public sector to help agencies develop processes and systems not only about the making of disclosures but also about supporting disclosers and putting in place practices, systems and cultures that guard against reprisal. Surely that would be a role for your organisation, would it not?

Mr MINNS: I think in the sense that the commission may have a view about what good practice is, the ethical framework that the commission has published is a response to that role to say, "This is what 'good' looks like." The way that the PSC is structured in the context of governance in the sector is that we do really see the secretaries of principal departments being accountable for what goes on and what takes place within their own context, so procedures should exist and they should respond to the legislative framework. We expect secretaries and the executive to do that work. The role of the commission can be to highlight what "good" looks like.

The Hon. ADAM SEARLE: Exactly. Obviously you have large, sophisticated organisations across the public sector but you also have significantly smaller and less sophisticated organisations that could well benefit from your organisation developing benchmarks for, as you put it, "what 'good' looks like", as a signpost for the sorts of practices they should engage in and the sorts of processes they should have. That would be right, would it not?

Mr MINNS: There is certainly that opportunity and, to some extent, we have already done it—

The Hon. ADAM SEARLE: Particularly around public interest disclosures?

Mr MINNS: I would have to seek—

Ms STRANGE: No.

The Hon. TREVOR KHAN: Sorry to cut across the questioning, but I read your submission and it says essentially that if it does not relate to the Public Service Commission, the public interest disclosure cannot be made to you. Is that what you want?

The Hon. ADAM SEARLE: That is how I read it.

Ms STRANGE: I might interject here. It appears that, if the public interest disclosure is made to the commission and it does not relate to the Public Service Commission, section 26 of the Act obliges the commissioner to refer the disclosure on in any event. There is a question about the utility of the commissioner's involvement, if that is the case.

The Hon. TREVOR KHAN: Can you accept that I have read the submission?

Ms STRANGE: Yes.

The Hon. TREVOR KHAN: If we were to recommend and indeed implement what you propose, somebody would come to you and say, "I want to make a PID" and you would simply say, "No, you cannot make it to us." Is that right?

Ms STRANGE: It might be treated as a misdirected disclosure, perhaps. At the moment I do not think the misdirected disclosure provisions extend to the commissioner.

The Hon. ADAM SEARLE: Would that not be a better approach? If you are not the relevant agency and somebody has attempted to make a serious disclosure, where is the harm in you redirecting that person to the appropriate authority to make sure that the disclosure is made?

The Hon. TREVOR KHAN: That was going to be my next question!

The Hon. ADAM SEARLE: Surely it is in the public interest that you make the connections, not that you put up a stop sign. I am a bit disturbed by the submission, frankly.

The Hon. TREVOR KHAN: In addition to that, it seems to me that if we do what is proposed, you are putting a stop sign in front of somebody who genuinely has a serious concern about an issue of public administration, as the Public Service Commission says, "No, it has nothing to do with us." To me, that seems to be capable of having precisely the opposite effect—

The Hon. ADAM SEARLE: It would be against the public interest.

The Hon. TREVOR KHAN: —of what the object of the legislation is.

Mr PAUL LYNCH: And designed for the convenience of the Public Service Commission rather than anything else.

The Hon. TREVOR KHAN: That is right. Do you want to comment on my harsh assessment of what this means?

The Hon. ADAM SEARLE: I am thinking it is a collective assessment.

Mr MINNS: I am not sure that that was the commissioner's intent, but—

The Hon. TREVOR KHAN: It may not have been, but what is the effect?

Mr MINNS: I think the issue is to try to find the most useful path for PID disclosures to reach the port that they need to reach. There is that sort of process, in a sense, where the commissioner's only role is to refer it on. What is the utility of that? If there is the misdirected context then perhaps that is an option to consider.

The Hon. ADAM SEARLE: I posit this proposition: Given the amount of time it would take to write back to a complainant saying, "Sorry, we cannot deal with this", you could equally write back saying, "Sorry, we are not the appropriate authority. The Ombudsman is the appropriate authority and we have forwarded it to that office." That would involve the same amount of effort, but it makes the connection for the complainant. Surely that is the better approach.

The Hon. TREVOR KHAN: It is a Pontius Pilate approach, in a sense—"It has nothing to do with me."

Mr MINNS: I do not think it derived from that context. I think it was about the fact that sometimes the referral to the commissioner creates a series of implications about how you deal with a matter now that you are aware of it. It is that particular point about redirection and enhancing that would be useful.

The Hon. ADAM SEARLE: Okay, but that is a different proposition. I have a bit more sympathy for that.

The Hon. SCOTT FARLOW: How many complaints do you receive along those lines?

Mr MINNS: Are you talking about PIDs or complaints?

The Hon. SCOTT FARLOW: Or things that you would not describe as PIDs that would fit into that category.

Mr MINNS: Ms Strange might know that. However, we do get quite a lot of complaints.

The Hon. ADAM SEARLE: You said seven.

Mr MINNS: Yes, seven PIDs.

The Hon. ADAM SEARLE: Non-Public Service Commission PIDs?

Mr MINNS: Yes.

Ms STRANGE: With regard to complaints, there could be 30, 40 or 50 a year about other agencies. I am not aware of any PID being made about the Public Service Commission to the commission anyway. The vast majority of complaints that I am aware of are about other authorities. They tend, by and large, to be about what you might regard as issues in the day-to-day operation of an authority. They might be about an allegation of bullying or some sort of workplace grievance which, as Mr Minns has indicated, is the responsibility of the head of that authority to deal with because of the employer functions of that authority head.

The Hon. SCOTT FARLOW: Are you finding that you are the first port of call or the last port of call? Are they coming to you because they have exhausted other avenues or because they do not know where to go?

Ms STRANGE: It is a mix; it is not always clear from what we receive. However, in some cases it is clear that they have come to the commission perhaps because of a perception that the commissioner is an independent officer, which he is, and that he has some sort of complaint-handling or review obligation or role. In other cases, it is because they are unhappy with the outcome of the processes that they have followed in their own agency. It is not entirely clear; often they are anonymous.

The Hon. TREVOR KHAN: If you get a complaint about bullying in a section of the department, it is by way of a letter of some five or six angst-ridden pages.

The Hon. ADAM SEARLE: With attachments.

The Hon. TREVOR KHAN: No doubt. You receive it and read it. Do I take it that it falls to you, Ms Strange, to look at it?

Ms STRANGE: Yes, I advise the commissioner on whether it looks as though it might be a public interest disclosure. That in itself can be a difficult judgement. But we err on the side of treating complaints as if they are in any event because of the potential that they are. By and large, the commissioner's decision would be then to refer that complaint on to the relevant authority for appropriate action.

Mr MINNS: In the case of bullying, unless the complaint related to the head of the agency or the department, it would go back to that point.

The Hon. TREVOR KHAN: And a letter would be written to the complainant, assuming you knew who it was, saying that is what you have done in accordance with normal practice?

Ms STRANGE: Yes.

Mr MINNS: Yes.

The Hon. TREVOR KHAN: How much time is involved in that process?

Ms STRANGE: It can involve quite a lot of time, because you have interaction with the complainant, which can balloon. You must make sure you have their consent to refer their complaint on, because we want to ensure that their privacy is protected. It can take time explaining why it may be better to disclose their identity, and to explore with them whether they have investigated other options. It can take a lot of time.

The Hon. TREVOR KHAN: Because you are going through each of those stages of checking, to a degree it is therapeutic for the complainant as well.

Ms STRANGE: Yes. I think they are pleased to have someone who listens to their complaint and takes it seriously, as we do. We do act on it, even if only to draw it to the attention of the appropriate authority.

The Hon. TREVOR KHAN: I am not doubting that. Once again, if we talk about a non-Public Service Commission PID, I take it that that therapy is a productive use of time.

Ms STRANGE: It may be, yes.

The Hon. ADAM SEARLE: I refer back to the role of the commission. What general policy development or support have you provided to agencies in guiding them as to what are the appropriate practices, processes and structures they should have in place to support disclosing under the PID legislation?

Mr MINNS: That which the commission has done falls under the ethical framework. I am sure that PID is referenced there.

Ms STRANGE: I think it is, too. However, it is my understanding that the Ombudsman's office is trying to improve complaint-handling generally. It has complaint-handling guides, and I know that there is a project underway. I am sure the Committee will be asking the Ombudsman about that if it thinks it is relevant. It would be fair to say that the commission's focus is more broadly on the ethics of the sector generally rather than on a particular process, such as the handling of PIDs. The commissioner obviously participates as a member of the PID Steering Committee and contributes in that way.

The Hon. ADAM SEARLE: I am certainly happy to ask the Ombudsman what he is doing. Do you think the public sector generally is handling protected disclosures appropriately and properly?

Mr MINNS: I personally do not have a frame of experience on which to answer. I am acting at the moment, and I have been in the commission since November. These matters are generally handled by the commissioner.

The Hon. ADAM SEARLE: I am happy for you to take that question on notice for the commissioner to respond to the Committee with regard to the commission's view about the adequacy of the public service's handling of PIDs, and what role he sees for the commission in assisting agencies to develop benchmark structures and processes so that they better handle disclosures under the legislation.

Mr MINNS: We will take that question on notice.

The CHAIR: The Ombudsman has recommended that the public authority appoint adequate numbers of officers who are responsible for receiving PIDs on behalf of the authority. Can you comment on this recommendation, and how many officers would you recommend?

Mr MINNS: I will deal with the last part of the question first. The people who can receive a PID in the Public Service Commission are the commissioner and the deputy commissioner. Until November there were two deputy commissioners; there is now only one. That is our internal policy. When I was in the Department of Premier and Cabinet, I was a person who could receive a PID. It needs to be clear within the organisation's policy who those people are. You would not want a situation where there was no-one available because of a leave scenario. It will depend on the size of each agency and the context. However, in the case of the Department of Premier and Cabinet, which has 120-odd employees, we had two people who could receive PIDs.

Ms STRANGE: I am afraid that I cannot comment on other agencies' positions.

The CHAIR: Thank you for appearing before the Committee today. We may send you some additional questions in writing, the replies to which will form part of the evidence and will be made public. Would you be happy to provide written replies to any further questions?

Mr MINNS: Yes.

Ms STRANGE: Yes.

(The witnesses withdrew)

SAMARA DOBBINS, Acting Information Commissioner, Information and Privacy Commission, sworn and examined

ROXANE MARCELLE-SHAW, Director, Investigation and Reporting, Information and Privacy Commission, affirmed and examined

The CHAIR: Would you like to make a short opening statement before we begin questions?

Ms DOBBINS: Thank you for the opportunity to address the Committee today. I am sure the Committee is aware that this week is Right to Know Week in New South Wales, and tomorrow, 28 September, is International Right to Know Day. This year Australia's State and Commonwealth Information Commissioners are promoting our commitment to the importance of open government and the right to access information and data for International Right to Know Day.

The right to information and our ongoing commitment to open government is a cornerstone of modern democratic society. Right to Know Day is an opportunity to encourage the public sector and the community at large to think about exploring the possibilities of open government. When done well it increases access to information and data, which results in better and more responsive services to the community, as well as increased accountability and the promotion of public participation in decision-making.

In 2011 the core values of integrity, trust, service and accountability were included in the then employment legislation for the New South Wales public sector. The introduction of the ethical framework and the core values for the public sector recognised that individuals in the public sector are able to set the tone of trust and dependability in our civil domain. They have the unique ability to enhance accountability in government by the identification and calling out of public officials on matters or practices that can limit or impact upon good government for the people of New South Wales.

As the Committee is well aware, the Public Interest Disclosures Act is designed to establish a system to both encourage and facilitate public interest disclosures, commonly known as PIDs, by public officials about issues that they may identify in the public sector, including corrupt conduct, maladministration, serious and substantial waste of public money, government information contraventions, and local government pecuniary interest contraventions. This system also requires that the public officials who have made the PIDs are protected from reprisal action for making those disclosures.

The Act provides for the PIDs to be properly investigated and dealt with, and does so in two ways. The Act does this, first, by providing in section 8 that a public official may make a PID to a principal officer of a public authority—that is, an agency head—or to a number of identified investigating authorities who may receive PIDs about one of the specialist areas outlined in the Act. The Information Commissioner is, by definition in the Act, one of the specialist investigating authorities, as well as an agency head, and has specific responsibilities in respect of PIDs made about government information contraventions as set out in section 12D of the Act. Section 6A of the Act also establishes a Steering Committee comprising the specified agency heads and the investigating authorities, and the committee is tasked, under the Act, with reporting and identifying areas for reform. The Information Commissioner is pleased to be a member of this Steering Committee and to play a valuable part in the PID framework.

The Information Commissioner's submission to this Committee has been informed by both the experience of complaints and disclosures made to the Information and Privacy Commission about government information contraventions, and the offence provisions in the Government Information (Public Access) Act [GIPA], as well as an analysis of the issues arising in those complaints. This led to the Information Commissioner identifying opportunities to provide guidance and clarity for those public officials who are considering reporting PIDs about conduct falling within the remit of the Information Commissioner under the Act, as included in the submission to this Committee.

The submission included a copy of the resources that the Information and Privacy Commission has published. I am happy to address the Committee on the four issues in the submission by the Information Commissioner. That is, first, greater legislative recognition of the role played by individual complaints in both identifying and informing the consideration of systemic issues and the benefits arising from this inclusion. Secondly, retaining the specialist expertise of investigating agencies, and when a PID is made to an investigating agency it is made under the operating legislation of the investigating agency. So in the case of a PID to the Information Commissioner about a government information contravention it is made under the Government Information (Information Commissioner) Act [GIIC]. Thirdly, a change to the definition of "government information contravention" and the inclusion of a test of seriousness for PIDs about this type of

contravention. Fourthly, expanding the scope of the Act to allow disclosures by former public officials and members of the public.

Issue one: Individual PIDs, although highlighting specific conduct, may also inform and identify systemic matters. The intelligence can enable investigating agencies to identify areas of potential reform and opportunities for collaboration—not only with other investigating agencies but also with other specialist regulators such as the State Records Authority of New South Wales. Collaborations of this nature can lead to new guidance and tools, with the benefit of improved public administration and better service delivery to citizens. Specific recognition in the Act that reporting wrong-doing is not limited to specific instances of conduct but also matters that may be more systemic in nature, will ensure that intelligence is recognised, captured and acted upon. Although it may be argued that the definition of "government information contravention" in section 4(1) of the Act captures systemic issues, making it abundantly clear would assist public officials in identifying issues of this nature. Section 4(1) of the Act provides:

> "government information contravention" means conduct of a kind that constitutes a failure to exercise functions in accordance with any provision of the Government Information (Public Access) Act 2009 .

The inclusion of consideration of systemic issues has the additional benefit of recognising the value of a coordinated and collaborative approach to prioritising the work and information-sharing capacity of investigating agencies. At present, the GIIC Act allows for limited information sharing between the Information Commissioner and the Ombudsman, and there is a memorandum of understanding about the exchange of information. There is a benefit to improved legislative capacity for information sharing in the Act.

Issue two: The current approach enshrined in the Act recognises that there is specialist expertise available in investigating agencies, allowing an informed assessment of the PID based upon the knowledge and expertise of the investigating agency. Additional benefits flow from the nexus between the Act and the operating legislation of the investigating agency which, for the Information Commissioner, is both the GIPA Act, in relation to government information contraventions, and the GIIC Act, which provides the mechanism for considering PIDs. As identified in the written submission, section 89(4) of the GIPA Act places appropriate limitations on the matters that can be considered as a complaint under the GIIC Act by the Information Commissioner, and ensures that the right of external review regimes set out in the GIPA Act is retained and distinguished from the complaint-handling investigative functions of the Information Commissioner.

Retaining specialist expertise in the consideration of PIDs allows the investigating agencies to calibrate regulatory programs to address proportionately the issues arising from PIDs that will inform any future proactive interventions, including the use of regulatory tools such as assistance and guidance to agencies. Previous experiences and analysis of the PIDs made to the Information and Privacy Commission led directly to the development of a fact sheet on the GIPA Act offences published earlier this year. This type of expert advice assists and informs the understanding and application of the offence provisions in the GIPA Act.

Issue three: Currently the Act does not require a test of seriousness for PIDs made about government information contraventions. However, the Information Commissioner considers both the object of the Act—section 3—and the requirements for making a PID as set out in section 8(1) of the Act when receiving and assessing a PID. Section 12(d) of the Act sets out the requirements for a PID to be made to the Information Commissioner. The requirements are: first, that the disclosure is by a public official to the Information Commissioner made in accordance with the GIIC Act; and, secondly, that it is a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in a government information contravention. Section 4(1) of the Act provides that government information contravention means conduct of a kind that constitutes a failure to exercise functions in accordance with any provision of the Government Information (Public Access) [GIPA] Act. Section 17 of the Government Information (Information Commissioner) [GIIC] Act provides:

> Any person may complain to the Commissioner about the conduct (including action or inaction) of an agency in the exercise of functions under an Information Act, including conduct that is alleged by the person to constitute a contravention of an Information Act.

The injection of an additional threshold consideration of seriousness may have the unintended effect of narrowing the Commissioner's functions under the GIIC Act and, in particular, limit the complaints to government information contraventions meaning that only complaints that meet the test of seriousness will be captured and may not allow the Information Commissioner to consider complaints about conduct relating to the inaction of agencies. A consistent definition of government information between the Act and the relevant operating legislation—in this case both the GIIC and the GIPA Acts—would address any inconsistency.

Issue four: As identified in the submission, the Act currently provides for public interest disclosures [PIDs] to be made by public officials. There have been some proposals to expand the scope of the Act to allow PIDs for both former public officials and members of the public. With regard to public officials: If the scope of the Act were extended to former public officials to report past wrongdoings, there may be challenges arising from delays in reporting, which may impact on the complaint assessment, any gathering of evidence and potential for investigation of the PID. As I stated earlier, the Act encourages public officials to report wrongdoings and provides protections against reprisals for reporting those wrongdoings so as to bring them to light expeditiously. Delay in reporting can undermine this process.

Although some potential reporters may argue that they feel comfortable in calling out the wrongdoings only once they have ceased employment, it is important that the wrongdoings are identified as early as possible so that the appropriate assessment can be done and any response and actions taken as soon as possible. With regard to members of the public, agencies, not just investigating agencies, have complaint mechanisms for receiving and considering complaints made to them by citizens. The Information Commissioner can receive complaints under section 17 of the GIIC Act. The complaints may be made about conduct, both inaction and actions of agencies in the exercise of their functions under the GIPA Act.

The Information Commissioner has articulated a clear statement of jurisdiction and proactive regulatory approach for both the public and agencies through the recently released IPC Regulatory Framework. These complaints provide a valuable source of data to inform the Information Commissioner of potential risks and matters that may require further guidance and assistance for the regulated entities and citizens about the obligations and responsibilities of the GIPA Act. Thank you for the opportunity to make an opening statement to the Committee. I am happy to take any questions that the Committee may have for the Information Commissioner.

Mr PAUL LYNCH: In the fourth area on which you focus—not extending the scope to allow disclosures by former public officials—the argument you use is that it is far better to get the complaints early and that is why you should prohibit former public servants or public officials from fitting within the scheme. Is not the flaw in that argument that you simply are not going to get the complaints at all? Is not the option going to be either getting complaints after they have ceased to be a public official, or not getting them at all? Are we not better getting them later than not having them at all?

Ms DOBBINS: Certainly, it is better to get the complaints at all. However, there are robust complaints handling mechanisms within agencies, especially in relation to employees of those agencies. The question is: Does the Public Interest Disclosures Act need to expand to cover those circumstances? I would suggest not because there are other mechanisms in place.

Mr PAUL LYNCH: Yes, but is not your assertion that there are robust mechanisms a view from inside the machine rather than from what former public officials might think? Surely we are dealing with their perceptions about whether or not those mechanisms are robust?

Ms DOBBINS: As I am a current public official, I am not sure I can comment on how people outside the regime would feel, but I am confident in those mechanisms that are currently in place.

The Hon. ADAM SEARLE: Well, let us assume that we are not. You can take some comfort from that. As my colleague indicated, what if a former public official learns of misconduct or things that should be reported because of his or her contacts? That is to say, they learn of this material from existing public servants who do not feel that the system is sufficiently robust for them to make a disclosure? Why should not former public officials who come by that information then be empowered to make a PID disclosure?

Ms DOBBINS: As I said in my opening statement, our concern is with the fact that these things must be dealt with expeditiously. I am not sure I can comment beyond the remit of the Information Commissioner to go further into that point.

The Hon. ADAM SEARLE: Okay. The submission from the Information Commissioner really does sound like one of decreasing the workload. It really does sound like you do not want to have these further complaints come forward. Can you explain the rationale behind that beyond what you have articulated because I find it completely unconvincing?

Ms DOBBINS: I can absolutely say that it is not about diminishing the workload. We have thoroughly investigated all PIDs that have come to the Information Commissioner since establishment and we do not shirk that responsibility. We take it incredibly seriously. But I am not sure I can add to my evidence I have already given today.

The Hon. ADAM SEARLE: I am moving back to issue three—this notion of injecting a test of seriousness. That would have the effect of narrowing, potentially, the flow of work or the matters that would be investigated, would it not?

Ms DOBBINS: That is why we would prefer not to inject that test of seriousness.

The Hon. ADAM SEARLE: What concrete action are you proposing in relation to issues one and two? Having read the submission and having heard what you say, I am unclear what changes, if any, you are recommending to the legislation under each of those two headings.

Ms DOBBINS: In relation to issue one, we would be proposing that we include a consideration of systemic issues and allow for information sharing between the Information Commissioner, the Ombudsman and other investigating authorities; and allowing the Act not just to look to individual PIDs but, as I said, systemic issues, and recognising the value of coordinated and collaborative approaches to prioritising the work and information sharing capacity of those investigating agencies.

The Hon. ADAM SEARLE: You think there needs to be legislative amendments to the PID legislation to better facilitate that?

Ms DOBBINS: Yes.

The Hon. SCOTT FARLOW: May I just tease that out a little bit? Is that in a sense because, if somebody goes to the Ombudsman, they might take direct action in respect to just that one issue, but if there is a systemic problem you would not become aware of that? Is that correct?

Ms DOBBINS: The Information Commissioner may well become aware of that because they sit on the Steering Committee, which is another benefit of that Steering Committee. But, yes, it would be useful if the legislation facilitated that sharing of information and that joint addressing of systemic issues.

The Hon. SCOTT FARLOW: If you received a PID, what sort of action could you take on the individual complaint that was raised rather than sort of guidances and guidelines and more policy mechanisms? What individual response could you take if somebody was complaining about a certain specific act within an agency?

Ms DOBBINS: The Information Commissioner, as an investigating authority and an agency head, can take all such action that other reporting entities in the scheme can take. The Public Interest Disclosures Act sets up the Information Commissioner as a person that can be reported to, PIDs can be disclosed to, and they can take all the protection mechanisms under that legislation.

Ms MARCELLE-SHAW: If I might add the operational context for that: The Information Commissioner has powers under the GIIC Act to investigate the complaint and to take appropriate actions. That might be providing information and it might be facilitating resolution of the issues that come to light by engagement with the agency directly, and with the discloser, if that is appropriate, depending on the confidentiality requirements attached to that particular matter. The Commissioner can ultimately make a report of investigations and make recommendations as to the actions that the agency ought to take to remedy any found issues.

The Hon. SCOTT FARLOW: Everything goes back down to the agency to implement.

Ms MARCELLE-SHAW: Yes.

The Hon. TREVOR KHAN: Can I just go to issue four again? Suppose that we have an employee who has, during the course of his or her employment, made a complaint. The thing grinds on for a time and the reaction by the employee, the public servant, is to then resign his or her employment. Then the department or section that is responsible for dealing with that complaint takes the not unnatural response of saying something similar to, "Thank goodness that person has left" and therefore dismisses the complaint. Subsequent to the termination of employment, the employee who made the complaint then becomes, in a sense, re-energised, either because of becoming aware of other information or because he or she remains frustrated with the outcome, and therefore wishes to pursue it further. If your recommendation with regard to issue 4 is adopted, in a sense, that former public servant would have no protection under PID. Is that right?

Ms DOBBINS: That is correct. If they were a former public servant, they would not attract the protections of the Public Interest Disclosures Act.

The Hon. TREVOR KHAN: That person may have left legitimately out of frustration.

The CHAIR: Or could have retired.

The Hon. TREVOR KHAN: Yes, essentially retired.

Ms MARCELLE-SHAW: If I may add a clarification, they would not attract the protections of the PID regime because it protects from reprisal in the course of employment. However, the Information Commissioner, under her legislation, would take all steps to protect the identity, confidentiality, of the complainant.

The Hon. TREVOR KHAN: They may not want their identity protected by that stage. For instance, that former public servant may now be working for a related private entity that happens to do work for the public service, which we know happens—

The Hon. ADAM SEARLE: Quite a bit.

The Hon. TREVOR KHAN: —a lot.

Ms MARCELLE-SHAW: Under the current regime, they would not attract the protections of the PID Act but they would have the benefit of all of the powers and protections that the Information Commissioner has in exercising her functions under the Government Information (Information Commissioner) [GIIC] Act.

The Hon. ADAM SEARLE: Going back to issue two, what action are you proposing needs doing? In relation to issue one, I read the submission and I did not understand that you were recommending any action. But now you have said that you are seeking legislative change to allow for information sharing, which I think is a good thing.

Ms DOBBINS: We are not proposing any changes to the legislation. We are just calling out that it is important to retain the specialist expertise of investigating agencies, and that when a PID is made to an investigating agency it is made under the operating legislation of the investigating agency. In the case of a public interest disclosure to the Information Commissioner, we have a unique perspective to investigate those PIDs in relation to government information contraventions.

The Hon. TREVOR KHAN: Going back to my point, what concerns me is not in your department. Let us suppose that somebody worked in a section involved in the issue of mining licences and that during his or her period of employment had some concerns with what a senior official was doing, for instance, but took it no further than that. Later, in the light of publicity that subsequently became available in the media, say, that person had serious concerns that what he or she saw was indicative of some very serious corruption in that section. Are you saying that a person should not be entitled to protection against reprisal in those circumstances?

Ms DOBBINS: No.

The Hon. ADAM SEARLE: You have acknowledged that at the moment they would not have the protection of the PID legislation and you have argued against extending it to former public officials.

Ms DOBBINS: Yes, because I believe there are other robust mechanisms in place—for example, through the Independent Commission Against Corruption [ICAC].

The Hon. SCOTT FARLOW: Even with the new definition of "serious corruption" in the ICAC Act?

Ms DOBBINS: Sorry, I am not a specialist in the ICAC Act, but I certainly am aware that is where allegations of corruption should be targeted.

The Hon. TREVOR KHAN: I am not doubting that that is where allegations of corruption should be targeted, but we are not necessarily only dealing with allegations of corruption in that sense. Even putting that aside, if you have somebody with a body of information, in a sense, which they did not take away of a complaint because they did not realise the seriousness of it during their period of employment, but if subsequent events lead them to have the golden kernel, then simply saying that they can go to ICAC and that would be the answer to their problems does not seem to me to be—

The Hon. ADAM SEARLE: Adequate.

The Hon. TREVOR KHAN: —sufficient, yes. If they give evidence there may be protections that flow from that, but I am certainly not sure, particularly after the report is made by ICAC, whether an ongoing protection is available to witnesses. We are talking about a person who has provided what may be very important information—and it does not matter which party is in government—and whether we have a robust system of protection for that person who gleaned that information during his or her employment. If your answer is, "We have robust complaints procedures", it does not cover the circumstance of a person who did not realise the importance of that information, and his or her employment subsequently ceased.

The Hon. ADAM SEARLE: Or they just chose to do it later because they did not have confidence in the robustness.

The Hon. TREVOR KHAN: Precisely, particularly if—and again it does not matter which party is in power—they had a Minister in charge of their department in whom they had no faith at all for one reason or another.

Mr PAUL LYNCH: If the mechanisms are so robust, why do you need the PID Act to begin with?

The Hon. TREVOR KHAN: Precisely. This is a Socratic exercise. Please help us work through how we deal with a circumstance like that. We all know about what has gone on and what goes on in New South Wales in regard to things going wrong. Getting an answer about robust complaints systems does not explain things.

The Hon. ADAM SEARLE: But it is worse than that, is it not? Yes, I think we can all agree that an early complaint is better than no complaint. But surely a later complaint is also better than no complaint?

Ms DOBBINS: I am not sure that I can go beyond the evidence I have already given in relation to the Public Interest Disclosures Act and the Information Commissioner's role in that regime. It may be a matter for other investigating authorities appearing before the Committee later.

The Hon. SCOTT FARLOW: Our concern is not necessarily around the Information Commissioner's role but in regard to the recommendation you made to the Committee.

The Hon. ADAM SEARLE: The systemic effect it would have.

The Hon. SCOTT FARLOW: Our concern is why that recommendation has been made. If a former public servant were to make a complaint under the PID Act and was afforded the protections of the legislation, what is your view of the detrimental action that could be protected under section 20(2) of the legislation? Does it concern you that the protection of the Act could not extend to a former public official?

Ms DOBBINS: It is true that the protections of the Public Interest Disclosures Act could not extend to a former public official in its current form. But there may be other protections in other legislation that may extend to such people, depending on how they made the complaint, the nature of the complaint or to whom they made the complaint. But it is true to say that the current legislation does not extend to former public officials.

The Hon. SCOTT FARLOW: That is true of the current legislation, but if the legislation were to be amended to be extended, how effective would the protections be that are defined as "detrimental action" to extend to a former public official?

Ms DOBBINS: It would be difficult for me to speculate.

The CHAIR: As there are no further questions, thank you for appearing before the Committee today. We may send you some additional questions in writing. Your replies will form part of the evidence that will be made public. Would you be happy to provide a written reply to any further questions?

Ms DOBBINS: Yes.

(The witnesses withdrew)

(Short adjournment)

ELIZABETH COOMBS, Privacy Commissioner, sworn and examined

NICK YETZOTIS, Acting Senior Adviser, Office of the Privacy Commissioner, affirmed and examined

The CHAIR: Thank you very much for joining us today. Before we proceed, do you have any questions about the hearing process?

Dr COOMBS: No, thank you.

The CHAIR: Would you like to make a short opening statement before we begin questions?

Dr COOMBS: Chair and committee members, thank you for the opportunity to address you on this important issue. I have sent through two submissions and on 19 September I sent through a second more detailed submission that followed on from my first correspondence. I did not provide all of the attachments to that but I have them now here, and a copy also of my opening statement, which should make matters I hope easier for the secretariat.

My recommendation falls under the Committee's terms of reference paragraph 2(c), the need for further review of the Act. The recommendation I am making is that the Public Interest Disclosure [PID] Act be amended to enable this role, the role of Privacy Commissioner to receive and deal with public interest disclosures regarding matters that appear to be conduct contrary to the provisions of the New South Wales privacy legislation and conduct under the Data Sharing (Government Sector) Act and the State Records Act that may amount to contraventions of privacy legislation. Our aim is to provide a secure and protected means to address the failure of agencies to properly fulfil their responsibilities under those Acts, but largely too we are recognising the changes that have occurred and the nature of breaches because of technological change and we think that there are more systems and systemic vulnerabilities that would benefit from an avenue of address provided by the Public Interest Disclosure Act.

We believe that our recommendation is consistent with the public policy aims of the Act which, as you know of course, are broadly to enable confidential disclosures and the independent investigation of those disclosures, to protect those who make the disclosures and also to prevent and address any reprisals that may occur. I acknowledge the work, the research and the intellect of my colleagues who produced the material that I am presenting today—obviously Mr Yetzotis is with me—Sean McLaughlan and Maria Fomicheva. It is their work that I am largely representing. So why do I make this recommendation? New South Wales legislation, that is the privacy, State records and data-sharing law, seek to protect and require proper handling of personal and health information between public sector agencies, as well as on some occasions to external individuals. Our two submissions point out that these matters necessitate amendment to the PID Act. There are nine reasons, so please bear with me.

Technological advances mean the misuse of personal or health information can have far greater and far-reaching implications. The systems and systemic breaches not directly related to the actions of a human being are now possible. I can ask you to think through such things as the internet and algorithms. One author has referred to algorithms as the "weapons of math destruction". There is a lucrative trade in personal and health information that did not go away in 1992 when the Independent Commission Against Corruption completed its inquiry. The growth in data breaches and the cost of these has grown. There is also a general failure to address these breaches, or in any really substantial salutary way.

Human nature and the desire to please or organisational pressure can mean that people are placed under pressure to turn a blind eye to contraventions of privacy legislation or non-compliant practices generally in relation to the other Acts. There can be at times ill-informed interpretation or implementation of government legislation or policies which lead to contraventions. There is also the lack of mandatory data breach notification requirements in New South Wales privacy legislation. Existing conditions in the Privacy and Personal Information Protection Act, such as section 62, that enable prosecution, presuppose that it is known who was improperly dealing with personal or health information.

The heading is "existing officers who are able to receive public interest disclosures". The way the Parliament has considered this has been to empower certain specialist officers to deal with matters that fall within their particular area of statutory functions. The grant of power to these specialist officeholders to receive public interest disclosures is determined by their statutory functions. In relation to government information, the Act only has a provision in relation to unlawful dealings concerning the giving of information to members of the public but not the protecting of personal or health information—so one side of the coin is addressed, but not the other. What is not covered are contraventions: the protective responsibilities of officials and agency for personal health information, which is held by the New South Wales public sector.

Disclosures of the sort that I am addressing cannot be covered by any of the other officers named within the Act due to the requirement that the disclosure be made in accordance with the Act that establishes the named officer—for the Auditor-General, for example, it is the Public Finance and Audit Act 1983 [PFAA Act] and it goes to the waste of public money; for the Information Commissioner, on the other hand, it is the Government Information (Public Access) Act 2009, or the GIPA Act, and section 12D of the PID Act refers to the Information Commissioner. But the Information Commissioner, while dealing with some aspects of information, is not able to act as Privacy Commissioner by virtue of section 34(4) of the Privacy and Personal Information Protection Act 1998, or the PPIPA Act, that prohibits the Information Commissioner from being appointed as Privacy Commissioner or acting as Privacy Commissioner.

The approach established by the PID Act to appoint the relevant expert independent officer remains, we believe, the best approach, as that person is best equipped to undertake any investigation and to address any matters identified in the process. Further, we have some detail there about recent research, which is showing that data breaches are on the rise, both in terms of frequency and the significance of the harm, as I mentioned at the outset, and I refer you to data from the United States which suggests that 62 per cent of breaches are now most likely the outcome of the behaviour of malicious insiders. Such behaviour might well have been avoided or reduced if there were in place a better process of auditing or reporting illicit conduct.

The Federal Privacy Commissioner has been advising agencies to prepare for more breaches. In the experience of my office, public officials are reluctant to make complaints with regard to privacy-related matters that directly relate to the performance of their organisation, superiors or peers. But, in the same way that members of the public expect to have their privacy protected, so do those public sector officials, and they can be very concerned about contraventions of privacy legislation. Typically when they call us or make contact they either seek anonymity or do not give their name, so we do not get the information or the evidence that really means we could launch an investigation.

Those trends are of great concern to us, and we believe to amend the PID Act would address the current gaps and provide a mechanism to do so. It would be consistent with Parliament's previous decisions to include specialist officers in the scheme who bring their particular experience, expertise and interpretation to the law that they administer. It would also introduce a way of bringing to attention issues regarding possible mismanagement of personal health information that might otherwise, if unattended, go on to create a range of risks not just for members of the community but also for organisations and public trust in the government and the public sector. Lastly, it would also facilitate freedom of expression, which has been sought in some of the other submissions, such as the NSW Ombudsman, the joint media organisations and the NSW Council for Civil Liberties submissions, from memory, because if you know you are protected you are more likely to feel that you can speak out. My opening statement is available for inclusion in the record. We are very happy to take any questions.

Mr PAUL LYNCH: What is the data that underlies the recommendation that you make?

Dr COOMBS: We have anecdotal data in the form I mentioned where public sector officials call us and not so much put on the record as voice their concerns. When we start to ask for name, agency and particular details as to who might be undertaking this, sometimes the calls are cut short or there is just backpedalling, if you like, or a real request to see their position is very vulnerable. That is the qualitative, anecdotal side. If I could go, though, to the quantitative side, this is actually quite an issue for us. You will recall that in my annual reports of 2013-14 and 2014-15, as well as in my report to Parliament that was tabled last year on the operation of the PPIPA Act, I stated that the structural and organisational arrangements for the undertaking of privacy functions are actually not well served by those arrangements. I have an inability to obtain and report data in the ways that would go to providing strong evidence on the questions you are raising.

By way of background, my statutory functions for complaint handling, recording of inquiries, undertaking internal reviews and investigations is recorded on a shared case management system, so it has both GIPA caseload and privacy caseload in there. Despite my responsibilities to be Privacy Commissioner and also the fact that it is a shared resource and the Parliament decided that the IPC would have two separate independent and equal commissioners, I do not have the access to that database to analyse it and report in the way that allows comprehensive analysis of data items. I have sought the administrator rights so I can do reports and analyse the data in a way which would go to what principles have been contravened and when.

That request has been denied a couple of times, and I clarify that has not been by the Department of Justice. That does mean the level of access and ability to analyse data is not the same as what it is on the Information Commissioner side. I do have the fallback position that I can request datasets to be provided to me. My recent situation in the preparation of my annual report for 2015-16 has been somewhat difficult and there has been a lot of unnecessary administrative toing and froing about that. In preparation for this meeting we

wanted to analyse the data we have to see what we could bring forward, because obviously that was a question I anticipated that you would be raising about the hard data and the numbers. Reluctantly, I do not have that. I guess what I really need to say is that to answer such questions I need this issue to be addressed because it is a significant matter to be a statutory officer who cannot actually get access to performance data in the form you need and in a timely fashion.

I will take this opportunity to flag to the Committee that it is possible, if not likely, that the annual report I will be producing for the 2015-16 financial period is going to have even less data than I have had in previous years. You may recall that when I have done my previous annual reports I have said that I have thought that the data we were providing was not up to what you had requested of us or what the department has requested in the past that I should be providing and that I did want to address that. I have a concern that there might actually be less than what there has been in previous annual reports. I would, if possible, seek the Committee's support to address that administrative constraint on my ability to undertake my statutory reporting, because it goes to accountability and the ability to perform my statutory function. That is the long answer to your question.

Mr PAUL LYNCH: You said your request was denied but not by the department. Just to make it absolutely clear, who was it?

Dr COOMBS: It is an internal to the IPC decision-making thing. We are in two separate offices. It means we do not have direct access. I appreciate the Attorney General's and the department's support to establish an independent, specified allocation of resources to privacy. It has been a tremendous boon to deal with matters coming in in a timely fashion; our productivity has increased quite markedly. To progress that even further to get better outcomes for the community, it would be advantageous to recognise that we need to remove administrative barriers to concentrate statutory functions.

The Hon. ADAM SEARLE: The material the Committee has received in this review suggests that the Commonwealth legislation is in much better shape than its New South Wales counterpart. We have the irony that the New South Wales legislation was the first protected disclosures legislation in Australia, but it now seems to be lagging behind. One issue is that it does not extend to the private sector. Do you have a view about whether there is a need to extend the New South Wales PID legislation to what might be described PIDs but not in the public sector?

Dr COOMBS: I think there are some important areas where this Act could be improved. On the private sector, I will come to that as I think these issues through. When I was reading the submissions the Committee has received, I noticed that that was picked up, as were some other matters. We have here in our submission the matters that we have picked up. I will ask Mr Yetzotis to address that.

Mr YETZOTIS: Some regulatory leakage is obviously noted in many writings and by many commentators in public statements. Obviously if the Committee is concerned with the possibility of enabling non-public sector employees, for example, to make PIDs, there would be an element in the public interest of "capturing", if that is the right word, employees in non-government entities that these days appear to be engaged at a minimum in performing what we used to call public functions. That is possibly an area to which the Committee could cast its attention. I suspect that it is possible to canvass the idea of enabling the operation of the legislation, be it the State legislation as it is, to capture those non-government employees in so much as the power of the Parliament might permit, having in the back of my mind the potential that some of those non-government entities may be notional companies under the Corporations Law. That is possibly a technical issue to look at, but I do not see any public interest standing against the proposition.

The Hon. ADAM SEARLE: For example, section 4A(1)(c) of the New South Wales legislation extends to employees of a private company doing work for the public sector, but only if that employee is involved in doing that work. For example, if you were an employee of a private company, the company contracts to an arm of government, and you become aware of what I will call maladministration—

The Hon. TREVOR KHAN: Someone in the accounts section.

The Hon. ADAM SEARLE: Yes. If you are not directly involved in the performance of that work, you cannot make a PID under the New South Wales Act. The Federal legislation has much more extensive provisions that seem to cover that possibility.

Mr YETZOTIS: It appears that we have in the State legislation a silo effect within corporations. The person must in some way be intimately connected with the project in question. You are obviously referring to a wider possibility involving an employee. Again, there is, in my opinion, a public interest against that proposition, because information about a particular project is not siloed within corporations.

Dr COOMBS: This is consistent within the issues that we have been raising about the provision of services by agencies other than government agencies. We have been concerned to raise the fact that if you have other providers—we are not fussed about other providers—it is about the coverage that should also be consistent for the clients of both of those services. By extension, if we are concerned that there should not be a two-class system—that is, you get privacy protection if the service is provided by a government agency but not if it is provided by another body—the same things should apply to employees. If we say that the PID legislation should be amended to pick up public disclosures by private officials, that would be consistent. If those involved in the provision of services have an issue about privacy and health information, for example, there should be some consistency.

The Hon. ADAM SEARLE: So the protection should follow the function?

Dr COOMBS: Yes. You said that much more concisely than I did.

The Hon. TREVOR KHAN: I refer to the situation where we are looking at extending it to non-public servants performing a function. I am thinking of two areas in which there has clearly been considerable contracting out of government services—disability services and the provision of social housing.

The Hon. ADAM SEARLE: Or, indeed, the provision of public hospitals.

The Hon. TREVOR KHAN: Let us not get too cute. Let us look at extending it to where a service has traditionally been provided by government, well or otherwise. We will talk about public housing. How far would that coverage go? Would it go to a social housing provider providing social housing equivalent to the old public housing model? Or is that too distant from the provision of a service to government?

Dr COOMBS: I do not think it is too distant. However, there are some interesting twists.

The Hon. TREVOR KHAN: There are.

Dr COOMBS: I am pausing as I think them through. If it were a service once provided by government and it is now provided by a social housing organisation and there is a relationship with the New South Wales Government, there is the issue of the protection following the provision. If they have not had that relationship before, I am pausing to wonder in what form there might be any relationship with Commonwealth legislation. I am not sufficiently versed in that to provide an answer in which I can have absolute confidence.

Mr YETZOTIS: Not that I know. If I may, I would like to approach my response to your question in a different way.

The Hon. TREVOR KHAN: Certainly.

Mr YETZOTIS: The State privacy legislation, for example, has enforceable provisions—namely, a complainant can obtain an enforceable remedy insofar as the conduct of the public sector is concerned. That is not a closed framework necessarily, because since the inception of the two statutes there have been examples of the Parliament's extending that framework we have come to know as the public sector to capture in a regulatory way entities that are not commonly known as public sector agencies.

The first example was the extension of the definition of what is a public sector agency to capture private entities that were to provide data services to government. The second example is in the health sector—namely, under the Health Services Act 1997. There are a number of private hospitals, called "affiliated", that are taken to be public sector agencies for the purposes of regulatory capture by the privacy legislation. More recently—I believe it was last week, on 22 September—a bill was introduced into Parliament in respect of what we commonly know as land titles services that may be performed by non-government entities. That, I believe, has a deeming provision to make those engaged akin to public sector agencies for regulatory capture purposes.

If we are to be concerned with the making of public interest disclosures, for example, in disability services or social housing services, where private agencies are engaged under contract, there may be a possibility for those entities to be similarly made subject to regulatory capture of the privacy legislation. That may then become the opening of the public policy in making public interest disclosures become more compatible with the existing understanding of the social policy of the scheme. That is just one way of addressing the apparent dichotomy in what we have all understood to be the purpose of the scheme—namely, to capture regulatory aspects of the public sector into something similar, which will no longer be the public sector but, in various ways, that private sector can become closer and closer to our understanding of a public function that it may be performing.

Dr COOMBS: As a general statement, when I think back to the second reading speech in *Hansard*, with respect to the legislation which went with the establishment of this position, it said that it was to champion the privacy rights of New South Wales citizens. So I would start from that general principle of wanting to see

that their personal and health information is protected, and that the mechanisms to do that in a way that is in keeping, should follow. As a general principle I think there should be coverage.

Mr PAUL LYNCH: It would follow the money, would it not? If the Government is funding an organisation to do something that it used to do, one would think that the logic is that the same rules should apply to that organisation as to the Government.

The Hon. TREVOR KHAN: That was a yes, I take it?

Dr COOMBS: Yes; I was nodding my head.

Mr PAUL LYNCH: If a social housing provider of itself, from its own resources, is running a social housing scheme that is one category of things that perhaps the regime would not so powerfully apply to, but if it is simply doing something that the Government used to do, and is being paid by the Government to do it, it is hard to see how, in that case, the regime would not apply.

The Hon. TREVOR KHAN: What I envisage, say, in the social housing sector, and why it becomes blurred, is that that social housing entity—an entity in Pyrmont comes to mind—may receive a one-off injection of a substantial amount of money flowing from the sale of certain properties, by way of example.

The Hon. ADAM SEARLE: Or it may receive property formerly owned by the State.

The Hon. TREVOR KHAN: Or it may receive property, indeed. That is a one-off dump and it then performs in accordance with its charter to borrow money and provide additional housing and the like. So it is not an on-going relationship with government; it is a one-off but it has, essentially, taken over a government function. There are degrees of continuing connection with government. That is interesting in relation to how you slot this over the top.

Mr PAUL LYNCH: I know where I think that should fall but, yes, it is a bit more complex.

The Hon. TREVOR KHAN: I have a final question, because I know we are going to run out of time—which is interesting.

The Hon. SCOTT FARLOW: It is the first time today.

The Hon. TREVOR KHAN: We received a submission—it does not matter from whom—that proposed that the PID scheme should not apply to former public servants. The rationale—I am not trying to be unfair—was that that encourages delay in the making of a complaint, and that there are robust complaint mechanisms within the public service which should, in a sense, be fostered.

The Hon. SCOTT FARLOW: And outside of it, in a sense, as well.

The Hon. TREVOR KHAN: That is right. I think that would be the description. What do you say about the proposition as to whether the PIDs should or should not apply to former public servants? I used the example before of public servants who may have complained during their time but who, for whatever reason, decided, "Bugger it, I can't be bothered"—I am not sure how that will appear in *Hansard*—and retires, and then later on decides that the information that they had may be a particular bombshell.

Dr COOMBS: In the case of it concerning personal or private health information, I could well imagine that someone might decide, "It is safer for me to make that disclosure after I have left employment," because currently there is no protection for them. In that scenario I think it is absolutely vital that former public servants or public sector officials have the ability to make a protected disclosure after their employment has finished. Even when you do have the protections of protected disclosure it is not an easy step for people to take, so I feel that for those who are not covered it is a very significant step. To see that you still have a responsibility after you have left employment means it is important to provide them with some protections in case there are some reprisals.

Mr YETZOTIS: I am trying to think of the life of an employee of the public sector through their years. A definition of "former employee of the public sector" might create some difficulties for those who are thinking of who might be a beneficiary of exit from public employment, say, at the age of 28 because of certain troubles, and whether or not that person should properly be considered a former public employee or retired, for that matter, in circumstances where it is possible for any adverse action to be taken against that person not too long after their departure from public employment. In comparison with the hypothetical 28-year-old employee there may be someone else—at the age of, say, 65, 70, 75—

The Hon. TREVOR KHAN: Let us say 58.

Mr YETZOTIS: —or let us say 58, who may well be more readily considered a former public servant or a retired public sector employee. But it may well create difficulties for some who do not necessarily consider their working life with the public sector to be at an end. I would have some difficulties with a generalised definition to remove the protections for making disclosures about recent employment, for example.

I take the concern that it may be strategically beneficial for a particular individual to delay in making a protected disclosure, but overall it may be more advantageous to take a little bit of that risk for the overall benefit of the protected aspect of their relationship with the recipient agency. Maybe the numbers will be low to justify allowing former public servants to be able to make protected disclosures in order to acquire the protections. The flipside of the coin of course is a reasonable concern that you have obviously received in submissions to the Committee about strategic decisions some people make, and that is understandable. How to balance it off, I am not sure I have a direct answer.

The Hon. TREVOR KHAN: Let me raise with you this scenario: We have a junior police officer who many years ago may have been involved in an operation of bugging various police officers and journalists. The thing has died a natural death after a variety of complaints have been dealt with. He or she has long left the NSW Police Force but, in the light of a recurrent tide of events, suddenly the information that person has as a junior officer becomes an absolute cracker for a long-delayed disclosure. That is the type of scenario where the length of employment and in fact the distance from employment may have no relevance to the quality of the disclosure that that junior police officer may be able to make, would it not? It is terrible how I live by example.

The Hon. ADAM SEARLE: Oh, I know—a hypothetical example.

Mr PAUL LYNCH: You would have no life without parliamentary committees.

The Hon. TREVOR KHAN: That is right.

Mr YETZOTIS: I think that is adding a third reason to my first two reasons of taking the risk of accepting that late, if that is the right word, public interest disclosures may be made under the scheme. At the end of the day that particular junior officer may be at liberty to make a disclosure about historical allegations that may have good value without necessarily wishing to obtain the protections under the scheme.

The Hon. TREVOR KHAN: That is true.

Mr YETZOTIS: The scheme itself is not going to stop this type of information coming to the attention of some agency, be it the service delivery agency or an oversight agency. You are not going to stop the making of this type of allegation.

The Hon. TREVOR KHAN: You understand that I am not actually encouraging the stopping of the material. I am in fact, quite the reverse, trying to encourage it.

Mr YETZOTIS: I am not suggesting there is a tilt in your comments, but objectively speaking you are not going to stop it one way or the other. What I think ultimately might stop is the concept of protections, and that is a lesser issue in my opinion, which brings me full circle to my original comment: It is worth taking the risk.

Mr PAUL LYNCH: I think the Privacy Commissioner wants to say one more thing.

Dr COOMBS: Chair, if you would not mind, we did prepare a list of machinery-type provisions which would need updating in relation to the recommendation which we have made and that would be of assistance to the Committee.

The Hon. ADAM SEARLE: Absolutely. Of course, if you have any other ideas about provisions that should be updated or changed, feel free to let us know.

The CHAIR: Yes. Do you wish to table that?

Document tabled.

The CHAIR: Thank you for appearing before the Committee today. We may send you some additional questions in writing. Your replies will form a part of the evidence and be made public. Would you be happy to provide written replies to any further questions?

Dr COOMBS: Yes, of course.

The CHAIR: Thank you very much for joining us today.

Dr COOMBS: Thank you, Chair, and thank you members.

Mr YETZOTIS: Thank you, Chair.

(The witnesses withdrew)

EUGENE SCHOFIELD-GEORGESON, Executive Member, NSW Council for Civil Liberties, affirmed and examined

RICHARD MARTIN BIBBY, Executive Member, NSW Council for Civil Liberties, affirmed and examined

The CHAIR: Thank you very much for joining us this morning. Before we proceed, do you have any questions about the hearing process?

Mr SCHOFIELD-GEORGESON: No.

Dr BIBBY: No.

The CHAIR: Would you like to make a short opening statement before questions?

Dr BIBBY: With your permission, I will speak briefly and then hand over to my colleague. Whistleblowers are likely to become the subject of abuse and accusations of disloyalty, of suspicion and hatred. Their subsequent careers can be blighted; promotions made difficult. They may find that their careers are in tatters and alternative options are few or non-existent. There is only so much that can be done to protect them. It is important therefore to make whistleblowing easier—to make it easier for them to protect themselves against discrimination or reprisals—to remove disincentives, and generally to encourage them.

For a person to go outside of their own body to an investigative authority like the Independent Commission Against Corruption [ICAC] or the Police Integrity Commission is a big step; and going to the press is a very big step indeed. It is desirable for people to be able to minimise harm to themselves and to be able to make disclosures in a low key way to a person whom they know, to a person whom they trust. We believe, therefore, that it should be made possible for people to report to a supervisor who can be such a person. At the moment, however, the Act makes that very difficult. There are two clauses in the Public Interest Disclosures Act which together mean that reports to a supervisor are not protected.

The first is that to be protected a disclosure has to be in accordance with the procedures established by the authority they work for. The second, which is section 6E(1)(d), implies that they are limited to perhaps just one person or to very few persons in order to be protected. If they do not trust the person who is available, or if the person is, worse, involved in the misconduct themselves, then they have severe difficulty in making such disclosures. Moreover, if a person can disclose something to an immediate supervisor and in fact they are mistaken, that provides an opportunity for the supervisor to correct them, to inform them, and the damage that is done to them or to others is minimised.

We believe, along with the Steering Committee which looked at the Federal Act concerning whether New South Wales should make changes and along with the Ombudsman's submission to this inquiry, that there needs to be a wider range of people to whom a discloser can disclose. We think that if that was made a supervisor, then there will be at least a large organisation with a range of people to whom the person can make disclosures.

Mr SCHOFIELD-GEORGESON: I suppose the thrust of the submissions that we have put before you is really threefold. First of all, we have proposed recommendations that specifically protect whistleblowers, individual whistleblowers on an anti-retaliation employee-rights basis. Secondly, we have made recommendations and proposals designed to facilitate external disclosure by whistleblowers predominantly to the media and members of Parliament [MPs]. Thirdly, our approach is aimed at preserving the institutional integrity of our public institutions through whistleblowing.

Of the seven recommendations that we have put before you, Dr Bibby has outlined the first one, and that is a reporting channel to supervisors or to people who are higher up on the food chain, if you want to put it that way, than the whistleblower, whether that be an immediate supervisor or somebody at the very top of the food chain. We would support that proposal. The second of our major recommendations goes towards specifically protecting whistleblowers. It involves protecting whistleblower litigants from costs in tort claims involving victimisation, which are predominantly claims that involve whistleblowers when push comes to shove and whistleblower matters end up in the courts. We would propose amending part 3 of the New South Wales Act to provide that whistleblower plaintiffs are protected from paying the other side's costs, in accordance with the Commonwealth provisions. Section 18 of the Commonwealth Act certainly provides for that. This would

facilitate more whistleblowers coming forward and taking action in the courts when they have been victimised by the institutions.

The Hon. TREVOR KHAN: Or when they allege they have been victimised or perceive they have been victimised.

Mr SCHOFIELD-GEORGESON: Certainly that is right. I think that is an important point, because the Federal provision excludes vexatious claims. What we are talking about is a provision that whistleblowers are protected.

The Hon. ADAM SEARLE: As long as they have an honest and reasonable belief.

Mr SCHOFIELD-GEORGESON: Absolutely. As long as they have an honest and reasonable belief—

The Hon. TREVOR KHAN: We would be more comfortable with that than with carte blanche.

The Hon. ADAM SEARLE: That could not happen.

Mr SCHOFIELD-GEORGESON: —and so long as the claims are not frivolous or vexatious. In that sense we would be treating whistleblowers like many other plaintiffs in our legal system. The second major thrust of our submission, as I outlined at the beginning, relates to external disclosure to the media. Our first proposal in this respect is to provide whistleblowers with an avenue to report their claims to the media if they face a significant risk of reprisal within their institutional setting. At the moment, section 19 of the New South Wales Act, specifically, does not provide for that. At the moment section 19 provides that whistleblowers may go public or may go to the media after an internal official above the whistleblower's pay grade, presumably, has failed to act on the whistleblower's claim. What we are proposing is that whistleblowers may go to the media if they face a significant risk of reprisal within their organisation or, perhaps, from a third party that may be connected with their organisation. This is an important means by which to facilitate whistleblowing.

In that vein, in relation to external disclosure to the media, we would also propose that external disclosure to the media be made possible where organisations have not done an adequate investigation—that is, an inadequate investigation. This is covered by section 26 of the Commonwealth Act, a sort of catch-all provision that allows whistleblowing when an organisation or public institution has failed to act properly in relation to the allegation of wrongdoing, or the whistleblowing. At the moment in New South Wales whistleblowers can only act when the organisation has not acted in response to the whistleblowing claim. We are saying that whistleblowers should be able to go to the media when an inadequate investigation has taken place.

The third and final submission in relation to external disclosure to the media is lowering the truth standard in relation to external disclosures. At the moment the standard for an external disclosure requires a test involving two limbs. The first of those limbs is that the whistleblower has an honest belief on reasonable grounds that the disclosure is substantially true. The second is that the discloser know that the disclosure is substantially true. That is quite a high test in order for a discloser to go public. I would suggest that it is a standard that the New South Wales police would often have difficulty satisfying, even with all the institutional backing that their job entails.

The Hon. ADAM SEARLE: It is also not a requirement of the Australian Capital Territory [ACT] or the Commonwealth tests, is it?

Mr SCHOFIELD-GEORGESON: No, absolutely not.

The Hon. ADAM SEARLE: So in fact New South Wales has the highest test, does it not?

Mr SCHOFIELD-GEORGESON: Absolutely it does.

The Hon. ADAM SEARLE: That could diminish the making of complaints.

Mr SCHOFIELD-GEORGESON: Absolutely it will. We are suggesting that, like the ACT and like the Commonwealth, New South Wales fall into line with those jurisdictions and adopt a single-limb test for public disclosure to the media or members of Parliament [MPs]—that is to say that disclosers only need an honest belief on reasonable grounds that the disclosure is substantially true. We would do away with the second limb that provides that the disclosure must substantially be true.

The Hon. TREVOR KHAN: How can you have an honest and reasonable belief that the disclosure is substantially true? I am not quite sure what that means. Would you not hold an honest and reasonable belief that the disclosure is true?

The Hon. ADAM SEARLE: It is one of the many curiosities of the New South Wales drafting.

The Hon. TREVOR KHAN: Otherwise you are inviting people to have an honest and reasonable belief that at least part of it is untrue. That to me is an intellectual exercise that is beyond my poor old brain and I think it would be beyond the capacity of most.

Mr SCHOFIELD-GEORGESON: I too think it is specious. One of the reasons it is so problematic is that we have not actually seen the cases go through the courts to test this stuff. We do not have the case law outlining what these words and provisions actually mean, because it is so difficult for whistleblowers to bring cases. If we adopted these amendments and brought our legislation into line with that of the ACT and the Commonwealth perhaps we would see that. Certainly the literature would. I am sure many of you are familiar with Dr A. J. Brown of Griffith University, who suggests that if we were to bring out—

The Hon. TREVOR KHAN: We will be later.

Mr PAUL LYNCH: He is appearing before the Committee this afternoon.

Mr SCHOFIELD-GEORGESON: He will articulate these things in a much better way than I have.

The Hon. TREVOR KHAN: I take it that in recommendation 4 you are saying that test should be an honest belief on reasonable grounds that it is true.

Mr SCHOFIELD-GEORGESON: Absolutely.

The Hon. ADAM SEARLE: Full stop.

Mr SCHOFIELD-GEORGESON: That is the same standard that we apply to internal disclosures.

The Hon. ADAM SEARLE: I think New South Wales is the only jurisdiction that has a differential standard for external disclosure?

Mr SCHOFIELD-GEORGESON: That is right.

The Hon. ADAM SEARLE: It is almost like they did not really want external disclosures to be made too often.

The Hon. TREVOR KHAN: I think you can work on the basis that both sides of politics at various times—

The Hon. ADAM SEARLE: Have formed that view?

The Hon. TREVOR KHAN: Yes.

Mr SCHOFIELD-GEORGESON: The third limb of our submission is institutional integrity. Maintaining transparency and accountability within public institutions will be facilitated, according to the NSW Council for Civil Liberties [CCL], by doing away with first of all restrictions on damages that are available to litigants with tort claims involving victimisation. At the moment New South Wales restricts litigants to claiming actual damages that they have suffered in relation to retaliation wrongdoing. That is under section 20A(3) of the New South Wales Act. This situation is substantially different to the ACT provisions, which allowed damages to be recovered for exemplary, punitive and aggravated damages.

The Hon. TREVOR KHAN: Have there been any instances under the ACT legislation of the awarding of aggravated, punitive or exemplary damages?

Mr SCHOFIELD-GEORGESON: Not to my knowledge, but that would be an excellent question to ask A. J. Brown.

Mr PAUL LYNCH: The reality is that trying to recover those damages in normal tort claims is extraordinarily difficult at the best of times.

The Hon. TREVOR KHAN: It would be a good university exercise.

Mr PAUL LYNCH: The real significance is it opens it up for general damages.

The Hon. TREVOR KHAN: Yes.

Mr SCHOFIELD-GEORGESON: Opening it up to general damages serves to create a culture of whistleblowing, a legal culture of representing and defending whistleblower cases. What that does is create a sort of reward system, an incentive on the part of lawyers to litigate these cases, to actually test these phrases and these clauses that are so wishy-washy and up in the air, undefined and undefinable at this stage. It actually creates a culture of litigation around this Act.

The Hon. TREVOR KHAN: Even as a lawyer I find that the most uninspiring submission you have made.

Mr PAUL LYNCH: I must say I was thinking I wish you would stop talking.

Mr SCHOFIELD-GEORGESON: I suppose this reward or bounty approach is one that exists in the United States. It is one that is informed by international literature, Transparency International is the peak international law body around these type of provisions. They recommended that approach.

The Hon. ADAM SEARLE: You have recommended that former public officials should be able to make complaints also.

Mr SCHOFIELD-GEORGESON: Yes.

The Hon. ADAM SEARLE: Under the Commonwealth legislation there are more extensive provisions for people employed in private sector organisations that are performing work under contract to the Commonwealth. The equivalent New South Wales provisions are extremely limited and would exclude most people working for private sector or non-government bodies that provide goods or services to the State under contract. Should not the PID protections extend to people in the private sector?

Mr SCHOFIELD-GEORGESON: Absolutely they should, and not only the private sector, the NSW Council for Civil Liberties would submit that the New South Wales legislation should again go as far as the ACT provisions, and not only the ACT—South Australia, Western Australia, the Northern Territory and to some extent Queensland—in adopting provisions that cover any person in the ACT as well as clients and citizens of public organisations.

The Hon. ADAM SEARLE: Do those disclosures have to relate to public administration?

Mr SCHOFIELD-GEORGESON: Yes, they do. However, the NSW CCL and the literature certainly suggests that a broader approach is necessary.

The Hon. ADAM SEARLE: If you look at the United States around automotive safety and tobacco, for example, you find that some of the most important whistleblower disclosures occurred in the context of private sector organisations that were arguably having a public impact but were not in any sense a public sector organisation. Should not the equivalents in this country be protected?

Mr SCHOFIELD-GEORGESON: Absolutely.

Dr BIBBY: I do not think we realised that the Committee was going to take its brief so widely so we did not prepare—

The Hon. TREVOR KHAN: Do not take it as the Committee; take it as the Hon. Adam Searle.

Dr BIBBY: I would suggest, since it has come up, that it might be appropriate for this Committee to recommended a fresh inquiry into whistleblowers in the private sector. It is plainly something that is needed.

Mr SCHOFIELD-GEORGESON: Perhaps corporations that are publicly listed could be included within the legislation.

The Hon. TREVOR KHAN: We might have a bit of a constitutional issue there.

The Hon. ADAM SEARLE: Obviously, the New South Wales Parliament is limited to protecting the public administration of the State. That might extend to private sector organisations performing public work.

The Hon. TREVOR KHAN: Going a bit further might test the limits of our Commonwealth friends.

The Hon. ADAM SEARLE: It may do if it were to do with the corporations power but there might be a way.

Mr SCHOFIELD-GEORGESON: I do not have anything further to add.

The CHAIR: Thank you very much for appearing before the Committee today. We may send you some additional questions in writing. Your replies will form a part of the evidence that is made public. Would you be happy to provide written replies to any further questions?

Mr SCHOFIELD-GEORGESON: Yes, we would.

Dr BIBBY: Could I make a brief comment in relation to the issue that you raised with the previous witnesses about allowing former public servants protection when they make disclosures? It seemed to me that the suggestion that this encourages delay is something to be looked at perhaps carefully. It seems to me that this is asking for someone to have an overwhelming sense of duty, or even beyond duty, it is asking for heroism in

some cases. Secondly, if you happen to know of some problem within the public service, and by now you have retired, then you think, "I really ought to say something about that." It is much better that it be disclosed than that the person is still scared to disclose it. Thirdly, a person could be sacked in the meantime on some other ground, or even sacked in order to silence them. So it is highly desirable that former public servants should be able to make disclosures about misconduct that occurred while they were in office.

The Hon. TREVOR KHAN: I think you have probably got us on that, unlike one of the earlier submissions.

(The witnesses withdrew)

MARGARET CRAWFORD, Auditor-General, Audit Office of NSW, sworn and examined

BARRY UNDERWOOD, Executive Officer, Audit Office of NSW, affirmed and examined

The CHAIR: Before we proceed, do you have any questions about the hearing process?

Ms CRAWFORD: No.

The CHAIR: Would you like to make a short opening statement before we begin questions?

Ms CRAWFORD: I make a brief opening statement beginning with thanking you for the invitation to address the Committee on a very important issue about the importance of being able to report maladministration, wrongdoing and, particularly from my perspective, serious and substantial waste. As we explained in my submission I have three particular statutory responsibilities under the Public Interest Disclosures [PID] Act. The first is obviously dealing with disclosures about the Audit Office's services and staff. The second is handling disclosures made by public officials about serious and substantial waste of public money by agencies or their staff, and also as a member of the PID Steering Committee. Currently my colleague Mr Underwood is my nominee on that Committee.

I think from our perspective—and it is very much from our perspective—the current law and structures to support the administration of public interest disclosures work reasonably well. I think that is especially if you consider it in combination with our general complaint-handling arrangements, and also our general powers in relation to both financial and performance auditing.

Over the past five years the office has received some 81 PIDs, most disclosures concerning the waste of public moneys. Some, however, have related also to corrupt conduct and maladministration, which my office has referred to the Independent Commission Against Corruption [ICAC] or the Ombudsman respectively. During this time I am advised that we also received one PID about the Audit Office itself. I asked Mr Underwood just before I came here what that was about and it turns out that it was about a person complaining that we had not properly published our policies in relation to PIDs on our website.

A great majority of the PIDs we have examined have not actually been able to demonstrate serious or substantial waste or have not provided sufficient evidence to justify the allegation. In the past two years, none that we have examined have been able to demonstrate serious and substantial waste. That is not to say that the Audit Office has not investigated areas of serious and substantial waste; on the contrary, it is part of our core business and many of my performance audits report on areas of waste, but these matters do not always originate from a PID. Generally the PIDs that we receive are referred, in the first instance, to our financial audit branch for information and follow-up. Financial audit often conducts additional testing as part of its audit of the relevant agency and reports on what it finds. The PIDs we have received covered a range of issues across a number of government agencies.

Over the past five years the majority have concerned the transport cluster, and education was probably the second highest, followed by the health cluster. The issues can cover allegations concerning IT projects or wasteful use of staff resources or that the agency's administration systems are inefficient. The information we receive through PIDs does provide valuable input into areas for my office to focus on when conducting its financial and performance audits of the New South Wales public sector. You may be aware that from 1 October I will be appointed as the auditor for local councils across New South Wales for this financial year.

The Hon. ADAM SEARLE: Congratulations.

Dr HUGH McDERMOTT: What did you do wrong?

Ms CRAWFORD: Yes. As a result, I will then have the statutory responsibility, along with the chief executive of the Office of Local Government, to handle complaints about serious and substantial waste in local government. My office and the Office of Local Government are developing arrangements for how we are going to manage that, a memorandum of understanding, so that we can make sure that we do not duplicate and work constructively together in what for me and our office will be a new area. We are not too sure what that will mean, particularly in relation to complaints and PIDs. We already have an MOU in place with the NSW Ombudsman more generally for the handling of exchange of information in this area.

Concerning your terms of reference relating to the 2010 amendments, I am advised that the matters relating to the Steering Committee and the Ombudsman's role work reasonably well and, arguably, have added to the effective administration of the PID Act but, as you may know, I have only been in this role since April this year, so if you have questions concerning that I might defer to Mr Underwood. As I said, he is my nominee on the Steering Committee and has managed our governance of this area for many years. Your last question concerns whether there is a need for further review of the PID Act. In general our view is that periodic reviews are pretty important, noting that this is an area where it is really critical for the public sector and public officials to know how it works, and we probably should not play with it too often.

The Hon. ADAM SEARLE: In your submission, you outline the three responsibilities your office has in relation to public interest disclosures. In relation to the Audit Office itself you have only received one complaint. I am happy for you to take this on notice, but how many of the disclosures you have received as indicated in your chart fall into the categories in the other two dot points? How many of those relate to your responsibilities under section 52D of the Public Finance and Audit Act, and how many of those would relate to section 6A of the PID Act? It is not a trick question; I am happy if you take it on notice.

Mr UNDERWOOD: I will have to take it on notice.

The Hon. ADAM SEARLE: In relation to the chart you have provided, there was a high point in 2012-13, then a slight decrease and then a fairly rapid decrease in disclosures made thereafter. Are you able to discern any trends or areas to which the complaints relate? Do you have any views about what might have led to that lower level of complaints?

Ms CRAWFORD: I am going to defer to Mr Underwood again, because I have only been here since April and he may have some insights.

Mr UNDERWOOD: I do not have any real explanation as to why that has happened. I would say that the number of complaints we receive in general—that is including PIDs and any other complaints we get—has not had a discernible drop-off. Why PIDs have, I cannot answer.

The Hon. ADAM SEARLE: Are you able to give us a sense of the flavour and nature of the complaints you have been receiving?

Ms CRAWFORD: There are a couple of great examples provided in our past annual reports. One dates to the financial year 2012-13. It concerns a public interest disclosure related to:

> … an energy company's risk management for peaks of demand, including the adequacy of insurance for extreme weather events.

That gives you a flavour. In that case, that investigation was not able to substantiate the disclosure but it looked at the risk framework for those companies and how they insure against peak weather events and the like. That is one example. In the 2013-14 financial annual report, there was an interesting case study on a PID that related to casual medical officers and how they were both assigned and paid in the health system. Again, while that investigation did not substantiate the public interest disclosure, it has become something that the internal audit function in Health looks at on an annual basis. We also as part of our financial audit look at that issue on an ongoing basis. They are a couple of examples.

Mr PAUL LYNCH: Have you had any discussions with the Office of Local Government about the scale of complaints and PIDs that you might now be looking down the barrel of?

Ms CRAWFORD: We have, in I think the past week or the week before. Mr Underwood specifically had a meeting after one with me to look at that issue.

Mr UNDERWOOD: Yes. We met with representatives of the OLG in the last couple of weeks, largely to work out how we are going to work out the memorandum of understanding. Its view is it will probably get quite a few complaints. We probably will. Whether they all end up being serious and substantial or whether they are of a less certain nature, we will work together on how best to address those complaints. It is a little bit of an unknown. We are being told it will be a lot more. We are preparing for that. I am sure in our annual reporting we will let people know the extent of those complaints.

The Hon. TREVOR KHAN: Has the OLG let you know how many PIDs they get relevant to this sort of issue?

Ms CRAWFORD: We have some statistics on that, but specifically in relation to serious waste I do not know that answer.

Mr UNDERWOOD: I do not know the answer to that one either at this stage.

Ms CRAWFORD: We were also speaking to our colleagues in other jurisdictions who have for some time also had responsibility for local councils. They say they get quite a large volume of complaints, not public interest disclosures specifically. We are pretty alert to it. I think it is probably fair to say at the moment our involvement in the local government reforms is probably fairly low down the list of public awareness. It will be interesting to see, once people know that the Audit Office has this role, whether that changes things.

Mr PAUL LYNCH: Have you been given extra resources to deal with what may well be an avalanche of extra work?

Ms CRAWFORD: Not at this point, but we will certainly be making submissions in relation to that.

Dr HUGH McDERMOTT: You stated that of all the complaints that have been lodged in the past 12 months none have involved serious and substantial waste. What is your definition of "serious and substantial waste", and what is the benchmark?

Ms CRAWFORD: The definition is quite helpful. It is set out and it is quite clear. To shortcut it, we look at the value of the allegation, whether it could be systematic or systemic, and the materiality in relation to the agency concerned, both in terms of the scale and also the function or its primary role. That is how we define it. I asked Mr Underwood while we were waiting whether the test is too high.

Dr HUGH McDERMOTT: That was going to be my next question.

Ms CRAWFORD: Why are we not substantiating these matters? He provided me with an answer.

Mr UNDERWOOD: In many cases, if it is not serious and substantial, it is maladministration, so we refer to the Ombudsman. It is still dealt with. We also use that information along with the arrangements we have with the Ombudsman to inform about potential systemic issues that are occurring across the sector so that we can consider initiating a performance audit in this area. We work in concert with the Ombudsman to ensure that complaints about maladministration and serious and substantial waste are dealt with, whether it be a PID or a general complaint.

The Hon. TREVOR KHAN: Does the complainant know that?

Mr UNDERWOOD: Yes, we respond to the complainant within 14 days, and we also let them know about the outcome.

The Hon. SCOTT FARLOW: Do you refer them directly to the Ombudsman, or do you refer the matter to the Ombudsman? Does your letter say that this is a matter that falls within the remit of the Ombudsman, or do you pass it on straightaway?

Mr UNDERWOOD: Based on the information provided, we let them know that it is probably maladministration and that they need to contact the Ombudsman unless they give us permission to forward it to the Ombudsman for them. Sometimes we do that. We phone them because sometimes the only point of contact is a phone number. We try, as best we can, to refer it to the Ombudsman if that is the most appropriate thing to do, but with their permission.

The Hon. TREVOR KHAN: It would clearly be better for you to forward the complaint, would it not—

Mr UNDERWOOD: Correct.

The Hon. TREVOR KHAN: —rather than forward it to the Ombudsman for him to say that it does not fall within his remit, and that it should go to the Office of the Auditor-General?

Mr UNDERWOOD: That is why we meet regularly and we have a memorandum of understanding. We both ensure that the complaint is properly handled, and that the member of the public—or in the case of a PID, the public official—is not left wondering why one agency dealt with it one way and the other agency dealt with it another way.

Dr HUGH McDERMOTT: Have there been complaints where you have said to each of the people who have complained that it is a matter of substantial or serious waste, and you have passed it on but it has not progressed anywhere? What has been the feedback from the people who made the complaints?

Mr UNDERWOOD: We do not simply say that it is not going to be examined; we refer it to the financial audit team because they go back every year to every agency in the New South Wales public sector, and will be going to all local government authorities as of next year. We do consider it as part of the financial audit and we may raise it in the report to Parliament. We do not dismiss it because it does not meet the serious and substantial waste test. However, in direct response to the question about whether we have had any negative responses, some people keep coming back and they are not happy. But that is not a big number. It usually relates to complaints, not PIDs. I am not aware of any PIDs where the complainant has been really dissatisfied with how it has been handled.

The Hon. SCOTT FARLOW: Is there any explanation for the substantial drop off in the number of PIDs lodged between 2013-14 and 2015-16?

Mr UNDERWOOD: Not that we are aware of.

The Hon. TREVOR KHAN: I think you identified three or four different primary areas. Can you provide a year-by-year breakdown?

Mr UNDERWOOD: We have a whole register and we can break them down.

The Hon. TREVOR KHAN: I do not know whether it will help us.

Ms CRAWFORD: It brings it to life.

The Hon. TREVOR KHAN: Yes. Have you read any of the other submissions made to the Committee?

Ms CRAWFORD: Yes.

The Hon. TREVOR KHAN: What do you think about the extension to former public servants?

Ms CRAWFORD: We have been talking a lot about that this morning. We would not oppose that per se, nor do we know how effective it would be. It is not a matter that we have examined in depth. Rightly or wrongly, we believe that our complaints management process works well and that we manage the interests of the complainant very respectfully and carefully. We think that our arrangements have worked reasonably well to date. However, that does not offer any protections. We are not sure whether that would add further value, particularly when we start to look at local government. That may be a different matter from my current mandate.

Mr UNDERWOOD: It would be interesting to see what happens in other jurisdictions that have a similar provision and whether there are any unintended consequences. If there were negative consequences, how are they addressed?

The Hon. TREVOR KHAN: The Committee is open to your thinking about that. This is apart from the question of effectiveness and whether it will bring out further disclosures. You would have heard me talking about the Emblems/Prospect issue and junior police officers. Can you think of any negative consequences from expanding the field?

Ms CRAWFORD: In principle I cannot. We do not think it is a bad idea. If it is a valid concern, each public servant has protection. It would be something we would want to defer, at least in respect of part 2, to the Office of the Ombudsman, because they would have probably thought about it much more deeply than we have. I am being very honest here—

The Hon. TREVOR KHAN: I am sure you are.

Ms CRAWFORD: —in saying that our complaints process is pretty good, and we do protect people's interests. I have not thought through what further protections would be available if this were extended. Having said that, as a former public servant, I know that just because you no longer work there does not mean you should be barred from making complaints. It is just that I have not thought about whether the extra protections are necessary.

The Hon. TREVOR KHAN: Let us deal with it in the local government sector. It has probably been as adept as any other sector at moving former employees into contract roles so that they lose the PID protections but are still essentially on the payroll. That is a group. Frankly, if we use the Independent Commission Against Corruption as an example, more than half of its work would be dealing with local government. Potentially, it is a

field that is alive for a range of protections that cover not only council employees but also those who maintain a valuable contract with those local government organisations.

Ms CRAWFORD: I certainly can see the logic in that. I do not know that we are well prepared to have a formal position in regard to it.

The Hon. TREVOR KHAN: But you can think about it.

Ms CRAWFORD: Yes, absolutely.

The Hon. TREVOR KHAN: I will return to the local government example because it must be alive in your mind. What about those people who have not been former employees of a council, but may be performing an employee-like function for that council, who wish to make a protected disclosure? Should they be covered by the PID?

Ms CRAWFORD: I am not sure I follow the "employee-like function".

The Hon. TREVOR KHAN: A council may be stripping down its numbers so that it retains a small company entity which, in fact, is providing employee-like functions to the council.

The Hon. SCOTT FARLOW: Contractors in accounts or IT.

Mr UNDERWOOD: Broadly speaking, those people are fulfilling the same functions that a staff member would have fulfilled previously, I assume.

The Hon. TREVOR KHAN: Yes, and all these organisations are going through this.

Mr UNDERWOOD: In a general sense, and to achieve the objectives of the Act, one would think there would be a reasonable case for those to be covered.

Ms CRAWFORD: Here, we are speaking as two individuals rather than as—

The Hon. TREVOR KHAN: I accept the caveat. As I said earlier, this is a Socratic exercise, so if you can see something wrong with the proposition, or something good about it—

Ms CRAWFORD: I think we should take this away and have a good think about it.

The Hon. TREVOR KHAN: Yes, workshop it.

Dr HUGH McDERMOTT: Going back to the complaints, there were 80, were there not?

Ms CRAWFORD: There were 81 in five years.

Dr HUGH McDERMOTT: You sent certain complaints to the Ombudsman. Have they gone anywhere else?

Mr UNDERWOOD: To ICAC as well.

Dr HUGH McDERMOTT: Those are the only two?

Mr UNDERWOOD: Those are the only two that we have sent complaints to.

Ms CRAWFORD: I believe there was one that had been sent to a number of agencies, including the Public Service Commission, about employment arrangements.

Dr HUGH McDERMOTT: Do you have the power to send it to others, if you decide to?

Mr UNDERWOOD: Yes, we do. We can share. It is under the Ombudsman Act. I forget the section. There is a whole list of agencies in section 1A of the Ombudsman Act—I am sure of that—that allows all those agencies to share information concerning broad complaints. That is what we rely on.

Dr HUGH McDERMOTT: How many did you send to ICAC and how many did you send to the Ombudsman?

Mr UNDERWOOD: I would have to take that on notice. I do not have that information.

Dr HUGH McDERMOTT: And how many have gone nowhere—not been acted on.

Mr UNDERWOOD: I can tell you the section of the Act that we rely on, if you like. I have it here.

Dr HUGH McDERMOTT: It is all right. I will go back and read it myself.

Mr UNDERWOOD: There is a section in the back part of the Act on complaints.

The CHAIR: Do you have any closing comments?

Ms CRAWFORD: No, other than to say that I have been in this role for something like six months. This hearing has afforded me a very good opportunity to delve right into this area, which I had not had previously. So I thank you for that.

The Hon. TREVOR KHAN: We rarely have people who leave our committees happy! What have we done?

The CHAIR: Thank you very much for appearing before the Committee today. We may send you some additional questions in writing. Your replies will form part of the evidence to be made public. Would you be happy to provide a written reply to any further questions?

Ms CRAWFORD: I guess so.

The CHAIR: Thank you for joining us today.

(The witnesses withdrew)

(Luncheon adjournment)

ALEXANDER JONATHAN BROWN, Professor of Public Policy and Law, Griffith University, affirmed and examined

The CHAIR: Thank you for joining us. Before we proceed, do you have any questions about the hearing process?

Professor BROWN: No, sir.

The CHAIR: Would you like to make a short opening statement before we begin questions?

Professor BROWN: Thank you, Mr Chairman. It will be the shortest opening statement because I am really here to answer your questions, I do believe.

The Hon. SCOTT FARLOW: Great!

Professor BROWN: I guess the main thing I would say is this: It is a very welcome development to see that the Committee conducted a review of the Act as amended in 2010. Anything I say should be predicated on the fact that the amendments made in 2010 were universally a big step forward from the previous legislation, but that does not mean that there are not significant improvements that could be made now and are likely to be able to be made into the future as we learn more about how to make whistleblowing and public interest disclosure regimes effective from all perspectives because it is such a complex, fraught and conflict-ridden-by-definition area of policy and regulation. I am just here to help the Committee in any way I can with whatever you think are the issues that the Committee is in a position to recommend there might be improvement on in the short term.

Mr PAUL LYNCH: You mentioned then the possibility of further improvements. What would you suggest?

Professor BROWN: I think it is important for the Committee to possibly sift the issues that you are dealing with into things that could be fixed now quite easily and things which might seem to be in the too-hard basket but which are more complex and which might bear scrutiny in another two, three or four years time when there is more information. I would divide any comments I make probably into those two categories partly because some of the more complex issues are things which are not going to go away and which will require improvement as these types of legislative regimes evolve. Just because they seem hard now I would not, if I were you, end up with a report saying it is just too hard and should not be dealt with. It is more of a case of: This should come back for further review in three years time or five years time.

The Hon. TREVOR KHAN: Can I just say that this is a fairly cooperative Committee—believe it or not.

The Hon. ADAM SEARLE: We do not mind making it a bit bold.

The Hon. TREVOR KHAN: Behave, just for a short time. Our general intent is to try to reach a unanimous report.

Professor BROWN: I get it. That comment was not in any way implying that there might not be agreement across the Committee. Let me give you the concrete examples, I suppose.

The Hon. TREVOR KHAN: Then again, there may not be.

Professor BROWN: Some of the things which stand out as benefiting from a fix now would include simple things like the threshold for whom a public employee can report to in order for their disclosure to be protected, so some basic things about reporting mechanisms, legal thresholds, the oversight roles, the powers of the Ombudsman's office, or whoever the oversight agency is. I would put those into the category of being things where there could be improvement now that the Committee could recommend. I think a category of things which is much more complex is how to define the protection obligations of agencies and of the Government in relation to public employees, and then what are the remedies when those obligations are not met. That gets us into the whole minefield of criminal remedies for reprisals versus civil remedies versus administrative remedies.

I think those are very important issues that, if the Committee can see its way to a clear solution on some of those now, might well improve the situation. But they are very complex issues which most jurisdictions are still working out on a global basis, let alone on a national basis. Those would be the types of issues where I could imagine the Committee, if it cannot see a clear solution now in terms of giving recommendations for how the Act should be amended, would be issues that would still be there in two, three or five years time for further discussion. I am happy to talk about any more of those specific issues a little bit, if that helps. Those would be the three main things—the basic mechanics of disclosure channels and avenues, and reporting channels and developing those under the Act. I think the Ombudsman's office and possibly others have already given you some recommendations on those and the oversight roles of the Ombudsman's office. But I think that third category of issues in terms of remedies not just for reprisals but for breaches of obligations to protect and support employees is a much bigger and more complex issue.

Mr PAUL LYNCH: In dealing with reprisals, do you think the bar for criminal prosecution in New South Wales is too high?

Professor BROWN: I actually think the more important issue is getting away from any kind of reliance on criminal prosecutions as being the hope for either dealing with reprisals effectively or preventing reprisals. I think there are all sorts of things that could be done to reverse onuses of proof or change thresholds for prosecution, and they should be done to make it more feasible to prosecute reprisals where they are criminal reprisals. If there is criminal intent to harm somebody's interest as a result of making a public interest disclosure, then the test should simply be whether the fact that a public interest disclosure was made or may be made was a factor of any significance in the damaging action that was taken towards that person. If so, there should be some level of liability, if there was an intent to do that damage.

The Hon. TREVOR KHAN: I could be wrong, but is that not what happened in the Kear case—that it is actually a reverse onus? Or am I wrong?

The Hon. ADAM SEARLE: Yes, it is a reverse onus.

Mr PAUL LYNCH: The reverse onus is there now. I think the real problem with it now is that there is a Transparency International submission to us that makes the point that if you are talking about a situation in which there is a reprisal action, it is inevitably going to come out of a fraught workplace where there are a whole lot of other things going on in any event. It is going to be almost impossible, even with a reverse onus, to actually have a successful prosecution, so maybe it should not be quite as much the sole factor, or whatever the precise wording was, or perhaps it should be a bit lower.

The Hon. ADAM SEARLE: At the moment it has to be the substantial reason for the reprisal.

Mr PAUL LYNCH: Rather than a reason.

The Hon. ADAM SEARLE: Yes, and some of the submissions suggest it should be one of the reasons as that would make things a lot easier to deal with. What do you think about that?

Professor BROWN: I actually think that the ideal threshold is not even to say a reason. A reason is the logical thing to do, but the language I prefer is "a factor of any significance" so that it comes back to the discretion of the magistrate to ask whether it was a factor of any significance at all. I go back to my original point that is that we come from a history—and New South Wales particularly has had this history under its legislation—of a preoccupation with the criminalisation of reprisals. Before the 2010 amendments there was no alternative mechanism. There was no right to pursue civil remedies for damage as a result of any kind of reprisal or detrimental action; there was only the criminal reprisal. Since 2010 that position has improved because the civil remedy avenue has been created. But on a much bigger national and international basis, there is a real problem with delivering remedies that are effective. Generally speaking in most jurisdictions internationally

there is not a reliance on criminal remedies. It is acknowledged that this is either a civil or an employment context in which we are operating 99.9 per cent of the time. It is quite clear now over a long time that the preoccupation in many of the Australian laws with the criminal penalty has interfered with and obfuscated the pursuit of real remedies for people.

I was having a conversation with the Queensland Ombudsman about this last week. Even though with the legislation in Queensland various amendments have been made to make it clear that civil remedies are still obtainable even if no prosecution could be mounted for a criminal offence, the practical reality within the public service is that agencies, managers, officials, Crown law look at this and go, "If the circumstances are such that a reprisal equals a criminal offence and the evidence is not there or the chance of a successful prosecution is not there to prosecute a criminal offence in relation to that reprisal then nobody has to worry about anything; there has been no damage and there is no need to worry about remedies". Whereas what we know is that the incidents where reprisals will manifest or detrimental action will manifest in a form that is conducive to a criminal prosecution are an incredibly infinitesimally small proportion of the cases we are actually talking about.

In my view, what the Committee should really do is recognise that there is a continuum where there might be a rare reprisal action or detrimental action that is so deliberate and where the intent is so clearly to damage somebody as a result of having made a public interest disclosure that is amenable to criminal prosecution, but in the middle there is a vast array of damaging actions that can be taken both deliberately or negligently by agencies or by individuals that can lead to detriment for people who have made public interest disclosures that will never go near a criminal threshold and where the remedies for those and the options for making good the damage need to be able to be pursued much more effectively either on a civil basis or on a normal employment level basis or on an administrative basis. I am happy to give the Committee some of the submissions I have made in relation to the Commonwealth legislation that go to this very issue. There is a real need to actually separate out what is a criminal reprisal from what is a compensable detrimental action of any kind.

The Hon. TREVOR KHAN: Let us suppose you have us on that, and I am happy to receive anything further, but the Council for Civil Liberties has suggested that there should be a high threshold set for costs orders against a plaintiff, essentially a detrimental action suit.

The Hon. ADAM SEARLE: Consistent with the Commonwealth legislation.

The Hon. TREVOR KHAN: Consistent with the Commonwealth legislation. Would you recommend that?

Professor BROWN: That does not sound like a high threshold in regard to costs orders; it just sounds like an appropriate one.

The Hon. TREVOR KHAN: I always thought costs followed the event.

Professor BROWN: Under the Fair Work Act or Commonwealth employment law and other legislative regimes at the moment there is effectively a public interest costs test built into the ability to take an action for some kind of remedy, which basically is that costs will not follow the event unless the plaintiff is vexatious or it is an abuse of process.

The Hon. TREVOR KHAN: Do I take that as yes, you support that?

Professor BROWN: Yes, I think I am agreeing with that proposition, but I do not see that as a high threshold in terms of costs order in relation to the plaintiff.

The Hon. TREVOR KHAN: Put my prejudices aside.

Professor BROWN: I think the Commonwealth provisions, which I had some hand in advising upon, were deliberately calculated so that an applicant who is an employee and who applies for relief in the Federal Court for detrimental action can never have the employer's costs imposed upon them unless the matter was vexatious or it was an abuse of process.

The Hon. TREVOR KHAN: Is there any other legislative change that you think would assist in providing civil protections?

Professor BROWN: The recharacterisation of what "detrimental action" is for the purposes of those civil remedies or employment remedies to make it crystal clear to everybody that there is a lower threshold of conduct and a broader scope of conduct that could be considered to constitute those compensable actions, a much broader scope with a lower threshold than anything that is required for the criminal offence.

The Hon. TREVOR KHAN: Is that contained in the Commonwealth legislation?

Professor BROWN: No, and it should be.

The Hon. SCOTT FARLOW: Is there another jurisdiction where it is contained?

Professor BROWN: Not yet. Australia is unique in having imposed these criminal sanctions and these criminal remedies right across the board in every jurisdiction. We have effectively created, from the 1990s, this problem for ourselves, where we made it criminally actionable as well as civilly actionable for the same conduct in a way that makes it very hard for people to understand that there might be civil liability or employment liability that could be attracted in circumstances where the criminal liability is not attracted. We need to have a much clearer separation of those things. A much better test for either employment, civil or administrative remedies would be one that basically acknowledges that where required procedures to protect and support a person who has made a public interest disclosure have not been followed or have failed and detriment has occurred then there should be a requirement to compensate that person.

The Hon. ADAM SEARLE: Irrespective of intention.

Professor BROWN: Irrespective of intent. It is much more like a workers compensation scheme approach; it is a no-fault approach. The reality is most of the damage that is done, as far as we can ascertain—and the current research that we are undertaking should give us a much better sense of exactly what the real scope of the problem is—most of the problems that befall people are simply the problems of being collateral damage to a process which has gone off the rails, often through no fault of any individual. It is simply a case of we realise we should have done something differently and we could have done something differently and the damage has occurred, or procedures simply were not followed, a risk assessment was not done and the damage has occurred. I am not necessarily talking about massive damage. It could be career destroying damage at the end of the day. In some situations we are really talking about quite low level damage which if not addressed can turn into a real festering mess for the agency and for the Government.

The Hon. ADAM SEARLE: You wrote an article in 2013 in the wake of the Federal legislation entitled "Towards Ideal Whistleblowing Legislation" and you charted out some of the positives that you thought came with the new Commonwealth Act. How has the Act worked in practice and has it lived up to what you had hoped in that article?

Professor BROWN: It has only been three years and there is a review report pending on the first couple of years of experience with that Act. I think there were always problems with the Act. Notwithstanding there were advances there were always problems and deficiencies. In many ways it is too early to tell. There is certainly no evidence of much litigation or active use of the legal remedies to obtain remedies, but nor has there been much time for cases to flow through. In terms of the overall successfulness of the scheme, we know it is operating, we know it is having an impact and we know it has been implemented. There is broad evidence that nothing has gone backwards and things have been going in a positive direction. In terms of whether it is really addressing circumstances of reprisals or detrimental action that it should be addressing, I think it is too early for us to really know yet.

The Hon. ADAM SEARLE: One of the things the Commonwealth legislation dealt with was requiring agencies to have proper procedures to facilitate dealing with disclosures and to comply with standards set by the Commonwealth Ombudsman. Do you have any sense of how those provisions are working in the area of culture change?

Professor BROWN: Only a broad sense at the moment. I do not put it any stronger than that because we are currently undertaking the next phase of the research—I am happy to provide the Committee with details—but there is a current Australian Research Council funded project which we have called Whistling While They Work 2. There was a previous project that members might have heard of which was called Whistling While They Work 1. I should say the New South Wales Ombudsman's office, along with every Ombudsman in the country and many other agencies, are partners to that project. We are currently undertaking large-scale research to give a better sense of exactly what the state of play is on the ground and to compare agencies to see what the quality of their procedures stacks up to be. That is the main reason why I do not like to be too prescriptive in my own opinions because we should hopefully be in a position soon to have firmer opinions based on reasonably strong evidence as to what is out there and what is actually happening and whether or not it is working.

The Hon. ADAM SEARLE: Last year you co-authored a document called "Breaking the Silence" which was looking at the strength and weaknesses of whistleblower laws across the G20 countries. One of the weaknesses in Australia-— it seems to be common—is the lack of regulation or protection for people working in the private sector. As far as I can tell, apart from some limited examples, neither the Commonwealth nor New

South Wales legislation really deals with protecting the private sector. Do you think that is a significant weakness and should it be addressed?

Professor BROWN: It is an enormous weakness. It is Australia's single biggest weakness when it comes to these regimes but, fortunately perhaps for your Committee, I do not think it is something you need to worry about.

The Hon. TREVOR KHAN: The Hon. Adam Searle seems to get involved.

The Hon. ADAM SEARLE: I disagree.

The Hon. TREVOR KHAN: There was a document written about this some time ago, the Constitution.

Professor BROWN: The Constitution does allow the New South Wales Parliament to regulate an enormous amount of private sector conduct. The trouble is it will be overridden by Commonwealth legislation.

The Hon. TREVOR KHAN: I think I tried this with same-sex marriage.

The Hon. ADAM SEARLE: That presupposes the Commonwealth actually acts.

Professor BROWN: There are two issues there. One is: Does the responsibility for a comprehensive scheme of whistleblower protection for the private sector—and for the not-for-profit sector for that matter—lie with a combination of State and Federal regimes? Or is it best achieved primarily through a comprehensive Federal regime? I think the state of Corporations Law, industrial relations law and most business regulation in Australia now would suggest that this is a field in which the Commonwealth should act. To answer the second part of your question, I think that there are good signs now that the Commonwealth will move. There has been a series of recommendations from the Senate Economics Committee over the years to move to convert what is currently there in the Corporations Act in terms of the supply protection provisions into a much more general legislative regime applying to the private sector. The projects that we are undertaking has not only public sector regulator partners but also private sector regulator partners. The Australian Securities and Investments Commission is a major partner in that project. The Commonwealth Government is involved on both a public sector and private sector front. That is clearly with a view to trying to figure out what the answers would be in terms of Commonwealth regulation.

There are a few different signs that I am aware of that this is something that the Commonwealth is going to move on as well as the fact that it should be the one that moves on it. I think the question for any State Parliament is to consider how that will interface with the State public sector public interest disclosure regime. Certainly when it comes to contractors and not-for-profit organisations, which are not public sector entities but in which the New South Wales Government and New South Wales Parliament clearly have an interest in making sure that whatever their interactions are with the public sector, whether it is delivery of services or the delivery of contracts or participation in contracting, procurement or whatever, there should be an ability—and I believe to a large extent currently there would be an ability—for the New South Wales integrity agencies to pursue those matters, and similarly people who report those matters. We need to make sure there is no falling between the cracks for people in the private sector who are working in areas of significance for public integrity for the State of New South Wales. When it comes to the broad question of whistleblower protection for employees in the banks or tobacco companies or whatever—

The Hon. ADAM SEARLE: Issues to do with public safety, for example, or public health.

Professor BROWN: I think that the Committee should probably bear in mind that not everything, in terms of protecting people who might provide information to regulators or integrity agencies, has to be in the Public Interest Disclosures Act or the Whistleblowers Protection Act. There is a vast array of legislation that would still be properly within the domain of the New South Wales Parliament when it comes to workplace health and safety or protection of public health or consumer protection. Most of it already dovetails in, in some way or other, with Commonwealth legislation or cooperative regimes now. Certainly there is plenty of scope for the Parliament to have the whistleblower protection provisions of various kinds built into all that regulatory legislation. Very often that would be the case.

If somebody victimises somebody who has made a complaint or provided information to the Office of Fair Trading, for example, then that is a form of whistleblower protection legislation that is inbuilt into regulatory legislation. In terms of the overarching scheme that we are talking about to cover any circumstances where employees or contractors or insiders to an organisation blow the whistle on wrongdoing by that organisation, then I think the logical thing is for everybody to put pressure on the Federal Government and the Federal Parliament to do that as comprehensively and as simply as possible across the private sector, incorporated organisations and corporations.

The Hon. ADAM SEARLE: Short of that, do you think it would be reasonable to extend the New South Wales Act to at least cover those providing contracts and services to the New South Wales Government?

Professor BROWN: Certainly, and those employed under grant-funded services, for example, in not-for-profit organisations. With any of these regimes, as with many elements of the integrity system, the answer lies in actually recognising that there is some redundancy and overlap. It is more important to have a bit of redundancy and potential overlap: That is a much lower risk than creating a system where everything tries to match up seamlessly and you end up with people falling through the cracks between different jurisdictions.

The Hon. ADAM SEARLE: What is your expected time frame on Commonwealth action in this space—or is it a hope?

Professor BROWN: At the present time it is slightly more than a hope, but certainly anything that any parliament, any government or anybody can do to help reinforce the message to the Commonwealth Government that this is a priority issue is a worthwhile message. It is more a matter of priority and the complexity of figuring out what the answer is than any other barrier at this point. I think everybody recognises it needs to be done.

The Hon. ADAM SEARLE: In those other examples of Commonwealth action you provided, the Commonwealth really only acted sometimes decades after the States had already put in place regimes. Commonwealth anti-discrimination legislation followed State action. The industrial relations uniform laws followed 100 years of State regulations, so the Commonwealth is not quick to jump into these spaces.

The Hon. TREVOR KHAN: Property relationship laws.

The Hon. ADAM SEARLE: Yes, property relationship laws—another area where the Commonwealth acted a decade after this State, for example. Sometimes State action could be a goad to Commonwealth action.

Professor BROWN: Absolutely. Certainly if all the States started—

The Hon. TREVOR KHAN: You are not going to convince me too!

Professor BROWN: —legislating to try to regulate and protect the private sector employee rights in this field, notwithstanding the state of the fair work legislation, the corporations power and the WorkChoices decision, I am sure that would help refocus the Commonwealth's mind.

The Hon. ADAM SEARLE: That would really crystallise things, would it not?

Professor BROWN: Yes, but I do not think that that is necessary.

The Hon. TREVOR KHAN: And I do not think it is feasible!

The Hon. SCOTT FARLOW: Or wise.

Professor BROWN: But certainly if it is an issue that has been put before the Committee by submitters and stakeholders that this lack of private sector whistleblower protection continues to make life more difficult for the operation of an effective public sector whistleblower protection regime, that message certainly could not hurt in terms of this being a priority that everybody needs to get on with.

The CHAIR: Thank you very much, Professor Brown, for your contribution. Thank you for appearing before the Committee today. We may send you some additional questions in writing. Your replies will form a part of your evidence and be made public. Would you be happy to provide a written reply to any further questions?

Professor BROWN: Within the best of my ability, certainly.

The CHAIR: Thank you very much for your time.

(The witness withdrew)

JOHN McMILLAN, Acting Ombudsman, NSW Ombudsman, affirmed and examined

CHRIS WHEELER, Deputy Ombudsman, NSW Ombudsman, affirmed and examined

The CHAIR: Thank you for joining us today. Would you like to make a short opening statement before we begin the questions?

Professor McMILLAN: Thank you, I will. I begin by saying we are pleased to be invited to speak to the Committee about its review of the Public Interest Disclosures Act 1994. Chris Wheeler, who is with me, a Deputy Ombudsman, heads our public administration division, which includes our public interest disclosures unit. I will make some opening remarks about the NSW Ombudsman's role in the public interest disclosure scheme. As the Committee would be aware, the Act commenced under a different name in 1995. It is now over 20 years old. In 2010 there were substantial amendments that led to the NSW Ombudsman's office having a role from 2011 in discharging specialist oversight functions. These were in addition to the role the office had as an investigating authority that could receive public interest disclosures. We commenced that role by establishing a public interest disclosure unit that has been responsible for our advice, promotion and awareness functions. The background paper we have prepared for the Committee sets out much of the work that we have done in that area.

Initially the work was focused on ensuring that public authorities were aware of their obligations under the Act and, in particular, obligations to establish internal reporting policies. We undertook a great range of forums, developed and delivered training, developed e-learning modules, released a range of guidance materials, distributed a regular newsletter, delivered presentations and hosted information events at corruption and public administration forums. That education and awareness work continues. For example, at the moment we are developing an interactive tool to assist authorities dealing with internal reports of wrongdoing. However, we now have an increased focus in the office on the practical application of the Act and the particular difficulties that authorities sometimes face in dealing with obligations under the Act. To address those challenges, we now consult regularly with PID practitioners in public authorities, glean their experience and have them co-present at forums that are hosted with public authorities. We have conducted an audit program. The submission refers to, I think, 22 audits in recent times of PID compliance in public authorities. We have sharpened quite a lot of the educational material and guidelines that are made available to agencies.

We have also consulted widely with agencies and through the Steering Committee that we chair on amendments that could be made to the PID Act, and those are set out both in the background paper we have prepared for the Committee and in our submission. All I will say at this stage is that the amendments are really driven by a number of key principles. I will briefly mention four. First, the Act can be simplified to minimise the technical barriers that face public officials who want to report wrongdoing under the Act. Secondly, protections in the Act should be focused on preventing adverse outcomes, in addition to providing legal mechanisms aimed at remedying reprisal. Thirdly, the obligations on public authorities should be practical rather than unnecessarily burdensome. Fourthly, there should be stronger requirements for providing information to the Ombudsman's office so that we have a much better information resource and database about problems and challenges arising in the administration of the Act. We have also partnered with, for example, the Whistling While They Work project that has been convened by Dr Brown under an Australian Research Council Grant. We are particularly committed to that project because one of the key research questions is to examine whether legislative reforms are necessary. During the finalisation of that study, we will examine whether there are any lessons to be learnt for New South Wales.

Finally, our view is that an effective legislative framework in itself is not enough. Practical protection for public officials who want to make reports depends strongly on there being a strong culture within agencies which facilitates reports and which provides protection to reporters. Overall, there must be a culture that supports the opportunity to make reports about corrupt conduct, maladministration, and waste of public resources. That concludes my opening remarks. Mr Wheeler and I are happy to address questions from the Committee.

Mr PAUL LYNCH: One of the things that has been put to me is that the Act has grown a bit like Topsy—it is all a bit moth-eaten and it has been amended here and there—and that it may well benefit from being completely rewritten in plain English. Do you have a view about that?

Professor McMILLAN: My personal view is that I find it a very hard Act to follow. I had quite a lot of familiarity with whistleblower and public interest disclosure legislation before coming to this role. I also played a strong role in advocating for the development of the Commonwealth scheme and that function being given to the Office of the Commonwealth Ombudsman, which I headed. When I first came to the New South Wales Office of the Ombudsman, I found this Act hard to understand. Then I realised its history—that is, that it

started as a Protected Disclosures Act that defined when you are protected, and it still has that essential framework. The Commonwealth Act is much longer and it spells out how a person makes a report, to whom they can make a report, the avenues available to make a report, and what obligations are triggered within the agencies to which the reports are made. If you are a NSW public official thinking of making a report, it would be very difficult to answer that simply by reading the Act. You would have to go to some of the guidance material and policies. Consequently, the work of this office has found that people frequently make complaints to the wrong authorities and authorities do not understand that what they have received is a public interest disclosure.

The Hon. TREVOR KHAN: If it is a problem for the agencies, it is a hell of a problem for the public servant seeking to make the disclosure.

Professor McMILLAN: Yes.

Mr PAUL LYNCH: To some extent it is a function of the fact that this was the first such Act in Australia; it was the first stab at it. No wonder it was not perfect.

Professor McMILLAN: So much rests on the definition of terms like "public authority". It is handy to have some legal experience in exploring the meaning of those concepts in the Act.

Mr PAUL LYNCH: One of the other things that has been put to me is that other jurisdictions provide for disclosures about a range of other conduct, such as scientific misconduct, and acts or omissions that create risk to public health and safety or the environment. Is there any benefit in extending the New South Wales Act to cover that sort of behaviour?

Professor McMILLAN: Clearly, reports about those specific areas of activity should be covered by one scheme or another. It becomes a question of whether the public interest disclosure scheme should embrace all of them. Most of those areas are covered by other complaint schemes with statutory protection. Before the Public Interest Disclosure Act, the Ombudsman dealt with public interest disclosures. The Independent Commission Against Corruption plays a role, and there is the Health Care Complaints Commission, and a large number of protections in environmental and health legislation. In some ways it is easier to address that question with a wholesale review of the Act rather than by amending it here or there. I suspect my view would be that unless there is a gap or a willingness to rethink the entire scheme, it is probably best not to keep adding bits and pieces here and there to this scheme so that it ends up with an awkward shape.

The Hon. ADAM SEARLE: The Committee has received some submissions that have suggested that the protections in the Act should be extended to former public officials. Do you have a view about that?

Professor McMILLAN: That is addressed in the background paper at page 23, which contains a good summary of the issues. The proposition we put is that the most suitable way of dealing with that is, first, by having a deeming provision similar to that in the Commonwealth Act that would allow an agency to deem a person to be a public official for the purposes of the Act having received the information. A second way of dealing with it is to have a provision stating that a former public official is protected in respect of information derived from their time as a public official. It does not extend the scheme too far by allowing a former public official to have the same latitude as a current public official to report any conduct that comes to their notice under the scheme. An example is given from the Commonwealth arena, where someone set up a blog to encourage people to provide information and they would then become the reporter under the scheme.

The Hon. ADAM SEARLE: What about employees of non-government organisations that provide services to the State? There is a very limited existing protection in section 4A (1) (c), but it protects only a very limited class if you are employed by the private sector entity and working on a public contract. It seems to be an omission.

Professor McMILLAN: The concept of people discharging public functions reporting—that is, contractors, subcontractors—

The Hon. ADAM SEARLE: That might be a better definition.

Professor McMILLAN: There is a strong case for doing that. I will invite Mr Wheeler to make a comment, because it delves into some of the fine detail that I think he has encountered in his work.

Mr WHEELER: There certainly is a move, at least in the New South Wales public sector, to outsource a range of functions that were traditionally public.

The Hon. ADAM SEARLE: We have noticed.

Mr WHEELER: Sometimes that is accompanied by the accountability mechanism that used to apply. For example, private jails are still within the jurisdiction of the accountability bodies in New South Wales. That is not the case in relation to certain other areas, for example, housing. In theory, I agree that the accountability mechanisms and the protections for making disclosures should be extended. However, there are certain associated issues that would have to be dealt with. First, if you are a large non-government organisation performing a range of functions and one small function used to be a public function, does the whole organisation come in or just that bit?

The Hon. ADAM SEARLE: It could be the whole organisation, but the disclosure might have to relate to the public function.

Mr WHEELER: It could, yes. That would be a way around that. Bringing in the whole organisation would be a massive task.

The Hon. ADAM SEARLE: It would depend on what you mean by bringing in the whole organisation.

Mr WHEELER: If there were maladministration, how would you define it? If you define it to be the performance of a function, how would you do that?

The Hon. ADAM SEARLE: The function would have to be the one that was formerly public.

The CHAIR: Or performed for the public.

Mr WHEELER: If it were a social housing provider, would you say that it was the provision of the social housing service? However, if the organisation had any other function that was not social housing—

The Hon. ADAM SEARLE: That would be outside.

Mr WHEELER: That would probably work.

The Hon. TREVOR KHAN: We spoke earlier about social housing and disability services, and the same could apply to foster care arrangements. What about educational services, where there has been, historically, a split provision of services, yet they are so dependent upon funding?

Mr WHEELER: If I could just finish the answer I had before—

The Hon. TREVOR KHAN: This is what one describes as the Socratic method of inquiry.

Mr WHEELER: The other thing that I was going to mention about the original issue is that it would also require the extension of the jurisdiction of one of the investigating authorities to cover that area. Otherwise you would need another change to the Act. At the moment the definition is certain conduct that is within the jurisdiction of at least one of the investigating authorities.

The Hon. TREVOR KHAN: Which investigating authority would be appropriate?

Mr WHEELER: If you are having one, why not have them all? The Audit Office would not be relevant unless the funds were auditable. Maladministration is a fairly simple one, because you could define that as what the role was before, but corruption might be problematic. If you are going to have one you should really have whichever organisations are applicable.

The Hon. ADAM SEARLE: Yes. In principle, you do not disagree with the idea.

Mr WHEELER: I do not disagree in principle at all. Again, we do not want to increase the technicalities of the Act. They have been a problem from the start. My favourite piece of legal advice from the Solicitor General started off referring to the "generous opacity" of the Protected Disclosures Act, and it has not got better. If there was a simple way of defining that jurisdictional expansion I would be all for it. There would also be a resourcing issue. All of a sudden, in the social housing area you could be building in any number of social housing providers and any number of staff. If you went to the education area, the sky is the limit.

The Hon. ADAM SEARLE: Particularly if you follow the money. It would go wherever State money went.

Professor McMILLAN: One of the issues that arises when you extend the jurisdiction is how many of the obligations in the Act you extend to that area as well. It is fairly easy to add an amendment that says a person working in this area can make a report of this kind, but what then about all of the obligations that rest on the public authority to collect information, to report it, to examine that there is no reprisal action? As you get beyond the core of government it becomes progressively harder to apply the rest of the Act to the extended jurisdiction.

Both the Independent Commission Against Corruption and the Ombudsman can receive a great variety of complaints about government agencies from anybody, and can receive them anonymously, and there are statutory protections in the establishing legislation that is comparable to that in the PID Act. They are not framed in quite the same way, and they tend to focus on criminal action rather than rectifying damage to somebody's career or providing protection for them. There are questions about just how far you want to extend the public interest disclosure scheme, I think.

The Hon. ADAM SEARLE: In relation to your 12 recommended changes, are changes 5 and 6 currently a practical problem? I assume they are in there as desirable but not essential. Is there a practical difficulty that the absence of those provisions has created?

Mr WHEELER: In relation to recommended change 5, we often find when we go out and do audits, when we are doing training or having forums, management indicate that they are reticent—I will not say scared—to take management action in circumstances where they believe that is appropriate because it will be alleged, they believe, that they are taking detrimental action in reprisal for a disclosure. So it is about putting it on the record that the taking of reasonable management action is not a breach of the Act.

The Hon. ADAM SEARLE: In the same way that the workers compensation legislation subtracts that from any actionability.

Mr WHEELER: Yes. It is the same as the definition of "bullying". It does not include reasonable management action in the circumstances.

Professor McMILLAN: That is one of the advantages of using the phraseology "reasonable management" or "action taken in a reasonable manner" because it has been so well and truly tested in tribunals and courts that there is now very strong guidance on what constitutes reasonable management action and what is a reasonable manner of taking it.

Mr WHEELER: Recommended change 6 is in there because one of the issues that is raised regularly—I will not say always—whenever we have any forum and we are discussing with public interest disclosure practitioners is the incidence of people claiming to be making disclosures about matters that are basically a grievance. They are dressing up the grievance as being something more than that. Any objective assessment of the disclosure would indicate that it is not that, but we are finding that agencies are having difficulty making such an assessment.

The Hon. ADAM SEARLE: Is that not a management failure in those agencies?

Mr WHEELER: It is a management failure, but it is in the context, generally, of ongoing workplace conflict where emotions are running very high and where people are very wary that any action they might take might make things worse. It is a significant issue—one of the most significant issues raised with us by practitioners. It is dealing with matters that arise in the context of an ongoing workplace conflict. A lot of disclosures are made in that context. Some fit the criteria of the Act quite clearly; others do not. They are often made as a strategic move in an ongoing conflict.

The Hon. ADAM SEARLE: Have you had a chance to review the other submissions that have been made to this Committee?

Professor McMILLAN: We have looked at them, but it is dangerous to say yes.

Mr PAUL LYNCH: At last an honest answer!

The Hon. ADAM SEARLE: Did you form a view, for example, on the New South Wales Council for Civil Liberties submission about whether any of the notions or submissions it has made should be considered?

Professor McMILLAN: I do not have an immediate response to that.

The Hon. ADAM SEARLE: Could you take that on notice?

Professor McMILLAN: We are happy to take that on notice.

The Hon. ADAM SEARLE: Having regard to the other submissions that have been made regarding proposals for change, is there anything else we should add to the list?

Professor McMILLAN: The staff of the PID unit have done a good analysis of the issues raised in those. We would be happy to adapt that and share it with the Committee. If there are specific issues that you would like us to look at, we are happy to do that.

The Hon. TREVOR KHAN: I think you have completely discombobulated us by suggesting a complete rewriting of the Act.

The Hon. ADAM SEARLE: That is an idea that has some attractions. One of the issues raised by a couple of the submissions was that there is a threshold for internal disclosures but there is a different and higher threshold—in New South Wales only—for making external disclosures. Is that appropriate or should it be the same? There are also some issues about the costs regime, for example, in the Commonwealth Act, which is very protective of complainants, as opposed to the New South Wales Act, which is not. There are a number of submissions suggesting what might be small, incremental changes, but which could improve the scheme. So we would like to know of anything in those submissions that you think we should consider.

Professor McMILLAN: I can give you my general reaction on that first issue about public reporting. First, there has to be a mechanism for public reporting built into the Act. It is associated historically with the concept of whistleblowing, which is a public action to draw attention to the existence of a problem. The two ways that transparency is usually brought in are by public reporting—either by agencies or by a central coordinating body such as the Ombudsman—and secondly by allowing a public report, a report to a member of Parliament or a journalist to be made on certain conditions. I think transparency in those forms is essential to an enlightened public interest disclosure scheme. But my second point is that I think the threshold should be higher for a public report because there is a dual focus in the Act—one facilitating and promoting public interest disclosure and the other providing protection to individuals—and history teaches that individuals are often best protected if they are initially drawn into contact with investigation agencies and staff in their own agency to have something explored.

The Hon. ADAM SEARLE: What if that is not feasible or they have made the internal complaint and nothing has been done about it?

Professor McMILLAN: I think that then becomes a question of fashioning the criteria for when a public complaint is justified from the normal criteria.

The Hon. TREVOR KHAN: But that is more of a temporal test, is it not?

Professor McMILLAN: Yes.

The Hon. TREVOR KHAN: The requirement that you attempt to make your disclosure internally but, essentially frustrated by that, you then go outside.

Professor McMILLAN: That is right.

The Hon. TREVOR KHAN: The question becomes: Do you suddenly actually have to jump over an extra barrier, having gone through the attempt to make the internal disclosure or have it addressed internally? Do you then have some additional barrier that is imposed before it goes outside?

Professor McMILLAN: There are the additional barriers in the New South Wales Act in phrases like "must be substantially true", or sort of honest and true.

The Hon. ADAM SEARLE: Yes. What does that mean?

Professor McMILLAN: It is a difficult concept, 'substantially true'. Again, it is not foreign in our law. For example, defamation law allows you to express an opinion based on stated facts. You may recognise that the opinion may be erroneous, but so long as you set up the facts.

The Hon. TREVOR KHAN: I think there are a lot of people who practise in that jurisdiction who do not quite know what is going on.

Professor McMILLAN: Yes. And honest and reasonable, or an honest belief of something, is another standard.

The Hon. ADAM SEARLE: Acting on an honest and reasonable belief is one thing, but then requiring the additional element—that it is in fact substantially true—is quite a big hurdle. Some of the evidence that we have heard today suggests that even in law enforcement you would not always get to that point before you initiate a prosecution.

Professor McMILLAN: Yes.

The Hon. ADAM SEARLE: It does seem to be, first, an artificial barrier and, secondly, also quite high—perhaps unreasonably high.

Professor McMILLAN: Yes.

The Hon. TREVOR KHAN: But the other problem becomes: How can you have an honest and reasonable belief if it is not substantially true?

The Hon. ADAM SEARLE: You can be deluded or you could just be wrong.

The Hon. TREVOR KHAN: It is an honest and reasonable belief.

The Hon. SCOTT FARLOW: It is an honest and reasonable belief but it is not substantially true.

The Hon. ADAM SEARLE: It just happens not to be true.

Professor McMILLAN: Honest and reasonable belief is, again, a familiar concept on which there is strong case law—the *Proudman v Dayman* defence.

The Hon. TREVOR KHAN: The man on the Clapham omnibus.

Professor McMILLAN: You get strong guidance in those sorts of areas.

The Hon. ADAM SEARLE: Why should it have to be substantially true as well? In point of fact the person making the disclosure might believe it is true on all the information he or she has. There may be other information they do not have.

Professor McMILLAN: I will not argue in support of that phrase.

Mr WHEELER: Those words were added in, in the parliamentary debate, on the original bill.

The Hon. SCOTT FARLOW: It is all our fault.

The Hon. ADAM SEARLE: If we are reviewing the Act, that seems to me to be an obvious barrier to people making a disclosure. Should it not be harmonised? Should it not be just one barrier, one threshold, as it is in other jurisdictions?

The Hon. SCOTT FARLOW: Hence the need for an overall review.

The Hon. ADAM SEARLE: Correct.

Professor McMILLAN: In a sense, there has to be a two-stage test, I think.

The Hon. TREVOR KHAN: Because you need that temporal element.

Professor McMILLAN: First, that you have reported it internally. Again, sometimes there are exceptions to that. Some legislative environments are different and require urgent risk of irreparable damage or something. That is the first stage—reporting internally—and the second is why are you then taking it outside? Because it has been more than six months, or there has been a failure to address it and you still have an honest and reasonable belief. I think there is a two-stage test. I suppose the distinguishing feature of American whistleblower protection law is that you can choose to go directly to the media rather than internally. I have never been in support of that feature of the legislation.

The Hon. TREVOR KHAN: The other problem is that if we were to put in that recommendation, we would be wasting our time, I would think.

Mr WHEELER: The other issue here of course is that if you have gone internally and you are not satisfied, there are mechanisms in New South Wales to go to an external investigating authority, who will look at that matter independently and objectively. If there is something in it, they will want to find it. That is what we are there for. There really should be, if you like, a second stage. If you are not happy with the internal, you should go to an external body.

One of the problems that exists if people can just go straight to the media is that people choose the time they go and they choose precisely what they are providing. Then the media comes to the agency or the watchdog body and they ask for a comment. That body basically is either precluded by secrecy, confidentiality, privacy, procedural fairness, and operational reasons from being able to answer. As soon as you say "No comment", that is the story. Depending on when somebody makes a disclosure – and what they say – can have a huge impact that is beyond what the impact should have been.

The Hon. ADAM SEARLE: But it could also prompt the agency to then investigate something which maybe it ought to have investigated months or years previously.

Mr WHEELER: If they have come to an external watchdog body and that body believes, on the evidence provided, that that should happen, that would have happened.

The Hon. ADAM SEARLE: In Operation Prospect you had a situation where a number of relevant bodies did not act over a long period and then there was a disclosure.

Mr WHEELER: They did act.

The Hon. ADAM SEARLE: Then there was a disclosure, which prompted a series of inquiries.

The Hon. TREVOR KHAN: It is a bit hard for the professor to answer or say too much at this stage. That is a bit unfair.

Professor McMILLAN: I was hoping to have a parliamentary outing that did not go into that operation!

The Hon. SCOTT FARLOW: You put the wrong words in—the key words.

The CHAIR: He will answer that at the end of November.

The Hon. ADAM SEARLE: Choose us one example.

The Hon. TREVOR KHAN: We might find ourselves in the Supreme Court.

Mr PAUL LYNCH: When Professor A. J. Brown was giving evidence, he divided issues into two categories: ones that he thought could be dealt with immediately and others that were bigger picture issues, assuming that we are only interested in the more immediate ones. My impression of the recommendations you have made to the Committee is that they all fall into that first category—things that you think we might be able to immediately recommend.

Professor McMILLAN: Yes.

Mr PAUL LYNCH: You consciously steered away from making any bigger picture recommendations.

Professor McMILLAN: Yes.

Mr PAUL LYNCH: Can I offer you the opportunity to remedy that defect and tell us what other things you think—

The Hon. SCOTT FARLOW: Tell us what you really think.

Mr PAUL LYNCH: Yes, basically. What do we do to make this better?

Professor McMILLAN: We have worked from the premise that the most likely outcome is, first, that you could get some updating and technically smaller amendments to the Act and, secondly, there is an opportunity through this process to underpin development that is practised throughout government. But if there is a willingness within government to embrace the broader picture and to rethink an Act that is more than 20 years old and is awkwardly framed, then certainly we would be prepared to participate in that review. Indeed, we have participated in reviews of the Commonwealth Act, which is a much more comprehensive and contemporary scheme.

The Hon. ADAM SEARLE: Should the New South Wales scheme look more like the Commonwealth scheme, for example?

Professor McMILLAN: The great advantage of the Commonwealth scheme is that it is logical. If you are an agency, a reporter or an investigating authority, you can go into the Act and you can work out what role you play in the scheme, what statutory standard you have to meet in order to take action, and what obligations there are on you. It is not easy for any of those groups to delve into the New South Wales Act and work out what their obligations are.

The Hon. ADAM SEARLE: No, but that is the essential point. If the Commonwealth legislation works better, is more understandable and, just reading between the lines, is of a higher standard, should we not replicate it?

Professor McMILLAN: Yes.

The Hon. ADAM SEARLE: It would at least have the benefit of consistency.

Mr WHEELER: If it is modified to suit New South Wales circumstances, yes.

The Hon. SCOTT FARLOW: Are there any advantages in the New South Wales scheme over the Commonwealth scheme? If we were to go down that path, would we be losing anything?

The Hon. ADAM SEARLE: Yes. What should we keep?

The CHAIR: You could tailor it.

Mr WHEELER: Yes. It is shorter.

The CHAIR: That is always good.

The Hon. SCOTT FARLOW: It is only 20 pages or so, so that is good—simplicity. Anything else?

The Hon. TREVOR KHAN: It is not simplicity. He said it was shorter.

Professor McMILLAN: I think one of the strengths of the New South Wales scheme that has been followed in the Commonwealth is that it did designate an agency, the Ombudsman's office in both instances, as having responsibility for supervising, monitoring and promoting. I think that has been the strength of those schemes.

The CHAIR: Are there any further questions?

The Hon. TREVOR KHAN: I think we have ended up in a different position from the one in which we started.

The Hon. SCOTT FARLOW: What is wrong with that?

The CHAIR: Thank you very much. Do you have any other closing comments before the Committee is adjourned?

Mr WHEELER: No.

Professor McMILLAN: No, not from me.

The CHAIR: Thank you very much for appearing before the Committee today. We may send you additional questions in writing. Your replies will form part of your evidence and will be made public. Would you be happy to provide a written reply to any further questions?

Professor McMILLAN: Yes, we would.

The Hon. TREVOR KHAN: I think you will probably find it is close to a unanimous report.

The CHAIR: Thank you very much for taking the time to appear. I know you are busy people.

(The witnesses withdrew)

The Committee adjourned at 14:54 pm