

**REPORT OF PROCEEDINGS BEFORE**

**COMMITTEE ON THE INDEPENDENT COMMISSION**  
**AGAINST CORRUPTION**

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

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**At Sydney on Monday 24 November 2008**

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**The Committee met at 10.00 a.m.**

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**PRESENT**

Mr F. Terenzini (Chair)

**Legislative Council**

The Hon. G. J. Donnelly  
The Hon. T. J. Khan  
Reverend the Hon. F. J. Nile

**Legislative Assembly**

Ms D. Beamer  
Mr D. R. Harris  
Mr N. Khoshaba  
Mr J. R. O'Dea  
Mr G. E. Smith

**CHAIR:** I declare open the inquiry and officially open the proceedings with a short statement. This is the second hearing of the Committee as part of its inquiry into the effectiveness of current laws, practices and procedures into whistleblower employees who make allegations against government officials. On 26 June 2008 both Houses of Parliament referred this inquiry to the Committee. This is the second day of the Committee's inquiry to collect evidence from a wide variety of agencies and public authorities, to establish what procedures and practices are in place to deal with protected disclosures or with those who come forward with information, to establish how those cases are investigated and, in particular, to establish how whistleblowers are protected or what procedures are in place to offer them protection. I welcome Professor Richard Henry and Mr Aaron Magner from the University of New South Wales and thank them for appearing before the Committee today.

**RICHARD LEIGH HENRY**, Deputy Vice-Chancellor (Academic), University of New South Wales, PO Box 955, Randwick, and

**AARON MATTHEW MAGNER**, Assistant University Solicitor, Legal Office, University of New South Wales, affirmed and examined:

**CHAIR:** Professor Henry, in what capacity are you appearing before the Committee?

**Professor HENRY:** In generic terms I am a medical practitioner but my current role is as an academic. I am appearing here in my role as Deputy Vice-Chancellor (Academic) representing the University of New South Wales.

**CHAIR:** Mr Magner, in what capacity are you appearing before the Committee?

**Mr MAGNER:** I appear before the Committee today in my capacity as Assistant University Solicitor.

**CHAIR:** Before I ask you a few questions do you wish to make an opening statement?

**Professor HENRY:** Yes. I thought it might be useful for the Committee if I clarified the management structure of the University of New South Wales. For starters, I am aware that my nametag states I am Acting Vice-Chancellor and I introduced myself as Deputy Vice-Chancellor, Academic. The university has as its Chief Executive Officer Vice-Chancellor Professor Fred Hilmer. He has been away for a few weeks and he returned to duty today. When he is away I take on the role as acting vice-chancellor. The Vice-Chancellor reports to a university council that is headed by Chancellor Mr David Gonski. Effectively, that is the board of directors of the university. Professor Hilmer has an executive team comprising me as Deputy Vice-Chancellor (Academic) and Professor Les Field as Deputy Vice-Chancellor (Research).

There are roles that would be more familiar to people in a business context—a chief operating officer and a chief financial officer—who also occupy senior executive roles. The next layer of administration comprises the deans of the faculties in the university. Each of the deans reports directly to the Vice-Chancellor. We have a relatively large number of senior people who are involved in the governance of the university. With that background I thought I would take the presentation as read and I am happy to answer any questions.

**CHAIR:** Thank you, Professor Henry. You made a submission to this inquiry. Do you wish that submission to form part of your sworn evidence?

**Professor HENRY:** Yes, we are very comfortable with that.

**CHAIR:** I have had a look at your submission in which you state that you have received one protected disclosure since 2006?

**Professor HENRY:** Yes.

**CHAIR:** Could you tell the Committee how many you have received over the past three to five years?

**Professor HENRY:** There have been two protected disclosures in that three-year to five-year period.

**CHAIR:** We are not here to go into the nuts and bolts of particular incidents, but you might want to refer to those disclosures and to state, for example, what procedures and practices you have put in place. Please feel free to do so. How were those cases handled and investigated? Were they referred or were they investigated internally? When someone comes forward with a protected disclosure what procedures are involved? How do you deal with them? In particular, how do you provide protection to the person coming forward with that information?

**Professor HENRY:** Let me provide some information in a general context. The university has 40,000 students and 5,000 staff. As one might expect, it is not infrequent for conflict to occur. With or without protected disclosure the university has processes in place to handle grievances and complaints. The general principles for the management of those grievances and complaints ensure that people who bring forward complaints are protected. We attempt to protect their confidentiality. There is no discrimination against staff on

the basis of allegations being made against other members of staff or complaints about university management. An overall ethic or set of values in the university supports people's right to make complaints and the desire for the university to act with integrity.

Let me move to specifics. Sometimes people make complaints that other people thought they might make under protected disclosure. A lot of the issues involve whether or not people feel the need to make a protected disclosure. During my two-year period as Deputy Vice-Chancellor, Academic, one protected disclosure was made to me. Two members of staff made quite serious allegations against a third member of staff, which was well publicised in the media. It related to the handling of body parts as part of university business. In particular, the issues related to a component of the anatomy work that we do.

Orthopaedic surgeons, as part of their training, dissect and practise doing things like hip joint replacements or knee joint replacements. Accusations were made that there was not sufficient care and diligence in ensuring that the dissected specimens were put back together so that the bodies were discrete and there was certainty that all the body parts for one person were put together and buried with that individual. Clearly, those allegations were very serious and the two people who made them were anxious to protect their identities.

They made the protected disclosures through the union representative and initially talked to the Director, Human Resources. I did not meet them but my dealings with them were through the interactions that were occurring. The situation was difficult because of the nature of the small workplace. The people making the protected disclosures were immediately identifiable by nature of the fact that there were four people in the workplace and two of them were complaining about the other two people in the workplace. It made problematic fairly early on what was meant by protected disclosure.

Another issue that was made more complicated fairly early on was that the details of the allegations appeared in the media, both electronic and radio. The university found itself in the difficult situation where it was obliged, by law, to protect the identity of those whose identities had been plastered across the media. That presented a problem for us. In complying with the legislation it made the university look like it was not serious about the allegations and it was not willing to be open and honest. That was not the situation. The situation was that, notwithstanding the fact that the names of various people were well publicised, we were still precluded from acknowledging their names.

In terms of how things have played out, we believed that the allegations made by the individuals had some substance and in the process of putting allegations to the particular staff member that staff member resigned and so effectively our mechanism for taking matters further as an institution was lost to us. However, the matters were the subject of police inquiries and the university also needs to comply with an Act referred to as the Anatomy Act, and we reported the issues to the particular member of the area health service who was responsible for ensuring that the university complied with the Anatomy Act.

It seemed to us that the circumstances that led to the allegations being made and the events occurring reflected some problems with the infrastructure and the control mechanisms that we had in place and so we voluntarily shut down this component of our operation. We spent a considerable amount of money in physically restructuring the environment so that there was a lot more space, it was a lot easier to physically ensure that particular dissections occurred at a considerable distance from other dissections, and we put in an extra series of checks and balances to ensure that the likelihood of a similar event occurring in the future was minimised.

I believe that the overall outcome was positive. We saw the complainants as having made very important contributions which identified something we did not know was occurring and which needed to be addressed and dealt with.

**CHAIR:** So if that person were to have remained in your organisation, what protections would have been available and what was your procedure if that person would have remained in there? I know you have highlighted some practical problems about the small size of your operation, and obviously confidentiality was not able, in reality, to be maintained. What kind of procedures do you have in place to ensure that protection?

**Professor HENRY:** We have misconduct procedures within the university and what had happened was the individual had been accused of serious misconduct and if we had upheld those findings the likelihood would have been the person would have been dismissed. However, if I take a different scenario to help you with your outcome, let us imagine that the disciplinary proceedings that we took for this individual did not involve

dismissal and the people who made the allegations were still employees of the university. What can we do to protect them?

In a sense that scenario played out because, as I have indicated to you, we elected to close down the particular part of the university while we took the remediation procedures, which meant that the two complainants, in a sense, did not have the job of work that they had had before they made the complaint because the area which they had worked was no longer a functional area. We attempted to find alternative work for them. As it turned out, their skill sets were fairly narrow and related specifically to the jobs that they were doing; there was not an easy alternative for them to find work compatible with their skill sets. So we elected to provide the services of an employment search firm for them to look for alternate employment for them in another organisation, and they left us for other employment, not because there was a problem but because we were working with them to try to provide an outcome that did not punish them for their appropriate and important information to us.

**CHAIR:** What you are saying is that the net effect of all of that was you had to find them something else and you could not do that and they left?

**Professor HENRY:** Exactly.

**CHAIR:** On your comments on the proposition, some would say that that, in effect, is a punishment. I am not criticising you. Do you find this is a problem with this legislation—not so much the legislation but these situations?

**Professor HENRY:** I think it is a problem and I think the reality of recognition of corrupt conduct is that the solution to that is often to disassemble the micro-environment in which that corrupt conduct has occurred. The notion that you can just remove a senior person from that workplace and replace that person and everything then functions as it should have been functioning but with different personnel often cannot be achieved.

The other well-publicised case from the University of New South Wales involved allegations of research misconduct against a professor of medicine. Almost by nature that professor of medicine's research depended on the professor of medicine. So if that research stops then the research team, through no fault of their own, do not have the environment in which to do the work that they have been doing previously. So I think it is not uncommon in a university environment where very specific research is undertaken by individual academics that if that academic is found to have a case to answer and the punishment is that that academic is dismissed, then often the environment to do that work disappears by the nature of things. I do not have a solution to that. I just think it is an unfortunate consequence of the process that gets followed.

**Mr DAVID HARRIS:** Just two questions on confidentiality. You made the comment that you feel that if confidentiality was breached at any time other than by the university, then the university or the organisation should not be bound by the legislation. Once it is out in the media it is out in the media. I think you said in your submission that you are unable to answer, freedom of information, and all that sort of thing. How do you see that working? In terms of when you say by the fault of the university, if another staff member comes out and talks to the media, would that by definition be the fault of the university or would that be the individual?

**Professor HENRY:** Clearly the devil is in the detail. If we take the case relating to the professor of medicine, we have had television coverage where the complainants have appeared on television identifying themselves and putting their point of view and the university is still precluded from releasing any information which would identify those complainants who have, in fact, self-declared. I think that is one fairly clear extreme where I would have thought that if self-declaration occurs then the university should be free to put its side of the story.

I take your point very clearly that if members of the university, acting under the authority of the university, break the law, then the university has broken the law and I do not think the university should have protection under amended legislation to find a way of avoiding the protected disclosure and the confidentiality. But I think when the confidentiality really has objectively been lost then all that is created at the moment is the sense that the university is not serious about dealing with the matter and is not serious about public scrutiny and its duties as an institution.

**Mr DAVID HARRIS:** So you see in the legislation that it would have a section that described specifically if the individual involved goes out and talks to the media, so that it was really clear?

**Professor HENRY:** I think that is a clear-cut suggestion, yes.

**Mr DAVID HARRIS:** There was another question of confidentiality where you say there is no time limit. Have you got a suggestion for a possible period of time, such as a seven-year sunset or something like that?

**Professor HENRY:** I think there are two issues about time limit. The first is about confidentiality and the second is about the nature of making the protected disclosure. I think the legislation suggests that an individual will make a protected disclosure at a moment in time. Certainly, one of our protected disclosures was multiple people making multiple allegations at multiple points in time, and it was far from clear when the protected disclosures had finished being made. When the legislation talks about the university has to respond within six months, it begs the question of six months from when? Six months from the initial flagging or six months from the latest protected disclosure that is made?

That is a problem in practice in implementing things because what has occurred in our experience is very broad, potentially serious concerns are made but not in sufficient detail that you can deal with them, and it takes a period of time—in some cases months—for the specific allegations to be made, and the question is when is the meter ticking from? Is it ticking from the initial moment or is it ticking from the most recent allegation? I think in terms of confidentiality for people, confidentiality should be for a very long period of time and should at least last for the person's employment at the organisation. I am not proposing that when the matter is resolved we should then say confidentiality no longer needs to apply. In fact, it probably needs to apply just as much then so people know that they can continue with their lives without something hanging over their head that might blow at any moment.

**Mr DAVID HARRIS:** You also indicate that there is a conflict with other systems. For example, under the enterprise agreement process there is a set criteria for investigating misconduct, and that comes into conflict with the expectations of the Act, is that right?

**Professor HENRY:** I am not sure that it comes into conflict with the expectations of the Act, but I think it does come into conflict with the expectations of the individual. With one of the protected disclosures, the outcome that the individuals were looking for was that the relevant academic would be hung, drawn and quartered and his entrails hung from the university's flagpole, and managing those expectations really becomes impossible. People who make protected disclosures, in our experience, sometimes think that the law is different for the punishment related to an offence that is reported under protected disclosure as compared to the same offence that is not reported under protected disclosure. So I think it is about managing expectations that is the enormous practical operational difficulty in these situations.

**Mr DAVID HARRIS:** In the last part before you go to your attachments you have mentioned that you would like—whether it is ICAC—an authority that the university could refer to for advice. One of the things we have been finding out is that nobody actually owns this Act. Would you be more comfortable if there was a central place you could go to ask questions through the process?

**Professor HENRY:** Yes, we would. I think any institution, even our size, has infrequent events and the challenge is for there to be a corporate memory that is really experienced at managing such a process. I think having an external body that one could go to for advice would really add rigour to the process.

**Reverend the Hon. FRED NILE:** Professor Henry, in your procedure are any instructions given to the people not to go to the media? Are there any direct instructions in that manner?

**Professor HENRY:** Yes, there are. We tell people very clearly the nature of the process. In terms of the enterprise bargaining agreement, it is quite clear that people should not go to the media. Of course, the reality is that when the media publishes a story, we have no idea who it was who went to the media, and the media protects its sources. As well, individuals deny allegations that they went to the media.

Once the event has occurred, there is nothing you can do about it. But we certainly did tell people that this is a confidential matter. We tell them what confidentiality actually means. In effect we tell them that they

are not allowed to discuss the matter with any of their colleagues unless it is in the preparation of the materials that they need to present.

**Reverend the Hon. FRED NILE:** Professor Henry, you said you had no option but to close down the unit after the complaints had been made. I suppose the individuals assumed that that would not happen. If they had known by complaining that they would put themselves out of a job, that may have been a factor in their considerations. Following it up, do you not feel there was an obligation on the university to provide alternative employment? You said you tried, but you could not find a position that suited their skills.

**Professor HENRY:** Yes.

**Reverend the Hon. FRED NILE:** But in fact the reorganisation was only temporary and they could even have been put on hold for a month or so—I do not know how long it took to deal with the reorganisation—so that they were not suffering because they had made a complaint.

**Professor HENRY:** I believe this is a very important issue. The staff members themselves indicated to us that they did not think there was any solution, except for the workplace to close down, at the time they made the disclosure. They knew the implications for themselves personally. We immediately shared those views. As I indicated to you, we worked with them to look for employment within the university. We actually found them employment within the university, but it was not employment with which they were satisfied.

The next step was to find employment for them outside the university. We believe that the employment we found for them outside the university was employment with which they were satisfied. Certainly they indicated to us that they were happy with the outcome. Clearly they were not happy with the events. We felt we had an obligation. I think the points you are making are very valid ones. We came up with what we thought was the best outcome for the staff, given the circumstances that were available to us and indeed to them.

**Reverend the Hon. FRED NILE:** You reported that with 40,000 students and 5,000 staff, there were only two cases in the last five years. That does seem to be a very low number. I assume you have many complaints that are not regarded as protected disclosures. Do you know how many other complaints you have had? Is a record kept of those?

**Professor HENRY:** We certainly do keep records. I should of course clarify that students cannot make complaints under protected disclosures, and many of the complaints that are made are a complaint by students. Almost by definition—well, not almost—by definition students do not fit within the legislation. We have complaints made of a serious nature regarding corrupt conduct. Recently we had one that was to do with a cleaning contract at the university. The allegation was made that a member of the cleaning contract had let a contract to a person who happened to be her husband and who also was involved in the cleaning industry.

That complaint was not made through protected disclosure, but it did lead to reporting to the police and reporting to ICAC. It had the same net effect as if it had been a protected disclosure. I think in some circumstances we have found that whether it is a protected disclosure or not, pretty well exactly the same course of action is followed.

**The Hon. TREVOR KHAN:** I will just follow up on your last remarks. Do you think there is an artificiality in the concept of a protected disclosure as opposed to other disclosures which may themselves be of a very similar nature?

**Professor HENRY:** Personally, I think there is. At the university, disclosures that people make are all made with confidentiality and with protection. In some cases it is hard to see what the difference is between a protected disclosure and the disclosure made that fits outside the legislation. I am not from a legal background, so I think I am the wrong person to say whether there are any circumstances in which there is a clear distinction.

I believe that on a day-to-day basis sometimes there is artificiality in whether a disclosure is made as a protected disclosure or in another mechanism whereby it will be properly and rigorously assessed with confidentiality and with protection of the people or the individual making the allegation.

**The Hon. TREVOR KHAN:** Let us use the first example that involved body parts. If that complaint had been made by one of your students, that would not have been dealt with as a protected disclosure.

**Professor HENRY:** That is correct.

**The Hon. TREVOR KHAN:** Yet in a sense it could have involved a person making a complaint standing directly next to the person who in the end did make the complaint. That is right?

**Professor HENRY:** Yes.

**The Hon. TREVOR KHAN:** If the complaint became known, having been made by the student, that student would not have had the protection of the sanctions that possibly could be imposed on the university for breach. That would be right?

**Professor HENRY:** Yes, but the university would ensure that the student was protected by the mechanisms in place to protect students making complaints.

**The Hon. TREVOR KHAN:** I understand that, but in another organisation that perhaps did not act as ethically as you do, the student would not be afforded the same protections.

**Professor HENRY:** I guess that is a theoretical scenario, yes.

**The Hon. TREVOR KHAN:** In regards to the six months rule of the report back, do you think there is a possibility that what one faces with people, whistleblowers, who make what we will call protected disclosures, the six months time for reporting back in a sense is too long? Let me explain a bit further. Somebody has got to a point where they betray a confidence, which is a significant emotional step to take. They are told, "We will report back to you within the formalised period of six months." Having lit the fuse, you are just waiting for that person to go off, in a sense, are you not?

**Professor HENRY:** I think the six months means very different things in different situations. With the body parts scenario, I would have thought a month to six weeks would have been the total time for the wrap-up of the matter, and to wait for six months would have been really idle behaviour on the part of the university. With the professor of medicine case, the allegations were very complicated, and even when the university sought external and very experienced legal opinion and external and very experienced medical immunology opinion, it still took a very long time to try to unravel the details of things. I am not sure that it is easy to identify what is the proper length of time needed to be taken to do a proper investigation. I do not think universities should be hiding behind six months as a way of delaying an outcome, but I do not think that is what we have done.

**The Hon. TREVOR KHAN:** And I was not suggesting you have.

**Professor HENRY:** No. But I do think there may be a role for an interim report back to people to say, "Look, we think this matter is of substance, but it is going to take a while to work through things. We are not ignoring you, but there are complexities here." In practice, I think that is what a good organisation does with complainants anyway. It keeps them regularly briefed about the progress. I would have no problems if the legislation enforced a regular reporting back to complainants so that they have confidence that the matter was being managed on an active basis rather than being passively pushed aside.

**The Hon. TREVOR KHAN:** You have spoken in terms of disciplinary procedures. How would you deal with the circumstance in which a person makes a disclosure, the whistleblower, and in the course of your inquiries it becomes plain that the person who has made the disclosure is one of the participants in the conduct that is the cause of concern?

**Professor HENRY:** It is something that has already confronted us. We did not have a satisfactory resolution. In the professor of medicine case, one of the complainants was a laboratory manager—someone whose job it was to manage the laboratory. One of the adverse findings against the professor of medicine was that the laboratory was poorly managed. The external review indicated that if the terms of reference of their review were to look at other people who might have contributed to the poor management of the laboratory, they would have things to say; but the nature of their brief and the nature of the protected disclosure meant that they did not.

In fact, they said that in the report, which was a way of saying, "We think other people, other than the complainant, have something to answer for." At the moment the legislation implies that the whistleblowers are



totally innocent and are white knights who are doing good things. Certainly in the case of the anatomy body parts, that was absolutely the case and there was never a suggestion of anything else. In the case of the professor of medicine, it was more complicated than that and I think people would form different views about what the issues were. I think it is a problem.

**The Hon. GREG DONNELLY:** In regard to the policy that is attached to your submission, I wonder if you could explain to the committee the background of putting together this policy? Has this evolved over a period of time? If so, over what period of time was it essentially developed by sitting down and putting it together as a document?

**Professor HENRY:** I think there are two answers to that. The first answer is that things do develop over a period of time. There is a clear external constraint, which is the enterprise bargaining agreement. The university in fact has two enterprise bargaining agreements—one with academic staff and one with professional and technical staff—and they dictate the mechanism by which disciplinary proceedings are conducted. If there is an allegation made against someone around misconduct, let us say the professor of medicine, then it has to be put in terms of the enterprise bargaining agreement. We have limitations there.

I think it is true to say that there is a danger for organisations that, over a period of time, one policy and another policy and then another policy all get developed separately. We are actually working at the moment with the Ombudsman to try to coordinate things into a single policy rather than to have multiple policies. That is what we refer to in the documentation. I think you are right in saying that things have evolved over a period of time that are not necessarily best practice. There comes a moment when it is probably better to start all over again and get one unifying policy rather than to try to make amendments to the existing policies we have.

**The Hon. GREG DONNELLY:** In fact, is that what is happening at the moment?

**Professor HENRY:** Yes.

**The Hon. GREG DONNELLY:** Would you mind is taking us through that process, if it is appropriate? That is a point because it may well be in the early stages.

**Professor HENRY:** No, it is perfectly appropriate. We believe that what we are talking about is a spectrum of activities that really have in their essence people having conflict in the workplace and people making complaints about other people. So we are looking for the complaints procedure to cover all bases from the most basic of grievances to protected disclosures.

**The Hon. GREG DONNELLY:** Right.

**Professor HENRY:** We have come up with a substantial draft as a result of consultation within the university. We have taken that to the Ombudsman and had discussions with the Office of the Ombudsman. They have provided us with significant and very helpful feedback to try to improve things. We are in the next iteration at the moment. The proposal is that the definitive code of conduct, procedures and processes around that will be taken to the 23 February meeting of the university council for formal ratification by the university council.

**The Hon. GREG DONNELLY:** Obviously, other universities in New South Wales presumably have similar types of procedures. Is there a cross-fertilisation of work between the universities on this issue or is this very much something you have developed?

**Professor HENRY:** No. There very much is cross-fertilisation. The draft policy that is going round at the moment specifically acknowledges a number of other universities from whom we have stolen ideas shamelessly. In addition, the Ombudsman actually gets universities together. There was a training workshop two weeks ago where our university and a number of other universities were represented. There were discussions about both policy and procedure so that we could all try to learn from each other to identify what best practice is.

**Mr GREG SMITH:** I did not fully understand the work being done on the body parts. Was that ongoing work that you have at the University of New South Wales because of your medical school?

**Professor HENRY:** The particular work that we are doing is not of itself related to the medical school. It is a service that we provide to surgeons who, as part of their postgraduate training, are developing enhanced

skills. The particular example that I gave is that people learning how to use new hip joints or new knee joint replacement clearly want to practise that and get their surgical techniques correct before they practise doing it on living people. So, the university was working with the College of Surgeons to provide an environment in which surgeons could come in under the cover of the Anatomy Act and undertake these procedures.

**Mr GREG SMITH:** Has that been stopped entirely or has it been resumed?

**Professor HENRY:** It was stopped. We then spent more than \$1 million refurbishing facilities and it has now been resumed.

**Mr GREG SMITH:** Were those whistleblowers, if I can call them that, who had to leave because they could not find any other suitable work offered jobs in the new section?

**Professor HENRY:** My understanding is that they declined an opportunity to return. Clearly, I would have welcomed them coming back.

**Mr GREG SMITH:** Were they academically qualified?

**Professor HENRY:** No.

**Mr GREG SMITH:** What were they?

**Professor HENRY:** They were professional and technical staff. One of them was actually on sick leave as a result of previous events that had occurred and another person was a part-time employee.

**Mr GREG SMITH:** They could have been found a job in other sections helping with filing, clerical work and matters of that sort?

**Professor HENRY:** And we did find them work and, as I indicated, that work was not work they wanted to undertake on a long-term basis. We continued to pay them through the whole period when we were looking for work for them and until they took up work elsewhere.

**Mr GREG SMITH:** Do you see it a problem that if you cannot find employment for people like this others who also detect problems are not going to come forward and report them?

**Professor HENRY:** Yes, I think it is a problem.

**Mr GREG SMITH:** In relation to this matter I think you said there were two people complained about but one resigned. What happened to the other one?

**Professor HENRY:** In fact, both people left the workplace. There were other people in management positions where we moved them on from their management positions because we did not believe that the overall surveillance of the workplace had been what it might be.

**Mr GREG SMITH:** So there was a failure in the system—

**Professor HENRY:** Correct.

**Mr GREG SMITH:** —to detect?

**Professor HENRY:** Yes.

**Mr GREG SMITH:** And you have improved that as a result?

**Professor HENRY:** Yes. We believe that there was bad behaviour but also there was inadequate monitoring to detect that poor behaviour. So we had to deal with the bad behaviour, but also we had to deal with how had the bad behaviour been allowed to occur in an environment where we believed it should have been detected much earlier.

**Mr GREG SMITH:** I think you said the police became involved in this matter. How long after the original complaints did the police become involved?

**Professor HENRY:** I cannot remember the exact details, but it was a matter of days rather than longer.

**Mr GREG SMITH:** Did you cease any investigation at the university level after the police became involved?

**Professor HENRY:** The answer is yes. It is clearly very important in any police investigations that the university does not try to collect evidence when the police need to collect evidence. This actually occurs very frequently in our environment. The situation in which it occurs the most often I would say is that if there are allegations of sexual assault either by student against student or student against staff or staff against staff or whatever the permutations, it is clearly vital that the university does not do its own investigation. We worked closely with the police and I believe we did not tread on each other's toes.

**Mr GREG SMITH:** I think you said that one of the persons who was the subject of allegations resigned as soon as you started questioning him. Was that questioning done before the police became involved?

**Professor HENRY:** We needed to put allegations to the individual. So, we put the allegations to the individual as distinct from questioning him. Before he responded to the allegations he left the workplace.

**Mr GREG SMITH:** Were those allegations put before the police became involved?

**Professor HENRY:** They were contemporaneous in that we needed to frame those allegations and then we made the police aware. There was only one allegation that was relevant for the police, but it was a very important allegation.

**Mr GREG SMITH:** Did the police ask you or say to you that it would have been better—

**CHAIR:** Mr Smith, you need to convince me of the relevance of these questions to this inquiry?

**Mr GREG SMITH:** It goes to the effectiveness of what happens with whistleblower complaints.

**CHAIR:** No. We are here to ascertain what this organisation is doing about internal reporting and protecting whistleblowers who come forward.

**Mr GREG SMITH:** That is right.

**CHAIR:** You are talking about another agency altogether and its involvement. This is now going into a particular matter and it is looking at what another agency has done, that is, the police investigating this matter. I do not see the relevance.

**Mr GREG SMITH:** Could I be heard on this?

**CHAIR:** Yes.

**Mr GREG SMITH:** If a whistleblower becomes a police witness, the whole relationship of the Whistleblowers Protection Amendment Act could be put under some sort of stretching and testing because police witnesses then have to disclose conversations and matters of that sort. I am just testing to see how the whistleblower complaints were dealt with by this university. I am not criticising it; I am trying to show for the edification of the Committee so that it gives a wise report the whole ramifications of what happens with whistleblowers and how, if they become witnesses, there are other matters that have to be taken into account that might require amendment to the whistleblower legislation and more protection for the witness.

**CHAIR:** I think the professor has answered that. He has told the Committee how he handled it when the police got involved. That has been answered.

**Professor HENRY:** I am happy to take you to the next step, which does not address the issue but does address resolution in this case. The two whistleblowers declined to talk to the police. So, they did not ever get into the situation of becoming witnesses. The matter ended there from the police perspective.

**Mr GREG SMITH:** Do you say that the Independent Commission Against Corruption or some other agency would be a useful assistant to you to provide advice when you find problems with the whistleblowers Act?

**Professor HENRY:** Not so much problems with the Act but alerting an external body to the existence of a protected disclosure and working through to make sure that we are covering all the bases that we should be covering.

**Mr GREG SMITH:** But your problem with the six months where you have multiple complaints could be solved by this other agency as a sort of guiding agency allowing you an extension of time or matters of that sort before you have to report, is that right?

**Professor HENRY:** Yes. I guess there are two issues there. One issue is getting advice and the other issue is that there is an external body with surveillance over whether you are acting properly. I think we would appreciate the opportunity to get advice rather than just the opportunity for somebody to be checking whether we are doing the right thing.

**Mr GREG SMITH:** You said that you get many complainants who do not come in under the whistleblowers legislation. Have you ever been required to produce details in court of the identities of those people in response to action taken by the persons complained about?

**Professor HENRY:** I am not sure of the answer to that. It is very frequent that the nature of the complaint identifies the individual. If someone says, "I allege sexual harassment" at such and such a time in such and such a place, almost by nature it is impossible to protect confidentiality from the person against whom the complaint is being made. Nevertheless, it is possible to protect that student from widespread knowledge of the events and the allegation. So, I think confidentiality applies at a number of different levels. We try to ensure that the minimum number of people know about any event in order for it to be managed. But I think the notion that people can make complaints and it will always be unknown as to who they are rarely pans out in practice.

**Mr GREG SMITH:** Would you raise public interest immunity if you were required to produce documents to court when it might disclose the identity of an informant?

**Professor HENRY:** If we thought that it was important for the protection of the informer, yes.

**Mr JONATHAN O'DEA:** You spoke of the difficulty sometimes of ascertaining whether a particular allegation or disclosure is actually a protected disclosure or should be treated as such. Perhaps going back to the recent example with the cleaning contract, why did you decide that that should not be treated as a protected disclosure?

**Professor HENRY:** That disclosure was handled before it came to me. I think what was clarified was that the nature of the complaint did not actually ever require the individual to be identified. The complaint was specific enough that the informer was very unlikely ever to be revealed because the allegation then led to a specific question. The question as to whether the wife and husband were husband and wife became very apparent very quickly. So, in a sense the matter was over and done and dealt with almost before it started.

**Mr JONATHAN O'DEA:** Your assessment was that there was no risk to the informer?

**Professor HENRY:** That is right.

**Mr NINOS KHOSHABA:** How confident are you that all staff know of their right to make a confidential complaint? How confident are you that the staff know how and to whom to make a complaint?

**Professor HENRY:** I think it is impossible in an organisation of 5,000 staff to be confident that every member of staff has read the material we have provided and knows the action to undertake. But I think all you can do in this situation is provide as many opportunities as possible to inform people about their rights and about the system in place. But I am absolutely certain you will be able to come into the University of New South Wales and find a staff member who does not know his or her rights.

**Mr NINOS KHOSHABA:** Is there a committee set up with regards to these protected disclosures?

**Professor HENRY:** As we indicated in the submission, each of the deans and each of the members of the executive team are authorities that people can make protected disclosures to, but I am the ultimate protected disclosures coordinator.

**Mr NINOS KHOSHABA:** If one of the staff made a complaint against one of the deans or, say, yourself, who would look after that?

**Professor HENRY:** That goes to the vice-chancellor.

**CHAIR:** I do not think there is much about protected disclosures in the annual reports. Would it pose much of a problem to the university if it included in annual reports facts and figures, data comparisons, on protected disclosures?

**Professor HENRY:** I would not have a problem with reporting numbers. I think as soon as you get into any details of the circumstances it causes an issue. In practice, all our protected disclosures are discussed at the audit subcommittee of council and the protected disclosures all find their way to the Auditor General. So in a way there is already a system in place because the Auditor General could choose to table in Parliament issues around a protected disclosure from the University of New South Wales or, indeed, any other university.

**(The witnesses withdrew)**

**ROSS KEITH WOODWARD**, Deputy Director General, Department of Local Government, 5 O'Keefe Avenue, Nowra, sworn and examined:

**CHAIR:** In what capacity are you appearing before the Committee today?

**Mr WOODWARD:** As the Deputy Director General of the Department of Local Government.

**CHAIR:** We have received a submission from the department. Would you like that to form part of your evidence today?

**Mr WOODWARD:** Yes I would.

**CHAIR:** Would you like to make an opening statement?

**Mr WOODWARD:** No, I think the submission stands for itself, but I would like perhaps to table something that is referred to in the submission, being an extract from our website about a check list for promoting better practice reviews of councils, which identifies how we go about reviewing council policies for dealing with protected disclosures.

**CHAIR:** That can form part of your evidence.

**Mr WOODWARD:** As part of our submission, yes.

**CHAIR:** I have noticed in your submission that you have all these local councils around New South Wales, and each one of them is supposed to put forward their own policies and guidelines on protected disclosures based on a model code of conduct. To what extent is there uniformity amongst all these councils about a protected disclosures policy that you can see? What is the desirability of having one?

**Mr WOODWARD:** Firstly, it is very desirable to have a consistent policy. We suggest to councils—in fact, more than suggest; we strongly recommend it—that they use the Ombudsman's guidelines for policies. We then check those as part of our promoting better practice reviews of councils. If we find a council does not have a policy or a policy that is sort of different to the Ombudsman's guidelines we draw that to their attention. But I have to say that is quite a rare occurrence. Most councils have the policies in place, and if not they are very quick to put them in place once we draw it to their attention. One of the benefits of having these reviews of councils is that we put all those reports on our website so councils learn from each other. In that sense, the sector is very good at learning the pitfalls of others so they can audit themselves. They see those recommendations and they immediately put them in place, so as time goes by we find less and less non-compliance.

**CHAIR:** You have done 74 reviews. How many more do you have to do? Is that 74 across all LGAs?

**Mr WOODWARD:** Yes, there are 152 councils in New South Wales. So progressively we will move through the whole lot. We do about 20 a year on average.

**CHAIR:** So that is 74 LGAs you have looked at.

**Mr WOODWARD:** Yes.

**CHAIR:** You have said in your submission that most of them comply.

**Mr WOODWARD:** Yes.

**CHAIR:** What is the general report card about how things are progressing?

**Mr WOODWARD:** Generally speaking, it is rare that you find one that does not have a policy, and it is usually a small rural council and it is an oversight. Though I have to say that we did find Wollongong council did not have one. So we immediately drew that to their attention and that was sorted. They respond very quickly. So it is a very small percentage. I could not give an exact figure but out of that 74 we are looking at less than five that would not have had a policy when we came looking.

**CHAIR:** To what extent do you monitor how these protected disclosures are handled? Do you have any figures on how many come forward? What is the general data that you can give? One of the big problems we have in this whole system is that we have hardly any data or information as to how this Act is operating, other than what the Ombudsman and ICAC have told us. Can you give us a snapshot picture of how things are going out there, how many reports you are getting in?

**Mr WOODWARD:** Unfortunately, no because, basically, councils are autonomous in this area. Our role is to make sure that they have the policies in place but how they are implementing that on a daily basis, we cannot say. Also, we do not know how many they would get.

**CHAIR:** Do local councils report it to anybody?

**Mr WOODWARD:** No.

**CHAIR:** Would you think that is desirable?

**Mr WOODWARD:** I think it would be desirable, yes. In fact, we think there is a bit of a gap in terms of the process. Since the Act was put in place we have implemented the code of conduct which also raises the bar in terms of behaviour in councils. One of the areas we have put in our submission where we think there is a bit of a gap that the councils are responsible for looking at all complaints against itself, including protected disclosures, but if, say, a staff member made a protected disclosure and was unhappy with the outcome of that review, they have the option of coming to us to complain about the process but they are not protected, unless it is about substantial waste. If it is about maladministration, for instance, they are not protected. I have to say we do not get those sorts of complaints because it is a fairly open sector. People make complaints to us all the time and we deal with them as if they virtually were protected disclosures in any case because we do not divulge the source of the complaint in the first place. So we deal with those all the time in any case but we do not have any specific statistics along the lines you are asking, no, we do not.

**CHAIR:** You have asked to be able to investigate maladministration. Would that help in that situation? Is that one of the reasons you have asked for it, so you can delve into that?

**Mr WOODWARD:** It would, but sometimes with maladministration it might be a deeper issue in the council. It would then give us the ability to go into a council, for instance, and use some other powers to make some reviews about their systems. At the moment the better practice review is a high-level governance review—have you got a policy in place for this? Have you got a policy in place for that? We then track, sometimes at a more deeper level, into some of those areas. For example, if in a council we suspect there might be an issue around some particular function we will go into it a bit more deeply, but we do not go into every function in the council unless we suspect there is something wrong. So in terms of maladministration we welcome complaints from the public and from anywhere because that is our source of information about whether a council is functioning well. It gives us a treasure chest for information that we can use. So if councils and council staff felt freer to put forward complaints around maladministration in a more formal and protected way, who knows, we might get more information. We may not. I could not answer that but we certainly would have that avenue available.

**CHAIR:** If you got one today what would you do with it? Would you pass it on?

**Mr WOODWARD:** About maladministration?

**CHAIR:** Yes.

**Mr WOODWARD:** We also have a very close working relationship with the Ombudsman's Office and ICAC to make sure we do not duplicate. Firstly, if it is about maladministration, clearly we would talk to the Ombudsman's Office about whether or not they also have the same complaint and are already investigating it. If not, we would come to an agreement between ourselves who should look at it, who is the most appropriate body to look at it.

**Mr DAVID HARRIS:** Because councils generally, in the context of a government department, are not large organisations, if an employee had a complaint against either the mayor or the general manager, and a line manager was the person who they do the protected disclosure to, would they have difficulty in investigating that at that level?

**Mr WOODWARD:** They should not any more because the way the process works now is that the councils must have a code of conduct committee, which is made up of three independent people to the council. That is a recent change. Prior to mid year it was the mayor and the general manager who were on that committee, and that was definitely a problem. That was a disincentive particularly for anybody raising a complaint about the general manager or the mayor. So we have overcome that. There are now three independent people who would make that call. That should give more protection to people making those sorts of complaints.

**Mr DAVID HARRIS:** From your experience or through investigations, do people generally use the council mechanisms that are in place or do they go straight to ICAC?

**Mr WOODWARD:** It is hard to know. From my experience, most people will do both. We often find that people will write to the council. Are you talking about council employees in particular?

**Mr DAVID HARRIS:** Council employees, yes.

**Mr WOODWARD:** Generally speaking, council employees would try the council process first. We would certainly encourage them to try the council process first unless it is corruption. If it is clearly a case of corruption they should definitely go straight to ICAC. If they come to us, which they often do as well, we then refer it straight to ICAC as well. But if it is anything else we encourage them to go through the normal council process.

**Reverend the Hon. FRED NILE:** You said that Wollongong council had no policy dealing with protected disclosures. When did you become aware of that?

**Mr WOODWARD:** When we were doing our promoting better practice review of the council, which was 2006.

**Reverend the Hon. FRED NILE:** So with the reviews you said you were conducting of all the councils, you have done 74 reviews. Was it during that review that you noticed Wollongong did not have it?

**Mr WOODWARD:** When we did the review of Wollongong, yes.

**Reverend the Hon. FRED NILE:** Had there been any prior reviews to 2006?

**Mr WOODWARD:** Not of Wollongong. This program has only been in place since 2004 so we have really only reviewed each council once. What the process is, though, once we have done that review we make a series of recommendations to the council and the council then must make that report public at the next council meeting, and we put it on our website and they have an action plan of how they will implement each of those recommendations. Most councils try to implement them as quickly as they possibly can. It is a public process. It is not something that is only between us and the council.

**Reverend the Hon. FRED NILE:** So your reviews only commenced in 2004?

**Mr WOODWARD:** Yes.

**Reverend the Hon. FRED NILE:** So there was no reaction by the department when the protected disclosures legislation was put in place to see whether people were going to implement it?

**Mr WOODWARD:** Yes, there was. Back in the 1990s there was a lot of activity by the department to drive forward the policy to ensure that all councils had policies and then we referred to the Ombudsman's guidelines as well. Since then, other than through our promoting better practice reviews, we have left that to the Ombudsman's Office in terms of trying to encourage councils about how to go about that process. So it is really only when we started these reviews in 2004 that we have been able to start to have a look to see whether they are complying or not.

**Reverend the Hon. FRED NILE:** To a degree you are leaving the Ombudsman to be the hands-on person in regard to councils.

**Mr WOODWARD:** Prior to that, yes.



**Reverend the Hon. FRED NILE:** We know there has been a lot of controversy about Wollongong City Council and the investigation by the Independent Commission Against Corruption. Are you aware of any protected disclosures during that time from any staff at Wollongong council? Did anyone try to use the Act?

**Mr WOODWARD:** Not to my knowledge; not directly to us. However, I am aware from comments that the Independent Commission Against Corruption commissioner has made that a protected disclosure emerged eventually in Wollongong.

**Reverend the Hon. FRED NILE:** So there were some.

**Mr WOODWARD:** That is my understanding from public statements made by the commissioner of the Independent Commission Against Corruption.

**Reverend the Hon. FRED NILE:** But you are not aware of that in your department?

**Mr WOODWARD:** No.

**Reverend the Hon. FRED NILE:** You never thought it was a priority for the department to follow up or to investigate what was happening?

**Mr WOODWARD:** We identified a gap in council policy and told the council to put a policy in place. That was our role, not to go into the individual matters. It was certainly our job to ensure it had a policy, which then happened.

**Reverend the Hon. FRED NILE:** You now include in the new policy document you have provided to the Committee entitled "Promoting Better Practice Review" protected disclosures and internal reporting. In future you will be able to monitor what councils are doing.

**Mr WOODWARD:** Yes, definitely.

**The Hon. TREVOR KHAN:** Do I take it from what you said that something in the order of four years into the process you have done about half the councils?

**Mr WOODWARD:** Yes.

**The Hon. TREVOR KHAN:** So it will take another four years to complete an initial run through all the councils?

**Mr WOODWARD:** Yes, that is right.

**The Hon. TREVOR KHAN:** Do you think that, in light of the Wollongong scenario, waiting another four years might be a little too long?

**Mr WOODWARD:** It is about matching our capacity to do the reviews. It is basically a resourcing issue. However, we give the checklist to all councils and some do their own internal reviews and report back to us. If we suspect that a council might not be up to par around a series of policies, we will accelerate our examination. At the moment we do not have a hit list of councils. It is about looking at all councils eventually—big councils, small councils, strong councils and weaker councils.

The whole sector is learning as a result. This is not about punishing councils. That is why the reviews are couched in terms of, "This is what you are doing well and this is what you need to improve on." As we go along we find that more and more councils are ahead of the game because they have seen what we have said about others and they are already addressing those issues. The speed of the process is probably a secondary issue because the sector is responding to what is already out there. The level of compliance and governance is increasing as we go along. Councils are also doing it for each other. They are using our checklist and they offer to help each other. A collaborative approach has emerged across the sector. They all want to get across the line; they all want to do a good job. We have not found any councils deliberately trying not to comply. It is a matter of how they should go about it.

**The Hon. TREVOR KHAN:** Did the audit of Wollongong City Council come about in the normal course of events, or was it an accelerated audit?

**Mr WOODWARD:** It happened in the normal course of events.

**The Hon. TREVOR KHAN:** If it was in the normal course of events, it could have taken until 2012 for you to get around to looking at it.

**Mr WOODWARD:** Possibly.

**The Hon. TREVOR KHAN:** Does that give you any cause for concern?

**Mr WOODWARD:** Even though I said "possibly", it is most unlikely because we rely on a number of sources of information to structure our program. Looking at major regional councils has been a priority. It is most unlikely that that would have been the case because we have done most of the major regional councils already. The Newcastle, Wollongong and Wagga Wagga-type councils were done fairly early.

**The Hon. TREVOR KHAN:** When in 2006 was Wollongong City Council audited?

**Mr WOODWARD:** From memory, it would have been in the first half of the year. These reviews take about six months. It is a fairly lengthy process. I have provided an extract of the checklist we send out. The council fills that in and we review it. We then send two reviewers on site, usually for about a week, to interview staff and councillors and to go through processes and files. They do a very detailed analysis to verify that we have been told the correct things for a start. It takes a fair while. After they come back they write up the report and we provide that to the council as a confidential draft to ensure that it is correct—we do not want to issue a report that is technically incorrect. The council then has 40 days to respond. We then provide the final version and that becomes public. The whole thing takes about six months from go to whoa.

**The Hon. TREVOR KHAN:** Do I take it that prior to undertaking that review there was nothing that came to your department's attention that caused you to want to accelerate the review or audit of Wollongong City Council?

**Mr WOODWARD:** That is correct.

**The Hon. TREVOR KHAN:** No reports of any sort?

**Mr WOODWARD:** No.

**The Hon. TREVOR KHAN:** As a result of the audit, was there anything that your department noted that set off alarm bells about Wollongong City Council?

**Mr WOODWARD:** We had some concerns. At about that time the planning manager had resigned and the general manager was acting as the planning manager. We raised that as a specific concern. There is a series of recommendations. There were a few key alarm bells and we raised all of them with the council.

**The Hon. TREVOR KHAN:** On page 8 of the report you look at possible areas of reform. Mr Harris also raised this issue. In light of the fact that councils are reasonably close organisations, is my discomfort misplaced about a general manager or anyone receiving a protected disclosure and then apparently having to deal with it if it is made by a relatively junior staff member?

**Mr WOODWARD:** I think it is. General managers have serious responsibilities under the legislation. Unless it is proven that a general manager is not operating under that legislation, and there is no evidence of that, we would certainly step in. We have no evidence that general managers are not fulfilling their responsibilities correctly.

**The Hon. TREVOR KHAN:** Without getting into specifics, obviously the situation at Wollongong City Council indicated that there was serious dysfunction in at least one council in regard to how the general manager interacted with other staff members. I am not suggesting anything of a sexual nature; it relates to the power plays that went on with other staff members of council. Is that not correct?

**Mr WOODWARD:** Yes.

**The Hon. TREVOR KHAN:** That is at least one tangible example that we can point to whereby if a staff member had made a protected disclosure to that general manager he or she might have grounds to say, "Gee, that could be a bit of a worry"?

**Mr WOODWARD:** That is why we are suggesting in the submission that the legislation might be broadened to assist staff members who feel uncomfortable or who have had their complaint dismissed, perhaps unfairly. Although I point out that reasons must be given for a complaint being dismissed. However, if the staff member feels that the complaint has not been dealt with properly, they have another avenue that is protected. That is why we are suggesting that. Wollongong is the only case that we are aware of in which that situation occurred.

**The Hon. TREVOR KHAN:** I will leave that comment alone. Should your department have some supervisory function with regard to protected disclosures to ensure that there is a follow-up process or that it is properly investigated?

**Mr WOODWARD:** The only way we could do that would be to become involved in each of the investigations. Our role is to ensure that they have the appropriate policies in place and that staff in that situation feel they can come to us. As I said, they may not feel that they can do that at the moment as a protected disclosure because they are not protected.

**The Hon. TREVOR KHAN:** If complaints are made about lawyers—perish the thought—they go to the Legal Services Commissioner as the first port of call and the commissioner decides, almost invariably, to refer them back to the Law Society or the Bar Association for initial assessment and decision. There is then an appeal back to the Legal Services Commissioner if the complainant is unhappy with the result handed down by the society or the association. Could that model be used?

**Mr WOODWARD:** It could certainly be looked at. It is matter of to what degree does a state government agency like ours want to become involved in every case. As I said in response to the question about statistics, we do not even know how many there are. From a staffing point of view it would be useful for us to know how many councils are getting.

**The Hon. TREVOR KHAN:** I suppose that would be useful.

**Mr WOODWARD:** That is the first point. But a model like that could be examined.

**The Hon. GREG DONNELLY:** My only questions relate to possible reform. This is dealt with on page 8 of your submission. Would you like to elaborate on your comments about possible reform, giving particular attention to things you think deserve specific consideration?

**Mr WOODWARD:** We have covered the circumstances where protected disclosures could be made to us. We have quite strong powers under the Local Government Act to do a range of investigations. One classic case is in section 430 of the Act, which provides that we can investigate virtually anything at a council. If protected disclosures were made to us about maladministration, it is a core part of our business to ensure that councils are not poor administrators. This could be another avenue for us to examine—that is, in regard to councils as a whole as well as the individual cases that might arise through the disclosure. We have the ability to look at a council as well as the individual cases that might come to us.

Sometimes things are connected and it might be something about a culture. Local government should be a very transparent and open decision-making process. Staff should not feel that they cannot raise issues both internally and externally. We encourage that over and again. We would welcome any opportunity to ensure that councils operate in that transparent environment. To have council staff and others feel they could come to us and be protected would give us another way to check that the system is working the way it is designed to work. We believe it is working that way, but that would certainly give us another avenue of investigation.

**The Hon. GREG DONNELLY:** The second dot point refers to section 462 of the Act. Would you like to make any comments about the two additional dot points?

**Mr WOODWARD:** Since this legislation was enacted the code of conduct has established stronger provisions around misbehaviour. For instance, the director general has the ability to suspend a councillor for a month for misbehaviour. Certain provisions and processes must be adhered to first. Referrals can also be made to the Pecuniary Interest and Disciplinary Tribunal, which can suspend for longer periods. Those provisions were not in place when the protected disclosures legislation was enacted. We have the ability to look at a wider range of things. At the moment the way we get advice on things like pecuniary interest is limited. Of course, that must automatically be declared to us. However, the issue relates more to behaviour. Some questions have already been asked about the point at which someone comes to the view that the council has not dealt with a complaint appropriately and therefore feels free to come directly to the department. We believe there is a few ways in which maladministration could be added to our list of things to examine.

**The Hon. GREG DONNELLY:** On page 9 of your submission you refer to a staff of 65 and say that yours is a relatively small agency. At any point in time are some of those staff members devoted to rolling out these reviews? Is there a group that is dedicated specifically to undertaking that task?

**Mr WOODWARD:** Yes.

**The Hon. GREG DONNELLY:** Or is it shared across the department?

**Mr WOODWARD:** The Investigations and Review Branch is responsible for doing the reviews of the councils, looking at complaints that come to us about councils and examining things like pecuniary interest complaints. It does reviews and manages the complaints process against councils.

**The Hon. GREG DONNELLY:** Approximately how many people are in that group?

**Mr WOODWARD:** About nine or ten.

**The Hon. TREVOR KHAN:** You retain people from outside the organisation to assist in those reviews, do you not?

**Mr WOODWARD:** We have at various times. Predominantly we have engaged the Internal Audit Bureau from time to time to help. We are looking at a process where we might expand it to allow councils to put forward on a rotational basis perhaps a governance officer who might want to work with us as well. We have not pushed that too hard at this point, but that is certainly one option we are looking at so that we can accelerate the number of reviews we do, but also so that it is the sector actually reviewing itself and helping itself to improve governance. We are looking at that option. The councils seem to be so far receptive to that idea, but we have not put it into concrete at this stage.

**Mr GREG SMITH:** I am aware of at least five ICAC inquiries that have found corruption in the planning process, that is, Wollongong, Rockdale, Strathfield, Tweed and Waverley—and there may be others. Is that not the main area of corruption in councils that has come out in recent years?

**Mr WOODWARD:** Yes.

**Mr GREG SMITH:** When you conduct your reviews do you examine whether councils are complying with the codes that they have set up as to the size of buildings, floor space ratio and matters of that sort?

**Mr WOODWARD:** Not in a lot of detail, unless we suspect that there is a particular planning issue in the council. We are not experts on planning, so in that circumstance—and we have done this on a few occasions—we engage with the Department of Planning and they provide a person who works with us and is part of the review team to come in and look at those processes. We are trying to do that more and more.

**Mr GREG SMITH:** Are you aware whether they conduct that type of inquiry on their own?

**Mr WOODWARD:** I am not sure.

**Ms DIANE BEAMER:** You have 64 staff members?

**Mr WOODWARD:** About 65.

**Ms DIANE BEAMER:** I take it you have not received a protected disclosure in your own organisation, or have you?

**Mr WOODWARD:** No.

**Ms DIANE BEAMER:** So you would use your own guidelines to go through all of that?

**Mr WOODWARD:** Yes.

**Ms DIANE BEAMER:** In terms of maladministration and saying it is another level at which you think you could revert back to council, and you see this as one way that really opens up the role of local government to look at protected disclosures, having been a councillor and a mayor I know that councils are very gossipy with each other, so they do know what is going on, and if you do not have the right to go to the local government department to make a protected disclosure about the mayor or the general manager in terms of maladministration it would seem to me it is going to get around the traps of local government. Is that one of the reasons you see it as really important that you look at maladministration in terms of protected disclosures?

**Mr WOODWARD:** Yes.

**Ms DIANE BEAMER:** Its real nature?

**Mr WOODWARD:** Yes, absolutely.

**Ms DIANE BEAMER:** I do understand the types of reviews being done and what they are supposed to reveal, and that it is about systems as opposed to individuals. Given that you now have things on protected disclosure and internal reporting coming back to you, can you now collate them?

**Mr WOODWARD:** Who has them and who hasn't?

**Ms DIANE BEAMER:** Yes, throughout the councils?

**Mr WOODWARD:** Yes, for the ones we have done, yes.

**Ms DIANE BEAMER:** Have you done that?

**Mr WOODWARD:** I think we would have. It is certainly easy to do.

**Ms DIANE BEAMER:** So there is a document that would show the number of protected disclosures in councils of the 74 that you have reviewed?

**Mr WOODWARD:** There would not necessarily be a document; it would be internal. We do that for a whole range of things to give us trends and so forth.

**Ms DIANE BEAMER:** Would it be interesting for the Committee to look at how many there are in the local government sector?

**CHAIR:** You could put it on notice, Ms Beamer.

**Mr WOODWARD:** Yes, certainly. We use this process to drive our work program as well. When we see deficiencies or a trend of deficiencies then we move forward on that and develop more policies. This is an area that so far we have not found to be of major concern.

**Ms DIANE BEAMER:** Do you feel that employees at local government level are comfortable in making protected disclosures or find it too cumbersome?

**The Hon. TREVOR KHAN:** How can Mr Woodward answer that?

**Ms DIANE BEAMER:** That is true—he can't.

**The Hon. TREVOR KHAN:** It is hearsay fourth removed.

**Ms DIANE BEAMER:** We have heard someone from the University of New South Wales say that many do not feel the need to make protected disclosures; they make them in other ways. That is a quote from him that I wrote and I guess it goes to how he interpreted what he could say about those who worked there. The point I am trying to make is that there are other ways for them to complain to you other than by protected disclosures. Is there a reticence perhaps because they are not protected or do you think there is a reticence to make any complaint to the department?

**Mr WOODWARD:** We have not detected any reticence. We have a good working relationship with councils and they see us as a place to check things. There is very good networking, as you know, in local government—people do talk to each other—and so we encourage council staff and the community, if they have any concerns about local government, to make that complaint to us. We do not have any suspicion that staff in councils feel that they cannot make complaints. I think it is all about culture and that is part of what we do when we do our reviews. We look at the culture: Is this a culture of everything being so controlled and staff feeling frightened to speak up? Our reviewers go and speak to staff and we are very quick to pick up whether or not there is control, and staff are pretty forthright if there is an issue around that.

**The Hon. TREVOR KHAN:** Did you detect that in Wollongong in 2006?

**Mr WOODWARD:** A little bit, yes.

**The Hon. TREVOR KHAN:** What did you do?

**Mr WOODWARD:** That is why some of the recommendations in that report were more heavy-handed. It did not get into the detail clearly, but it certainly picked up that there was an issue around culture.

**Ms DIANE BEAMER:** I take on board what you were saying about looking at the culture of a place.

**Mr WOODWARD:** Yes, so getting back to that, our view of local government generally is that it is a very open culture. Councils talk to each other and they talk to us. We are out and about a lot. That is another benefit of us doing these reviews, because we are out all the time. It is not only that the investigation and review branch that I mentioned before is out and about, we have other branches, such as our finance branch, so we have staff out and about with councils all the time and they pick up on what is happening out there pretty quickly.

**Mr JONATHAN O'DEA:** You obviously play an important role in terms of giving advice and providing information to local councils as well as an oversight role. In the course of providing that, I suppose, central repository of resource, where do you go when you find there is a bit of a blurry question? Who do you see as the owner of the Act or the authority that can answer your questions?

**Mr WOODWARD:** You mean the Protected Disclosures Act?

**Mr JONATHAN O'DEA:** Yes.

**Mr WOODWARD:** Probably we would go to the Ombudsman if we had any queries—either ICAC or the Ombudsman.

**Mr JONATHAN O'DEA:** Which of those two bodies do you see as the authority?

**Mr WOODWARD:** The Ombudsman.

**Mr JONATHAN O'DEA:** And how satisfactory are his responses to your queries as they arise from time to time?

**Mr WOODWARD:** Excellent. We have a very close relationship with the Ombudsman and ICAC on operational as well as policy direction because we do not want to be saying things that are inconsistent or duplicating resources, as I mentioned earlier, so we meet with both parties on a regular basis and we tick-tack with some of our staff on a daily basis to make sure that things are going well, and they make referrals to us, we make referrals to them, so it is a pretty close relationship to make sure that we are all on track.

**Mr NINOS KHOSHABA:** You have completed 74 reviews and you mentioned that you send two staff to councils for week periods. In those reviews what did you find were common concerns raised by staff? You said there were trends of deficiencies.

**Mr WOODWARD:** Probably the biggest deficiency at the moment that we are starting to address with councils is risk management, which is a bit different issue to what you are looking at, but what we are saying to councils is that in the past you looked at risk management more in terms of your insurance and money, but it is actually bigger than that. We are starting to work with councils about looking at risk and cultural risk is one of those risks, so it does sort of link to this because that is what we are seeing. Many councils do not see that risk management is a whole of organisation issue that all staff should be involved in and they need to have risk management strategies in place to deal with a whole range of things, not just money.

That is probably the biggest trend we have currently. Other things we have picked up along the way. We picked up, for instance, that many councils did not have internal audit committees the way we thought they should have, so we have issued guidelines on that, making very strong recommendations about how to go about that. Since we have been doing this, since 2004, there have been a number of areas that we have honed in on. Another one is councils working together, resource sharing and how to go about that. We have assisted with some of that. But the big picture issue at the moment is around risk management.

**Mr NINOS KHOSHABA:** From the 74 reviews that you have done, have they all accepted your recommendations with regard to independent panels? Have they all adopted that?

**Mr WOODWARD:** For code of conduct?

**Mr NINOS KHOSHABA:** Yes.

**Mr WOODWARD:** That is a mandatory requirement, so yes, definitely.

**Mr NINOS KHOSHABA:** That is all councils?

**Mr WOODWARD:** Yes, as of mid year. The code of conduct has been in place for a few years, but the new code of conduct was updated. The new code came out mid year and that is where we changed the requirements to make sure they were all independent, so the councils should already have implemented that and, if not, they certainly will very soon.

**CHAIR:** There seems to be a fair bit of information flowing into the department through reviews and protected disclosures as well. Ms Beamer asked you a question and if you could take that on notice and provide that information that would be very good.

**Mr WOODWARD:** Yes.

**CHAIR:** Is it feasible to have included in your annual report information on protected disclosures, statistics and data? I know that it is not a requirement of government agencies to do so, but does having that kind of information in your annual report pose a problem?

**Mr WOODWARD:** You mean for individual councils or a total number across the sector?

**CHAIR:** From your department, for example. Could you use that as a way of rounding up important data from your councils and putting that in an annual report so that we could have a look? If there was an overarching body created to look at all that information, you could provide that information in your own report.

**Mr WOODWARD:** We could not currently because we do not have individual numbers from councils, but if something was put in place to require councils to report those on an annual basis to us or in their own annual reports then certainly we could collate that.

**CHAIR:** Is that a possibility?

**Mr WOODWARD:** That is a possibility, yes.

**CHAIR:** Would you be in favour of that?

**Mr WOODWARD:** It certainly would be a useful exercise to know how many complaints there are, absolutely.

**CHAIR:** And what policies are in place, how they are being handled, outcomes and things like that?

**Mr WOODWARD:** Yes.

**(The witness withdrew)**



**PETER JOSEPH CRIBB**, Acting Principal Solicitor, Contract Information and Audit, NSW Maritime, 1 James Craig Road, Rozelle, sworn and examined:

**Mr CRIBB:** I am currently on secondment with NSW Maritime. My substantive position in the government service of New South Wales is as a senior legal officer with the New South Wales Department of Education and Training, a position I have held for 10 years.

**CHAIR:** Mr Cribb, we have received a submission from NSW Maritime. Do you wish that submission to form part of your evidence today?

**Mr CRIBB:** Yes, I do.

**CHAIR:** Would you like to make an opening statement before we ask you some questions?

**Mr CRIBB:** No, thank you.

**CHAIR:** I notice in your submission that you refer to having very few protected disclosure cases in the department. Can you indicate how many you have had and what has been the outcome?

**Mr CRIBB:** Yes. I asked the protected disclosures coordinator of NSW Maritime how many and the answer was about two in the past 10 years.

**CHAIR:** Two in 10 years?

**Mr CRIBB:** Two in 10 years.

**CHAIR:** I also notice that you adopt the internal reporting system guidelines that have been put out by the Ombudsman?

**Mr CRIBB:** Yes, a very close copy of it.

**CHAIR:** Is that adaptable to your department and do you think that is satisfactory?

**Mr CRIBB:** Yes, it is.

**CHAIR:** From what you said to me earlier you have had only two opportunities in which to call on those guidelines. Are you able to tell us what was the outcome of those two protected disclosure cases? Were they investigated internally or were they referred? Generally, how did NSW Maritime handle them?

**Mr CRIBB:** I do not have any personal knowledge of that but I asked the coordinator whether there were any problems when dealing with those protected disclosure cases and she said no.

**CHAIR:** I assume you have been sent here to speak on behalf of NSW Maritime?

**Mr CRIBB:** Yes.

**CHAIR:** And you do not have with you any information on how those cases were dealt with?

**Mr CRIBB:** They were dealt with in accordance with the policy. The concept of protected disclosure is part of the process of reporting corruption, maladministration or a serious and substantial waste of money. It is part of the process and that assists NSW Maritime to encourage and facilitate the reporting of those sorts of matters. The investigation of those disclosures is a separate issue. The Protected Disclosures Act is about providing a process for that information to come forward.

**CHAIR:** On behalf of NSW Maritime are you able to say whether or not there would be any difficulty in including information about protected disclosures in your annual reports—information regarding statistics and outcomes?

**Mr CRIBB:** As the endnote of the short submission states, there is a problem in the sense that a protected disclosure, unlike the Freedom of Information Act, is not necessarily something that walks in the door with the words "protected disclosure" on it. Unless the application specifically refers to the fact that it has been made under the Freedom of Information Act it is not a valid application. It is a two-edged sword. In my experience it is possible for person A to report to person B about the misconduct of person C. For that information to be dealt with appropriately it is possible that person C would be dismissed or sent to jail without person A or person B realising at the time that he or she was dealing with a protected disclosure. Person A—the person who has made the report—often realises at a later date that it is a protected disclosure. That poses a difficulty because you do not always know exactly what is a protected disclosure.

**CHAIR:** We receive reports from the Independent Commission Against Corruption [ICAC]. In its reports it reveals how many cases were treated as protected disclosures, et cetera. I imagine that the same thing applies to other agencies. In this system people must have confidence that they can come forward and report matters as set out under the Act and they should not have to suffer detrimental action. Do you see any problems with NSW Maritime reporting on how many protected disclosure cases it has dealt with? For example, NSW Maritime adopted the Ombudsman's guidelines. Do those guidelines indicate to you how to handle these cases? Do you investigate or refer those cases? Do you foresee any problems in reflecting in your annual report how many cases you have dealt with on that basis?

**Mr CRIBB:** On that question, no, because you are talking about how many protected disclosure cases were dealt with. My issue relates to identification. You cannot state specifically that NSW Maritime received 15 protected disclosure cases because you might have another five that you did not identify as such. If the question was whether NSW Maritime would include in its annual report a statement that it dealt with five protected disclosures, I do not see a problem with that.

**CHAIR:** That is right, because you would have identified them as protected disclosures?

**Mr CRIBB:** Exactly.

**CHAIR:** Many people who make disclosures do not seek protection. They do not even think about it; they just make them because they want to report something wrong that is going on. As a matter of fact, that has been readily recognised.

**Mr CRIBB:** Yes.

**Mr DAVID HARRIS:** I make reference to the procedures that are in place and note that you said earlier that you had closely adopted the Ombudsman's guidelines. Can you be confident that the organisation is committed to implementing those guidelines? Who are the line managers and are they identified? What staff training takes place?

**Mr CRIBB:** I am satisfied that a good system is in place. The chief executive is the principal officer of the authority. Each of the general managers—I believe there are four of them—are nominated disclosure officers. The regional managers—and there are six of them—are also nominated disclosure officers. Branch managers are nominated disclosure officers and the Manager, Human Resources, is the coordinator. I was able to find the policy on the website of NSW Maritime. Since I have been at the authority I have been given two online training courses in occupational health and safety and discrimination, so I am satisfied that NSW Maritime has a good system of making its employees aware of what is in place.

**Reverend the Hon. FRED NILE:** You said a moment ago that the branch managers were protected disclosure officers and that that goes down the line of responsibility. How is that information conveyed to the 400 staff? Do they all know who those people are and that they have such authority?

**Mr CRIBB:** That is in the policy document and the policy document is available on the website.

**Reverend the Hon. FRED NILE:** You said also that you had a protected disclosures coordinator.

**Mr CRIBB:** Yes.

**Reverend the Hon. FRED NILE:** You said a moment ago that you spoke to the coordinator and she had told you that NSW Maritime only had two protected disclosure cases in 10 years. Did the same coordinator handle those two cases?

**Mr CRIBB:** Yes. I asked her how long she had been there and she said between eight and 10 years.

**Reverend the Hon. FRED NILE:** So it was the same person?

**Mr CRIBB:** Yes.

**Reverend the Hon. FRED NILE:** You made a good point on page 2 of your submission. The Act follows a specific procedure in defining a freedom of information request. Would it be helpful if those who wished to make a complaint were advised to fill out a protected disclosure form—perhaps even under oath? Would that assist in getting past the problem of vagueness—whether they are complaints or protected disclosure complaints? Other witnesses who have given evidence have said that one of the problems is identifying what is a protected disclosure complaint.

**Mr CRIBB:** Yes, that would assist with part, but not all, of the problem. If I were the person about to make a protected disclosure it would assist me if I was able to fill in a form and take that to the chief executive. We would then be on the same page, so to speak. However, that it does not solve the whole problem. In my example, if person A were to make a disclosure without realising that it was a protected disclosure, he or she should not be constrained by the fact that a form had not been filled out. If someone made a protected disclosure the chief executive would have known, or ought to have known to use a legal expression, that it was a protected disclosure. I think the discloser is entitled to protection. Your point about having a form is a good one, but that is not the only solution.

**Reverend the Hon. FRED NILE:** In the case to which you just referred the chief executive officer could say, "Please fill in this form."

**Mr CRIBB:** Exactly.

**Mr GREG SMITH:** Have there been any protected disclosures this year?

**Mr CRIBB:** Not that we are aware of, no.

**Mr GREG SMITH:** Have there been any other types of complaints that might not have been categorised as professional disclosures?

**Mr CRIBB:** With 400 staff I imagine that there might have been some complaints, yes.

**Mr GREG SMITH:** Were there any complaints relating to Joe Scimone?

**Mr CRIBB:** No, not that I am aware of.

**Ms DIANE BEAMER:** You said earlier that somebody within your organisation looked after protected disclosures. You also said that you had had only two cases of protected disclosure. I do not mean to be rude or impertinent, but why could that person not appear before the Committee?

**Mr CRIBB:** I understand your question. Because we have had only two protected disclosure cases in 10 years, the Manager, Human Resources, does not have a great deal of familiarity with them. I have with me the first page of my eight-page job specification. My title is "Contract, Information and Audit." Contract is obvious, information is the freedom of information officer role, and audit is this part.

**Ms DIANE BEAMER:** The procedures?

**Mr CRIBB:** The position deals with matters referred to New South Wales Maritime by the Independent Commission Against Corruption, including corruption review issues, and by the New South Wales Ombudsman. The position also "independently undertakes internal investigations in relation to allegations of misconduct, et cetera". The answer to your question is: I imagine that if NSW Maritime received a protected

disclosure today it would be walked around to my desk for me to provide advice to the Manager, Human Resources—the co-ordinator.

**Ms DIANE BEAMER:** And you would provide some legal advice relating to that matter?

**Mr CRIBB:** Legal advice.

**Ms DIANE BEAMER:** We are interested in the process that is followed. Do those who are making the complaints feel protected? How were the investigations carried out? Did they feel that their jobs were threatened? It seems to me that the person who carried out those investigations could have gone down that track without being specific about how the agency resolved those cases.

**Mr CRIBB:** As I see it, there are two issues. The first is protected disclosure and the second is investigation. Both are equally important. If NSW Maritime received a third protected disclosure today I would be heavily involved in managing how it was dealt with.

**Ms DIANE BEAMER:** And the investigation?

**Mr CRIBB:** Possibly or, as my position statement says, I might be "instructing external investigators". I am a solicitor rather than an investigator.

**Mr JONATHAN O'DEA:** Mr Cribb, how long have you been with NSW Maritime?

**Mr CRIBB:** Two months.

**Mr JONATHAN O'DEA:** I have substantial and serious concerns that NSW Maritime is not treating this forum seriously. I have cause to believe from other submissions that have been made to this Committee that there are problems within NSW Maritime. Furthermore, I am aware of other employees within NSW Maritime who are not comfortable in making disclosures. It is almost contemptuous of the chief executive to have sent Mr Cribb here. I am not criticising Mr Cribb, as he has been with the organisation for only two months, but the person who handled those previous applications is not here. I am happy to make further comments but I think that this Committee should ask someone with experience and knowledge of those previous matters to attend before it.

**CHAIR:** I take your comments on board. Perhaps we can discuss this issue later at our deliberative meeting.

**Mr CRIBB:** Might I address that issue, Mr Chairman?

**CHAIR:** If the witness does not have the facts and figures perhaps you could ask him to provide that information on notice.

**Mr JONATHAN O'DEA:** I am happy to ask other questions, but I wanted to state that up front.

**Mr CRIBB:** As the representative of NSW Maritime, the reason I was asked to be here was about the practices and procedures. NSW Maritime was not given any notice of specific matters it wanted to address or even the word "experiences".

**CHAIR:** Indeed, Mr Cribb—and maybe I should say this to each witness—it is not our role to go into individual matters and investigate those, it is about establishing what you have as far as practices and procedures are concerned and what would happen if someone came up and made a disclosure. You have not, however, been able to give any information on the ones that you have received—two in 10 years, I think it was—and what the outcomes were. We have asked those questions of other agencies and, in a general sense, to demonstrate how the procedures are working or not working, for example, without going into those matters.

This Committee is interested in knowing in general what the outcomes were and how your procedures worked or whether you had to improve them, et cetera. That is the information you have not been able to give. But you are correct, you have not been referred to any specific matters or anything like that, so we are not looking at specific matters. As to what Mr O'Dea raised, we can talk about that at another time when you are not here. Have you any further comment to make?

**Mr CRIBB:** Only that the submission does deal with the issues at points 9, 10 and 11: "NSW Maritime has not experienced any difficulties in complying with the Act". They are, in lawyer-speak, my instructions. Point 10 states, "NSW Maritime has not received any complaints regarding its compliance with the Act. NSW Maritime's compliance with the Act has not been the subject of any investigation by the NSW Ombudsman". Those matters are all identified by me as being relevant to this inquiry.

**Mr JONATHAN O'DEA:** And, with respect, I could question those, and I would question those statements, but I do not feel confident in questioning them with you. It is not a criticism of you, but you have been with the organisation for two months; you are not in a position to know the history, and I suspect you have not been briefed on the full history, of a range of matters, and I am not going into specifics of other submissions or other cases. But I can tell you from my own personal knowledge and from other things that have been put before the Committee, I have very good reason to believe that this is not an accurate statement and I do not feel confident in pursuing how effectively the Act is being implemented in the current circumstances.

**CHAIR:** Mr O'Dea, we can talk about that later. Mr Cribb, I take it there is nothing more you can offer than what you have said. You have told us you have got your instructions.

**Mr CRIBB:** Yes.

**CHAIR:** Does anyone else have any questions?

**Mr NINOS KHOSHABA:** Your submission refers to the NSW Maritime policies and procedures on protected disclosures. However, there are no copies of policies included with your submission. Would you be able to provide this Committee with copies of development policies?

**Mr CRIBB:** Yes, I can.

**Mr NINOS KHOSHABA:** Today or at a later date.

**Mr CRIBB:** I can supply them today.

**CHAIR:** Are you also able to provide this Committee with some general outcomes of those protected disclosures—what they were about generally; in a broad sense what sections of the department they involved; how the procedures handled them, et cetera? The other issue: when we talked about whether you could put information in an annual report, as I understand it, when someone visits a head of an organisation or head of a department or someone and reports something, is it not a matter for that organisation then to supply all the information to that person and say, "You can divulge this. It may well be a protected disclosure. Here is what we are going to do", and explain to that person what the procedures are to keep it confidential; for example, to make sure they do not suffer detrimental action, et cetera. The onus is on the organisation, is it not, because they have the practices and procedures in place?

All that employee is doing is coming up and saying, "Look, I have seen that happen." That person needs to be told that that could be a protected disclosure, and that person, ideally, will have already seen in an induction program, for example, that what you have to say may be protected, et cetera. So if a policy is working correctly and if we adopted the Ombudsman's guidelines, that person should already be appraised of what procedures are in place and there should be common travel of information between management and employee about protected disclosures.

**Mr CRIBB:** In a perfect world I would say yes. But I think the issue is at the margin, particularly if the report is being made to a lower-level person in the organisation, such as a branch manager—an issue is brought forward to the branch manager about something that is happening in the branch, which the discloser thinks is sub optimal, if I can put it that way. The best example is the serious and substantial waste of money aspect of the protected disclosures. There are four categories: one is a waste of money which is neither substantial or serious; one is a waste of money which is substantial but not serious; the third one is a waste of money which is serious but not substantial; and the fourth one is a waste of money both serious and substantial.

A branch manager may not go through that analysis and identify that it is the fourth one. That is the issue I make that as a personal observation in fact, that there are some difficulties in necessarily identifying

something that is a protected disclosure. In my view, if it is a protected disclosure and it is made as such by the discloser it will be dealt with in accordance with the Act and the policy.

**Reverend the Hon. FRED NILE:** Just to clarify: You had no role in preparing this submission; this is Mr Dunn's document?

**Mr CRIBB:** I drafted it. I spoke to the coordinator.

**Reverend the Hon. FRED NILE:** So you are able to make those statements 9 and 10 with confidence. That has been challenged. That is what I am getting at.

**Mr CRIBB:** I had no knowledge of any of the matters Mr O'Dea is about to bring forward.

**CHAIR:** Thank you for your time, Mr Cribb.

**(The witness withdrew)**

**FRANCES ANTONIA SIMONS**, Group General Manager—Human Resources and Communications, RailCorp, 18 Lee Street, Chippendale, and

**ANDREW BRUCE PATTERSON**, Manager—Workplace Conduct Unit, RailCorp, 18 Lee Street, Chippendale, affirmed and examined:

**VIRGINIA WILLS**, Manager—Investigations, Internal Audit, RailCorp, Level 17, 55 Market Street, Sydney, sworn and examined:

**CHAIR:** We have received a submission from RailCorp. Do you wish that submission to be treated as part of your evidence today?

**Ms SIMONS:** Yes.

**CHAIR:** Does any one of you wish to make an opening statement?

**Ms SIMONS:** No, we are good.

**CHAIR:** We received your written submission consisting of a few pages and, attached to that, some policy documents relating to workplace standards, et cetera. The first thing I want to ask you is that among that information, I have not been able to see any material, data or figures on how many protected disclosures you have received. How many have you received in the last, say, five years? How were they investigated? What were the general outcomes? Were they referred? What were the policies and procedures in place that you used to deal with this? Can you give the committee some information on that?

**Ms SIMONS:** I can give the committee information for the last two years. Prior to that, I would have to take that on notice and provide figures. In the 2006-07 year, we received 15 protected disclosures, all of which were investigated. For the year 2007-08 we received 22.

**CHAIR:** When you say "protected disclosures", where these people who came forward with issues and complaints that you identified as protected disclosures and dealt with accordingly? For example, when these people came forward, how were they dealt with? What happened with their cases?

**Ms SIMONS:** Their matters were investigated by either the workplace conduct unit or the internal investigations unit. They were matters that we determined were protected disclosures.

**CHAIR:** Were the employees aware that protected disclosures, as an Act of Parliament, is a process and part of a regime? Are they informed of this when they start work, or at induction? Is this explained to them? How do the mechanics of it work?

**Ms SIMONS:** Every employee in RailCorp who comes in receives our code of conduct and the material on our policies, which includes our protected disclosure policy, which you have. Also, in the last two years, we have been giving special purpose briefings on our code of conduct to all employees in the organisation, so that covers people who have not recently joined our organisation and would, if they had, been picked up in inductions. We have two main points: the efforts that we have put in over the last 18 months with the rollout of the code of conduct, and induction of new employees.

**CHAIR:** I know that you investigate particular individual cases, but could you tell us what sort of cases that involved, what were the outcomes, and how you afforded protection against detrimental action against those people who came forward?

**Ms SIMONS:** Sure. I will ask Mr Patterson and Miss Wills to cover the areas of their particular investigations.

**Mr PATTERSON:** In relation to the workplace conduct unit, it will probably make sense at this point to explain the difference between the two investigation units for the committee. The workplace conduct unit looks at serious misconduct, such as drug and alcohol breaches, bullying and harassment in the workplace, violence in the workplace, recruitment misconduct and misuse of resources, whereas the internal audit

investigations area looks at fraud, official corruption, theft, and those sorts of matters. That is where the distinction lies between the two units.

In relation to the workplace conduct unit, for the 2006-07 financial year we had three protected disclosures. Two of them related to bullying and harassment matters. One related to threats to kill. For the 2007-08 financial year, the workplace conduct unit had four protected disclosure matters. One related to a breach of procedures, which fell into the serious maladministration category, one related to bullying, one related to recruitment misconduct, and the other was again a bullying and harassment matter.

**CHAIR:** What were the outcomes of those?

**Mr PATTERSON:** In relation to the 2006-07 financial year, of the three protected disclosures, two were substantiated and one was discontinued through lack of evidence. In the 2007-08 financial year, three of them had been completed. One is still under investigation. Of those three, none has been substantiated.

**CHAIR:** Did you find any difficulty or issues with people suffering detrimental action as a result of disclosures? Did you have to turn your attention to that issue with employees who came forward about any detrimental acts? You know that the Protected Disclosures Act covers that.

**Mr PATTERSON:** Yes.

**CHAIR:** It is a criminal offence. Did you have to turn your mind to that at any stage?

**Mr PATTERSON:** No, not for ones conducted by the workplace conduct unit, no.

**CHAIR:** Are there any instances when you had to deal with an issue of detrimental action or reprisal in the workplace?

**Mr PATTERSON:** Not that I am aware of, no.

**CHAIR:** Your organisation comes up for regular mention from time to time as an investigated organisation for problems that you have. You have a large number of employees—14,000 employees. I have read the policies and procedures and the units that you have. Are you able to tell the Committee that your policies are effective in dealing with people who come forward with matters that may be classed as protected disclosures about things that have gone on in the workplace?

**Ms SIMONS:** I believe that they are effective. I believe that they are characterised by being comprehensive in their coverage. The investigation processes that were used through the professional standards we adopt in the workplace conduct unit and the internal investigations or internal audit area are, I think, appropriate and professional for what needs to be done.

**CHAIR:** It is not only protected disclosures. People may want to come forward to do with things that may not be protected disclosures. They might be all sorts of things.

**Ms SIMONS:** Indeed.

**CHAIR:** We are looking at that sort of thing as well. Do you feel confident that, given the publicity that your organisation is having or has had, people feel safe enough or confident enough to come forward with issues, knowing that they will not suffer detrimental action?

**Ms SIMONS:** We have a work force of 14,000 people. That is a relatively large work force. I could not speak for all 14,000 people, but I do believe that we provide, through our policies, procedures and professional standards, a big message to our workforce that we take these matters very seriously. There are some people who, as a result of a number of things that they might raise with us under any of our policies, such as grievance policy or our harassment policy, may feel dissatisfied with the response, but I do believe that the policies are comprehensive and that the work that we have put into investigating them is appropriate and proper, given the importance of these issues.



**CHAIR:** There is a discussion on who is covered by protected disclosures procedure for employees. There is a question of whether or not contractors who have relations with a government department, who contract with a government department, should also be covered.

**Ms SIMONS:** Yes. We apply our policies and procedures to contractors as well as employees.

**Mr DAVID HARRIS:** Further to what the Chair is referring to about some investigations, are you able to indicate how many of the ICAC investigations originated from protected disclosures?

**Ms SIMONS:** There have been a variety of matters. Virginia might like to comment.

**Ms WILLIS:** Yes. In relation to the most recent public hearings—are they the ones you are talking about?

**Mr DAVID HARRIS:** Just generally. You do not have to speak specifically. They originated through this process?

**Ms WILLIS:** I am sorry, could you ask the question again?

**Mr DAVID HARRIS:** Were the ICAC investigations started because people came forward under the Protected Disclosures Act?

**Ms WILLIS:** In all the most recent public hearings over the last 12 months, none of them were as a result of protected disclosures. The majority of them were people or employees who came forward to us just to make a normal complaint. Then we referred it on to ICAC, after some investigation.

**Mr DAVID HARRIS:** To the best of your knowledge, those people received no reprisals or anything similar?

**Ms WILLIS:** Not that I am aware of, no.

**Mr DAVID HARRIS:** Compared to some of the government departments, the figures you have given us are what I would call significant: 15 in one year and 22 in the other. Do you think that shows that members of your organisation have a clear understanding of the roles and responsibilities in reporting these matters?

**Ms SIMONS:** I think it is fair to say that people in our organisation are aware of the seriousness with which the organisation takes the issue. Mr Chairman, if I could, I need to correct the figures. I think we did not get that figure quite right in terms of the internal investigations unit. I think that the 22 for the 2007-08 year is not correct.

**Mr JONATHAN O'DEA:** Or it is correct.

**Mr DAVID HARRIS:** Ms Simons is checking.

**Ms SIMONS:** I am checking. I would like to revise that, I am sorry. I had earlier information that is not correct. The figures for 2006-07 in total are 13, and for 2007-08, they are 15.

**CHAIR:** Thank you, Ms Simons.

**Mr DAVID HARRIS:** If someone feels that they have received detrimental treatment, what would that process be? After they have reported and they think that they have had some reprisal against them, what is the process?

**Ms SIMONS:** There can be a number of processes. They are entitled to raise that concern with any of the key people in the organisation, including the Workplace Conduct Unit, the Internal Investigations Unit, any of the nominated disclosures officers, the general manager or our grievance advisory service. Any of those people on receiving such a complaint would refer that matter through the Workplace Conduct Unit for investigation.

**Mr DAVID HARRIS:** What happens to that person whilst the investigation is taking place?

**Ms SIMONS:** A number of things. It depends on the nature of the complaint, but immediately an assessment would be made about what would be in the best interests of that person so that an appropriate investigation could be taken. Sometimes that might mean supporting that person in a particular way. Other times it might mean doing nothing in particular.

**Reverend the Hon. FRED NILE:** I have a general question in regard to the nominated disclosures officers as outlined in your submission. What training do they receive in regard to the whole procedure governing protected disclosures?

**Ms SIMONS:** They get specific briefing on the responsibilities of that role in terms of the protected disclosures policy and the Protected Disclosures Act.

**Reverend the Hon. FRED NILE:** Who gives that training?

**Ms SIMONS:** The Manager Workplace Conduct Unit gives that training.

**Reverend the Hon. FRED NILE:** Are those roles publicised to the employees of RailCorp?

**Ms SIMONS:** Yes they are.

**Reverend the Hon. FRED NILE:** Do they receive information that these are the people and if you wish to make a complaint you can go to one of these people?

**Ms SIMONS:** Yes, they do. The procedure itself identifies who the people are. The procedure is available on the intranet to all employees.

**Reverend the Hon. FRED NILE:** You mentioned earlier that you had received a number of complaints about corruption and so on and you referred those to the Independent Commission Against Corruption—that is a good thing. At that point do they receive any advice about the powers of the Protected Disclosures Act in that they may need to use it to protect themselves?

**Ms SIMONS:** They do, and it may be appropriate that Mr Patterson or Ms Wills talk specifically about that as they are the ones who most often deal with the complainants.

**Mr PATTERSON:** When a staff member comes in to make a protected disclosure either directly to one of the investigation units or if they are referred through one of the other nominated disclosure officers, either myself or Ms Wills will sit with that person and explain the protection under the Act, specifically in relation to the provision about reprisals. We also explain the provision relating to confidentiality or their identity as a discloser and also the exemptions that may need to be invoked, such as for legitimate investigation purposes. They also have explained to them about the notification within six months under the Act as to what action we are taking or what the outcome of the matter is. Those provisions are all explained to them. It is impressed upon them that should there be any issues in relation to their disclosure they should let us know immediately.

**Reverend the Hon. FRED NILE:** In answering that question you said "when they make a protected disclosure complaint." My question was directed to those making complaints. Are they told that they may need to come under the protected disclosure regime? Are they given an option at that point? They may not be aware of it.

**Mr PATTERSON:** That would depend on a case-by-case basis. There certainly are cases where we may raise the possibility of a matter more appropriately being a protected disclosure. But it depends on the individual matter.

**Reverend the Hon. FRED NILE:** It would still go to ICAC?

**Mr PATTERSON:** If it is a matter that is reportable to ICAC under section 11, yes.

**Reverend the Hon. FRED NILE:** I note that your protected disclosures procedure became operational on 25 June 2007. What operated before June 2007?

**Ms SIMONS:** Prior to that there were two different policies in the organisation because RailCorp was formed in 2004 being a merger of the former Rail Infrastructure Corporation [RIC] and the former State Rail Authority [SRA]. Each of those had applicable policies. At the time the organisations were merged and became RailCorp it was a principle that existing policies would continue to cover the people in the organisation depending on what section they had come from. Eventually a new policy to cover the whole of RailCorp was put in place.

**Mr GREG SMITH:** Ms Wills, what do you see as the advantages of being covered by the Protected Disclosures Act compared to just being an informer?

**CHAIR:** Mr Smith, are you asking in relation to RailCorp procedures?

**Mr GREG SMITH:** Yes, and her understanding too. She said all the matters that have been recently investigated were not dealt with under the Protected Disclosures Act but referred on to ICAC. My question is in that context.

**Ms WILLS:** Okay. All the matters that my area deals with are all reportable to the ICAC regardless of whether it is a protected disclosure. The matters that were referred to ICAC for those past couple of hearings, the people did not claim to be a protected disclosure, at the time it was not appropriate for them to be or they chose not to avail themselves of that. The benefits with people coming in now and asking to be treated as a protected disclosure as opposed to not, it is really a matter for the individual if they fear that there could be some regress taken against them. Confidentiality is always maintained regardless of whether it is a protected disclosure or it is not.

**Mr GREG SMITH:** So you do not see any greater benefit to be covered by the Protected Disclosures Act than just being a confidential informer, is that right?

**Ms WILLS:** We try to treat everyone, regardless of whether it is a protected disclosure. We try to treat it confidentially. We keep an ongoing dialogue with the complainant or the person making the complaint. There is all the normal security of their information et cetera. So, quite frankly, they are both treated very similarly.

**Ms SIMONS:** Each of our grievance, complaint and workplace conduct policies makes a point of saying that confidentiality is important, is maintained and that breaches of confidentiality will be treated as a separate disciplinary matter.

**Mr GREG SMITH:** Is it not the case that if somebody complained about their boss taking valuable goods, for example, and that the boss had told him that that is what he is doing, if you were going to question the boss, would you not put to him what had been alleged that he had admitted doing?

**Ms WILLS:** Yes, we have to.

**Mr GREG SMITH:** And would that disclose the informer?

**Ms WILLS:** It could do in that particular instance, yes, if he was the only person who knew about it.

**Mr GREG SMITH:** What steps are taken to avoid that happening?

**Ms WILLS:** In past investigations where there is a chance of that happening, particularly in relation to records or interviewing people, instead of just going in and taking one or two personnel files, we will take 20 or 30 of them. When we have gone in to interview a particular person, instead of just interviewing that one person, we will interview a number of people in that same area as well. So, therefore, it minimises the likelihood of that person, the complainant, being known.

**Mr GREG SMITH:** Do you ever, as it were, allow the matter to run using listening devices or other intelligence gathering data?

**Ms WILLS:** We do not have any statutory power. That is when we refer matters to ICAC because the exercise of their powers is a lot greater than ours.

**The Hon. GREG DONNELLY:** Following on from the question of Reverend the Hon. Fred Nile about the procedure introduced on 25 June 2007, what has been done and what is being done to educate and inform your workforce comprehensively about the new procedure?

**Ms SIMONS:** What we implemented was a rollout of briefings to all our workforce of roughly 14,000 people. It took us a few months to get through that many, but we have now completed the exercise. So, each of the people in the organisation was required to attend the briefing session on the new code of conduct, which refers to the protected disclosure procedure. They were required to sign for their attendance so that we had a record that we had briefed them and they had a record that they had been briefed.

**The Hon. GREG DONNELLY:** Will there be ongoing training to refresh employees or was it intended to be just a one-off briefing?

**Ms SIMONS:** This particular thing was a one-off briefing. All new employees who come to the organisation receive that same briefing. The matter is also regularly referred to in our newsletters and through a program we have running called the Just Culture program. We have put over 2,000 managers through the Just Culture program now. That outlines a number of these matters as well.

**Mr JONATHAN O'DEA:** I am heartened to hear that you take this matter seriously. Obviously, from any account, anybody following even public reporting of various matters in RailCorp in recent times would be a little concerned that perhaps RailCorp had a culture within its whole organisation that it did not take things as seriously as perhaps it needed to. Obviously, that is reflected in the degree of corruption and in the public comments of the ICAC commissioner about the willingness of RailCorp to respond to past recommendations and reports. I have listened to everything you have said but I have not heard any sort of recognition perhaps that things in the past have not been other than appropriate. If everything in the past has been appropriate, how is that consistent, firstly, with an ongoing pattern of corruption and, secondly, a seeming lack of commitment to actually address matters that have been addressed by ICAC or recommended by the ICAC commissioner? I suppose I am more disturbed in not hearing some admission that there have been problems in the past because all the objective evidence seems to be that there have been?

**Ms SIMONS:** With respect, nobody has asked the question if there have been problems in the past. What I have outlined is that in respect of protected disclosure we have a very comprehensive policy and a very clear message from the organisation through the education work we have done that it is something that is taken seriously. The ICAC hearings into corrupt conduct, Ms Wills has referred to the fact that we got a number of reports of corrupt conduct, which were duly investigated as far as our powers allowed and then referred to the ICAC. So, in that respect clearly the message was there at some point in the past few years because many of them were quite old. Even in 2004/05/06, there were mechanisms for people to come forward and they did come forward. Those matters have now been thoroughly investigated by ICAC and are seeing light. It was the case that a number of people did come forward in the organisation to report these serious matters.

**Mr JONATHAN O'DEA:** What are you doing differently now?

**Ms SIMONS:** In respect of protected disclosures?

**Mr JONATHAN O'DEA:** Yes, either culturally or in terms of procedures to encourage a healthier culture whereby people feel encouraged to come forward.

**Ms SIMONS:** Continuing the fact that people have come forward with serious matters, we have put a lot of effort into explaining why it is important for all the workforce. We have put an effort into making sure that everybody gets the information they need, knows who to come to, understands that if it is a protected disclosure or a non-protected disclosure confidentiality is still important.

**Mr JONATHAN O'DEA:** And mindful perhaps. In light of the fact that these recent matters were all precipitated other than through protected disclosures, what programs or initiatives have you got in place to perhaps better ensure that we do not go through the same pattern again where things either are not detected or are not disclosed? I think there is a legitimate concern that RailCorp has, let us say, a reluctance to put in place recommendations when they are made from the ICAC commissioner. So I do not think it is unreasonable to perhaps question the current practice and procedures. Despite what you are saying, the reality is that the track record is not great.

**Ms SIMONS:** In respect of the ICAC hearings, we will be receiving a final report from the commission, as I understand it, towards the end of this year, and clearly we will be looking at any other assistance that process will be able to give us in terms of other recommendations that they might recommend for us. But the organisation has, over the past couple of years, been putting an immense effort into this important issue of outlining the standards that are required and outlining the mechanisms in place if anybody feels those standards have been breached. The one program that we have, that I have briefly touched on, that I think goes to what you might be most concerned about, which is the underlying culture and the underlying message apart from our policies and procedures, is a program called Just Culture. That has been a very intensive work effort for the organisation since 2005.

We have put over 2,000 people—managers mostly—through that program, and that is about trying to establish the fact that our workplace culture is very important for the organisation and the workplace culture is defined by what we do react to and what we do not react to. This is about saying that if there are norms in the workplace that are below the standards that our code of conduct sets out, whether they be interpersonal behaviour norms, safety behaviour norms or procedural norms in terms of procurement and administration, then we have a duty to do something about it, we have a duty to report that and we have a duty to re-establish those norms. So that program in itself, I believe, is very significant for the long term of the organisation and has been, as I said, a flagship program.

**Mr JONATHAN O'DEA:** And that is encouraging to hear. I welcome your comments on this. The legislation itself in many ways can only be reactive and in a situation of an organisation where there appear to be systemic issues or problems, I think an organisation needs to be more proactive than the legislation actually requires, and that extends to more actively encouraging employees to be vigilant and to be acting in the broader public interest. There may be other organisations out there that can learn from RailCorp. I do not want to be too critical but I think simply the Parliament and the people of New South Wales want to see how this sort of initiative can be used in the public interest to make our system work better than perhaps it has in the past. I do not want to be overly critical, and I am certainly not critical of the three individuals sitting here who I am sure are all committed to doing the right thing, but there is a high level of concern that there needs to be more proactivity. Perhaps if you are doing that now, that message is a good message to get out there not only in the case of RailCorp but also in the case of other organisations.

**Mr DAVID HARRIS:** Is that a question?

**Mr JONATHAN O'DEA:** I invite comment on that.

**Ms SIMONS:** We think our Just Culture program is significant for a number of reasons and we would be very happy to share what we are doing with anybody. In respect of the concerns you are raising about ICAC, when matters were identified by the organisation through reporting we immediately set about implementing better systems in terms of procurement and finances. Those systems went live last week in the organisation. As you can understand, there is a fairly long development time when you are calling for a totally new financial system and procurement system but those things are now operative.

**Ms DIANE BEAMER:** I am interested if you have any thoughts about how we could improve the Protected Disclosures Act with inquiry into its operation, et cetera. Does anybody have any thoughts? We have had comment about six monthly reporting back, those issues. Does anybody have any ideas on some of the things you think are onerous or could work a lot better?

**Ms SIMONS:** One thing I think is a difficulty for employees who have something to report or believe they have something to report, often when they report it, as you have heard from Ms Wills and Mr Patterson, we take that investigation seriously and we do what we think is a thorough job. Sometimes the allegations are substantiated and sometimes they are not. Where they are not substantiated, it is often difficult for that person to achieve some closure about something that they may have felt very strongly about. This I think is a problem because if for example they really believe that something is wrong in the organisation and we come back to them and say, "Despite our best efforts and our investigations, thank you but no", there may be an ongoing problem for that person to feel that they have had their concerns adequately investigated. For some—not all—they see that the organisation coming back and saying, "No, there is no problem", is a continuation of the problem. So it may be that some appeal mechanism or review mechanism could be considered, such that a person who finds themselves in the position of being told that their deeply held concerns are not substantiated has someone else to turn to.

**Ms DIANE BEAMER:** Some oversight committee like the Ombudsman?

**Ms SIMONS:** Perhaps, and some people do do that. Some people write in any event to other bodies and say that they want to raise issues, and those issues are referred to us, as far as I am aware, for comment and anybody that that is referred to—mostly the Ombudsman—has a capacity to look themselves into what we have done with the complaint that we received, and that is a good thing. But I think that perhaps that could be strengthened, perhaps it could be formalised that there is some sort of review or there is some mechanism for a review which is different from someone knowing that they might have another avenue to go to or try.

**Mr NINOS KHOSHABA:** On page three of your submission you talk about the nominated disclosures officers where people can go and make their complaint, and as well as the internal audit team and the workplace conduct unit you also have the RailCorp executive. If there was an instance where someone wanted to make a complaint against the chief executive officer, do one of these other people have the power to investigate someone who is obviously more senior than them, or do you have to refer that to an external agency?

**Ms SIMONS:** What we would do is receive the complaint and then make an assessment of how it was to be investigated. If it was the chief executive officer it may be that we would refer that out to some independent investigator to do that investigation.

**Mr NINOS KHOSHABA:** Like any other employee he would not be notified of the investigation until it is sort of—

**Ms SIMONS:** Correct, yes.

**CHAIR:** One of the great problems we have had with the Act and how it works is the lack of statistics and data across a series of agencies about how the Act is working. You have just put forward some new initiatives that you have got going at RailCorp. You have just been through a fairly lengthy process of investigations, et cetera. Is there any impediment or any issue with you including information about protected disclosures in your annual report? Would that pose a problem if that was part of your job?

**Ms SIMONS:** I would not think it posed a problem, no.

**CHAIR:** Not a problem at all?

**Ms SIMONS:** No.

**CHAIR:** In that way could let the public know what is happening with protected disclosures. You have talked about culture which is very important. Perhaps to get that information out there about statistics, about how much information you are getting from protected disclosures, do you see any difficulty with that?

**Ms SIMONS:** In terms of the nature of the numbers or the nature of the complaints?

**CHAIR:** The statistics—how many you had, referrals compared with the previous year, for example, just a pattern of how things are going and policy and that kind of thing.

**Ms SIMONS:** I do not see that as being problematic, no.

**Reverend the Hon. FRED NILE:** You mentioned those 13 and 15 cases. One of the main reasons for protected disclosures is to ensure that there is no punishment of the person who made the complaint. Is there a follow-up to make sure that there is no payback or harassment or even downgrading of the person?

**Ms SIMONS:** There is no active follow-up in terms of monitoring the person that I am aware of after the matter is settled but I do believe that anybody who has made a complaint, whether it is a protected disclosure or otherwise, and feels that if they felt reprisals or any detrimental action they would say so. I believe that from the process of working through what is involved in making a complaint, what is involved in the investigation process, what our policies say and through the leaders of our investigation teams, the fact that we are taking it seriously, I believe that people feel that they would be able to say if they felt detrimental action has been taken. From time to time people may say that and we then look into it. We investigate that.

**Mr NINOS KHOSHABA:** Further to my question earlier, this is all hypothetical but let us say someone made a complaint to yourself about the chief executive officer. How confident are you or how comfortable are you with the Act that you will not suffer reprisal? Obviously because the chief executive officer will be investigated, even though you were not the person who made the complaint, however you have to carry out your duties, how confident are you that the Act will protect you?

**Ms SIMONS:** I am pleased to say I am very confident. Every senior manager at RailCorp knows that there are mechanisms that people are entitled, that it is important that all of us understand that if a complaint is made or an allegation is made there is due process to be followed.

**(The witnesses withdrew)**

**KAREN JAN CRAWSHAW**, Deputy Director General, New South Wales Department of Health, 73 Miller Street, North Sydney, and

**TERRANCE JAMES CLOUT**, South East Sydney and Illawarra Area Health Service, New South Wales Department of Health, 73 Miller Street, North Sydney, sworn and examined:

**CHAIR:** Ms Crawshaw, please state your professional address, your occupation and the capacity in which you appear today.

**Ms CRAWSHAW:** I am the Deputy Director General, Health System Support in the New South Wales Department of Health. My professional address is 73 Miller Street, North Sydney. I am appearing today representing the Director General of the Department of Health, and I suppose more broadly the New South Wales health service.

**CHAIR:** Mr Clout, please state your professional address, occupation and the capacity in which you are appearing today.

**Mr CLOUT:** I am the chief executive of the South Eastern Sydney and Illawarra Area Health Service and a member of the senior executive of the New South Wales Department of Health. My professional address is South Eastern Sydney and Illawarra Area Health Service head office, care of Wollongong Hospital, Wollongong. I appear here in that capacity.

**CHAIR:** The Committee has received a submission from you. Do you wish that submission to be part of your evidence today?

**Ms CRAWSHAW:** Yes.

**CHAIR:** Do you wish to make an opening statement?

**Ms CRAWSHAW:** The submission we sent late last week covers the key points that New South Wales Health wishes to emphasise from a broader perspective. That is, the lack of clarity about the applicability of the definition of "public official" in the relevant Act to employees in New South Wales Health and the clarity around the issue of disclosures clearly relating to the public interest rather than an individual's personal interest.

**CHAIR:** We will do our best to get that definition problem fixed this time. It has been hanging around for a while. New South Wales Health is a very interesting proposition. There has been an increase in protected disclosures over the past few years. There were 26 until 2005 and that has increased to 40 and then 56. That is worth examining. An investigation has been carried at Royal North Shore Hospital, the department has been involved in an Independent Commission Against Corruption program since 2003 and it has taken part in the Whistling While They Work project. The department has been very active in this area, which is good to see. Can you attribute the increase in disclosures to people being more confident in coming forward?

**Ms CRAWSHAW:** The increase in awareness is a result of all those factors. We have also had a reasonably good training regimen from the Ombudsman and the Independent Commission Against Corruption as well as our own training. That has certainly lifted consciousness. It has also encouraged people to think about whether they are in a position where they should make a protected disclosure. I do not think we have an epidemic of maladministration or corruption going on in the public system. When you look at whether things have been substantiated or not, I would like to think that it is a result of people feeling more confident in coming forward to have their issues aired.

**Mr CLOUT:** I think that is right. What you have seen in the past three years is probably a result of what has been done in the past five years. There has been a view that we needed to be very much more involved in the education program with the assistance of the Independent Commission Against Corruption and the Ombudsman. Training has been provided in all rural and regional area health services, mostly on an annual basis. It is also happening in metropolitan areas. It probably happened more in the regional areas at first, but it has now taken off.



There is now an acceptance that complaining is a legitimate thing to do and an opportunity to improve the way we do things, both systematically and individually. That is true not only for protected disclosures but also across a range of issues. If that happens we see that sort of increase. That is a good thing but, of course, it challenges the system and requires appropriate resources to support it. It has also been clearly articulated in New South Wales Health's Corporate Governance and Accountability Compendium adopted by the area health services that came into being on 1 January 2005 and in the code of conduct that this type of behaviour is necessary and a fundamental part of good governance. We cannot measure people who are not putting up their hand. However, the number of substantiated matters is actually low. It is a good balance to have an increasing number of reports but then to have a small number substantiated.

**CHAIR:** What areas within your organisation were the subject of protected disclosures and what scenarios are being examined? What kinds of things are people coming forward with and what are the general outcomes?

**Mr CLOUT:** Notwithstanding the definitional issue, which Ms Crawshaw has quite rightly said and you have confirmed needs to be addressed, we have always taken the approach that the policy covers our area health service employees in total and, indeed, contractors and consultants.

In my experience the issues raised fall into three broad categories. One is a problem, that is, the category of people who have a grievance or disciplinary matter being dealt with and they feel that they need to put in a protected disclosure to assist them in that process. We normally deal with them by having appropriately trained officers and coordinators in the area service make a decision. If they are in doubt, the general proposition is that they will accept them as fitting the definition and/or they will seek guidance from the principal officer, which in an area health service would be a chief executive officer.

There is also the category of genuine and very difficult cases relating to corrupt conduct. They are few because most of those will go through a different process of notification to the Independent Commission Against Corruption, and they would go through that process anyway. There are some in that category, although it is a small number. The other category covers disclosures about efficiency or waste. That involves people who genuinely believe there is maladministration and a waste of resources. It is really important that we hear about that. We treat almost all of them as if they fit even if they do not fit that category.

A small number involve people who have not been successful in getting their way of doing something accepted and they use this mechanism to achieve a further review. They are initially assessed as to whether they fit the category. If they do, there is a process to notify the person who made the complaint. We must also work out at some point how we let the people against whom the complaint is made aware of it. We follow the procedure pretty literally. If the issue requires investigation, a decision is made by the senior manager, or in our case by the director of audit or me, about the appropriateness of an investigation, who should undertake it and what the terms of reference should be. We make the complainant and the person against whom the disclosure has been made aware of the situation. It then goes through the normal process of people being informed of the outcome and being appropriately given the opportunity to comment. Recommendations then come through to the chief executive officer in the case of an area health service.

**Ms CRAWSHAW:** I do not think we can give precise proportions of particular classes of conduct. It covers the full gamut across the system. It might relate to a concern about some sort of inappropriate appointment or compromising of merit selection processes in employment areas and, as Mr Clout alluded to, wastage. Sometimes there are allegations of illegal conduct. It could be some sort of fraud. There is a crossover with the Independent Commission Against Corruption reporting regime. Sometimes the disclosures relate to matters that have their genesis in a clinical service and the conduct of a particular health professional.

**Mr CLOUT:** There is probably one other issue. I refer to the area of maladministration and inappropriate conduct by an individual against another individual—that is, bullying and harassment in particular. The greatest difficulty relates to protected disclosures, because most of them come from within the service, unit or department in which it has occurred. The issue is how we can be supportive of the complainant in their workplace and how we can provide an ongoing working environment while we are investigating a matter properly. The person against whom a complaint is made is under no obligation to keep that to themselves, although we advise them to deal with it as sensitively as possible.

**CHAIR:** Have you ever had to take any action to stop a complainant suffering as a result of making a complaint? Have you ever had to deal with reprisals as a result of information being disclosed? Do you have any procedures to address that?

**Ms CRAWSHAW:** We certainly have procedures. That is obviously part of the policy we have promulgated within the department and the areas have picked up on that. I am not aware of any instance, but I will confirm that for the Committee. I am not aware of any case in which management has had to intervene because of reprisals as a result of someone making a protected disclosure.

**Mr CLOUT:** In my experience at an area health service level we deal with it at the other end. When you know there is a disclosure, you are proactive and make it clear in the organisation. There is a couple of ways in which to do that. You can be clear and open about the fact that a protected disclosure has been made. We obviously do not deal with the details or person involved. People need to be made aware of the requirements and the code of conduct—that is, what is and is not permissible and the penalties for a breach. In my experience, if that approach is taken there is normally no difficulty and no disciplinary action needs to be taken at the other end.

**Ms CRAWSHAW:** Further important work needs to be done in ensuring that those who may be the subject of the allegations, and, indeed, management generally, are confident in dealing with investigation of a protected disclosure. Often people are extremely concerned not to be perceived in any way as engaging in some sort of reprisal activity. They must understand that there is a difference between engaging in reprisal and conducting a fair investigation. We must get that balance right. As I said, there appears to be a nervousness that any fair investigative action may be seen as a reprisal when in fact that is not the intention.

**Mr DAVID HARRIS:** You have explained pretty well the process that is gone through after someone makes an allegation. Do you have in place a group that makes that assessment or is it an individual person, and does that happen at the area health level or at a higher departmental level?

**Ms CRAWSHAW:** The department itself does not have a particularly high number of protected disclosures, they are quite a rare event within the department's operations itself, and by and large the first port of call in our process or as a point of disclosure is our internal audit director, but sometimes obviously people feel that they want to disclose to the director general. In any event, there is usually a discussion between the internal auditor and the director general, and possibly myself in my role—I have the corporate governance and risk management branch responsibilities for notifications to ICAC, et cetera—about how best to deal with it. So it is taken seriously at a very senior level within the department. Area health services are responsible for running the process in their area and I am reasonably confident that, based on our policies, there is good attention at a senior executive level in area health services to ensuring that a protected disclosure is handled appropriately. Did you want to give an example?

**Mr CLOUT:** Do you want me to make you more than reasonably sure?

**Ms CRAWSHAW:** Yes, I do.

**Mr CLOUT:** In my area health service, which is South Eastern Sydney and Illawarra, which goes from the harbour bridge to just the other side of Milton on the South Coast, I have a director of internal audit who works directly with me. I am the principal officer. We then have at this stage 12 or 13—don't keep me to the exact number—senior people who have been nominated and appointed by me on the recommendation of senior managers and the director of internal audit to act as protected disclosure coordinators or officers. They do have a role in terms of education, but, more importantly, their contact details and information is made broadly known across the organisation, starting from myself and then through the sectors and the services, as people who can be contacted.

There is no requirement that an individual contact a person in their geographic area or service, they can contact any one of those that they feel comfortable with, and then the process will be looked at. In a sense, the applications come to them—well, not in a sense, they do come to them and decisions will be made by them, normally in conjunction with the director of internal audit, as to whether or not an application meets the criteria and a plan of how to deal with it. My director of internal audit meets with me fortnightly and keeps me apprised of a number of things, of which this is one, and if she wishes to seek my advice—and sometimes she does, particularly about how we should deal with the matter. There are two issues there. One is the process of appointment of someone to do a review. The second is the one I talked about before about how we deal with the

workplace. I have had occasions where I have, as chief executive, had a meeting with the person making the complaint and discussed with them what their needs are in terms of how we deal with that matter for them to be able to feel comfortable in that workplace and to give them direct access to me. To be honest, I do not do that all the time, but if the circumstance warrants it in my view then that is what I would do. So that is really the process.

We call for expressions of interest every two years in relation to people who want to do it, because some people are happy to do it for 12 months or two years, not happy to do it forever, and actually there is some good governance around the fact that you do have a change and it is the acorn principle: if you have 13 for two years, and then you have another 13 for two years, you are broadening the scope of people who have the skills to do the investigations, make the decisions and spread the information around.

**Mr DAVID HARRIS:** In terms of consistency across the area health services, is there any audit process at ministry level to do a check to make sure that the processes across the different area health services are the same so that people get the same treatment?

**Mr CLOUT:** There are two processes for that. First of all, the policies are the same, so there is the Department of Health policy and then there are area health service policies and guidelines and protocols and procedures. The area health service ones need to obviously fit for service, however, they cannot be inconsistent with the department, and mostly they are almost identical. The second thing is that directors of internal audit have two-monthly meetings—all the area health service ones—with the audit branch in NSW Health and that is a place for looking at consistency, but the training that is done is done at that level. For example this year, I am not sure if it was the Ombudsman's office in conjunction with ICAC did training of our internal auditors.

**Ms CRAWSHAW:** The Ombudsman with ICAC.

**Mr CLOUT:** That is the way it is done, and I think that is okay, to be honest, from my point of view.

**Ms CRAWSHAW:** Certainly the policies are consistent. The next Whistling While They Work report is coming out next year and one of the things I want to give some consideration to is whether we still need a system where we have the framework within the department and then individual policies at an area health service level or whether we can develop in conjunction with the areas one policy that fits everybody, so there is no room for local variations. That is something I want to think about next year once we get the Whistling While They Work report.

**Mr CLOUT:** And I would strongly support that. There is no logical reason why there should be different policies.

**Ms CRAWSHAW:** I think it was a philosophy at the time to let the area health services develop their own local policies, but certainly I think we have come so close now in terms of an approach that little is to be served by having individual local policies. I think one policy for NSW Health should be sufficient.

**Mr CLOUT:** If I may, I need to correct one thing I said. The meetings of the area internal audit people are twice a year, not two-monthly.

**Reverend the Hon. FRED NILE:** You said the number of protected disclosure complaints comes to 120, and I think Mr Clout made a remark about how many were substantiated. Could you tell us how many were substantiated perhaps for each of those years—the 26, 40 and 54?

**Ms CRAWSHAW:** I have the figures for the Department of Health.

**Mr CLOUT:** I can give you the answer for my area health service for this year. For the last financial year, 2007-08, there were 13 that came in. Of those there were seven that were found to meet the criteria and of those at this stage there have been two—one was partially substantiated and the other was substantiated.

**Reverend the Hon. FRED NILE:** That is what I was trying to get at, whether it was the majority substantiated.

**Mr CLOUT:** No, it is very small.

**Reverend the Hon. FRED NILE:** A small minority?

**Mr CLOUT:** It is.

**Reverend the Hon. FRED NILE:** What would be the reason for that, in your mind?

**Mr CLOUT:** I have 20,000 employees and if you ask me to give an honest estimate of the extent to which my 20,000 employees understand the criteria for using a protected disclosure and what would be accepted I would say, notwithstanding the education, it is still quite small. Secondly, there is very often a correlation between disciplinary matters being undertaken in relation to an individual and the existence of a protected disclosure by that person. I think there is a very clear correlation between those two and that leads to a considerable number of those falling outside of the criteria for acceptance of them. That would be the main reason. The other is that people believe that if you want to have disclosed something and not have to say who you are, this is the best route to go, even when having done that up the line in management that information is already out in the system and often they have actually promulgated that. That is a real thing that happens and you have to come to a conclusion that if the person who has put the protected disclosure in has already disclosed the exact information to 10 other people it is very difficult to then treat it as a protected disclosure. I would like to think also that the clear existence of the policy and the framework and the code of conduct, and the clear statement that acting outside of the code of conduct is unacceptable and leads to the strongest of disciplinary action, including loss of employment, is also the reason why we have less actual maladministration and wastage, but I cannot prove that. I would like to think that, but I cannot prove it.

**Reverend the Hon. FRED NILE:** You use the word "substantiated" in one of two ways, the first being to meet the criteria?

**Mr CLOUT:** No, by "substantiated" I mean that it has been accepted, even if there is doubt as to whether it meets the criteria. It has been accepted, it has been investigated and there have been findings as to whether or not that which is alleged in the disclosure is proven or not.

**Reverend the Hon. FRED NILE:** So you do go right to that point?

**Mr CLOUT:** Yes.

**Ms CRAWSHAW:** I can give you the breakdown for the Department of Health over the last two years, and bear in mind the Department of Health certainly receives protected disclosures in relation to its own operations, but from time to time it also receives protected disclosures in relation to matters within the health system. Sometimes it actually conducts an investigation into something in the health system. In 2006-07 we received three protected disclosures. All of them related to the health system as opposed to the department. In 2007-08 we received 14 protected disclosures relating to the health system and two relating to the department itself. In relation to the three that we received in relation to the health system in 2006-07 in none of those, upon investigation, were the allegations substantiated and in 2007-08, of the 16 protected disclosures we received, that is, the 14 in the health system and the two for the department, one was substantiated, two had a range of multiple allegations, some of which were substantiated and some of which were not, four are still under investigation and nine were not substantiated. So there is a real mix there.

**Reverend the Hon. FRED NILE:** Out of the 120, how many of the people were happy with that outcome? Is there any feedback?

**Ms CRAWSHAW:** We have not done a survey and I think you would have to do a survey for that. I am not sure.

**Mr CLOUT:** Not sure were happy.

**Ms CRAWSHAW:** Yes.

**Reverend the Hon. FRED NILE:** Would your impression be that, although they may not be happy, they feel you dealt with it in a satisfactory manner?

**Ms CRAWSHAW:** In a fair sort of way.

**Reverend the Hon. FRED NILE:** In a fair way, or are they resentful?

**Mr CLOUT:** My experience is that most people are comfortable with the process that is followed. Some people are unhappy when they realise that it is not possible to investigate it without actually indicating where it came from, and when you go back to them they say, "Well, I don't want to proceed any further". That happens and people are not happy with that. In one of the categories people are not happy if the outcome of the investigation does not align with their view of what should be the case or their perception of what the reality is. Some people are unhappy because their view of what is reasonable evidence is different. In other words, there are some people who think that it is okay to proceed with action against people on a reasonable suspicion as opposed to reasonable evidence of something happening. There are all those levels of difference. I have 20,000 employees. If I am going to ask 20,000 employees what is reasonable in terms of an outcome on a particular thing I am going to get quite a few different views about that, but I think most people would say, "I understood what the process was and I am reasonably comfortable that the process was followed." Outcomes? I am not sure how to measure that happiness.

**Ms CRAWSHAW:** I think that our experience with disclosures is the same, that gamut of satisfaction with the process, but by and large not faulting the process itself.

**Mr GREG SMITH:** At the moment the health system is one of the most politicised areas of government. There has been a special commission of inquiry into acute health care and an inquiry into abuses in the Camden-Campbelltown area. Several doctors are either facing charges or have been sacked as result of misconduct, inefficiency, or whatever. Do you get the impression that all these things have taken a long time to flush out? Do you agree with that? For example, it took the health department or anybody else a long time to do something about Dr Reeves' alleged misconduct.

**CHAIR:** Mr Smith, what relevance does this have?

**Mr GREG SMITH:** It has relevance because I will ask the witnesses whether there is an attitude of fear in the health administration and junior people who see misconduct in doctors or people higher up the scale are scared to do anything.

**CHAIR:** Perhaps you could just put that question.

**Mr GREG SMITH:** Do you agree with that? Do you agree that there is fear among many of the more junior staff to do in, as it were, doctors and other senior people in the system?

**Mr CLOUT:** I will take a stab at that. I do not think there is any doubt that it is exceedingly difficult for a first-year intern, a first-year graduate nurse, a member of the cleaning staff, a member of the clerical or administrative staff, or people who have a family to look after and this is their career in this chosen narrow area. If you work in a clinical area of health you work in a clinical area of health and that is where you get your employment. It is exceedingly difficult for those people and it takes enormous courage—beyond the norm—to step up if they see something wrong and do something about it.

My view is that the process is a balance of providing protection to enable them to do it, if they feel that they can. If they feel that they can it provides protection for doing that. If you are asking whether or not the system encourages people to do it and provides an environment in which it can be done my view, unequivocally, would be yes, it does. Can it do better? Yes, it can.

**Mr GREG SMITH:** What steps are being taken?

**Ms CRAWSHAW:** Can I add to that? I agree with you. I do not think you can look at a protected disclosure policy in isolation from other policies and other settings that you have in place around your workforce, whether it relates to anti-bullying policy, good grievance management, a robust code of conduct that people respect and understand, and even going into the area of effective workers compensation and rehabilitation processes. I agree with you: all that comes together in a culture. There is always more that we can do in that area.

**Mr GREG SMITH:** What can be done to enable the most junior people to be given more protection when making allegations about what they see and believe to be wrong?

**Mr CLOUT:** I do not think it is a question of protection; I think it involves creating an environment within the organisation that people consistently seek. When they believe that something is wrong there must be a mechanism and a culture that respects them being able to do that. You can have all the legislation in the world but all those things to which Ms Crawshaw referred are sufficient. I do not think that adding something else would make any difference. You could provide some penalties and those penalties could be pretty severe. At the end of the day, losing your job is about as significant a penalty as you can get. Sometimes it is more devastating than going to jail.

Those penalties are already there; I do not think you can do any more than that. We are educating people and making it clear through our code of conduct. From a senior manager's point of view it is walking the walk and talking the talk. If they see me doing it and talking about it and if they see my senior managers doing it and supporting them when they do it, more than likely they will be prepared to come forward. Even so, people see that things are wrong and they say, "Sorry, it's somebody else's problem." No legislation, guidelines, codes or policies will change that natural human behaviour. In my view, if we have leadership from people walking out there and talking about it, over time that is the only thing that will make it better than it is now.

**Ms CRAWSHAW:** And targeting the senior clinical staff to whom you alluded—those that junior staff are fearful of confronting. Perhaps they are fearful of confronting them because in the past there was a concern that those senior staff could impact on their future career prospects, et cetera. Because of that we must also ensure in a number of areas that their career prospects, access to training, access to promotional opportunities, and access to specialty training is all done transparently. We have been trying to promote that to ensure people do not fear their access to future prospects.

**Mr CLOUT:** Let us be clear that this profession is no different from other professions, for example, the legal profession.

**Ms CRAWSHAW:** Of course not.

**Mr CLOUT:** The same things are true there and the same difficulties are apparent.

**Mr GREG SMITH:** I would suggest that it is because in a hospital situation everyone is working much closer together than they would be working in the legal profession. People in the legal profession are spread out across town.

**Mr CLOUT:** I am talking about the necessity for junior people to be reliant on the views and influence of senior people in their career development. In my view that is the strongest issue that prevents people from coming forward—not the lack of legislation, policy, education or leadership.

**Ms CRAWSHAW:** That is right.

**Mr GREG SMITH:** Mr Clout, you said that people might not qualify as whistleblowers. Do you reject many people who come forward and say that they want to give information?

**Mr CLOUT:** No.

**Mr GREG SMITH:** Do you tell them that they are not whistleblowers?

**Mr CLOUT:** No, quite the opposite. We are talking about the Protected Disclosure Act. There are many forms of whistleblowing.

**Mr GREG SMITH:** We are looking into whistleblowing.

**Mr CLOUT:** The Act deals with only one form of whistleblowing. The answer is no. I said earlier that if we are in doubt we accept it and deal with it even if technically, as I said before, there is an argument about whether or not the legislation covers area health services. Our policy covers all those people plus the contractors and consultants. We err on the side of accepting. When accepting everything we have to balance the cost to the taxpayer and what is in the public interest. When these things come forward we err on the side of accepting it and investigating it, at least to the point of first investigation.

**Mr GREG SMITH:** If I were a nurse working in a country hospital and I went to the media and said that I had to get bandages from the local veterinarian, would I be subject to punishment by the health department?

**Mr CLOUT:** No.

**Ms CRAWSHAW:** No.

**Mr GREG SMITH:** Could I be accused of misconduct for disclosing things that were happening in my employment?

**Mr CLOUT:** No. Ms Crawshaw will give you the legal answer.

**Ms CRAWSHAW:** Assuming there was truth to the allegation—and we would query whether or not there was—no. Generally, those sorts of allegations are anonymous. Do we spend huge amounts of time tracking down the source of the allegation? No.

**Mr GREG SMITH:** What if I stated that publicly?

**Mr CLOUT:** It happens every day.

**Mr GREG SMITH:** And no-one suffers any detriment at all. Is that what you are saying?

**Ms CRAWSHAW:** Some people are out there every day making allegations about the state of the system, but they do not suffer any detriment. Are you aware of anybody who has been disadvantaged as a consequence of that?

**Mr GREG SMITH:** Not particularly.

**Mr CLOUT:** You would have to issues-manage it because in reality there would be issues to be managed. First, you do not want that to continue inappropriately to disrupt the provision of services. Second, I would have it looked into. Third, I would ensure that the unit from which that came was aware of the appropriate and available internal processes to deal with it. When there are genuine concerns the purpose of the exercise is to provide the vehicles for people to bring forward their concerns in an orderly and non-threatening manner that does not raise any of the issues that you have talked about.

I would not do it with the individual and I would not say to the manager, "Talk to the individual." I would say, "In this cluster or area we might need a program across rural hospitals to show what options are available to you." That is what I would do. When I was chief executive of the Hunter New England Area Health Service I dealt with those communities. You would talk to the communities to ensure that you had forums for consumer consultative committees and regular consultative committees so that issues could be raised in an orderly fashion. If the things to which you have referred do occur, do we then go and bash up people? In reality we need them in employment in our hospitals, which is one reason why we do not.

**Ms DIANE BEAMER:** If somebody came to you with allegations of negligence rather than allegations of misconduct or maladministration and said, "I believe Dr X was not asked about an issue in the correct way" would that come under a different system to the protected disclosure system?

**Mr CLOUT:** Yes.

**Ms CRAWSHAW:** It would.

**Ms DIANE BEAMER:** If a nurse came to you and said, "I saw this guy performing an operation in hospital while he was drunk" would that come under an entirely separate system?

**Mr CLOUT:** Absolutely.

**Ms DIANE BEAMER:** That would not be dealt with under this legislation?

**Mr CLOUT:** No.

**Ms CRAWSHAW:** However, as I have said, sometimes there can be a crossover between this legislation and clinical service matters. For example, if there were an allegation of euthanasia obviously that would fall under illegality and obviously involve the professional conduct of the clinicians. We certainly have policies in place to manage concerns about individual clinicians. We have a stepped process to deal with that. We have certainly improved our processes since Dr Reeves, or the present Mr Reeves.

**Ms DIANE BEAMER:** And that would fall outside the protected disclosure legislation?

**Ms CRAWSHAW:** Yes.

**Mr CLOUT:** It would. Let me give you an example of where one might lead to the other. Let us take the clinical circumstance about which you spoke. On the clinical side of it, the clinical competence or negligence of that practitioner, if it involved a doctor, would be dealt with through the Medical Board or the Health Care Complaints Commission. That would be the process that would be followed. There would also be an internal investigation. However, if that had been happening for 12 months and the health service had not promulgated policies relating to appropriate conduct and/or it had such policies but it but had not followed them up even though the matter was within its knowledge, it is possible that it could have cause to do so.

**Ms DIANE BEAMER:** If it received those complaints but it did not act upon them somebody would be caught up in it?

**Mr CLOUT:** Yes.

**Mr JONATHAN O'DEA:** If your openness and healthy attitude were reflected in the whole of the health system I would be quite impressed. I have not said that to others who have sat in that chair. You are right in emphasising some of the cultural and softer aspects of the importance of protected disclosure. I congratulate you on reporting and not being afraid to report what you see as protected disclosures. It seems as though there is a slightly different view from different quarters about what are protected disclosures. If you have a matter that has been reported to the ICAC do you generally record that as a protected disclosure? In what circumstances would you record it as a protected disclosure as opposed to referring it to the ICAC and not dealing with it further?

**Ms CRAWSHAW:** Depending on the way in which you received the information it would result in a referral to the ICAC. If an individual came forward with an allegation of corrupt conduct, even if he or she had not mentioned the words "protected disclosure" normally we would treat that as a protected disclosure and notification to the ICAC would occur and the processes would ensue. But not all our referrals to the ICAC emanate from individuals disclosing information.

**Mr CLOUT:** In fact, most would not.

**Mr JONATHAN O'DEA:** My question is: Do you record it in your statistics as a protected disclosure, or do you at that early point merely refer it to the ICAC and let it worry about it?

**Ms CRAWSHAW:** No, they would be recorded as a protected disclosure to the organisation, if we are the point of disclosure, if an individual came to the area health service.

**Mr JONATHAN O'DEA:** I just think it is a point that might be worth the Committee following up on as well because I think we are hearing different approaches.

**The Hon. GREG DONNELLY:** My question goes to the issue of the nature of the difference between protected disclosure and other industrial related matters like bullying, harassment or like matters. Is there a lack of understanding out there, do you perceive, in the workforce generally about the differences between these types of matters, or are people inclined to bring matters along and say that this is a protected disclosure?

**Mr CLOUT:** If I can answer that. In most cases where there is an issue relating to alleged bullying and harassment, if we just use that example, that is normally something that the person raising the concern, in my experience, does not seek to have dealt with as a protected disclosure, and indeed the manner in which it comes up in most cases does not facilitate that happening. In other words, it is normally pretty well known that there is an issue there and someone has a complaint about it and it is clearly out there in the system.



**The Hon. GREG DONNELLY:** It is a grievance.

**Mr CLOUT:** It is a grievance and we have very strong, robust systems to deal with that process. Having said that, there are clearly occasions where the opposite is true; where the person specifically has concerns as to where they are going to sit in the system and how it is going to be dealt with and they have got allegations and/or grievances and they put them through the protected disclosure process. In my experience, where the individual seeks to do that, that is how they are dealt with. But in most other cases it is dealt with through the normal processes within the workforce.

There are also the ones where there is a senior person in an organisation who has a grievance against the chief executive and their way of dealing with it sometimes is through this process simply because they are not sure where to go because they have got to go outside the organisation.

**Ms CRAWSHAW:** You also get allegations that are a mix; they are a mix of allegations of waste or maladministration coupled with bullying. So you have to sometimes tease through the particular allegations to work out what goes under the Protected Disclosures Act and what is more in the nature of a grievance, and often in those circumstances it is a simpler and cleaner process to simply accord the umbrella of protected disclosure to the full rein.

**The Hon. GREG DONNELLY:** And then try and tease out the matter?

**Ms CRAWSHAW:** Yes.

**Mr CLOUT:** At a practical level what would happen is those types of things can either come up through your human resources area or through your protected disclosure coordinators. The practical way that that is dealt with, if it is in doubt or they are not sure how to go, is that they will talk between my director of workforce and my director of internal audit and they will, or one of them will, have a discussion with the person raising the issue as to what are the options for dealing with it and seek their input into that. That is at a practical level how it happens, I think, in most cases.

**Mr NINOS KHOSHABA:** I understand some complaints would obviously take longer than others to address and to investigate. I just want to ask in regards to the steps and processes that you have in place when a complaint is made and, further to that, does the department have any specific guidelines—for example, once a complaint comes in should it be recorded, say, within 24, 48 hours, and how long before you actually start your investigations and, obviously depending on the complaint itself, some will take a lot longer than others, what is your best practice?

**Ms CRAWSHAW:** We do not have specific time frames within which you have to commence the investigation and you have to conclude the investigation, because obviously, as you rightly pointed out, it depends upon whether you have got a whole swag of allegations involving multiple people or just a simple allegation involving one person. We have got an investigator's manual that the department puts out, and there is a tool kit that goes with that, that applies in a multitude of situations. So it is an investigator's manual to assist with disciplinary investigation as well as with investigations of the nature of maladministration or corruption, and often times, if we think it is something that is going to be resource intensive or take longer than simply doing it ourselves, we have a panel of external investigators and we would refer it out to one of those panel. That is how we try and keep things moving along in a timely way.

**Mr CLOUT:** From my point of view, there is a period in which it has to be done and completed, and that is six months. The bane of my life is the fact that it takes a lot longer than I would like on this and a range of other things, to be honest. But there are three things that have to be balanced: one is that you have to make sure that the process is robust; secondly, you have to ensure that if the matter is going to be investigated there is a level of independence to it, and that often means that you have got to work with people off the panel who can come in and do it, given that they are not sitting there waiting for your phone call; and the third one is that you have got to ensure procedural justice and procedural fairness to not only the person who has made the protected disclosure but the person involved in it.

There is probably a fourth one, and that is I have also got to make sure that the clinical services that I have got absolute overarching responsibility to provide are not inappropriately compromised while this is occurring. So you have got to balance those four things up and the end result of balancing the four things up is

that it takes longer than I would like it to do. I think that is true in all these types of matters in the health system and elsewhere.

**Ms CRAWSHAW:** Sometimes you kick off with a protected disclosure and start an investigation and as the investigator goes forward you might find others coming forward with further allegations or a different twist. An investigation is an organic thing, I suppose. As long as you have a good process and you do it in a timely sort of way. It is very hard to set down specific time frames.

**Mr NINOS KHOSHABA:** I guess it comes back to that timely way if someone makes a complaint, whether it might not be a priority compared with other complaints, should it not be recorded within a certain time frame and then later you decide whether it needs to be investigated or you do your initial checks or whatever?

**Mr CLOUT:** I am sorry; I misunderstood your question. There is a formal process. When something comes in it has to be recorded immediately. There is a register for recording matters. It is very clearly done. The second most important thing is to get back to the individual making the complaint and acknowledge the fact that it has been received and discuss with them the process to go forward and give them a contact that they can keep in contact with—a person they can keep in contact with. I think that is imperative. The rest of it I think you just have to deal with on a case-by-case basis, given those other things you have got to balance.

**CHAIR:** Thank you both very much for appearing before this inquiry.

**(The witnesses withdrew)**

**TIMOTHY JAMES CAMPBELL ROGERS**, Executive Director, Performance Management and Communication, Department of Environment and Climate Change, 59 Goulburn Street, Sydney, and

**CATHERINE MAREE DONNELLAN**, Director, Corporate Governance, Department of Environment and Climate Change, 59 Goulburn Street, Sydney, affirmed and examined:

**CHAIR:** We have received a submission from the department in relation to this inquiry. Do you wish that submission to be part of your evidence today?

**Mr ROGERS:** Yes, please.

**CHAIR:** Do either one of you wish to make an opening statement?

**Mr ROGERS:** I might just make a few brief points, if I may. You have our submission and a copy of the guidelines on protected disclosures used by Environment and Climate Change. The information we have provided comes since the formation of the Department of Environment and Conservation in 2003. There were four organisations put together to form that department in 2003. In 2007 it became the Department of Environment and Climate Change with parts of three other organisations. We can speak about the continuum from DEC to DECC, and the figures obviously reflect the departments in that time.

We have said in the submission that there have been six disclosures since 2003. It is fairly consistent; there is one year with none, one year with two and one in each of the other years. So it is a fairly stable sort of trend. We do not have 20,000 staff, we have got about 3,600, and we operate right across the State, obviously with National Parks and the rest of the organisations, so we have a fair complement of regional people. Given that we have, on average, one protected disclosure a year, we have had a look at what we call significant complaints. We vary between 14 and 28 across the last four financial years: two years of 14, one of 24 and one of 28. Obviously it is a small number but the number of complaints we have in total is also relatively small for an organisation that size.

Of the six protected disclosures that we have mentioned, one is still under investigation—the 2008 one; two resulted in disciplinary action against staff members, one of whom was dismissed; one was withdrawn after management took action to resolve the issue that had arisen as part of the complaint; in one there was no evidence found to substantiate the allegation; and one which involved an industrial relations process was resolved through that process as it went through. I thought I would just give you a potted history of the six and we can then turn to any questions you might have.

**CHAIR:** I will start with a few questions. Mr Rogers, you have the National Parks, you have the EPA, you have various tough internal departments in your organisation. Can you tell us where those protected disclosures came from and generally what they involved and what the sort of thing we are looking at happened on the ground in your department, and what kind of complaints are coming forward? Secondly, one of the things we are looking at is detrimental action—people suffering reprisals for coming forward. Have you detected that? What are your procedures and how have you addressed those issues?

**Mr ROGERS:** There is only one that has been referred from an external body. We have had one as an ICAC referral; the other five have all been made internally. There would be more from National Parks, but National Parks has half the staff. There are a couple where I cannot tell you which part of the organisation they are from at this stage. But certainly the larger number would come from the parks area. As far as I am aware, we have no indications of detrimental action being taken. Certainly, we have had two staff disciplined as a result of the complaints made about them, but I am not aware of any complaints of follow-up action.

Obviously we have procedures in place. We have the code of conduct. We have the protected disclosure material available. When we work with managers, we ensure that the purpose of the protected disclosures legislation is well understood. A number of these also involve industrial issues, so the human resources directors are also on top of making sure that there is no detrimental action. Probably half of them have involved human resource types of actions and industrial relations types of consequences that have come out of them as well.

**CHAIR:** One thing that is very lacking is information on how the Protected Disclosures Act applies. We have very little information. In fact we have had people here today who have no information about how it is

working at all. Is that something that you think could be included in an annual report by way of statistics, the number of complaints, and how the matter was disposed of to communicate how many you are getting, the trends, and comparisons with previous years? Is that something that would pose a problem for your department?

**Mr ROGERS:** It would not pose a problem, but at one a year, I am not sure that would also disclose a trend. We publish a number of significant complaints annually and we publish the extent to which they have been resolved or carried forward, with new ones and old ones disposed of, and that sort of thing. That information is already available and that covers the range of 14 to 28 that I was talking about.

**CHAIR:** Where is that to be found?

**Mr ROGERS:** In the annual report.

**CHAIR:** You have only a very few, but still if we were looking at having an agency gather all this information and tell us in two years time how it is operating, before the agencies did so we would need to know whether it would allow us to collect that information. That is why I asked. It does not sound as though that would be too much of a problem because you are doing it already.

**Mr ROGERS:** It is not a problem in terms of gathering information, but I was here for the tail end of some of the Health discussion. This issue of "Is it a protected disclosure, or is it something else?" can get down to very fine lines. I have to say that we take much the same attitude: we treat it as protected. It would go down the same course, or if somebody made a complaint about something else—whether it was fraud or corrupt behaviour or maladministration or whatever it was—we would take it down largely the same course of investigation that we would take for a protected disclosure.

I am not sure whether trying to fragment them into little boxes is necessarily helpful at a departmental level. I am not an external reviewer who is trying to track a particular category. As somebody who has to manage a complaint handling system, we are anxious to make sure that people can report things; that we deal properly with the allegations when they are made, whether they are internal and external; and that we get a proper result from it. I am happy to publish the overall number, but I do have concerns when you get down to "I had zero complaints this year", or, "I had one of this particular category", and I am trying to put them into boxes for the others.

**CHAIR:** The guidelines and procedures that you have, they are ones you developed yourself?

**Mr ROGERS:** Yes.

**CHAIR:** Did you have to borrow or use the Ombudsman's?

**Mr ROGERS:** We have obviously borrowed them from everybody else, but we have a set that is specific to us and that talks about who our disclosure people are, and what the process is.

**CHAIR:** You have adapted that?

**Mr ROGERS:** We have adapted it into part of our suite of programs.

**Mr DAVID HARRIS:** You state in your submission that the Department of Environment and Climate Change undertakes a fraud and corruption assessment every three years.

**Mr ROGERS:** Yes.

**Mr DAVID HARRIS:** What does that involve?

**Ms DONNELLAN:** The one that was undertaken in 2005-06 involved identifying a series of fields where potential fraud and corruption could occur. It involved discussions with senior managers and line managers across a department to identify areas of corruption and fraud potential. That was then reviewed by the corporate governance branch and the manager of corporate audit and review. The assessment was pulled together from that and the strategies subsequently prepared.

**Mr DAVID HARRIS:** I just thought that that was a good initiative.

**Mr ROGERS:** Can I also say that the strategy is then signed off by the department's executive group and by the internal audit committee.

**Mr DAVID HARRIS:** In the part of your submission from the intranet packages—I have to say that I do like the way it has been set out with a few scenarios showing that shows, "If you do this, this happens and that happens", but is there any training that goes along for staff in this as well, or do they just refer to the intranet page?

**Mr ROGERS:** When it first came out, it came out with some talks and things around it. We are about to relaunch our corporate governance package where we will take this and the code of conduct and a few other things and run a series of staff meetings to look into the corporate plan and the corporate governance package. We are rolling out a new intranet site in a matter of weeks. The idea is that we will roll a new site out and then we will relaunch the governance package with it.

**Ms DONNELLAN:** I wish to just add to that. As part of the induction process for new employees as well, there is a package on ethics and corporate governance generally.

**Mr DAVID HARRIS:** Finally, I know you have had only a very low number that you have classified under protected disclosure, but when someone comes forward to whoever makes the assessment, is there any audit done on that decision to make sure that it was the right decision? Do you know what I mean? In terms of a checking procedure, if someone comes forward with information, is there an audit as to whether it is a protected disclosure or not, as a checking role, or is it just that person's judgement?

**Ms DONNELLAN:** The way it operates is that the director of corporate governance is the disclosure coordinator. Anybody in the department can make a disclosure to the disclosure coordinator, the director and, across the department, the director general. That is then referred to the disclosure coordinator for assessment as to whether it is a protected disclosure, and then it proceeds from there.

**Mr DAVID HARRIS:** They would have the opportunity to get advice to make sure that they are making the right decision?

**Ms DONNELLAN:** That is correct.

**Reverend the Hon. FRED NILE:** I will just follow some of the titles you have. You are the disclosure coordinator?

**Ms DONNELLAN:** I am.

**Reverend the Hon. FRED NILE:** There are some references to disclosure officer. Is that lower down the scale?

**Ms DONNELLAN:** There is a reference to a nominated disclosure officer. That means all directors and above in the department. They are one of the three people that somebody can make a protected disclosure to, the other being the director general.

**Reverend the Hon. FRED NILE:** You have mentioned that a number of those protected disclosures came from the staff at National Parks. Has there been any analysis of why that is occurring in the National Parks area?

**Mr ROGERS:** They do not cover the same issues, so they are different issues. It represents about half our staff, so you would expect that at least half of them would come from that area. It has also the area where there is most management of things in the sense of managing parks, so people are working on those sorts of things whereas much of the rest of the organisation is a policy-type organisation or a regulatory operation that is operating on third parties. I think it is more structural than it is anything else.

**Reverend the Hon. FRED NILE:** It does not reflect on the type of person employed in the National Parks area?

**Mr ROGERS:** My comment was really directed to that. I think it possibly comes out of some of the nature of the work as distinct from the people. It is because you have people who are running things and working on-site in doing those sorts of things whereas there are other people who do not interact with each other or actually manage a function of that nature. I do not think it is related necessarily to individuals, or where they come from.

**Reverend the Hon. FRED NILE:** I note that, as with other departments, there are restrictions on taking disclosures to members of Parliament or journalists. Has that area been a problem at any stage with any of the complaints?

**Mr ROGERS:** It has not been a problem. One has gone to a member of Parliament and has been subsequently sorted out. There were some helpful suggestions made from that area. I obviously do not want to go into the details of the individual one. Frankly, the provisions of the legislation have not caused us a problem. It segregates certain of our complaints into a specific way of handling. For one complaint a year, it has not caused us a problem; nor would I suggest that if we had two or three it would cause us a problem.

Because we are the complaint receipt point, we do not have the problem of being the Auditor-General or the ICAC or the Ombudsman as to whether we have jurisdiction. They are ours; we have jurisdiction. We need to handle them. Realistically, the protected disclosures legislation, in our view, protects the individual. It does not constrain us carrying out the investigation. It is basically the same investigation we would carry out if somebody else came in and said, "You have a problem at X. This is going on. Do you know about it?" No, it does not cause us a problem. We would hope that we would deal with matters sufficiently promptly for the follow-on disclosure provisions not to be a problem.

**The Hon. TREVOR KHAN:** You indicated that you have 14 to 28 significant complaints per year. Is that right?

**Mr ROGERS:** Yes.

**The Hon. TREVOR KHAN:** So it is something in the order of, on average, 20 complaints a year?

**Mr ROGERS:** Yes.

**The Hon. TREVOR KHAN:** What is the nature of those complaints?

**Mr ROGERS:** They vary from the protected disclosure to referrals from the Ombudsman and the ICAC to discoveries of misadministration or theft or something like that. They cover the full gamut of those sorts of things.

**The Hon. TREVOR KHAN:** Do I take it because you include in that amalgam of strict protected disclosures, you essentially deal with them all in a complaints procedure that is common to all of them?

**Mr ROGERS:** Other than the issue of disclosing the name of the complainant and identifying them and necessarily some of the feedback work, yes.

**The Hon. TREVOR KHAN:** Do I take it that with some of the 14 to 28, which is an average of 20, you would also not disclose their name, even though they would not fall within the concept of a protected disclosure?

**Mr ROGERS:** That is right.

**The Hon. TREVOR KHAN:** Why would you do that? Why would you not disclose the name of the complainant in those circumstances?

**Mr ROGERS:** You would simply not always do it because it was not necessary. It would depend on the nature of the investigation. Sometimes with a protected disclosure, you cannot investigate it without actually identifying the person, not necessarily by name. It becomes quite obvious who the person is. That is the reason for having the provisions—to go back and say to them, "If we go ahead with this, it will necessarily identify you because you were the only one there." You have to afford natural justice to the person being investigated and at the same time balance that with how you are protected. You are right that you would be less concerned about

identifying an individual if it were not a protected disclosure, but it does not mean that you would always want to identify where it came from.

**The Hon. TREVOR KHAN:** Because it may be harmful to that person in some form or other if the identity were disclosed?

**Mr ROGERS:** Yes, maybe.

**The Hon. TREVOR KHAN:** Do you think it may be appropriate that protected disclosure protections extend to groups of persons beyond those who are protected under protected disclosure legislation?

**Mr ROGERS:** I think the key point about the protected disclosures legislation is the prevention of subsequent action against the complainant.

**The Hon. TREVOR KHAN:** Sure, yes.

**Mr ROGERS:** I think to give everybody the same set of protections is probably not either necessary or reasonable.

**The Hon. TREVOR KHAN:** I was not suggesting everyone.

**Mr ROGERS:** No. I am just working down the track.

**The Hon. TREVOR KHAN:** Sure.

**Mr ROGERS:** There may be a case that there is a particular class you could look at. I do not want to venture too far into where the policy bits of it might be, but the less the better from an administrative point of view in terms of being able to carry out a proper investigation, afford natural justice, and go down that track. If you are going to extend the class of people covered, you need to have a clear line as to why it is being done.

**The Hon. TREVOR KHAN:** I will go to something that you identified then and in your earlier comments. I take it that you are not able to point to anyone, apart from perhaps one that we can identify ourselves, who has been unhappy with the outcome of your inquiry approach? This is specifically with regard to protected disclosures.

**Mr ROGERS:** I personally cannot point to anyone. I do not know whether Catherine can.

**Ms DONNELLAN:** No.

**Mr ROGERS:** There are instances where things have been negotiated. I might be talking about one person, perhaps, where something has been negotiated. It has been negotiated, so it is not necessarily one that they would have wanted. But in a couple of cases, people have either been disciplined or have left so that they are right out of the picture. Certainly the ones where we have changed the system to accommodate the problem are those they foresaw were happy with that because it was done before any decisions were made.

**The Hon. TREVOR KHAN:** We are essentially asking people who are reasonably senior in the department whether those people who have made the complaints are happy with the outcome. Would you agree with me that we may be asking the wrong people? You are the ones who do the work from the hierarchy side, not the people who initiate it.

**Mr ROGERS:** I think then you have to look at what the nature of the complaint was as to what satisfaction means or what happiness means.

**The Hon. TREVOR KHAN:** That is getting very esoteric.

**Mr ROGERS:** No. I go back to the previous two who sat here and said, "I've got to 20,000 staff and I will have an awful lot of opinions about what 'satisfied' means." If you had complained that somebody had done something that you thought was particularly not nice and they had been dismissed, then I guess you would be satisfied with the outcome that the system had dismissed somebody and had changed procedures to make sure that it was fixed. Whether you would describe them as happy at the end of it, I do not know.

**The Hon. TREVOR KHAN:** Let me deal with another part of the concept. Part of the protected disclosures legislation essentially is to protect that person from retribution in due course?

**Mr ROGERS:** Yes.

**The Hon. TREVOR KHAN:** I ask you once again, can you be certain that from their perspective, as opposed to your own, those people feel they have been afforded appropriate protection?

**Mr ROGERS:** The only place in which I would say I could not say that with complete confidence would be ones where it involves an industrial situation as well and there was a negotiated outcome. It is very hard to tease some of these apart when they get into industrial circumstances as to where the protected disclosure starts. Sometimes it comes in the middle of the process. I would not put my hand on my heart and state that every one of those is going to end up with a completely happy outcome for either side.

**The Hon. TREVOR KHAN:** Indeed, when you have that industrial component, whether it is at the start, the middle or the end, the outcome may be that the person who has made a protected disclosure in fact may walk out of the organisation. That might be the outcome, might it not?

**Mr ROGERS:** Look, it is certainly a potential. I cannot identify one of ours where that is the case.

**The Hon. TREVOR KHAN:** But you can envisage that potential?

**Mr ROGERS:** I understand the question and I understand how it could arise. It could arise from any industrial situation, not just a protected disclosure.

**The Hon. TREVOR KHAN:** Sure, but the consequence of it may be that with the assistance of third parties, the unions that are involved, essentially what that person is told is, for instance, "Look, the way out of here is that we get you retrenched." Yes?

**Mr ROGERS:** Look, I find that hard from a complainant with a protected disclosure. I really do. I cannot identify one of those. I know lots of industrial cases where people say, "Well, that's the easy way out", but I cannot identify a protected disclosure within our area where—

**The Hon. TREVOR KHAN:** Where that has happened?

**Mr ROGERS:** Not in the six cases since 2003.

**The Hon. GREG DONNELLY:** I refer you to page one of your submission and some of the points about policies and procedures, and specifically in the second last paragraph to the issue about short training courses and refresher programs for staff. Can you elaborate on the nature and regularity of those courses, and the degree to which refresher programs are run?

**Mr ROGERS:** We have actually identified the need to run the refresher so there is not a series of refresher training in that sense. That is why it says it is being prepared.

**The Hon. GREG DONNELLY:** So that is to come?

**Mr ROGERS:** Yes. The intention is to actually take them out and run them in regional locations as well as the city so that we can actually get the coverage in those sorts of areas.

**The Hon. GREG DONNELLY:** Obviously, people receive some preliminary exposure through the normal induction process into the department?

**Mr ROGERS:** Yes.

**Ms DONNELLAN:** That is correct.

**The Hon. GREG DONNELLY:** Will the rolling out of these refresher programs be in the near future?



**Mr ROGERS:** We were going to try to run it in the current quarter, but have not managed. So, we are now aiming at the first quarter next year.

**The Hon. GREG DONNELLY:** Do you have any way of identifying or appreciating how often staff wanting to inform themselves about the protected disclosures information access the intranet information?

**Mr ROGERS:** Not on our current intranet.

**The Hon. GREG DONNELLY:** So it is posted up there for people to avail themselves of, but it is really—

**Mr ROGERS:** Attention is drawn to it in a range of circumstances. We have a code of conduct, we have this, and we have a fraud and corruption strategy. There is a whole suite of different things. You are quite right, the average member of staff will not go into it regularly and look at it. That is part of the reason for wanting to refresh it and make sure that we have drawn everyone's attention to it more recently. It comes up in a range of circumstances when we have briefings and things. We remind people that the code of conduct is there, but we need a program to get it to all staff and refresh that. Rebuilding the intranet is useful as part of that because we can use the fact that people will look at the new intranet as part of the process of saying, "This is what's on it."

**Mr GREG SMITH:** Mr Rogers, how long have you been with the department?

**Mr ROGERS:** I was one of the people moved into it in 2003.

**Mr GREG SMITH:** Did you ever work for the National Parks and Wildlife Service?

**Mr ROGERS:** No.

**Mr GREG SMITH:** Did you, Ms Donnellan?

**Ms DONNELLAN:** No.

**CHAIR:** Thank you very much for giving your evidence. We are grateful.

**(The witnesses withdrew)**

**JIM GLASSON**, Director General, Ministry of Transport, Level 21, 227 Elizabeth Street, Sydney, and

**PETER DAVID SCARLETT**, Executive Director, Transport Services Group, Ministry of Transport, Level 21, 227 Elizabeth Street, Sydney, sworn and examined:

**CHAIR:** We have received a submission under your hand Mr Glasson. Do you wish that to be part of your evidence today?

**Mr GLASSON:** I do.

**CHAIR:** Before we proceed to questions do either of you want to make an opening statement?

**Mr GLASSON:** No. I think we have given you a brief submission and we are happy to take questions and respond.

**CHAIR:** We are investigating practices and procedures in dealing with what we call whistleblowers; you may know it as protected disclosures. We have been inquiring into the policies, procedures and practices that are in place and what happens when people come forward with information. I note your submission does not attach any documentation. Can you provide the Committee with information about your policy or a copy of it? How do you treat someone who comes forward with information on the areas outlined in the Act or any other disclosure?

**Mr GLASSON:** We have a number of policies within the Ministry of Transport. We have a protected disclosure policy, a fraud and corruption policy, and a code of conduct. I am happy to make copies of those available to the Committee following today's proceedings. The protected disclosure policy deals specifically with whistleblowers and how a reporting is handled within the ministry. I have Mr Scarlett as my nominated officer. Staff can come directly to me or to Mr Scarlett. Clearly they can go to others, but in that instance they would be referred on to either myself or Mr Scarlett. Both the fraud and corruption policy and the code of conduct contain references to protected disclosure and to the protected disclosure policy.

**CHAIR:** In the past five years how many protected disclosures have you dealt with? What has been their general nature? What was the outcome from how you handled them?

**Mr GLASSON:** I have been director general in an acting or appointed capacity for three years. I have not had one protected disclosure in that period.

**CHAIR:** Are your employees aware of the policy? Are they given a copy of the policy? Are they taken through a training process where they are told that they can come forward with information?

**Mr GLASSON:** This year all employees have gone through a fraud and corruption training program that contains references to the protected disclosure policy. All our policies are on our intranet. Last year all staff went through an ethics training workshop and it is also referred to in that.

**CHAIR:** In the time you have been in your position you have not had to deal with any real-life disclosures?

**Mr GLASSON:** No, I have not experienced one in my time.

**CHAIR:** You have told us that you are going through a fraud training program?

**Mr GLASSON:** Yes.

**CHAIR:** Is that as a result of anything that has happened? Is that as a result of any complaints or internal complaints? Has anything initiated that?

**Mr GLASSON:** No, it is not. It is more a view I took when I became director general that I wanted, on an annual basis, to take all staff through a training program with a particular focus in relation to their obligations. We have done ethics, fraud and corruption, and it may well be that we specifically do protected disclosure at some time in the future.

**CHAIR:** Have you received complaints about any other types of matters that would not normally be protected disclosures? Do you have internal complaints or grievances? If so, do you have policies for those?

**Mr GLASSON:** We do, but Mr Scarlett may be able to answer it in more detail because the human resources and corporate services areas come under his direct responsibility. I am not aware of instances in the ministry in my time when people have had grievances that have not been resolved.

**Mr SCARLETT:** The ministry follows the Government's guidelines in relation to grievance management. From time to time there are issues raised by people and they are dealt with in accordance with those guidelines. I am not aware of anything that is outstanding in respect of those. There is not a large number of those sorts of issues that come up in the ministry because we are not a very large organisation.

**CHAIR:** Is it the case that the ones you have dealt with and determined were not protected disclosures?

**Mr SCARLETT:** Yes.

**CHAIR:** You made that determination?

**Mr SCARLETT:** Yes. There is only one issue that has come to my attention as a protected disclosure in my time in the ministry, and I have been there five years. So, there was one issue that was raised that was treated as a protected disclosure, but there have been no others that have come to my attention that have been treated in accordance with the Act.

**CHAIR:** What was the outcome of that one instance? Was it referred or dealt with internally?

**Mr SCARLETT:** It was dealt with internally. An investigation was undertaken. A disciplinary investigation was undertaken relating to the complaint—the subject of the complaint, not the person making it, obviously. Appropriate action was taken to deal with the matter at the end of the day.

**CHAIR:** Is there any issue about detrimental action or reprisals as a result of that?

**Mr SCARLETT:** No.

**Mr DAVID HARRIS:** Does the Ministry of Transport just cover the administrative arm of the Ministry of Transport or does it cover other areas as well?

**Mr GLASSON:** The Ministry of Transport covers a number of different areas. We have a policy area. We have a ministerial coordination and support area that deals with Cabinet matters. We have a transport operations group which covers the contracts for buses and the regulation of buses. We cover the regulation of taxis and hire cars, the administration of driver authorities for buses and hire cars, and we have a coordination role across transport under the State Emergency and Rescue Management Act for transport support in bushfires, floods and other things. That is probably not the full picture. While it is a small organisation, we have an office in the city. We have our largest office in Parramatta. We have an office in Newcastle and an office in Wollongong, and we have 11 transport coordinators across regional New South Wales. So we are fairly well spread but not large in number.

**Mr DAVID HARRIS:** With regard to the contract functions, including taxis and buses and things, do you receive many complaints about dealings in that area?

**Mr GLASSON:** We do receive complaints, particularly in relation to determinations about fit-for-purpose and health matters, but those issues where they cannot be reconciled with the party ultimately normally would end up in the Administrative Decisions Tribunal because we would make a determination that they would go elsewhere for a determination.

**Mr DAVID HARRIS:** So in that area the actual contractors who get awarded the contracts, do you cover them under protected disclosures as well or do you treat them differently?

**Mr GLASSON:** I have not turned my mind to that but I am presuming that if someone from outside the organisation came and made an allegation about someone within the organisation, yes, we would treat that in a confidential manner.

**Mr DAVID HARRIS:** Finally, do you have a random audit process that looks back at some of the complaints and just does like a checking mechanism to make sure that the right process has been followed? If so, who would do that?

**Mr GLASSON:** Not that I am aware of but maybe that is something we ought to do.

**Reverend the Hon. FRED NILE:** Just to clarify the last question about all the other departments, we have the New South Wales Department of Health. With you we have the Ministry of Transport. Is there a department of transport?

**Mr GLASSON:** No. We were formerly the Department of Transport and then were renamed as the Ministry of Transport.

**Reverend the Hon. FRED NILE:** So there is no such thing as a department of transport?

**Mr GLASSON:** No.

**Reverend the Hon. FRED NILE:** What is the total staff then?

**Mr GLASSON:** About 350.

**Reverend the Hon. FRED NILE:** That could be why you do not have many complaints, compared with 20,000 in the health department.

**Mr GLASSON:** That is not for me to say. It certainly does not mean that you cannot have problems even within a small organisation.

**Reverend the Hon. FRED NILE:** Have there been any other investigations in your area? Have there been any complaints to ICAC that you know of?

**Mr GLASSON:** No but we do from time to time refer information to ICAC that we think should be brought to its attention but we have not been subjected to an investigation by ICAC in my time.

**Reverend the Hon. FRED NILE:** What sort of information would that be? What types of evidence?

**Mr GLASSON:** There can be allegations made in relation to the industries that we have involvement with, and in those instances I refer them to the ICAC commissioner to his attention and investigation if he sees fit.

**Reverend the Hon. FRED NILE:** Getting back to, say, a taxi driver licence or tow truck activities, those types of things.

**Mr GLASSON:** It depends on the nature of the issue. Sometimes it is an issue about our decision to not award or not give a driver licence or a driver authority. In those cases we would normally refuse and it will go to the Administrative Decisions Tribunal. But if there were a suggestion of some form of corruption, any sort of allegation of that nature, I would just immediately refer it to the ICAC commissioner.

**Reverend the Hon. FRED NILE:** Would that apply to driver testing officers? Would that be part of your concern?

**Mr GLASSON:** Yes, it would. We do not actually have a test. We rely on the drivers licence issued by the RTA but we then have a fit and proper test and a medical test that would apply in addition to that. But if there was ever a suggestion that one of my officers was in any way acting corruptly in relation to those duties, then we would certainly investigate it and refer it to ICAC.

**Reverend the Hon. FRED NILE:** But you have not had any?

**Mr GLASSON:** No, I have not had any of those in my period.

**The Hon. TREVOR KHAN:** I am right that ICAC does not investigate every complaint that is referred to it, does it?

**Mr GLASSON:** No, it does not.

**The Hon. TREVOR KHAN:** There is an issue of resourcing in terms of ICAC and in a sense there is a public interest test that ICAC applies about the significance of the complaint, is that right?

**Mr GLASSON:** Yes, it does.

**The Hon. TREVOR KHAN:** So that essentially on the approach that you take, where if you get a complaint that infers corruption you whip it off to ICAC, would you agree with me that on the basis of what you have just agreed with, that you could be whipping it off to ICAC for it to fall into a black hole?

**Mr GLASSON:** No. Can I just clarify that? If I thought there was something within my organisation that needed further investigation I would always do that. Secondly, my experience with the ICAC is that even though they may not initiate an investigation it is not unusual for them to ask the agency that refers to carry out an investigation and to provide them with a report on the outcomes.

**The Hon. TREVOR KHAN:** Indeed, that is their procedure, is it not, that if it is referred to ICAC, if it is of a relatively minor nature they will refer it back to the appropriate organisation for investigation and report?

**Mr GLASSON:** Indeed.

**The Hon. TREVOR KHAN:** Again, reflecting, ICAC is there to deal with the biggies, not the relatively small complaints.

**Mr GLASSON:** That would be my understanding.

**The Hon. TREVOR KHAN:** That being the case, those matters that you have referred off, have you got a system of, in a sense, review to determine whether ICAC has done anything with it or whether it has fallen into a black hole?

**Mr GLASSON:** Absolutely. My corporate counsel is aware of anything I refer to ICAC and we determine, depending on their response, whether there is any follow-up action required or not.

**The Hon. TREVOR KHAN:** And is that part of a formal reporting process?

**Mr GLASSON:** No. It is something that is undertaken between the corporate counsel and myself.

**The Hon. TREVOR KHAN:** I am not being critical. There is not a system of formal reporting as part of your annual reports or the like with regards to matters referred to ICAC and whether they are referred back or the like.

**Mr GLASSON:** No, there is not.

**The Hon. TREVOR KHAN:** Is there a system of retaining the numbers per year of those complaints that are referred to ICAC?

**Mr GLASSON:** We would have all those matters but we do not report them.

**The Hon. TREVOR KHAN:** I suppose it follows that there is no reporting of the number of matters that are referred back by ICAC?

**Mr GLASSON:** Not unless ICAC is reporting those things.

**The Hon. TREVOR KHAN:** I am asking in terms of your ministry as opposed to ICAC.

**Mr GLASSON:** No. I could be corrected but I am not aware that we are obliged to report those.

**The Hon. TREVOR KHAN:** Again, I am not being critical and I am not saying you are. I am just wondering what your internal mechanisms are to deal with them.

**Mr GLASSON:** The internal mechanism is simply an internal mechanism.

**The Hon. TREVOR KHAN:** Those matters that are referred back for investigation, what processes do you have to deal with them?

**Mr GLASSON:** Depending on the nature of the issue, we would make a decision as to whether we do that internally or whether in fact we get an external person or agency in to assist us with it.

**The Hon. TREVOR KHAN:** What rules do you apply in terms of those investigations?

**Mr GLASSON:** I apply generally the ICAC legislation.

**The Hon. TREVOR KHAN:** Let me just now deal with protected disclosures, seeing that in a sense that is what some people think is all that we are talking about. When we talk about disclosures and you talked about disclosures earlier, when you used that term were you using that in the concept of a protected disclosure under the legislation?

**Mr GLASSON:** Yes. The legislation is quite different. It is not the ICAC legislation.

**The Hon. TREVOR KHAN:** No, I fully understand that.

**Mr GLASSON:** Our protected disclosures policy is aligned to the protected disclosures legislation.

**The Hon. TREVOR KHAN:** There are some 335 people in your organisation, I think that number is.

**Mr GLASSON:** It varies.

**The Hon. TREVOR KHAN:** I think Mr Harris asked you earlier with regard to complaints in essence received from outside and I think your answer was something along the lines that you would apply similar procedures or policies with regard to confidentiality as you would to a protected disclosure from inside. Is that right?

**Mr GLASSON:** That would be my approach, I think, yes.

**The Hon. TREVOR KHAN:** You think or it is?

**Mr GLASSON:** Yes, I mean, as director general I treat in confidence anything people bring to me that would relate to anything to do with corruption or maladministration within my agency.

**The Hon. TREVOR KHAN:** The protected disclosures legislation goes beyond confidentiality, does it not?

**Mr GLASSON:** Yes.

**The Hon. TREVOR KHAN:** It deals with the question and essence of retribution from somebody who makes a disclosure.

**Mr GLASSON:** Absolutely, as it does with frivolous and mischievous claims.

**The Hon. TREVOR KHAN:** We will not worry about frivolous and mischievous claims yet; we will worry about there being a substantive complaint made. Let us suppose that a complaint is made by a contractor to your organisation. What procedures do you have in place to protect a contractor who makes a complaint against retribution?

**Mr GLASSON:** I would need to take that on notice and I would happily come back to you on the detail of our policy.

**The Hon. TREVOR KHAN:** Are you able to assure us that contractors are protected from retribution in the event that they make a disclosure?

**Mr GLASSON:** I would give you my assurance that as Director General I would never countenance retribution against anyone having dealings with my agency who brought something to my attention with regard to my agency's administration.

**The Hon. TREVOR KHAN:** I am not doubting your bona fides but you are the head of an organisation so I suppose I am asking whether you can assure us that people in your organisation will not take retribution against a contractor who makes a disclosure.

**Mr GLASSON:** How can I give an ironclad assurance about everyone who works for me? I do not think that is a reasonable thing. What I will say is that I believe that people who work for the Ministry of Transport are provided with enough guidance to understand the way the ministry conducts itself and the way it deals fairly and honestly with people who have dealings with it.

**The Hon. TREVOR KHAN:** Are you aware if there is a policy and procedure in place to ensure that contractors who make a disclosure are not the subject of retribution?

**Mr GLASSON:** No, I am not but I will certainly take that on notice and come back to you.

**The Hon. GREG DONNELLY:** In your submission on the bottom of page one you make reference to work being done to update the policy.

**Mr GLASSON:** Yes.

**The Hon. GREG DONNELLY:** Specifically in regard to that, I understand that is being done in the context of looking at the ICAC and New South Wales Ombudsman and what their position is on dealing with these sorts of issues. Are you in a position to inform the Committee about the proposed changes in any detail or is it early stages?

**Mr GLASSON:** I am happy to give you the context in which we are revising those things. Coming out of the fraud and corruption workshops that we had with all staff this year, there was a comment both from some staff and from the organisation that undertook the training that they thought some of our policy documents were a little wordy and a little difficult to follow at times. So we are simply going through those and trying to make them more user friendly and more easy for staff to understand. It is not an issue of changing the substance; we are comfortable that the substance is there and correct. It is a matter of making them easier for the staff to understand and use.

**The Hon. GREG DONNELLY:** Is there an approximate time line for the release of the revised policy?

**Mr SCARLETT:** No, we have not determined that at the moment. We are getting someone in to help with the redrafting. I would have to come back with the timeframe for when we expect that work to be finished.

**Mr GLASSON:** I would say six months at the outside.

**Mr GREG SMITH:** Is this a case that the Ministry of Transport does not have authority over the 10 or so agencies that deal with transport in this State?

**Mr GLASSON:** That is correct.

**Mr GREG SMITH:** Are you there mainly to look after the Minister?

**Mr GLASSON:** We have a range of functions, one of which is to provide ministerial support around the Cabinet process et cetera. We also provide an across-agency policy perspective. Then we have these very specific obligations around bus contracts and taxi and hire car regulation.

**Mr GREG SMITH:** So you are not the contractor for things like the Epping to Chatswood rail link?

**Mr GLASSON:** No, I am not.

**Mr GREG SMITH:** I understand there are two groups, RailCorp and the Transport Infrastructure Development Corporation.

**Mr GLASSON:** Correct.

**Mr GREG SMITH:** Who decides disputes between those two organisations?

**CHAIR:** Is this appropriate?

**Mr GREG SMITH:** I want to know where the protected disclosures go in those organisations and he might know.

**CHAIR:** He can answer that question.

**Mr GREG SMITH:** We are entitled to see just how the transport umbrella works, if it exists. That might help to explain why it gets so few protected disclosures.

**CHAIR:** Can you address that?

**Mr GLASSON:** I do not have accountability beyond my organisation in terms of governance. Clearly, RailCorp as it is currently constituted and the Transport Infrastructure Development Corporation are both state-owned corporations. They report to the board and shareholding Ministers under their legislation.

**The Hon. TREVOR KHAN:** At the moment.

**Mr GLASSON:** I am not qualified to comment on how governance operates within those organisations.

**Mr GREG SMITH:** Do you receive complaints about activities occurring in those agencies?

**Mr GLASSON:** Not in the general scheme of things, no.

**Mr GREG SMITH:** Do you do any monitoring of all the Independent Commission Against Corruption investigations into RailCorp and what happens about the recommendations?

**Mr GLASSON:** No, not in relation to any of those other agencies.

**Mr GREG SMITH:** What does your organisation actually do?

**Mr GLASSON:** We provide policy advice to the Minister for Transport across a range of public transport and rail matters, which are in his broader portfolio. We provide ministerial support in relation to the Cabinet process et cetera. We provide licensing for intrastate aviation—that is, regular passenger services. We hold the contracts for all regular public transport bus services in New South Wales. We regulate the taxi and hire car industries. We issue driver authorities for both taxis and buses. We do the cross-agency coordination under the emergency management legislation.

**CHAIR:** It is an impressive list.

**Mr GREG SMITH:** You mentioned bus contracts. Does that mean you deal with the purchase of buses for the State Transit Authority?

**Mr GLASSON:** The operators procure their own buses, but we authorise the procurement and pay for the operation of those bus.

**Mr GREG SMITH:** Do you receive complaints about corruption in that process?



**Mr GLASSON:** If it were to occur, I imagine we would. However, I am not aware of any complaints in that regard.

**Mr GREG SMITH:** Do you have complainants who are not categorised as being covered by the protected disclosures legislation?

**Mr GLASSON:** If I had one that I thought was covered I would treat it as a protected disclosure.

**Mr GREG SMITH:** But if you had complaints from the public about possible corruption in your organisation, how would you classify that?

**Mr GLASSON:** It would depend on the nature of the complaint.

**Mr GREG SMITH:** But you have not had any?

**Mr GLASSON:** Not that I am aware of about corruption within the organisation.

**Ms DIANE BEAMER:** Given that any complaint from the public would not be subject to the protected disclosures legislation, I assume that you would handle that in the same way that you handle any complaint that requires confidentiality.

**Mr GLASSON:** Any member of the public or any person who deals with the ministry who comes to me would always find that I deal with their complaint or the issue raised in a sensitive and confidential way.

**Ms DIANE BEAMER:** Separate from protected disclosures you would have your own system to deal with anything that fell outside of that; that is, the whole range of other policies that fall outside protected disclosures. That is specific and it is about the people you employ.

**Mr GLASSON:** Yes. But in relation to someone externally raising an issue with me, how I treat it would depend on the nature of the issue.

**Ms DIANE BEAMER:** Absolutely. But you could not afford them the coverage of the protected disclosure legislation.

**Mr GLASSON:** No, but I can give them the assurance that I would treat their complaint in a confidential or sensitive way if that is what they wished. I would certainly give them the assurance—to the extent that I was able—that I would protect them from any retribution from within my agency if they were complaining about one of my staff. It is very important that I understand if those things are causing concern to people.

**Mr JONATHAN O'DEA:** If you received a complaint about the Minister himself, would you classify that as a protected disclosure?

**Mr GLASSON:** I guess it would depend on who made the complaint, would it not? I have not had one.

**Mr JONATHAN O'DEA:** Would you treat that any differently from a complaint about anyone else?

**Mr GLASSON:** I do not think I would differentiate on the status of the individual within the government. If a serious complaint is made—and it passes the test of a serious complaint—then it needs to be treated properly.

**Mr JONATHAN O'DEA:** I note your comment about vexatious or frivolous complaints and the potential to discern between a complaint lodged by an employee who might be trying to protect himself versus a legitimate complaint about a grievance, discrimination or reprisal as having been identified by a whistleblower. Without going into the details, I am aware of a matter that has been played out over the past few years. I raise it because you say there has been nothing in the past three years. Either you have classified that matter as being in a different category and therefore not a protected disclosure or you are unaware of it. That is unlikely given that it has been litigated.

**Mr GLASSON:** A matter certainly has been the subject of ongoing litigation for a number of years. However, I answered that I was not aware of a protected disclosure matter coming to me in the three years that I have been director general. A matter has been on going for a number of years, since well before I became director general, that has been the subject of various actions.

**Mr JONATHAN O'DEA:** You would not classify that as a matter that falls within the protected disclosure legislation as a potential reprisal against a whistleblower?

**Mr GLASSON:** Not that I am aware. We cannot comment on the matter that I think you are raising because—

**Mr JONATHAN O'DEA:** I am raising it only because you said there were none. I am wonder whether there are in fact none.

**Mr GLASSON:** To clarify it, I was referring specifically to whether any had been brought to my attention as fresh matters during the period in which I had to make a determination. I understand this matter commenced well before my time as director general.

**Mr JONATHAN O'DEA:** Are there any other matters that have arisen in the past three years that perhaps because of the categorisation might be on the borderline?

**Mr GLASSON:** I am genuinely not aware of any matter that I have considered classifying as a protected disclosure in those three years.

**Mr JONATHAN O'DEA:** Are you satisfied that if there were a complaint that perhaps could be construed as falling under the Act that the culture, practices and procedures in your organisation are such that it would be recognised?

**Mr GLASSON:** I would like to think so, but one can never say categorically that something will not be dealt with incorrectly. However, I have certainly endeavoured in my time to provide my staff with the encouragement to act fairly and reasonably and not to feel threatened in bringing things to my attention.

**Mr NINOS KHOSHABA:** During the previous review of the Act the ministry raised serial disclosures made about the same or essentially the same issue. It stated that it would be useful if a mechanism were available to allow for conclusive close out in relation to such disclosures. Do you or Mr Scarlett have any comment on that issue?

**Mr GLASSON:** I do not at this time.

**Mr SCARLETT:** I do not have anything to add.

**Mr GLASSON:** When was that?

**Mr NINOS KHOSHABA:** I think it was done two months ago.

**CHAIR:** It was done in 2006.

**The Hon. TREVOR KHAN:** I suspect I know why that submission was made.

**Mr GLASSON:** I do not have anything to add in relation to that at this stage.

**CHAIR:** Thank you very much for appearing.

**(The witnesses withdrew)**

**PETER CHARLES ACHTERSTRAAT**, Auditor-General, Audit Office of New South Wales, 1 Margaret Street, Sydney, sworn and examined, and

**PHILIP GARVEN THOMAS**, Assistant Auditor-General, Performance Audit, Audit Office of New South Wales, 1 Margaret Street, Sydney, affirmed and examined:

**CHAIR:** We have received a submission from you. Would you like that to be part of your evidence?

**Mr ACHTERSTRAAT:** Yes, thank you.

**CHAIR:** Do you wish to make an opening statement?

**Mr ACHTERSTRAAT:** Yes, I will say a couple of words. To a certain extent I might be here under false pretences. We do not have a great deal to do with protected disclosures or with the protected disclosure legislation. In two contexts it does come up—first, internally, if somebody puts in a protected disclosure. There has not been an internal one in my two years in the position, or at least for the last five years, so we do not have a lot of experience to draw on in relation to an internal protected disclosure from a staff member. We do, however, get 15 or so protected disclosures from public servants in other agencies referred to us and we assess those, and invariably we find that they do not meet our criteria for serious and substantial waste or they are more appropriately handled by the Ombudsman or ICAC, so I just wanted to put it in context, as I am not sure that I will be able to give any great insight.

**CHAIR:** In your submission you say that disclosures received range from 8 to 16, and you have one in 2004, 2005 and 2008, so you are talking about the ones that are handled by others?

**Mr ACHTERSTRAAT:** From an employee of another agency writing in, for instance, and we interpret it as a protected disclosure. They might say, "In the agency I am working in someone is using a car when they should not use the car", and then we assess that to see whether we think it is serious or substantial waste and deal with it, but no, they are not in relation to persons employed in the Audit Office.

**CHAIR:** I note in your submission you have a range of portfolio areas—law enforcement, transport, health—listed on page 26 of your document?

**Mr ACHTERSTRAAT:** Yes.

**CHAIR:** Can you tell us a bit about those? What areas are more represented in the complaints that you receive?

**Mr THOMAS:** We get a reasonable amount in Health. They tend to be in different areas, naturally enough. We have had some in Transport and some in Environment and Planning. We get them across all areas. They are more likely to arise where areas have become more contentious recently or at that point in time through the media. We have more noise arising and more protected disclosures coming to us simultaneously, I guess.

**CHAIR:** What you are saying is that most, if not all, of the ones you have experienced are not internal ones?

**Mr THOMAS:** That is correct.

**CHAIR:** They are ones that you have referred on?

**Mr THOMAS:** We have received.

**CHAIR:** You have received them and you have referred them on?

**Mr ACHTERSTRAAT:** Yes, so someone could write to us and, using a car example, if they write in and say, "In the organisation I work in there are systemic problems with the use of cars, there are hundreds of cars being used wrongly", we might assess that as serious and substantial waste and follow that up ourselves. If

they wrote in and said, "My boss uses his car on the weekend", we would assess that and it may not be serious and substantial waste. If they wrote in and said, "A number of people do not fill out their log books", that is an internal control matter and we would refer those things to our financial audit area.

**CHAIR:** So you find yourself referring things?

**Mr ACHTERSTRAAT:** Absolutely. Often members of the public sector think, "A protected disclosure, I don't know who to send it to—I'll send it to the Auditor-General." Invariably we have to write to them and say, "Sorry, it should have gone to the Ombudsman." I sometimes feel as if I am not giving them service by saying that, I feel like I am passing the buck, and invariably, if they are anonymous, we cannot even tell them we have done that. So in a way it would be nice if we could get these people to write straight to the Ombudsman.

**CHAIR:** Is that why you have said in your submission that you think all of them should go to the Ombudsman?

**Mr ACHTERSTRAAT:** All the ones that initially come to us, yes. The ICAC ones could probably keep going to ICAC, but the ones that come to us, I think we would do better service to the protected disclosure people if they knew up front that we are probably not going to look at their minor matter and send it to the Ombudsman.

**CHAIR:** The ICAC has provisions in its Act where people who make a disclosure at work are protected from reprisals, or protected from their employer taking reprisals, protected from the ICAC itself. Would you like those in your Act?

**Mr ACHTERSTRAAT:** Our Act being the Public Finance and Audit Act?

**CHAIR:** Yes.

**Mr ACHTERSTRAAT:** It is not something I have addressed my mind to, but I guess there are protections in the Protected Disclosures Act. I have not come across a situation where I have thought that needs to be changed. I have not analysed it, but we do not see enough of these.

**Mr DAVID HARRIS:** On page 48 of your submission under "Statistics and Reporting" you refer to a previous review where it was recommended that public authorities be required to report to the parliamentary joint committee undertaking review. Do you think that should be formalised to a particular committee or do you think that it would be more relevant for those authorities to, in their annual report, report those statistics?

**Mr ACHTERSTRAAT:** Let me give you a fairly detailed answer and then cut to the chase at the end. If someone gives a protected disclosure it could be a symptom for something else. It is handy for us to know that. Someone might write in and say, "This is happening in my organisation" whether it is an accommodation issue or whatever. Even if it does not necessarily involve serious and substantial waste there could be underlying issues. From a management point of view it would be handy to collate that information. That would then enable us to say, "If we look at them individually there is nothing there, but if there are 10 of them there could be something to do."

It would be a first-class idea if somehow that information were collated. I am not sure whether or not they need to be reported before they are investigated. If the data were there it would be helpful for agencies such as mine. If a central repository kept the data it could write to me and say, "Auditor-General, we have noticed that there seems to be a trend on these sorts of things in this agency, or even across the sector generally" and we would probably look into it.

**Mr THOMAS:** This issue has been kicked around for a while. Whether it should be done through the Committee or perhaps through the Office of the Ombudsman is another proposal. I do not have a view on which of those options is superior. However, I think it would be important to receive that data.

**Mr DAVID HARRIS:** This might be outside your brief, but would you like to give the Committee your view about good audit procedure? Should there be a process across agencies to ensure that the ICAC or somebody else does an independent audit of protected disclosures as a checking mechanism to ensure that people are following policy, that whistleblowers are being looked after and that sort of thing?

**Mr ACHTERSTRAAT:** Yes, I think that would be a good idea. It would depend on the terms of reference or the specification. In any administration in the public sector it is always helpful for someone to review it, to comment on whether it has been followed, and to suggest best practice. That is an unconsidered view but it is a view off the top of my head without having researched it.

**Reverend the Hon. FRED NILE:** I wish to follow up your discussion about collating material. Committees such as this have only a small secretariat so they would not be equipped to do that. However, the Office of the Ombudsman has a special unit to do that so this responsibility would be best given to that office.

**Mr ACHTERSTRAAT:** I support that suggestion. That would be an appropriate place in which to collate such information. As I said earlier, the brochures and the format would make it quite clear to persons wanting to make a protected disclosure that if it was maladministration it should go to the Office of the Ombudsman straightaway. That might prevent people's hopes from being raised unrealistically by writing to us.

**Reverend the Hon. FRED NILE:** You said you had received some anonymous complaints. Obviously you cannot respond to those complaints.

**Mr ACHTERSTRAAT:** It makes it very difficult.

**Reverend the Hon. FRED NILE:** What is your policy?

**Mr ACHTERSTRAAT:** Sometimes they come through on the website. You do not respond to the website because it is just some sort of machine. Our policy is the same. We review them. It is just that we cannot apply the six-month rule and get back to them and say, "This is what we have done" because they are not there.

**Reverend the Hon. FRED NILE:** You would still look at it and take note of it?

**Mr THOMAS:** The public interest is there. If the complaint looked reasonable we would put it through the same sorts of tests as though it had been named or otherwise. It is complaint management and we handle the expectations of the person who advised us. We cannot execute that part of it but we would still investigate it.

**Mr ACHTERSTRAAT:** Sometimes we have a slight advantage. If a matter comes to us that looks to be insignificant—it is not serious and substantial waste—we would usually send it to our financial audit team that looks after that department and we would say, "We received this matter but we do not consider it to be serious and substantial waste. When you are doing your financial audit can you look for any systemic problems that that might be highlighting?" There is a real balance to ensure that we do not breach any protected disclosure rules and things like that. We go through all the procedures.

**Mr THOMAS:** We have two key interests. The first is through the protected disclosure legislation when public interest matters are brought to our attention. The second is our responsibility as auditors, so we would investigate them anyway. We cannot put our heads in the sand and say, "We were not aware of it." We must pay attention to it in its own right as a financial audit issue.

**Reverend the Hon. FRED NILE:** If you found a systemic problem—it might not be serious problem but together with other issues it highlighted a problem—how would you handle that?

**Mr THOMAS:** That is part of our approach. The beauty of our approach is that we can say, "One person has raised an issue in isolation." If we stand back and look at it in the context of a financial audit we might see a more pervasive matter that might have wider implications.

**Reverend the Hon. FRED NILE:** What would happen then? Would it go back to the department?

**Mr THOMAS:** You would get back to protected disclosure complainants in their own right about such matters, advise them how they have been executed and responded to, and there would also be our normal broader reporting to Parliament and to other parties as part of the financial audit.

**Reverend the Hon. FRED NILE:** If it were a systemic problem would it go to the ICAC?

**Mr THOMAS:** If it involved systemic corruption it could. If it was a systemic process to which management should respond we would advise management and we might report to Parliament, depending on its significance. It would then be picked up, as would be any other financial audit matter, and it would be rectified by management through other processes.

**Ms DIANE BEAMER:** If it involved a small matter but it warranted telling the agency or department that it should tighten the procedure or look into somebody using cars at the weekend, would the matter be referred back to that department if the complaint were anonymous? You do not have a box that can be ticked to show that you have referred it back to a government agency.

**Mr THOMAS:** On the first page of our submission we have included a table. An issue might be serious, for example, a person might advise us that the running sheets for cars are not being maintained properly. In isolation it might not involve a large amount of money but I would still tell our financial auditors, "This issue has been raised. We do not know whether or not it is true, but you need to look at it." It is then up to them, as part of the financial audit, to evaluate it further. I am distinguishing between our protected disclosure responsibility and the financial audit responsibility.

**Ms DIANE BEAMER:** Let us say, for example, that the ministry of flowers, or whatever you would like to call it, is using its cars and not writing up logbooks. Would you go back to that department and say, "Would you like to conduct an internal audit?"

**Mr THOMAS:** Correct.

**Ms DIANE BEAMER:** You do not have a section on your form that enables you to refer it back to a department?

**Mr THOMAS:** This inquiry is about the Protected Disclosure Act. Even if it does not meet the requirements under that Act, that is, it is not serious or substantial, we would still respond and address the issue through a financial audit.

**Ms DIANE BEAMER:** If someone raises an issue that falls under the Act you can refer it back to the government agency to conduct its own investigations, which it can do under the Protected Disclosures Act?

**Mr THOMAS:** We would probably do it ourselves as part of the financial audit. So the issue is resolved in the public interest through financial audit matters. The financial auditors would look at it and say, "What is the nature of the issue?" They would then write a letter bringing it to the attention of management. Whether or not we would handle it would depend on its significance.

**The Hon. TREVOR KHAN:** I wish to correct an earlier statement. This inquiry is not necessarily about the Protected Disclosures Act; it is about whistleblower employees.

**Mr THOMAS:** Okay.

**The Hon. TREVOR KHAN:** This inquiry is wider than that, which is one of the reasons why we are here.

**Mr THOMAS:** Referring to that aspect, we would still maintain the same degree of confidentiality as if it had been a protected disclosure. The financial auditors do not need to know the name of the person due to the way in which the financial audit operates. We have the advantage of being able to get into the front door without having to say, "It is a protected disclosure." We are there to do a financial audit. The financial auditors might come across a matter that might have been raised through a protected disclosure. That is the other aspect of it. The first aspect is how we handle the public interest, which is what I am discussing. The second aspect is how we handle the confidentiality.

**The Hon. TREVOR KHAN:** If a complaint or a disclosure is forwarded to your financial audit section what is the largest time frame that is involved between the receipt of a complaint and the financial audit section looking at the issue?

**Mr THOMAS:** It would depend on whether or not the matter being treated as a protected disclosure was serious or substantial.

**The Hon. TREVOR KHAN:** Let us assume that it was not.

**Mr THOMAS:** In those cases the legislation would not constrain it. The maximum would be a year, but it is unlikely to be that long.

**Mr ACHTERSTRAAT:** It would be the next time we did a financial audit, which is usually done on a yearly basis.

**The Hon. TREVOR KHAN:** Is there an assurance that they are done on a yearly basis?

**Mr ACHTERSTRAAT:** All the financial audits are done on a yearly basis. We might be at an agency for six months of the year, depending on the size of the agency. As Phil said, the maximum would be 12 months. For a small agency we do an audit for only a couple of weeks. However, if it involved a long audit we would go in earlier and make inquiries then.

**The Hon. TREVOR KHAN:** Can you give the Committee an assurance that, having received a protected disclosure—we will use the term "disclosure" in the wider sense rather than in the sense that it is used in the protected disclosure legislation—the matter you referred to your financial audit section will be the subject of an inquiry during the audit?

**Mr THOMAS:** We make those decisions on a case-by-case basis. They could be trivial and involve only small amounts of money, in which case we would make a judgment about the cost of conducting an inquiry relative to the savings or to public interest aspects.

**The Hon. TREVOR KHAN:** Do I take it that your answer is no—there is no assurance that the matter that is raised as part of a disclosure will form the subject of an inquiry by the organisation?

**Mr ACHTERSTRAAT:** It will be considered in the risk assessment and determined by the audit leader. Anything other than a trivial matter would probably be looked at. But if it is risk assessed out—

**Mr THOMAS:** Essentially, it has a triaging effect. The triaging is inherent in the Act itself. A certain level of work has to be done. In most instances there will be some degree of middle ground. However, a matter might be raised in which someone might say, "Billy Blogs did not sign the logbook for the use of a motor vehicle." The cost of tracking that down could be very expensive and it might not even be there. A lot of the allegations are very imprecise. Someone might say, "This happened." You then state, "In the absence of specificity I cannot justify spending a significant amount of public funds on an audit to try to find out the specific information relating to these allegations." Each time it is a professional judgement call.

**The Hon. TREVOR KHAN:** If the person has provided his or her name and details, what follow-up inquiry is there?

**Mr THOMAS:** We make contact that person and say, "Can you be more specific about what you are alleging?"

**The Hon. TREVOR KHAN:** Let us assume that your audit has been the subject of an inquiry. What is done at that stage?

**Mr THOMAS:** If it were a significant matter, typically we would advise those involved that it had been reported to Parliament, as part of the normal audit.

**The Hon. TREVOR KHAN:** Let us assume that it does not constitute a significant matter.

**Mr THOMAS:** I cannot recall any having arisen. Normally, we would get back to them and say, "There are no matters that need to be substantiated."

**The Hon. TREVOR KHAN:** Does your organisation adopt a policy or a procedure to deal with complaints that are received and investigated?

**Mr THOMAS:** No. We do not get things of that nature. Primarily, we are not a complaint-handling organisation. That is more the role of the Ombudsman. We do audits.

**The Hon. TREVOR KHAN:** I am trying not trying to be obtuse but you dealt with matters that are referred to your financial auditors.

**Mr THOMAS:** The issues to which I am referring come under the provisions in our primary Act—the Public Finance and Audit Act. In our audit function we are executing stuff and I doubt whether we have a legal capacity to advise people of our findings.

**The Hon. TREVOR KHAN:** Again, I am not trying to be obtuse but, because of the restrictions under your Act, when you receive a complaint you take some action with your financial audit section. Would the general approach not then be to liaise further with the complainant?

**Mr THOMAS:** If we do not have a legal capacity to do so we will not. Under the Protected Disclosures Act we have a legal capacity to do so, but under the Public Finance and Audit Act there is a limit as to what we can do and, by default, what we cannot do. We have no capacity to talk to them about those matters.

**The Hon. TREVOR KHAN:** If your assessment at the start of the process—again I am not being critical of it—is that it does not involve serious and substantial waste, in essence, it is sent off to your financial audit section. The financial audit section then deals with it but there is no reporting-back process?

**Mr THOMAS:** We advise the person up front. If any matters of significance arise it will be through a report to Parliament. We advise them of that but we have no capacity to write to them.

**The Hon. TREVOR KHAN:** Again, I am not being critical because I understand that you are working under restrictions.

**Mr THOMAS:** I am simply trying to emphasise the distinction.

**The Hon. TREVOR KHAN:** I suppose it comes to this: Somebody may, in all good faith, have raised a matter which they see as being of significance—either of significance to them or significance to the State of New South Wales. It gets, in a sense, taken into your organisation; it may well be dealt with, but the lack of any follow-up may in itself create a disincentive to people to report matters, which may be of far greater significance.

**Mr THOMAS:** The mechanism we would have is to bring it to their attention that a report to Parliament has been written and maybe we would send a copy of it saying, "Here is the section of the report which is of relevance to you".

**The Hon. TREVOR KHAN:** I think we are speaking at cross-purposes.

**The Hon. GREG DONNELLY:** Looking at the attachments to your submission, they are obviously very detailed in terms of specifically the policy and procedures, were they developed by the Audit Office itself and refined over time or have they been borrowed from some other agency and refined to meet your particular needs?

**Mr THOMAS:** They were largely developed in conjunction with the Ombudsman's office. We work jointly with the Ombudsman's office and it is developed within that mechanism.

**The Hon. GREG DONNELLY:** These particular policies and procedures we have here have been in place for some time?

**Mr THOMAS:** Yes.

**The Hon. GREG DONNELLY:** In terms of your employees within the Audit Office being aware of the policies and procedures and educated and informed and reminded over time about them, what is the actual procedure that exists to ensure that understanding is there?



**Mr THOMAS:** There is training—it is part of the training program—and if a specific matter comes through, go and speak to the people involved about the specific matter and how it needs to be handled.

**Mr ACHTERSTRAAT:** When they start with induction, when we go through all that material, would we cover this as well?

**Mr THOMAS:** I believe so.

**The Hon. GREG DONNELLY:** It would be part of the induction. With the training, could you elaborate: is there a specific course dealing with this or is it all part of a more general training?

**Mr THOMAS:** I cannot tell you, I am afraid.

**Mr GREG SMITH:** If you found evidence of ongoing fraud, such as a payroll person paying ghosts that are not really there, would you report that to the police?

**Mr ACHTERSTRAAT:** That would go to ICAC, clearly, to start with, and I imagine we would send it to the police too.

**Mr GREG SMITH:** What if it was suggested, would the agency be told?

**Mr ACHTERSTRAAT:** I do not know if this has happened yet. If there is fraud and things like that we might find out about it in a financial audit, but what you are talking about is if someone writes to us and says there is fraud?

**Mr GREG SMITH:** Yes—tells you.

**Mr ACHTERSTRAAT:** I would imagine, and I do not know the answer to this, they would normally write to ICAC or somewhere like that. We get 15 of these a year; I do not know if we have had it on fraud; if we did I would imagine that we would contact either the Ombudsman or the ICAC, the people who are the experts on that, and say, "We are going to give it to the police or to yourselves. We do not want to prejudice any review or investigation you do. Should we tell the agency or shouldn't we?" I think we would get their advice on a case-by-case basis. We would not want to taint the evidence.

**Mr GREG SMITH:** You would not want to prejudice an investigation.

**Mr ACHTERSTRAAT:** That is what I am thinking off the cuff. As I said, I am not aware of us having one of those.

**Mr JONATHAN O'DEA:** Have there ever been any instances where your staff have felt victimised or pressured by virtue of doing their own role within government departments? I would hope not but it is just something that occurred to me that while there may not be complaints about their treatment within your own organisation are there ever any complaints about their treatment from other government departments?

**Mr ACHTERSTRAAT:** We have complaints about the accommodation they give us; they often give us the worst accommodation so we do not stay long. I am not aware of anyone having felt pressure. One of the fortunate things of the Audit Office is that it is so independent that my understanding is that other agencies just do not do that sort of thing. I am not sure if you have ever come across any, Phil?

**Mr THOMAS:** I just think if you want to be loved you should not become an auditor—that goes with the turf.

**Mr ACHTERSTRAAT:** There is always spirited discussion but I am not aware of any situation where it has gone further than spirited discussion, and it is quite spirited discussion. I am not aware of any that could be underhanded or anything further. I am not aware of anything—that is not to say there has not been any.

**Mr JONATHAN O'DEA:** Your organisation or your office in a sense is a whistleblower of sorts in a healthy way, but I am just wondering whether any of your staff have ever felt undue or inappropriate pressure from any government departments.

**Mr THOMAS:** At mid- to junior-level officers, these sorts of things do arise, but more senior levels of both sides understand that we both have roles to play; we are executing our roles, what is required of us, and inherently there is going to be some tension, and that level of education then flows back out and we understand our roles.

**Mr JONATHAN O'DEA:** But do you have some sort of mechanism or some sort of sensitivity at the junior level where it is more likely perhaps to happen?

**Mr THOMAS:** Certainly that is part of our training, that we advise people that being subject to audit is inherently an intense process. We can expect some people do not respond in the most charitable way to that, and how to handle it. That is just normal personal skills training we give people—conflict resolution sort of stuff.

**Mr NINOS KHOSHABA:** In your submission you propose that a single investigating agency such as the NSW Ombudsman receive all protected disclosures. Do you think that having a single coordinating agency with regard to protected disclosures would potentially provide better protection to public sector whistleblowers?

**Mr ACHTERSTRAAT:** I am not sure it would provide better protection because they are not aware of any situations where the protection has not been afforded, but I think it would be administratively a lot simpler if there were a central agency. There may be reasons why ICAC would not be part of that, because of the fraud side of it, but I think from an administrative point of view it would be quite effective if there were a central agency receiving our complaints or the Ombudsman's complaints and also keeping the data on those.

**Mr NINOS KHOSHABA:** Given the different types of agencies, and they all operate very differently, do you think it would be possible to have uniform policies and procedures in place that could cover all agencies?

**Mr ACHTERSTRAAT:** My general approach is that standardisation is a good thing but you do need to modify it for the needs of every situation. As Phil said, our procedures were developed very closely to the Ombudsman's office. I would be surprised if an agency sat down and just dreamt up their own procedures. So maybe there could be a yardstick or a benchmark template that someone could produce. In fact, I think the Ombudsman have got a couple on their websites, which people probably use and modify. As to whether they should make those mandatory or not, I think there has probably got to be a bit of discretion to tweak them—a service delivery agency might require something very different to a policy agency, for example. But I like the idea of having a standard template that people can use as a guide.

**CHAIR:** You are an investigating agency under the Protected Disclosures Act?

**Mr ACHTERSTRAAT:** Correct.

**CHAIR:** And your brief is serious or substantial waste. Is it fair to say that you locate more of that in your role as Auditor than you would under the Protected Disclosures Act? Your role as Auditor covers that?

**Mr ACHTERSTRAAT:** Our role as Auditor under the auditing standards, and that would require us to follow up on serious and substantial waste anyway. But the protected disclosure gives more of a framework on how to protect the identity and things like that.

**CHAIR:** The very nature of your job is to look out for that very thing?

**Mr ACHTERSTRAAT:** Correct.

**CHAIR:** Proactively you go out and issue reports?

**Mr ACHTERSTRAAT:** Correct. Many of our performance audits do not actually use the language as waste but look for savings and opportunities for improvement, which is basically another way of saying the same idea.

**CHAIR:** Thank you very much for your time.

**(The witnesses withdrew)**

**BARRY ROBERT O'FARRELL**, New South Wales Leader of the Opposition, Politician and Member of Parliament, Macquarie Street, Sydney, sworn and examined:

**CHAIR:** You have made a submission that we have received. Would you like that to form part of your evidence?

**Mr BARRY O'FARRELL:** Thank you.

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

**Mr BARRY O'FARRELL:** Just very briefly. I would like to support the work of this Committee. Frankly, we have had three inquiries. This is the fourth inquiry into protected disclosures in 14 years. It is time that people acted. It could be argued that it is a waste of public resources to trawl over something that was conducted over three years ago and over the committee's report. I think the only continuing member of this Committee is Reverend the Hon. Fred Nile. The Committee report in 2005-06 was unanimous. It made many of the same recommendations made in reports one and two. Frankly, I think it is time for this review and more action.

I am here simply to support the Committee in its endeavours and to suggest that there is nothing more critical for the public sector in New South Wales and nothing more critical for the delivery of public services than for people who operate those public services to know that they can blow the whistle on things that they think are wrong; that they can do so, knowing that they will be afforded some protection; and they do so knowing that those matters will be properly investigated. What concerned me particularly in reading the 2006 report was that there is no guarantee that matters will be investigated. There is no guarantee that matters will be investigated in a timely fashion. There is not even a guarantee that the same complaint made in two separate agencies will be handled in the same way. I think that is an omission.

I accept the fact, and I suppose I point to it as a matter of pride, that the Protected Disclosures Act was introduced during the last Liberal Government. But I accept that, after 14 years, it is clearly in need of reform. It is in need of change to bring it into line with other jurisdictions. It is in need of reform to ensure that the public of New South Wales believe and know that they will actually get the public service that they deserve.

**CHAIR:** Thank you, Mr O'Farrell. You are well aware of the previous report. You have gone to the trouble of formulating a private member's bill.

**Mr BARRY O'FARRELL:** Yes.

**CHAIR:** One of the recommendations is a protected disclosures unit in the Ombudsman's office, which you support and which this Committee is considering.

**Mr BARRY O'FARRELL:** Yes.

**CHAIR:** The Deputy Ombudsman gave evidence to this Committee on 18 August and expressed some concern about that because you could have a situation in which one investigating authority, such as the Ombudsman, was investigating another authority, such as ICAC. I would like your comments on that. Personally, I am supportive of a central overarching body. What are your comments on those concerns?

**Mr BARRY O'FARRELL:** Chairman, it has to exist somewhere, and it will exist more efficiently and more effectively in terms of public resources by operating within an existing agency. I think it is appropriate that that agency be the Ombudsman's office. I appreciate that if you are the Police Integrity Commission, if you are ICAC, or if you are State watchdogs, you may have some concern about a loss of face because a section of the Ombudsman's office will fulfil this role. But at the end of the day it is not about the face or standing of those organisations; it is about restoring public confidence and ensuring that public servants know that they have somewhere to go.

The idea of this unit is not only to promote the way in which the Protected Disclosures Act could work, not only to collect statistics, not only to ensure that appropriate action is taking place across all government agencies, but to provide assistance to those public servants who want to engage in protected disclosures. All of us as members of Parliament have no doubt had experiences where public officials have come to us who are

concerned about two things: they are concerned about wrongdoing or what they believe is maladministration or in some cases corruption, and they are concerned equally that if they put up their hand, even under the current legislative provisions, there is no guarantee that protections will occur. I do not know who else around the table has had those discussions, but that has certainly been the case in my electorate office over 13 years.

**CHAIR:** Mr O'Farrell, one of the problems that we have with the legislation, which I realise was enacted in 1994, is that nothing has been really done to it since then in relation to the collection of data under it and ownership of the Act. The Ombudsman made it quite clear that no-one owns the Act. Ownership of an Act leads to the collection of information so that we can see how it is travelling. Would you be in favour of agencies having to include their statistics and data in their annual reports?

**Mr BARRY O'FARRELL:** I think transparency and accountability on matters related to protected disclosures—as well as school performance and hospital performance—are essential. One of the ways in which you can predict whether there is a problem in a particular area is by the collection of statistics that show whether or not the number of disclosures has gone up. Presumably it will also include the number of successfully prosecuted disclosures. It is a great sign. It is a great tool to ensure that the public sector is responsive. It is a great tool to ensure that those agencies that are meant to keep our public sector clean and corruption-free have some direction upon which to act.

**CHAIR:** I note you are also in favour of the proposition of including in the Act that a discloser has to have an honest and reasonable belief that they have a protected disclosure because the conditions under Act also have to be tested and determined as to whether the matter constitutes a protected disclosure. I note that you are in favour of people who make a disclosure having to make it on an honest and reasonable belief. I also put to you that the Deputy Ombudsman also gave evidence on this matter on 18 August and did not give total support to it because it was very difficult to tell whether or not someone did have an honest and reasonable belief. Do you have any comments to make on that?

**Mr BARRY O'FARRELL:** Chairman, you are the lawyer: you know that there are two tests in protected disclosures. There are objective tests and there are subjective tests. You will not be able to operate a system of protected disclosures without some degree of subjectivity. I have approached these issues by seeing where the problem is better solved. The fact is that other jurisdictions have provisions along these lines, and I support the provision being included in legislation in New South Wales.

**CHAIR:** They also have that in other States. We were not able to get much evidence of how it operates in other States.

**Mr BARRY O'FARRELL:** Then I suspect the Committee should travel! I am being provocative.

**CHAIR:** There is also an argument relating to the right to seek damages: If you get to the stage at which you are seeking damages, you have failed because you have reached the stage at which the damage has already been done. Do you have any comments on that?

**Mr BARRY O'FARRELL:** You could argue at the wider level that if you have used the Protected Disclosures Act you have failed because you have failed in that duty to ensure that you have a corruption-free and properly-administered public sector. Look again. South Australia and New South Wales are the only two jurisdictions in which this does not apply. I think it provides the same sort of protections as the flip-side provides, which is that if you wilfully engage in protected disclosure knowing that it is wrong to make allegations that you know are wrong, you can also be subject to action.

**CHAIR:** I suppose there are then arguments to support the view that it acts as a deterrent.

**Mr BARRY O'FARRELL:** Again, you have to draw a line somewhere. I am persuaded by not just the last report of this august body, but the report of the previous Committee that looked at the same matter.

**Mr DAVID HARRIS:** Mr O'Farrell, in the legislation that you have put forward, schedule 1 part 11 inserts proposed section 20A, which provides for the Supreme Court issuing an injunction. Could you explain how that would work in practice?

**Mr BARRY O'FARRELL:** I make the general in globo point that, given the resources of Opposition, which include six staffers compared to 300,000 public servants behind Government, we rely upon Parliamentary

Counsel who does an excellent job, but who at times is overloaded. The point about it is that it simply provides a legal means by which action is open to be effected. Without it, you again rely upon a system where there is no standard procedure across agencies. You rely upon a system where there is no guarantee of timely resolution of disputes, and you rely upon a system in which, even though there are meant to be protections for those who genuinely, honestly and faithfully put up their hands about what they believe is wrongdoing, they can be the subject of, at best, gossip and innuendo and, at worst, victimisation.

**Mr DAVID HARRIS:** In practice, what it is saying is that the Supreme Court can issue an injunction to prevent a person from conduct that constitutes taking detrimental action.

**Mr BARRY O'FARRELL:** Yes.

**Mr DAVID HARRIS:** It seems to be putting the bat before the ball. How do you stop someone in advance? That means every time someone makes a protected disclosure, the Supreme Court would have to grant an injunction just in case detrimental action was engaged in.

**The Hon. TREVOR KHAN:** That is not what it says.

**Mr DAVID HARRIS:** That is the way I read it.

**Mr BARRY O'FARRELL:** I think if you go back to the original Committee report, on which the recommendation is based, it was all about public servant A making a disclosure under the Protected Disclosures Act, public servant A then being subjected to what they believe is action that is contrary to the way in which the Act is meant to operate, and an injunction being held to ensure that the Act is upheld. I actually think it is a protection for those making a protected disclosure; I do not think it is an added complication.

I say again, as I said to the Chairman, that if the system worked well, you would not need protected disclosures. The system relies upon human beings and, as Reverend the Hon. Fred Nile knows, all human beings come with their faults. That means that this legislation is required. If it is required, we need to ensure that it works. If one of the ways of ensuring that it works is through the Supreme Court injunction that would guarantee that those who put up their hands—genuinely, faithfully and honestly believing that there is wrongdoing—are not victimised, and that has to be effective. Mr Harris, I suppose I would say to you that if not a Supreme Court injunction in these situations, how else do you protect the whistleblower?

**Mr DAVID HARRIS:** The legislation says that people cannot engage in detrimental action.

**Mr BARRY O'FARRELL:** And of course that never happens, does it? Not even the last Committee believed that!

**Mr DAVID HARRIS:** All I am saying is that in that particular clause, it refers to issuing an injunction to prevent a person from engaging in that.

**Mr BARRY O'FARRELL:** Yes.

**Mr DAVID HARRIS:** Does that mean that they actually have to start the detrimental action and then an injunction is ruled on?

**The Hon. TREVOR KHAN:** You need to go to subsection 5. It presupposes a number of different circumstances that the court would take into account.

**Mr BARRY O'FARRELL:** As usual, Mr Harris, with legal matters, it is heavily qualified to ensure that our legal friends around the table do their job.

**Mr DAVID HARRIS:** That is right, but sometimes it is to give them more work.

**Mr GREG SMITH:** That is not such a bad thing, either. Some would say that the Government has been cutting back their work lately.

**Mr BARRY O'FARRELL:** I do not want to get into that discussion!

**Mr DAVID HARRIS:** Where would you see the advisory committee existing? Would that exist in the Ombudsman's area, or independently by itself? Where would that be?

**Mr BARRY O'FARRELL:** It can exist independently by itself, but clearly it would be served or serviced by the unit being within the Ombudsman's office. It makes sense that if it is engaged in this area, it would sit over; but, presumably like this Committee, it would have a staff and it would have people who do the work between meetings. Presumably they would be people who would operate out of the office.

**Reverend the Hon. FRED NILE:** Thank you for appearing before the Committee.

**Mr BARRY O'FARRELL:** It is a pleasure.

**Reverend the Hon. FRED NILE:** Your submission supports the recommendations made by the inquiry in 2006, and judging from your submission, you still hold to those recommendations—for example, the change of name to the Public Interest Disclosure Act. Do you see any advantages in that?

**Mr BARRY O'FARRELL:** I think it indicates more clearly what it is about. Like most pioneering legislation, names never quite appear to be important. A decade or 15 years on, it is important because it demonstrates to people what the Act is about. It is about public interest at the end of the day.

**Reverend the Hon. FRED NILE:** Obviously we have discussed having an advisory committee with all the various departments represented in various ways, but the same problem arises with the parliamentary committee oversight. We are debating this issue again with this Committee as to which parliamentary committee should have oversight of the public interest disclosures legislation, if that became the new name.

**Mr BARRY O'FARRELL:** I presume the fact that you have been vested a second time with reviewing the Protected Disclosures Act suggests there is confidence being shown in this Committee and the fact there are members of this Committee now who will have sat through two inquiries. Perhaps the answer suggests itself: it should be this Committee.

**Reverend the Hon. FRED NILE:** I was not thinking so much of the membership but the structure of the ICAC committee itself. Is that the best way to handle it?

**Mr BARRY O'FARRELL:** I think the advantage this advisory committee has over the way in which this joint parliamentary committee operates is that by access to the sorts of statistics and data being proposed it will be able to see which agencies have problems arising. Of course, one of the difficulties this Committee has is that you can perhaps at times believe there are problems within the ICAC but because of your limitation on delving into particular cases you cannot attend to it. If you are talking about an office within the Ombudsman's office that is looking at standardising the way in which prosecutions or protected disclosures are handled, standardising the way in which information is collected and promoting the use of the public interest Act amongst public servants, it would be able to identify where problems arose. I think there is a slightly different role, but if you are saying which parliamentary committee should oversight it, I would be very happy for the ICAC committee to do so, given that you will have now held two inquiries into it.

**Reverend the Hon. FRED NILE:** Are you aware of any reason the recommendations have not been adopted by the Government?

**Mr BARRY O'FARRELL:** No, and I did see that Mr Wheeler wrote to the Premier I think in March. I was unclear from your website as to whether that was a two- or three-page letter. It struck me that a number of recommendations were left out of Mr Wheeler's letter. I did not know whether that was a mistake on the website. But I did notice that 9 out of the 17 recommendations were strongly supported for immediate implementation. I think 2 others were mentioned and then I just wondered what happened to the rest of them. That is the problem with relying on web-based information.

**CHAIR:** We will check that out.

**The Hon. TREVOR KHAN:** If this Committee were to adopt recommendations similar to what you propose and the Government did not act on those recommendations, what would your intention be at a later time?

**Mr BARRY O'FARRELL:** We are committed to this legislation. This is Liberal Party and National Party policy. Whether it is implemented in this term or it has to wait until after 26 March 2011, it is going to be implemented by a future Coalition government. This is too important. I would dearly like to see this Committee make another strong report, another unanimous recommendation, supporting the recommendations made by the previous Committee. Hopefully, over the next 121 weeks that should acquire some action from a state government that over the past 13 years perhaps has not been as proactive as it should be.

**Ms DIANE BEAMER:** This may sound like a strange question but you refer to a constitution of the advisory committee that you think it should fall under the Ombudsman's office, and includes the Auditor General and then the Commissioner for the Commission. I am unclear as to what is the Commissioner for the Commission?

**Mr BARRY O'FARRELL:** That may well be a typo.

**Ms DIANE BEAMER:** You have the ICAC and the PIC and all of those people.

**Mr BARRY O'FARRELL:** What page are you looking at?

**Ms DIANE BEAMER:** On page 4 of your submission.

**Reverend the Hon. FRED NILE:** I think it is ICAC.

**Ms DIANE BEAMER:** But then you have the ICAC Inspector.

**Reverend the Hon. FRED NILE:** No, that is the inspector. They are two separate departments.

**Mr BARRY O'FARRELL:** I will bring that to the attention of the Parliamentary Counsel.

**Ms DIANE BEAMER:** That is also in your legislation.

**Mr BARRY O'FARRELL:** Well picked up.

**Mr GREG SMITH:** When you are recommending that the Ombudsman's office be the one to have overall supervision of the running of this legislation, did you have in mind that already the Ombudsman's office audits many agencies' use of telephone interception powers, such as the ICAC and the State Crime Commission?

**Mr BARRY O'FARRELL:** I think that is a model and a precedent that good lawyers such as yourself and Mr Khan would build upon in constructing a model in this path. Mr Terenzini, I include you in that as well. In all seriousness, I just think it is obvious—given the Ombudsman's breadth of activity across the public sector now, notwithstanding concerns of some other agencies—that this unit be housed within the Ombudsman's office. It has the background, experience and personnel, as you have no doubt heard from Mr Wheeler, who could do the job well. At the end of the day we are talking about improving the performance of our public sector.

**Mr GREG SMITH:** You were asked questions about the power to seek an injunction. Were you looking at similar powers under the Trade Practices Act to stop false and misleading advertising and, say, under the Noise Control Act to stop noise offences or under noxious fumes and other legislation where prosecution may take too long to be carried out and urgent action is needed?

**Mr BARRY O'FARRELL:** You need a cut-through measure. As I said to Mr Harris, if not Supreme Court injunction, what else? Again, this is not about filling the pockets of lawyers. It is not about tying up court time. It is about trying to ensure that those who genuinely, honestly and faithfully believe there is wrongdoing, those who are serving the State as public servants, are able to make those disclosures, improve the situation they find and ensure that their agency and this State public service improves. Surely that is something in which we are all united. I think you should cut through any rivalries between independent investigatory bodies. It should cut through the matters of politics. That is why I was impressed when I read that the 2006 report was a unanimous report. There was not a single recommendation on which there was any division. The Committee at that stage was chaired by a former Minister of the Crown, who had some understanding, as does the member for Mulgoa, about the way in which the public service operates at all levels. I thought it was a very good report. The

ICAC committee has always been a Committee—I am sure it still is—on which there is a broad range of experience. It tends to be a Committee that attracts senior appointees as well as those who are skilled to the task. That is why I came here principally to support your work or at least the work of your predecessor and hope that you will uphold that work.

**Mr GREG SMITH:** Our charter goes a little beyond the Protected Disclosures Act and looks at whistleblowers generally. Would you give consideration to including in your amending bill coverage to persons who are not public officials when they wish to make a disclosure about public waste, corruption or matters of that sort?

**Mr BARRY O'FARRELL:** I am conscious that in other jurisdictions that has occurred. I think particularly now that the Government is moving to contracting out and moving to alliances across a whole range of areas that the issue of members of the public who see wrongdoing within the public sector should perhaps fall within the ambit of whistleblower legislation. But my principal concern was to ensure that we got some action before the next election in a non-controversial non-political way by simply seeking to give legislative voice to the recommendation of this Committee from the past Parliament.

**The Hon. GREG DONNELLY:** My question goes to this issue of the protected disclosures implementation steering committee, which relates back to your recommendation from the previous Committee's report. I understand that your current bill supports that, is that the case?

**Mr BARRY O'FARRELL:** Yes.

**The Hon. GREG DONNELLY:** Could you elaborate on the role you see of that committee?

**Mr BARRY O'FARRELL:** Basically it is designed to ensure that there is responsibility permanently in one area to ensure that protected disclosures are operating effectively in New South Wales. Currently it is an area where there is no continual oversight because there is no peak body. There is oversight to some extent within individual agencies, but it is not brought together, except in inquiries like this. So, it is bringing together each of those agencies, including under paragraph (b) the Commissioner for the ICAC as well as the other committees. It is an attempt for those people to sit around—as you are during this inquiry; as the previous Committee did during its inquiry—working out whether (a) it is working well and (b) what improvements are needed and making recommendations along those lines. In a sense it is an oversight body. It is in a sense a body that is designed to ensure that you do not have to hopefully wait another 14 years to seek substantial improvements to the way in which the legislation operates.

**Mr JONATHAN O'DEA:** I have really only one question, having only been on this Committee since last year.

**Mr BARRY O'FARRELL:** You have all the legal skills required.

**Mr JONATHAN O'DEA:** You did not say I was a good lawyer before. That is because I have not acted as a lawyer for over 10 years, so I do not describe myself as a good lawyer anymore! I certainly like to see things implemented. My question is to you as somebody who has been on the political scene for a much longer time. I do not understand why there has not been action to date over however many years but certainly since the last Committee's report in 2006. Perhaps you might make us a little more aware as to why there has not been action? As an adjunct to that, are there any instances of which you are aware where people have been prejudiced because we have not moved?

**Mr BARRY O'FARRELL:** I respect your legal skills as well and anyone else who is a lawyer on this Committee, because I am not sure of Mr Khoshaba's qualifications! I know he has not. You will discover that just because parliamentary committees make recommendations, even when they make unanimous recommendations, in my experience in this place there has never been either a quick response or a guaranteed response. I am sure Reverend the Hon. Fred Nile would confirm that.

**Reverend the Hon. FRED NILE:** There is to my committees.

**Mr GREG SMITH:** That is why you get so many.



**Mr BARRY O'FARRELL:** There is an argument! To answer your question directly, I am concerned that the longer a government is in office I think the zeal with which it comes to office, the zeal that includes at that stage cleaning up what it believes to be areas of administration that are not properly functioning, starts to wane. I think that after a decade it has all but gone out and so, yes, I am concerned that in recent years I see instances of whistleblowers who I think are treated badly: we have seen that in this place, in major agencies and in the Premier's office. I do not intend to trawl over that material here. I have contact occasionally with a known CityRail whistleblower. The last time I was in contact with her she tells me that CityRail has now acknowledged having spent \$675,000 in pursuing legal cases against her all for a matter that at the start allegedly would have cost \$30,000. To me that says that you have a government and an administration that is far too defensive, that has lost sight of what protected disclosures are about and lost sight of the fact that competition and choice, honesty, openness, accountability and transparency normally have us performing better. When we perform better as public servants either as members of Parliament or in the public sector, the State in which those people live, New South Wales, gets better service. I accept that as a matter of principle the longer a government is in office, that zeal that inevitably gets you into office starts to fade. It may be something that we have to worry about in 15 or so years, but the point is that if you have legislation, if you have legislation oversight in the way the last Committee suggested, it becomes organic, it becomes much harder for a government to ignore recommendations from committees like this and that guarantees to the citizenry of the State hopefully better outcomes.

**Mr NINOS KHOSHABA:** You introduced a private member's bill basically supporting the 17 recommendations. The establishment of a protected disclosures unit is one of your recommendations. Given all the different departments and agencies in this State, if one unit were set up, would you be confident that that unit would be able to resolve these complaints even though the environments may be different and the expertise obviously changes throughout each area?

**Mr BARRY O'FARRELL:** There are obviously two models. There is the ICAC model, which is that every agency should do it themselves. I think the previous Committee looked to the 1996 Premier's memo, which told agencies to do certain things. I think the last time Mr Wheeler gave a submission to an inquiry by this Committee he made the point that only 63 per cent of agencies complied. So it is terrific to teach our children to adopt good habits but occasionally you have to have someone to stand beside them as they are brushing their teeth at night or, in the case of boys, having a shower occasionally. That is why I think that this protected disclosures unit is a way to ensure you get some consistency across the board. More importantly, you get the statistics being produced. You get some procedures and guidelines outlined so that there is a degree of standardisation. Who knows? Ten years after the unit is in operation, maybe you then can go to where we would like to all get to with our children: agencies that do the right thing, that are responsible and that of their own volition ensure that these matters are handled appropriately. That is clearly not the case in New South Wales today. That is why I argue that the recommendations made two years ago should be implemented. That is why I argue that is the only way we guarantee public servants in this State the protection they deserve when they see wrongdoing.

**(The witness withdrew)**

**(The Committee adjourned at 5.31 p.m.)**