REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

At Sydney on Monday 18 August 2008

The Committee met at 11.00 a.m.

PRESENT

Mr F. Terenzini (Chair)

Legislative Council	**Legislative Assembly**
The Hon. J. G. Ajaka	Mr D. R. Harris
The Hon. G. J. Donnelly	Ms J. L. McKay
Reverend the Hon. F. J. Nile	Ms L. A. McMahon
	Mr J. R. O'Dea
	Mr R. G. Stokes
	Mr J. H. Turner

CHAIR: The Committee on the Independent Commission Against Corruption is holding this inquiry to assess and report on the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament. This inquiry was referred to the Committee by both houses of Parliament on 26 June 2008. The purpose of today's hearing is to obtain an overview of the operation of the Protected Disclosures Act 1994.

CHRISTOPHER CHARLES WHEELER, Deputy Ombudsman and Chairman of the Protected Disclosures Act Implementation Steering Committee, Level 24, 580 George Street, Sydney, affirmed and examined:

CHAIR: Would you like to give an opening statement?

Mr WHEELER: No.

CHAIR: You have been sent questions about the operation of the Protected Disclosures Act. Are you in a position to address some of those questions at this stage?

Mr WHEELER: I am.

CHAIR: This session is for you as someone who has been heavily involved over the years with this Act, together with the agencies that play a role, to inform the Committee as to how you see things and how the Act works so we can best deal with any submissions we receive. Firstly, how does the Protected Disclosures Act utilise the existing accountability legislation to set up the framework to make disclosures in the public sector?

Mr WHEELER: Broadly speaking the Protected Disclosures Act itself is accountability legislation for New South Wales. It is there with other legislation such as the Ombudsman Act, the Independent Commission Against Corruption Act, the Police Integrity Commission Act, the Public Finance and Audit Act, parts of the Local Government Act, the Freedom of Information Act and the list goes on. The Act does not create a new reporting mechanism but it provides certain types of disclosures, effectively public interest type disclosures made by public officials in accordance with avenues already established in other legislation, to be protected under the Protected Disclosures Act. The only place it goes a little bit further is to provide for a mechanism to be created by agencies to allow for internal disclosures to be made. It does not require agencies to do so. It says that if they establish an internal reporting system for the purposes of the Act then disclosures can be made in accordance with that system. Otherwise it uses the existing mechanisms under the Ombudsman Act, the Independent Commission Against Corruption Act, the Police Integrity Commission Act et cetera.

The protections provided under the Protected Disclosures Act are separate from, and do not detract from, any of the protections available under the other accountability Acts. For example, there are largely similar protections for people who have made a protected disclosure under the Protected Disclosures Act to people who have made a complaint to the Ombudsman or a complaint to the Independent Commission Against Corruption. Each Act contains very largely the same sorts of protective provisions.

CHAIR: You are with the Ombudsman's office. How does your office relate to this particular Act?

Mr WHEELER: We have several roles we perform under this Act. In terms of statutory obligations it creates no particular obligation on the office of the Ombudsman; it just specifies that if somebody makes a disclosure in accordance with the Act then it will be a protected disclosure. That is in accordance with the whole scheme of the Act as it currently stands, that it places very few obligations on anybody to do anything. While one of its objects is to make sure that disclosures are properly investigated, as it currently stands it does not actually contain any provisions that require that. One of the things that has been recommended by this Committee in its review of the Act, and by the Committee on the Office of the Ombudsman and the Police Integrity Commission in its two reviews of the Act, is that certain obligations should be placed on agencies to actually properly deal with disclosures.

The Ombudsman's office is an avenue under the Act by which disclosures can be made, and the Act says that a disclosure can be made under it if it is made in accordance with the Ombudsman Act. From the legal advice we have received that means it has to be in writing. If it is writing by a public official, it meets the test, then it is a disclosure made under the Protected Disclosures Act and a complaint made under the Ombudsman Act; it is dealt with as a complaint under the Ombudsman Act. The Ombudsman will look at it and decide what action should be taken, if any. The criteria that has to be met is that it has to be an action or inaction of a serious nature that is

contrary to law, unreasonable, unjust, oppressive or improperly discriminatory or based wholly or partly on improper motives. But the overriding consideration is the objective provision of the Act, which says that we are talking about public interest disclosures. So it is not just a personal grievance or anything similar to that, we are talking about something that has to be reasonably serious.

As I mentioned earlier, largely the same protections apply whether it is complaint to the Ombudsman by a member of the public or a protected disclosure by a public official. In both cases there is a criminal offence for detrimental action; there is a reverse onus of proof; there is absolute privilege in defamation and a defence against actions, claims or demands whichever way it goes. The same with complaints made to the Independent Commission Against Corruption and complaints made to the Police Integrity Commission.

The actions that the Ombudsman can take in relation to a protected disclosure might be a preliminary or informal investigation, a formal investigation that might involve the use of Royal Commission powers. At the end of it there might be a report to the complainant, agency, Minister, and there is the potential for a report to Parliament.

Other functions that we perform that relate to this Act: firstly, we provide an advisory service for people who are contemplating making a protected disclosure. They can ring us up and ask how they should go about doing so, what they should expect if they do, how long, what sorts of involvement they will have in the matter, advice as to where they should take it—which would be the most appropriate place. Secondly, we provide specific advice to public officials who are dealing with a protected disclosure where they need advice about how the Act impacts on what they are doing or about good investigative practise—we will often given advice there. Thirdly, we provide general training to public officials in relation to the requirements of the Protected Disclosures Act. A lot of that training is done in conjunction with the Independent Commission Against Corruption as a joint exercise. Finally, we publish the Ombudsman's Protected Disclosures Guidelines, which is currently in its 5th edition, where we try to give as much advice as we can about the management of disclosures, the protection of whistleblowers, development of internal reporting policies and the like.

CHAIR: I wish to pick up on your comment about internal procedures that investigating authorities have. You are an investigating authority under the Act.

Mr WHEELER: Yes.

CHAIR: I know that some time ago directions were given to investigating authorities or to public authorities to put in place disclosure procedures. A directive was put out. I understand there was a slow uptake of that. How is that going in your view with the public authorities and the agencies in terms of their internal investigating systems? What kind of coordination is there among the various societies for handling these disclosures and these communications between agencies—for example, referrals, et cetera?

Mr WHEELER: There was a circular put out by government asking all agencies to adopt an internal reporting policy for the purposes of this Act. After about one or two years, we decided we would audit that, so we wrote to all State Government authorities, and the Department of Local Government wrote to all councils. We asked each authority to send in its internal reporting policy. We then went through them, based on a number of criteria, to see whether they were adequate. I cannot remember the exact figures but there was a very low proportion of agencies that had adopted a policy.

Of the ones that had, the policies were generally inadequate. We wrote back to most agencies making detailed recommendations as to how they could improve their internal reporting policy and asked them to forward the revised version. We then went over the revised versions to make sure that they were adequate. A number of agencies adopted a model policy that we had developed. Unfortunately, many of those agencies did so with very little thought being given to it, which you can always tell when the same typos appear in the model and in the actual document. One of the things we are doing now in revising our guidelines is to revise the model policy so that it cannot just be adopted. They have to be thought through and agencies have to develop their own document.

The Department of Local Government used a self-assessment checklist for councils to fill out their own assessment of their policies. Again, they did a lot of work to make sure that local government policies are adequate. I have not done a follow-up survey since a previous one, which was several years ago, but when we do investigations that involve a protected disclosure, we ask to see the policy.

When I go out giving training, I ask to see the policies of agencies that have in-house training done. By and large those policies are reasonably adequate. As part of the Whistling While They Work research project that has been undertaken, the project did a very detailed analysis of the policies of 188 agencies from around Australia. They used a large number of criteria—larger than the criteria we used—and came up with some very good suggestions for changes to improve those policies. We have built that into the drafting of the revised protected disclosures guidelines. Certainly the outcome was that New South Wales policies were by and large some of the better ones in Australia across the board. However, there is still a lot of room for improvement.

CHAIR: Do you put out those guidelines? The Ombudsman's Office does that?

Mr WHEELER: Yes. They are published by us. They are available to be downloaded from our website.

CHAIR: How effectively do the agencies take up and adopt them? Are you happy with that?

Mr WHEELER: I think the figure is about 300 to 400 of them that are downloaded every month and have been for years. They are also used as a basis for guidelines developed in other jurisdictions around Australia. We get a lot of very good feedback from agencies about those documents. We are quite happy with that at the moment but, as I say, we have been going through and updating them in the light of what has come out of the Whistling While They Work research.

CHAIR: Since the last review of the Act by the previous Committee on the Independent Commission Against Corruption, which was in 2006, have there been any recommendations for legislative changes to the Act since then?

Mr WHEELER: I am not aware of any recommendations as such or new recommendations for amendment of the Act. What I am aware of is that the Protected Disclosures Act Implementation Steering Committee wrote to the Government recommending that consideration be given to a number of those recommendations as a matter of priority, and made comments about a number of the other ones. They have a copy of that letter.

CHAIR: These are recommendations in that last report?

Mr WHEELER: In that last report. The letter went to the Government on 28 March 2008 and we have not yet received a response. But I have copies of that, if the Committee would like it.

Document tabled.

CHAIR: While we hand those around, I will ask this question: If a public official under the Act were to make a disclosure, say, to the Ombudsman, what is the mechanism? How are they picked up and dealt with as a protected disclosure in agencies?

Mr WHEELER: In the agency itself, or in our office?

CHAIR: Both.

Mr WHEELER: Okay. If they come directly to the Ombudsman, our staff will do the assessment of complaints when they are received and they have been trained about the requirements of the Act. If they find a disclosure made by a public official that shows or tends to show maladministration, corruption, et cetera, they would identify that as a protected disclosure. It is then dealt with in our office on that basis. We start off by using a different procedure than we would for an ordinary complaint from a member of the public.

With an ordinary complaint, we might write to the agency or ring them up and say, "We've got complaint from so and so raising the following issues. Can we have your views on that?" If it is a protected disclosure, we would not identify the whistleblower unless we had talked to that person. This raises one of the more difficult issues in relation to the Act. Most people who make a disclosure to a watchdog body have already raised their matter internally, or they have told somebody internally, or they are so intimately involved in the matter that it is quite obvious who would have made the disclosure.

As soon as we acknowledge or admit that we have a protected disclosure, the chances are that the people in the agency will know who made it, and if they do not, they will think it was somebody else who did not make it. But it is human nature; if you know a disclosure has been made, you are going to think, "Who made that disclosure?" You will either get it right, or you will get it wrong. But from our experience since the Act commenced, in most cases the person can be identified. What we would normally do is talk to the person and say, "Have you told anybody? Is it obvious that it is going to be you if we admit to the fact that there is a disclosure."

In many cases they will accept that it is important that we are able to identify them to the head of the agency so that we can say, "We have this disclosure. There is a choice: You can look at it, or we can look at it. If you look at it, we need to have guarantees that this person is not going to suffer detrimental action", et cetera. Sometimes we can look at these matters without identifying the whistleblower, but that can be very difficult. Agencies have the same problem. If they get an internal disclosure, often the person will be identified. The normal approach is not to admit anything, not to admit whom you got the disclosure from, not to do anything to point to the person who made the disclosure.

In practice that does not really help very much because people know they made it, or they suspect they made it, and the agency is not doing anything to try to control the culture of the workplace to basically say, "What has happened is appropriate. It is correct. We support the fact that disclosure has been made. We want this matter dealt with appropriately and will not accept detrimental action against the whistleblower." We have come out with some guidelines that make that point—that when a disclosure is received, the agency or our office needs to do a risk assessment with the whistleblower and say, "Okay, once it is known that the disclosure has been made, would you be identified?" If that assessment comes out and says, "Yes, you will", then you really need to approach it in a very different way to how you approach it if you could maintain confidentiality.

My personal view is that the only time you can really maintain confidentiality is if you do not have to admit you have a protected disclosure—you have some other reason for looking. Sometimes that can be done. Agencies with internal disclosures sometimes can decide to have an internal audit of some area and may be looking at something different, which they just happen to go and look and find, without having to admit they have a disclosure from an internal source. Sometimes that is not possible.

CHAIR: Do you approve of that way of managing what is a protected disclosure?

Mr WHEELER: Of coming out publicly?

CHAIR: Yes.

Mr WHEELER: Yes, very much so because we see that if you do not admit reality, if you leave your head in the sand and say that we are not going to tell anybody and hopefully they will not know, when they do, it does not help the whistleblower. You get people doing things in the workplace which are inappropriate, and then the agency is on the back foot reacting, whereas there is more chance of being in control if the agency goes in at the start and says, "We have a disclosure from so and so, and they have done the right thing. We will look at this. We are not making any decisions. We are not taking sides. We will take a very dim view of any action taken against this person because they have done the right thing."

CHAIR: One of the things I read in what I think are your guidelines is that a decision has to be made early whether or not confidentiality can be maintained.

Mr WHEELER: Yes.

CHAIR: The answer to that question will determine how the matter is dealt with.

Mr WHEELER: Absolutely.

CHAIR: This all goes towards protecting the whistleblower because what the Act is all about is making sure, as best you can, that the potential whistleblower has confidence that they are not going to suffer reprisals. Our terms of reference relate to the effectiveness of the current laws, procedures and practices. With those guidelines that you have about making an early decision and all those managerial strategies that you have alluded to, from what you can see of the agencies you have looked at, are they adopting new strategies? What is the effectiveness of the strategies that the agencies are adopting to ensure that the objectives of the Act are being

met? This Act has good, sound objectives. The commentary has been that reforms are needed to fully achieve these objectives. That is, the management procedure. What is your view on how the agencies are dealing with this?

Mr WHEELER: We do not have and nobody has a view on how agencies are dealing with this Act. The Act has no owner; it is an orphan. It sits out there on its own and there are various agencies that are named in there as investigating authorities. No agency has the role or power to actually monitor how it is being implemented. There is no reporting by line agencies about their experiences under this Act. They do not have to put anything in their annual report. They do not have to notify any centralised body. In some jurisdictions around Australia, that has been put in place under more recent legislation. I can only talk about the matters where I have talked with the staff of agencies, either while I am doing training or when people have rung me, or during investigations that we have conducted ourselves into how disclosures have been dealt with.

From what I see the practices are very patchy across the public sector. A lot depends, for example, on whether an agency is big enough to have a dedicated staff who are involved in internal investigations, who can be trained and understand their obligations and the problems associated with implementing the Act. They have more chance of implementing it appropriately than an agency that might only get one in a blue moon. They will give it to somebody who probably has not seen or heard of the Act before and they will immediately look around for things to guide them. They might find our guidelines; they might not.

It is very patchy from what I have seen, but I do not have a comprehensive picture. The most comprehensive picture I guess has come from the Whistling While They Work research, which indicates that there are a lot of people who say they have made disclosures, not necessarily protected disclosures. The definition is far broader than our statutory definition. A lot have said that they have made disclosures in the two-year period that we looked at and that they were okay afterwards. Twenty per cent indicated that that was not the case. In terms of people who have made protected disclosures, my guess would be that there would be a fair percentage who would indicate that they are not particularly happy with what has happened and how they were dealt with.

CHAIR: I think you are alluding to what you would say is the need to have some overarching control—

Mr WHEELER: Coordinating.

CHAIR: Yes, to coordinate the agency. One of the recommendations in the last report talks about the disclosures unit. You would see some overarching body responsible for coordination, statistics, information gathering et cetera as enabling us to get a good picture of how it is operating and whether or not the laws are effective.

Mr WHEELER: Indeed.

CHAIR: It has been said that that overarching body would be established in your office. Does it have to be established in your office or could it be some external body?

Mr WHEELER: It could be any external body that has the investigative and complaints handling experience and jurisdiction. This limits the number of bodies that it might be in.

CHAIR: For example, the Ombudsman has an advisory role. You are able to advise people whether or not what they have to say may be a protected disclosure. You have guidelines and do all those things. Is it still possible for you to continue to do that and have some other body, organisation or group be responsible for overall coordination and enforcement, for example, in investigatory practices and procedures to make sure that the objectives of the Act are being looked at? Would that still be possible?

Mr WHEELER: It is entirely possible provided the body has, firstly, jurisdiction to be able to do what it needs to do, and, secondly, experience in complaint handling. That is the crucial one. The issue here is how to manage protected disclosures and central to that is managing whistleblowers. So managing complainants and all that goes with it is the essential requirement. The reason why both the previous ICAC Committee and the previous two committee reports recommended a unit and that it be in the Ombudsman's office was because the Ombudsman's office is the general jurisdiction complaint handling body. We have experience in managing

complainants whereas for other types of investigative bodies, complainants are sources of information but there is not necessarily an ongoing relationship with that individual.

CHAIR: But you are also an investigating authority.

Mr WHEELER: Yes.

CHAIR: Do you see any problems with the unit being established in your office if you are also an investigating authority?

Mr WHEELER: We have oversight roles in relation to police complaints, for example. All complaints have to be notified to us and we ensure they are all dealt with appropriately. We have an oversight role in relation to allegations about child protection in the workplace. All allegations against teachers—both public and private—childcare workers et cetera must be notified to us within 30 days and we make sure they are properly dealt with. We give advice, we monitor what is going on and we produce guidelines. It is the same sort of role.

CHAIR: With protected disclosures, if you are an investigating authority would you be checking how you comply with the Act?

Mr WHEELER: We would be monitoring how we comply with the Act, indeed. We already audit how we perform our roles under the other legislation, and sometimes get external auditors in to go over how we have dealt with various matters to see whether they believe we have done it appropriately.

CHAIR: There are a couple of other issues. There were some recommendations in the last report about redress for whistleblowers. Two of the proposals put forward were civil damages and injunctive relief. Can you tell us how that is operating in other States where that happens? They are very interesting ideas: to give whistleblowers, whoever they might be, the opportunity to take civil action or get compensation and also to seek injunctions. I know that is enacted in other States. Can you tell the Committee how that has operated? Has it been successful?

Mr WHEELER: As far as I am aware, no injunctions have been taken out in any jurisdiction in Australia that has that power. I am not aware of any civil damages action being taken. By the same token, in terms of prosecutions for breaches of the Act I am only aware of prosecutions in New South Wales. As far as I am aware there are no other prosecutions anywhere else in Australia. We have had five, either under the Protected Disclosures Act or the equivalent provision of the Police Act - section 206 is a provision that allows for protected allegations by police. Those five proceedings have been unsuccessful on technical grounds generally.

CHAIR: Were they private prosecutions?

Mr WHEELER: Three I think were taken by police and two were private.

CHAIR: Of those taken by police, did they have to do with police officers?

Mr WHEELER: Yes, they were police officers.

CHAIR: And the others were private.

Mr WHEELER: They were private.

CHAIR: All unsuccessful.

Mr WHEELER: All unsuccessful, generally on technical grounds. In the first private one the prosecution was taken against a person who had nothing to do with the offence. In one of the police ones the police officer's defence—this is a very brief summary—was that he was not aware that the person had blown the whistle or had made a complaint against him, and there was no proof that this person did know. In another case the admission was obtained under direction and the interview should have been stopped and a caution issued and the matter proceeded again. I cannot remember the other two.

CHAIR: That is notwithstanding the reverse onus. By that I mean the prosecution's job is to establish prima facie that something has occurred and the onus on the balance of probability is for the defendant to show that it was substantially not to do with that. Did it get that far? Were those things discussed?

Mr WHEELER: It did not get to that issue. They were all knocked off on technical matters before that arose. But in terms of the experience in other jurisdictions with injunctions and with damages, when you look at what the purpose of this sort of legislation is, it is partly to send a message—strongly to send a message—to say that the Parliament and the Government believe that whistleblowers should be protected and these are the mechanisms that are going to be provided to assist in that protection. It sends a message to people who might be contemplating doing something inappropriate that there could be repercussions. So whether or not there has actually been an injunction sought or damages sought does not mean that the provisions have been ineffective. They may have been very effective in preventing things from occurring where people have thought otherwise, thinking, "The repercussions for me of a criminal offence or whatever it might be are so significant I'm not going to go there".

CHAIR: You are talking about the deterrent element.

Mr WHEELER: The deterrent element I think is very strong.

CHAIR: Are there any statistics in other jurisdictions to show that those provisions are acting as a deterrent?

Mr WHEELER: Apart from the Whistling While They Work research—and I do not think we have analysed it for that purpose—there is no research anywhere that I am aware of on that point.

CHAIR: There are objections to the recommendations of the last inquiry regarding civil damages. For example, when people take those they preclude themselves from taking civil damages in other Acts of Parliament. There are other Acts of Parliament that take care of those things and there are also provisions in legislation. I think you are saying that if they were in the Protected Disclosures Act they would act as an extra deterrent. Is that what you are saying?

Mr WHEELER: Indeed. It is a message that is being sent to people. It is viewed as something important by the Legislature and by the Government. If inappropriate action is taken there can be serious consequences.

CHAIR: What is your view, as the law currently stands, of section 20 of the Act, detrimental action? How effective do you think that is?

Mr WHEELER: In terms of sending a message, I think it is a useful provision to have in the Act. As I have indicated, the five prosecutions that I am aware of have all failed under that Act or under section 206. I personally believe it would be more effective to retain it but to add a separate provision in this Act that talks about a detrimental action also being a disciplinary matter that should be dealt with by the employer as a disciplinary matter using the civil standard of proof within the organisation. I think you would have a lot more actions being taken if that was the way it was to go, with the agency having an obligation to do something. At the moment there is no obligation on an agency to prosecute if they believe there has been a breach of the Act. But if there was a specific provision that indicated that detrimental action could either be dealt with criminally or through disciplinary procedures, I think that would be a much more effective way of proceeding.

CHAIR: For each agency to have their own disciplinary—

Mr WHEELER: For each agency, detrimental action under this Act would be a disciplinary offence for that agency; implying in that agency's legislation—if they have anything about codes of conduct and standards of behaviour—that this is a disciplinary offence. There is something in the Public Sector Employment and Management Act but that only covers certain public officials; it does not cover officials who are employed in a whole range of other agencies. So having one centralised provision, maybe even modelled on that one, would say that basically detrimental action is a disciplinary offence.

Mr DAVID HARRIS: Returning to section 20, you said that some of the other prosecutions were not successful. A lot of this is very subjective, is it not? In some agencies if someone knows someone was a whistleblower they would steer a wide berth so they are not seen to be associated and that sort of thing and the

person on the receiving end feels persecuted but the people doing the persecution may feel that they are not being detrimental. How do you get around that? How do you strengthen that?

Mr WHEELER: One of the interesting results from the Whistling While They Work research is that people who report making disclosures indicate that where there is detrimental action it is much more likely to come from management than from their colleagues—which is quite different from what we expected. Of course management has far more ways to express displeasure without leaving fingerprints than colleagues. That is one of the reasons why the offence provision, while it serves a purpose, is not going to be that effective in many cases. But as to proving that somebody is being impacted on in the workplace in terms of their conditions of employment or greater supervision than they may have had otherwise, or whatever it might be, and that that was substantially in reprisal for making a protected disclosure, a disciplinary offence would not necessarily achieve the right objective there either.

But one of the things that we are lacking in the Act that is in certain other Acts around Australia is an obligation on management to bring in procedures and practices to protect whistleblowers. Maybe that might assist in terms of trying to ensure the right culture is in place in that workplace. At the moment there is something in the standard contract of employment for SES and CEOs that they are required to make their staff aware that the Act exists, but it does not go any further than that and I am not aware that many SES and CEOs are actually aware that this is in their contract. That is where having it all under one Act of Parliament I think is far more useful than in various locations.

Reverend the Hon. FRED NILE: One thought has occurred to me. Do you do any evaluation of the effectiveness of your office? You get reports from the whistleblower and you mentioned that you audit other agencies.

Mr WHEELER: Certain of our roles are more amenable to audit. As I said, in the police role, for example, we will go through and have separate people audit our involvement with particular matters to see whether we have performed the role appropriately. One of the ways that we keep track of feedback is people coming back to us to express dissatisfaction or satisfaction with how they have been treated by us and by the agency concerned. We have a policy that if people do not like the decisions we have made on a matter we will review that decision. Somebody else within the organisation will review it and make a recommendation to the Ombudsman, who will make the final decision on that matter. The feedback we have received indicates that sometimes whistleblowers might be dissatisfied, but what they are dissatisfied with is things that are outside our control. Trying to separate out dissatisfaction with how their matter was finally dealt with within the agency from our involvement is very difficult.

In the past we used to do some detailed surveys of a large sample of our complainants, have an external body survey them for their levels of satisfaction with the service they received. We found that is particularly expensive so we have narrowed that down a bit since then. A lot of the feedback was quite common from year to year, each survey. One of the key issues, for example, is expectation. If people have an expectation of a certain level of involvement, a certain level of service, and that is not met, they will be dissatisfied. So, we have tried to modify our procedures to make sure that people's expectations are realistic at the outset.

That is something we emphasise in the training that we provide to agencies and in our guidelines. It is vital that they make sure that when people blow the whistle that they understand what the agency can do and what it cannot do; what it will do and what it will not do; what the potential outcomes are—that somebody is not going to be fired, that the whistleblower is not going to get a million dollars, those sorts of things. This is what might happen, this is how you will be involved in the process, this is how long it might take. So, we do attempt that from the feedback we get—and when we hear of people coming back who are dissatisfied with how we have dealt with their matter, we attempt to address that where we can. Our business is dealing with complaints and trying to make sure we can improve on that as time goes by.

Reverend the Hon. FRED NILE: You mentioned a lot of the discrimination may come from the management level. If it occurs, do you have some procedure to encourage whistleblowers, if they feel they are being unfairly treated, to come back to you?

Mr WHEELER: Yes, indeed.

Reverend the Hon. FRED NILE: So you have that dialogue with the person?

Mr WHEELER: We have an ongoing dialogue with our complainants, all of them, throughout the process—part of the nature of being a complaint handling body. So, we will either talk to them through correspondence or on the phone and, with whistleblowers, we will say if you suffer any detrimental action, come back and we will go and have a look and see what is going on. The problem often is perception. While a whistleblower might validly perceive they are being treated detrimentally, as an external body looking at that independently it is often hard to say yes it is or no it is not. A lot depends on the history of the relationship between the whistleblower and the agency. A lot depends on the standard of work of the whistleblower prior to the disclosure being made, and whether the agency has indicated its satisfaction or dissatisfaction with that standard of work prior to the disclosure being made. So, circumstances have a big impact on each case.

The Hon. JOHN AJAKA: If I can just go back a bit. As we understand it, one of the paramount considerations is to ensure that corruption, misconduct, in government departments is stopped. Clearly, the need for the effectiveness of the whistleblower is also paramount in that equation. We are encouraging State Government employees, local government employees, Federal Government employers, et cetera, to come forward if they see any corruption. It is almost a duty on their part to do so. What concerns me, if we walk through a hypothetical situation, you have an employee who comes to you and says that corruption is going on. You talk him through it and you come to the decision that it is best his name be revealed, that he be identified. He is identified, the complaint is made and action is taken. That whistleblower finds himself in a situation where he is being mistreated—full stop. He may lose his job, he may have been fired. Where does the whistleblower go then? If prosecutions are not successful, there is no history of prosecutions, there is no history of injunctions, how is this whistleblower protected to ensure that at least if he is not given any benefit for coming forward he is kept in the same status that he was in before he came forward? Hearing everything you are saying to me, I do not see why a whistleblower would come forward, how he is being protected?

Mr WHEELER: It depends on whether the whistleblower has come to an external body or has gone totally internal. Again, the Whistling While They Work research indicates that 90 per cent of whistleblowers go internal. Even if they make a second complaint, it is 90 per cent who will go internal. Not that huge proportion of people who make a disclosure will go to an external body, but if they do and they come back to indicate they have suffered detrimental action—and we get people who come back and say that—we will go back in and investigate the allegation of mistreatment. As a matter of fact, we would prefer to focus our efforts on how a disclosure is dealt with than on the investigation of the actual subject matter of the disclosure. In our view, the agency should be investigating, where possible. If it is about the chief executive officer, that is not possible but by and large the agency should be dealing with the substantive matter. Our role should be to make sure the agency deals with it properly and deals with the whistleblower. So, if people come to us and say, "I am suffering detrimental action," we will in every case look into that. If we believe there is detrimental action, we will talk to that agency about stopping it.

The Hon. JOHN AJAKA: But how do you stop it? Do you have the power to stop it?

Mr WHEELER: In most cases we have been involved in, when we have gone in and pointed out that what has been done is totally inappropriate, it has been fixed. We do not have the power in any case to direct an agency to take certain action other than to answer our questions. Our role is to shine the light, if you like, to put a different view, and to reframe a problem, to explain something to an agency about where we think, as an independent body, it has done something wrong. In most cases that is successful.

The Hon. JOHN AJAKA: Were you saying earlier that the problem is that there is no one agency with one specific role, no specific powers to take it further if necessary?

Mr WHEELER: There is not a specific prosecuting body. So, anybody who could prosecute, like police, DPP, whatever, can basically say it is not really our role.

The Hon. JOHN AJAKA: Or they get it wrong on technical grounds? And I am not criticising them. Maybe that is the problem, that there is no specific body, and that is where the technical grounds—

Mr WHEELER: And the expertise. Indeed, that could be. There is a separate issue which is whether there is an appropriate coordinating body, which I think should not have a prosecuting role—keep that quite separate. There is a third issue as to whether there should be another body that is concerned about the policy issues under the Act, about the legislation itself, keeping that under scrutiny. In most jurisdictions there is an agency of government that owns that Act and is responsible for making sure it is kept up to date, et cetera, reviewed. The Protected Disclosures Unit that has been proposed in all three reviews, its primary function

would be to keep the operation of the Act under review, to make recommendations for change, to investigate where necessary, that sort of thing. But you would have one centralised view of what is going on. At the moment it is speculation. It is based on ad hoc and patchy information.

The Hon. JOHN AJAKA: But today, if you have an employee who feels they have been aggrieved, they have lost their employment because they have been a whistleblower, they have come to you when you have shone the light, as you say, and nothing has eventuated, where does this employee go other than out of work, looking for a new job?

Mr WHEELER: The number of people who have come to us saying they have been fired—I cannot quite think of one case at the moment. We have had people come to us saying, "I have suffered detrimental action. I have been moved against my will from this place of employment to some other one." We have talked to that agency about that, about doing that against somebody's will where it is detrimental to their interests or could very well be seen as detrimental action, and things have been resolved in most cases one way or another. In terms of people coming to us and saying, "I was fired because," I cannot think of a case. We would take that very seriously.

The Hon. JOHN AJAKA: That is the Ombudsman's Office?

Mr WHEELER: That is the Ombudsman's Office.

The Hon. JOHN AJAKA: That does not include ICAC, the Police Integrity Commission?

Mr WHEELER: I do not know if they have cases of that nature. Normally somebody would come to us before that had eventuated. Then, of course, you have to separate issues such as, was there a pre-existing performance issue? It is not unheard of that there is a pre-existing performance issue. The agency has let that slide for many years, decides to do something about it and a disclosure is then made about something. Then things become very complicated as to whether any action taken to manage that performance is detrimental action or not. A lot depends on whether there is pre-existing documentation that there is an employment issue. Often there is not. Then it gets very messy.

The Hon. JOHN AJAKA: What is the time period for this, in your experience? Do you have a situation where this employee could be mistreated—in their minds—for six, seven, eight, nine, 10, 11 months while all of this investigation is going on, to the extent that they think, "I give up, it is not worth it"?

Mr WHEELER: As soon as any of our complainants believe they are being mistreated we ask them to tell us. As soon as we hear anything that implies there is a problem, we will go to the agency immediately. We would not wait until the end of the process. It depends on what we are told about. There are some cases where it is fairly open and shut. There are other cases where it gets very difficult as to whether that it is detrimental action or whether that action is appropriate. You sometimes get people who, arising out of a disclosure and the way they have been treated, become a bit obsessed with proving their disclosure was correct, focus all their attention on doing that and not on their substantive job. The agency is trying to get them to do their substantive job and they believe this is detrimental action against them because they are trying to prove what they have done was a protected disclosure. It can get very messy for all concerned.

The Hon. JOHN AJAKA: I guess the more facts you know about a particular case the more circumstances you are aware of? It becomes a bit difficult to just generalise?

Mr WHEELER: A fair few of these things are open and shut, and where they are, they are easily solved.

Mr JOHN TURNER: I have been around too long. I served on the legislation committee that set up the Protected Disclosures Act, and I think we had some concerns then that Joe Average does not know whether it should be you or ICAC or the AG, as it was then—now there are quite a few more involved—and I think we used the words there should be a gateway committee set up with, from memory, the Ombudsman monitoring that. I presume the protected disclosures steering committee is the big brother of that, is it, or is it something separate?

Mr WHEELER: The Protected Disclosures Act Implementation Steering Committee does not receive complaints in its own right. It does not act as a sort of triage body to send complaints where they should go.

Each individual investigating authority will analyse complaints and if they believe it is one that should go to one of the other investigating authorities, there are provisions in the Act that allow it to be referred on that basis, and we do refer matters between us when the need arises. The committee is more about coordinating the broader activities of the various organisations that have a role under the Act—for example, making recommendations for amendments to the Act, to make sure our training activities are coordinated between various bodies, that sort of thing. It is not an operational committee. It is not the committee that your committee was thinking of at the start.

Mr JOHN TURNER: If a complaint that should go to ICAC goes to you, you make the administrative decision where it goes. Has the steering committee discussed problems such as Mr Ajaka was alluding to, the practical aspects of dealing with aggrieved whistleblowers? Does that come under the auspices of the steering committee?

Mr WHEELER: Those sorts of issues come up when we are discussing other matters, for example, discussing the recommendations of the previous ICAC committee. Those sorts of matters would be discussed. We do not have an agenda item of discussing policy issues in relation to the Act outside of the problems that have arisen on issues that we need to address. We have not met for some months because we have been awaiting the response from government on the letter we sent off in March. In the absence of a response, we will be having a meeting in the next month or so, hopefully.

Ms LYLEA McMAHON: Earlier you stated that some investigating agencies see complainants as a source of information rather than developing an ongoing relationship with them as complainants. Can you elaborate or provide some explanation as to what you meant by that?

Mr WHEELER: There are many different roles of different integrity bodies with a complaint handling body, the complainant has an ongoing involvement. It is their issue, they have raised it with you and you are looking into that independently, not as their advocate, but you are looking into their issue and you really need to keep going back to them about what you are finding and what their views are, et cetera. If you are a corruption-fighting body, a complainant is a source of information. They have no further ownership of that matter, if you like. They do not own the issue; it is a public interest issue. So you would need to give them reasons as to why you might take it up or not.

But once their witness role was over, their source of information role, in most corruption-fighting bodies around Australia there is not an ongoing, formal relationship between you. Whereas, if you are an Ombudsman, first you must give them reasons for any decision you make in relation to their complaint, you must inform them of what action you are taking, and you have to inform them about what happens at the end. If there is a report, they get a copy of the report. If their matter is discontinued at any time, they are informed of that. You have an ongoing interaction; you are managing that interaction as time goes on. This is not said in any derogatory sense; it is just that there is a totally different role performed by certain watchdog bodies compared with others.

Ms LYLEA McMAHON: Is it an issue of skill in their being able to perform the role in terms of maintaining that ongoing relationship with line agencies?

Mr WHEELER: Absolutely. Dealing with complainants, particularly with certain complainants, can be time-consuming and stressful. If the agency does not adopt the right approach to that, it can lead to all sorts of difficulties as time goes on. One of the development projects being done by all the Australian Ombudsmen is developing new policies and procedures for managing unreasonable complainant conduct. We find that about 4 per cent of our components might take between 25 and 30 per cent of our resources, and that this has equity considerations in relation to the resources we have available to deal with other complaints.

So there are detailed things that can be done to help manage that process, to ensure that resources are properly allocated and that people are all treated fairly and reasonably. It is a profession, basically. It is not something that most people are able to do straight off, unless they can be given some guidance about what is necessary and what is important.

Ms LYLEA McMAHON: And some skill development?

Mr WHEELER: And some skill development.

Ms LYLEA McMAHON: I suppose one of the issues from a line agency perspective is that if the investigation result in a disciplinary outcome, it is not always appropriate to disclose the nature of that disciplinary action. Normally, disciplinary action is confidential to the individual against whom that action has been taken.

Mr WHEELER: Yes, indeed.

Ms LYLEA McMAHON: How do you see that fitting in, whilst maintaining the integrity of the disciplinary process?

Mr WHEELER: I would think, in that complaint handling process with the whistleblower, you would have to inform them that disciplinary action is being taken and the outcome of that action, even though there is a certain level of confidentiality required. If you do not keep a whistleblower advised as to what action is being taken, they are entitled to believe that nothing is being done and to act accordingly, which might mean that they go off and do things that are not entirely appropriate.

The Act has a provision that says you should inform whistleblowers of the action taken or proposed. One of the things we advise agencies is that they should keep them informed, "We are about to do this. We do not want this being spread around, but we are taking action. We have not ignored your disclosure. We are not just dawdling along; we are doing appropriate things."

Ms LYLEA McMAHON: In relation to your comments about management being capable of taking detrimental action without leaving fingerprints, could you elaborate on what you mean by that?

Mr WHEELER: Management of an organisation, theoretically, controls all aspects of the employment relationship with the employee: whether they can take leave, whether they can take flexitime, how much work they are given, what supervision is imposed on them, where they have to sit, who they are going to be sitting near. There are so many things that can impact on their enjoyment of the job or their ability to perform the job. Good management will do that appropriately, but theoretically it does leave a lot of levers available for people to take detrimental action without it being able to be proved.

Ms LYLEA McMAHON: In your view, is that an attitudinal thing, or is it again an issue of skill? Or is that a supposition on your part without any direct evidence?

Mr WHEELER: The whistleblower research has found that a number of things that are alleged to occur include those sorts of actions where it is very hard to prove. In terms of it being an attitudinal issue, in my view whistleblower legislation by itself is not going to work. If you have an agency with the right attitude, they really do not need whistleblower legislation, apart from the protections against actions. If you have an agency that does not have the right approach, the whistleblower Act itself is unlikely to really help the whistleblower. You need both: you need a cultural change in the workplace to accept that whistleblowers are vital sources of information as to what is going wrong in your organisation, and you need the Act. The two work together well, but the Act by itself, if you have a culture in an organisation, an attitude, that is against whistleblowers, the Act is not going to be of much use.

Ms LYLEA McMAHON: What are the key drivers for cultural change, as you see them?

Mr WHEELER: I would think it is things like education, things like government making it plain that they want to see these matters dealt with appropriately; it is having obligations in the Act so that management must have policies and procedures in place to ensure that whistleblowers are protected; it is holding management responsible for the protection of whistleblowers. But it means some organisation that is out there trying to bring change into that workplace—not three or four organisations doing ad hoc things—within the resources they can make available.

Ms JODI McKAY: My question follows Mr Turner's line of questioning with regard to the steering committee. I acknowledge your last comment about an ad hoc approach by a number of agencies. Does the steering committee have an established terms of reference, how did it come about, and how often do you meet?

Mr WHEELER: It was established by the former Premier at the time the Act was brought in, as a way of coordinating the implementation of the Act through agencies. I cannot recall if it had a very detailed terms of reference, but certainly we understood our role to be to try to provide training and a coordination of

implementation of the Act. We initially undertook a major training exercise. I think we would have run 60 or 70 training sessions around the State using an external presenter. Staff from each of the investigating authorities went along and took part. For us, it was quite a massive effort, given that none of us were funded for this.

Over time, the role of the committee has focused on coordinating the overall activities of the agencies, but mainly in the area of training provided to public officials, and putting submissions to the three reviews of the Act and putting submissions to government about amendments that are required.

Ms JODI McKAY: In terms of auspicing the Act, is there a greater role for that steering committee?

Mr WHEELER: I think there could be a greater role. I think it could have a statutory basis, that basically says this is its role and it has a formal role of recommending amendments to government, for example, and to coordinate the activities of the agencies, perhaps even to assist them to liaise about individual matters. At the moment that is a bit more problematic. If you are not actually referring a complaint, you have issues to do with the Privacy Act and the secrecy provisions in our own legislation about what we can and cannot say to another agency about a matter if we want to discuss it.

If you had a formal role to liaise in relation to individual complaints, this comes up in two circumstances. One is where an investigating authority gets a complaint that really is within the jurisdiction of another. Secondly, what is not uncommon is that we all get the same complaint. It might have a bit of interest to the Audit Office and a bit that could be corrupt conduct and a bit that could be maladministration, and we need to sit down and discuss how we are going to deal with that. It is easier if we all have the same complaint, because then you are not actually breaching any privacy or secrecy provisions. But if one of you has it and you want to talk to somebody else about it, I do not think the ICAC would have a problem, I think its Act would allow that, but ours gets a bit more problematic.

Mr JONATHAN O'DEA: I have two questions picking up on earlier discussion regarding former employees or former public officials. Firstly, in a situation where somebody had become a former employee or former public official and certain threatened disclosures resulted in their being terminated, you said you would treat that very seriously but you were not aware of any circumstances in which that had occurred. How would you treat that very seriously, given that the Act seemingly does not protect people who are former employees; it only protects current public officials?

Mr WHEELER: If a disclosure is made while somebody is a public official, it can be a protected disclosure. If they are fired first, it will not be a protected disclosure. However, it would still be a complaint about the implementation of that Act and we would take it seriously, regardless of whether it is a protected disclosure. That does not stop them being able to complain to the Ombudsman; it would be a complaint under the Ombudsman Act. If they were alleging that they were terminated because they were about to blow the whistle, we would do an investigation into that, if they had any evidence whatsoever to lead to us to thinking that there might be some substance.

Mr JONATHAN O'DEA: You would be investigating and dealing with that in your capacity as Ombudsman?

Mr WHEELER: Absolutely.

Mr JONATHAN O'DEA: There would be no protection, however, for that individual under this Act?

Mr WHEELER: It would not be a breach of that Act, but if something detrimental was done it would be a breach of our Act.

Mr JONATHAN O'DEA: In a situation where somebody has formerly been a public official, and perhaps drawing a parallel with the private sector where a lot of disclosures or whistleblower situations arise from former employees who are no longer in the organisation for whatever reason, if a former public official has left their employment, for whatever reason—not connected perhaps to the threat of disclosing information—but is looking for public employment elsewhere, so they want to become a public official again, and they say, "I have a lot of information that I could tell about my previous place of employment", if they came to the Ombudsman and said, "Under the protected disclosures legislation, what protection do I have if I tell you this information? But I still want to get a job", what protection would they have, if any?

Mr WHEELER: None under the Protected Disclosures Act, because they are not a public official at the time. But they will have the same protection under the Ombudsman Act. Basically, the same types of protections in the Protected Disclosures Act are also in the Ombudsman Act. You do not have to make a protected disclosure to get the protections of the Ombudsman Act. It is the same thing with the ICAC and the Police Integrity Commission. Technically, they would still have statutory protections under the Ombudsman Act by coming forward as a non-public official.

Mr JONATHAN O'DEA: Can you outline what protection that would be in that circumstance? If somebody came to you saying, "What protection do I have?", if they received a response—and I can think of a particular example where this did occur—saying, "You have no protection under the Protected Disclosures Act", what would your response be to them and how would you outline the sort of protection they might have?

Mr WHEELER: My response, and hopefully the response of my staff, would be to say that this is outside the Protected Disclosures Act, but any complaints to the Ombudsman receive the same protections that you would get under the Protected Disclosures Act, which includes protections against detrimental action, and protections against actions, claims, demands, reverse onus of proof, absolute privilege in defamation. All the same protections are there if they come under the Ombudsman Act or under the ICAC Act as they would have got under the Protected Disclosures Act. But again we are talking about the theory of statutory protection. It is how it is being managed as to whether that person is going to suffer detriment.

Mr JONATHAN O'DEA: And that protection equally applies to a prospective employee as much as it would to a previous employee?

Mr WHEELER: If they have suffered detriment it would apply to making a disclosure. They would have to actually get the job and then suffer detriment.

Mr JONATHAN O'DEA: If they had applied for a new job and they were treated differently because of public notoriety or the fact that somebody had heard they were a whistleblower?

Mr WHEELER: One of the problems is how do you prove that?

Mr JONATHAN O'DEA: Let us just assume that that had happened.

Mr WHEELER: If it could be proved. I would have to go back over the provision but I think it has to be actual employment that you suffer detriment not potential employment.

Mr JONATHAN O'DEA: So my question is, in a situation—and I can draw on a real-life situation here but I will not talk about it—where someone has information but is afraid to give it because they think it might affect their future employment prospects, how might the legislation best address that? I will leave it as an open-ended question.

Mr WHEELER: The drafting would have to change certainly, and because we are talking generally, not just a complaint to the Ombudsman, it would actually require a change so that it was broader than just for an existing public official or that there was some change which talked about detrimental action covering the actual process of any employment of an individual as opposed to the termination or during the conduct of an employment relationship. It could be drafted.

Mr JONATHAN O'DEA: Would you see that as an enhancement that would be admirable or advantageous or appropriate?

Mr WHEELER: I think it could be appropriate and it certainly would not hurt. In terms of sending a message, if you look at the purpose of the Act being to do several things, it would be very good.

Mr ROB STOKES: My question follows on from Mr O'Dea's line of questioning, which was in relation to public officials getting a particular protection and people who are no longer public officials not having that same level of protection. If they do have the same level of protection under the Ombudsman Act then why the need for separate protections?

Mr WHEELER: As I mentioned at the very start, the Protected Disclosures Act builds on to existing accountability mechanisms. The existing accountability mechanisms have protections for anybody who goes to

those particular agencies. The Protected Disclosures Act, it was easier to draft it to say these protections apply across the board if you have made a protected disclosure than to say they only apply if you have made an internal disclosure or if you have gone to the Audit Office or if you have gone to the Department of Local Government, but they do not apply if you have gone to the ICAC or the Ombudsman because they have got protections in their Act. It does not detract from the protection, it just duplicates, if you like.

The Audit Office does not have that level of protection for complainants, the Department of Local Government, who can get disclosures about serious and substantial waste in local government, does not have those protections in its Act for complainants. It is far easier to have one scheme: these protections apply if you have made a protected disclosure no matter where you go. And the fact the same protections might apply under the Ombudsman Act as well does not detract from it.

Mr ROB STOKES: Given, however, one thing that maybe this Committee can look at, that certainly over the last decade or so the nature of employment has changed so that you find fewer people who just select a career as a public servant and continue in that until their retirement is much more, as Mr O'Dea commented, hopping between the public sector and then out and in again into related fields where information gained as a public official may then form the basis of something that would be a protected disclosure outside of it. So I ask the same question: Is there some sense in relation to perhaps broadening the definition of "public official"?

Mr WHEELER: I cannot see a downside to broadening it to say that if the disclosure relates to a period when the person was employed as a public official that they can still make a protected disclosure. Only certain of the protections would be relevant of course; the detrimental action in employment could not be. But the protection against defamation, for example, or for breach of secrecy or breach of confidentiality, they would be appropriate to extend to people disclosing something that they learnt while they were a public official but they are no longer a public official.

The Hon. JOHN AJAKA: If I could just ask something following on from that. If I could be clear on this: If a government employee or a private corporation makes a formal complaint against a government official whilst that private corporation is dealing with a government department—local, state or federal—and the private corporation management decide this employee has got to go because he is in some way affecting their business as a result of that complaint and that private employee is suddenly terminated, moved or harassed in some way, all of these protections in these Acts are not afforded to this employee in any way, are they?

Mr WHEELER: That is correct.

The Hon. JOHN AJAKA: Do you see that there should be a need to extend this if there is a direct or indirect involvement of some government department?

Mr WHEELER: There are jurisdictions around Australia which include contractors who work for government in the Act, and I think that is entirely appropriate. Our definition goes a bit beyond your standard public official; it basically says that it covers any person performing a public official function or acting in a public official capacity that is within the jurisdiction of any of the watchdog bodies. That is much broader than people who are employed under the Public Sector Employment and Management Act or the teaching legislation. It is a person who is performing a public function, even though technically it might not be a public official. But, as I was saying, other jurisdictions have taken it one step further and basically said if you are a contractor employed under a contract involving government then you are covered by the legislation.

The Hon. JOHN AJAKA: But that does not apply—

Mr WHEELER: It does not apply in New South Wales.

The Hon. JOHN AJAKA: It is something we should maybe look at.

Mr WHEELER: Indeed.

CHAIR: One other thing I wanted to ask you: You talked about ownership of the Act. If someone in the Government took ownership of the Act then we could have a situation where within that ownership there could be a committee established made up of representatives from all the stakeholders to report back, gather information, suggest reforms and all those things. That would be possible, would it not?

Mr WHEELER: Indeed.

CHAIR: And that would not have to be a statutory body, that could be just within that other body, could it not?

Mr WHEELER: It helps if it is a statutory body in terms of issues such as privacy legislation et cetera if you want to discuss and coordinate, obtain information, share information. If you are just some ad hoc body set up by administrative action you have got a problem there.

CHAIR: It would all depend though on what functions that body would take, would it not?

Mr WHEELER: Indeed.

CHAIR: It is possible to have that and still fulfil all those jobs or tasks that were in those recommendations from you. That would be possible, would it not?

Mr WHEELER: If we are talking about the current functions of the Protected Disclosures Act Implementation Steering Committee, yes. If we are talking about the functions of the proposed unit then no, because it would be obtaining information from agencies, which would contain personal information, plus it would be in breach of a number of agency secrecy provisions to provide information willy-nilly. For example, the Ombudsman, we can only disclose information for the purpose of performing a statutory function. We must be able to point to a function.

CHAIR: Are you saying that if that unit was established in your office you could do all those things?

Mr WHEELER: Yes.

CHAIR: In looking at protection for whistleblowers is this proposal about putting in there that the whistleblower has to have an honest and reasonable belief that something is going on because there has been a debate about whether or not someone is a protected disclosure. I know you advise on that but a decision was handed down in a case, the effect of which was that the interpretation of whether or not someone is protected will be determined by interpreting the Act, which only a court of law could do, and by that time it might be too late. So do you agree with putting in that provision that someone should have an honest and reasonable belief or do you see that as raising other issues?

Mr WHEELER: I personally do not have a particular problem with it. It just builds in a further complication. There are other members of the committee that I think may have some issues with it. I do not necessarily object to it, I just do not know whether the benefits that would be achieved would outweigh the complication that would be created. If you have still got the test that it must show or tend to show—at the moment we have the belief only in relation to disclosures to MPs and journalists in, I think, section 19: you must reasonably believe it is true. Then if the clause says that, the provision says it must be true, which is a bit difficult.

But I think basically the objective test of it 'shows or tends to show' is a far easier test to administer from our perspective as a watchdog body that has to assess it and say do we think it is or not, because how would we know if they have an honest and reasonable belief? That might be okay in a court setting down the track if they need to defend themselves under the Act, but from a watchdog body's perspective you get a disclosure in, you have to assess on its face is this likely to be a protected disclosure? You can do that on the basis of does it show or tend to show; you cannot do it on the basis that they have got an honest and reasonable belief. You would not have a clue who they are; you do not know what is in their mind. So, from a practical perspective if you had both, our decision should be made on the basis of it shows or tends to show.

CHAIR: So you would disregard that when you are making your decision to advise people?

Mr WHEELER: About whether they have an honest and reasonable belief?

CHAIR: Yes.

Mr WHEELER: There is no way for us to be able to tell their motivation or their level of knowledge unless we have them in in each case and we grilled them in detail about just what information they had and formed a view about whether they actually had an honest and reasonable belief.

CHAIR: So, in other words, it could be something that could be put in to give a whistleblower more confidence, for example, in making a protected disclosure while at the same time allowing you to still carry on with your parameters of advice?

Mr WHEELER: As long as it was over and above and did not remove the 'shows or tends to show'. As long as our assessment is based on it 'shows or tends to show'. We do not make a decision as to whether something is a protected disclosure, we make our best guess and we act appropriately. The decision, if it is made, is only made by a court or tribunal if somebody brings an action. So, for detrimental action or if somebody is defending themselves, for example, in a defamation action, then a court would decide yes it is/no it is not.

But from our perspective we would go back to a person and say, "We believe you have made a protected disclosure" or "We don't". We have to make that assessment on the document we receive, because we have to do at the outset. So as long as our test is only the 'shows or tends to show', having the other test in there in case something went to court, if that can be drafted, I would not object to it.

The Hon. GREG DONNELLY: The issue of a person being vexatious or a person perhaps seeking retribution, would you care to comment on that, because in terms of looking at a particular circumstance you indicated that you would have trouble trying to establish what was the mind of the person, but surely from time to time there is the possibility of instances where a person may be vexatious, that they feel they have been treated unfairly or poorly and in their mind are configuring a set of circumstances. What sort of challenge does that provide in terms of if you extend the scope of the work that you do to look at this in a more broader sense where does this ultimately lead in terms of dealing with matters like that?

Mr WHEELER: Just to start from the provisions of the Act, the Act provides that a disclosure is not protected if it was made vexatiously or frivolously. I do not know what "made vexatiously" actually means, but you do need to distinguish between a complaint which is 'vexatious' in the sense that it is made for the wrong purpose and it has got nothing in it and a complaint that is 'malicious' in the sense that it is made for the wrong purpose but it has got something in it. As watchdog bodies or agencies we need to focus on the content. Somebody might make a disclosure for a whole range of reasons. In this area of protected disclosures quite often we will only get the disclosure because somebody is trying to hurt somebody else, but the disclosure might be gold. So when we are giving training we emphasise there is a big difference between something made for the wrong purpose that has nothing in it and something made for the wrong purpose that has something in it. We really have to focus on the content.

It is important to know the motive, so you know what weight you can put on the content and what other information you need to verify it, but quite often you will find out things you never would have found out before, because somebody is annoyed. It might be in the work situation, for example, where somebody has not been performing and a supervisor turns around and says, "Enough is enough. We are going to manage your performance." That person thinks: I will get you. I am going to make a disclosure. They will then bring up something they are aware of. It might be a bit more historical but it is something serious they are aware of. In the public interest it is important that the employer knows about it and deals with it, but the motive might not be all that holy.

In the police jurisdiction it is not unheard of to have payback complaints. A police officer makes a complaint and the subject of that complaint makes a payback complaint. It does not mean the payback complaint is wrong at all. You might get very important information out of that payback complaint - it was a trigger to get somebody to do something they would not otherwise have done. I accept that there might be a vexatious complaint in the sense that there is nothing in it and it is made for the wrong purpose. I have got to say you do not often see those. More often it will be a malicious complaint where somebody is annoyed and they are doing it to get even, but there could be very important information in there in the public interest.

The Hon. GREG DONNELLY: If the complaint seemed to be malicious you used the phrase that you put weight on the information to try to discern the motivation. How do you get in the mind of that person? How do you assess that?

Mr WHEELER: What we try to do is steer away from motivation but look at the content. If you think there could be malice there then you are far more careful about what weight you put on information, unless you can verify it, because your witness is not necessarily that reliable. It might be very good information but it might be partial or it might be selective. You might need to get far more verification than you would otherwise need to get if you had a witness that you could rely on. So it is something you want to be aware of but you cannot get into the mind of people. Sometimes it is obvious, other times you just do not know why they have come forward but it is best to stay away from that motivation issue. If you get an inkling then you think okay that affects what weighting I put on the information they have given me. Not that it is inaccurate, but just what other proof I need to look for.

Reverend the Hon. FRED NILE: I noticed that the Independent Commission Against Corruption Committee made recommendations in November 2006, your Committee reviewed them 12 months later in November 2007 and you wrote to the Premier on 28 March 2008. I am wondering whether the Steering Committee should liaise with this Committee? Whether it is possible for the chairman to be an ad hoc person because looking at all the other groups which are represented you are spending a lot of your time discussing the recommendations of this Committee. I am wondering whether that would help speed up the process?

Mr WHEELER: I have no objection to that. I might mention with the dates, that one of the things that impacted there was the date of the election. So it was not worthwhile for the Committee to write before the election and it needed to leave a bit of time afterwards.

CHAIR: Have you made a submission to the Committee as yet or not?

Mr WHEELER: Not as yet.

CHAIR: I look forward to receiving your submission. It may be the case that you will be required to return after we have looked at all the submissions so we can ask you further questions.

Mr WHEELER: Yes.

Mr JONATHAN O'DEA: Are we to take this letter of 28 March 2008 from Mr Wheeler, as the Chairman of the Protected Disclosures Act Implementation Steering Committee to Premier Iemma, as having been formally submitted to the Committee?

CHAIR: Do you wish that letter to form part of your evidence?

Mr WHEELER: Yes, I do.

(The witness withdrew)

(Short adjournment)

THERESA JUNE HAMILTON, Deputy Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

CHAIR: Would you like to make an opening statement?

Ms HAMILTON: No, thank you. Most of what I would have said in an opening statement will be encompassed in the questions.

CHAIR: The purpose of the Committee's inquiry is to assess and report on the effectiveness of the current laws, practices and procedures in relation to protecting whistleblower employees when they make certain allegations. You are with the Independent Commission Against Corruption and the Act has been in place for quite sometime now and you are aware of the review that was conducted a couple of years ago. Firstly, can you explain to the Committee the role of the Independent Commission Against Corruption as one of the investigating authorities and a stakeholder in the role of protecting whistleblower employees?

Ms HAMILTON: The Independent Commission Against Corruption has a specific role in that it is mentioned under the Protected Disclosures Act as an agency to whom allegations can be made of corrupt conduct. It also has a role under its own Act, a broader role in a way because the Independent Commission Against Corruption Act also contains protections for people who provide us with information and they include protections for them against liability for criminal or civil action. It includes an offence provision for people who take detrimental action against people who provide information to us. The Act also includes an injunction provision, which I looked at quite hopefully when I first came here because that provision does exist in the Queensland Whistleblowers Protection Act. I do think, however, that the injunction protection under the Independent Commission Against Corruption Act is probably too narrow to be used to protect someone, for example, who has been dismissed for providing information because the court has to be satisfied that the injunction is being issued to prevent action that will damage or hinder the investigation. I think it could be argued that that witness is still available and the fact they have been dismissed is not actually stopping the investigation or hindering it.

We have our own protections and the significant thing about the protection under our Act is that you do not have to be a public official to get them because it applies to anyone who provides information to us. Of course, the protection we can provide to people under the Protected Disclosure Act is limited to public officials and this Committee may want to consider whether that restriction continues to be necessary. I must say in terms of the people who come to the Commission, for example, last year 680 of the complaints we received were from members of the public, as against 194 protected disclosures. So three to one are coming from members of the public and if one looks at the object of the Protected Disclosure Act it refers generally to the object being to encourage people to provide information about misconduct in the public sector. It does not actually refer to protecting only public officials but, of course, the effect of the Act later is that it only extends to public officials. In that regard, in view of the continuing trend that the Independent Commission Against Corruption is seeing for public functions to be contracted out to private firms and for there to be public-private partnerships, it becomes more and more likely that people other than public officials will have significant information about possible misconduct in the public sector. That is obviously a policy matter for the Government, but I would just point out that the present difference between our Act and the Protected Disclosures Act is that our Act is not limited to protecting public officials.

CHAIR: Certain jurisdictions in Australia have what they call public contractors, who would be protected, and those are people who deal with the Government and are no doubt out there in private practice. Is that what you are saying?

Ms HAMILTON: I have never really understood why anybody who has information about public sector misconduct is not protected by whistleblower legislation. In Queensland it has been extended to protect anybody who provides information about three specific categories which, as you would know, are very limited. It has to be about threats to somebody in physical incapacity or serious damage to the environment. So anybody can make protected disclosures about those very specific issues, but otherwise the Queensland Act is the same as here; it has to be a public official making the complaint.

CHAIR: I know some Acts in Australia refer to the phrase "any person".

Ms HAMILTON: Yes, I think it is Western Australia.

CHAIR: Western Australia says "any person". Is that what you are alluding to, is it?

Ms HAMILTON: I cannot see, as a matter of policy, why any person who genuinely makes a complaint about public sector misconduct should not be protected.

CHAIR: The original aim of the Act back in the nineties was to encourage better efficiency in the public service and to make sure the resources of the public service were used properly and that there was no corruption or maladministration, so you have got where it comes from. There are jurisdictions that prescribe either public contractors or "any person".

Ms HAMILTON: Yes.

CHAIR: In your organisation of ICAC, how do you pick up a protected disclosure that someone makes? What is your procedure for dealing with or detecting a protected disclosure? Do you advise? What is the mechanism in your office?

Ms HAMILTON: With the assessment section, one of the items they have to check when they are talking to someone is they have to try to identify whether it is a protected disclosure. They do that simply by looking at the nature of the person making the complaint and the type of information they are providing. If they form the view it is a protected disclosure, then there is a section on the form to put that and that obviously leads to certain consequences, such as that person's identity cannot be revealed without its being referred to the Deputy Commissioner for a decision about whether it is in the public interest, and certain confidentiality provisions kick in. It is basically just a matter of assessing who is the person who has made it and what the information is about in determining whether it comes within the legislation.

CHAIR: And you advise the complainant on that?

Ms HAMILTON: That we have classified them as a protected disclosure?

CHAIR: Yes.

Ms HAMILTON: I do not think we do. We do advise any departments we refer it to because obviously we think it is important to say, "We have categorised this as a protected disclosure", and I think we point out in the letter that it is an offence for anybody to take a reprisal on somebody who has made a protected disclosure. However I do not think we go back to people and say we have categorised this—I am sorry, I take that back. We do go back to them to find out whether they consent to their identity being revealed. So, yes, if it is a protected disclosure, we normally would go back and say, "You have made a protected disclosure. Do you consent to your identity being revealed? We are going to refer it back to the department.", or " We are going to refer it to somewhere else."

CHAIR: Are you able to tell us about your experience with the agencies that you deal with in terms of their efficiency or effectiveness in investigating these types of matters? One of the great issues that we have here as a Committee investigating this, and as Mr Wheeler has pointed out, is the effectiveness of the agencies that put in place the investigatory procedures and practices to protect whistleblowers and investigate matters. Have you had any contact or experience with those other agencies?

Ms HAMILTON: Not particularly. I mean, we frequently get complaints about the way someone has been treated during an internal investigation. Sometimes the allegations of corrupt conduct we get are that the person has been victimised for making a complaint or has not been treated properly during some internal investigation process. So I guess we only get to hear about the absolute failures where people have been left feeling victimised.

We are presently doing a study of how internal witnesses are treated during investigations, but that is more the witnesses as opposed to the whistleblower, if you want to call it that. As Mr Wheeler said, the problem is that not a lot of pure research has been done on how agencies are dealing with it. We certainly try to help them to deal with it appropriately by having protected disclosures posters and postcards and we give advice if they want to ring up about how they should treat it. We try to channel them into treating it properly by, as I say, writing back and saying, "This is a protected disclosure. You have to deal with it properly and confidentially."

But I have no real evidence about how agencies are dealing with it, apart from the ones we hear about eventually.

CHAIR: One of the issues raised today and that has been raised before is ownership of this Act and coordination with the agencies, communication with the agencies, and gathering data and statistics. I take it you would support something of that nature?

Ms HAMILTON: I would support some collection of data, yes, and a coordinated approach. I must say I do not think the commission supports the Ombudsman's proposal in full. I was on a similar committee in Queensland a few years ago and the same proposal was put forward by the Queensland Ombudsman—that a unit should be created there that would supervise the way protected disclosures are handled. The same objections were raised as have been raised here: That it would possibly interfere with other agencies and the way they are investigating protected disclosures.

At the end of the day the Premier's Department in that State decided that no statutory amendment was required; that it could be achieved through the existing mechanisms by keeping that committee going and by asking their heads of the agencies to meet under more broad-brush policy issues to look at trends and whether things were being dealt with properly. That is the way it was dealt with there. I tend to think that is better than trying to impose another level of management, as it were, on how protected disclosures are dealt with, by having the Ombudsman oversighting how various departments are dealing with it.

The other reason militating against it is that of course in both Queensland and New South Wales all of the recent moves have been towards making departments take responsibility for their own activities. I think it is a training and education issue rather than somebody else taking responsibility for managing how they are dealing with protected disclosures.

CHAIR: In that system in Queensland, were the heads of department getting together more frequently to discuss?

Ms HAMILTON: I am sorry, it was not the heads of department. It was the heads of the main agencies that get protected disclosures, like the Chairman of the Crime and Misconduct Commission [CMC], the Ombudsman and the Auditor-General.

CHAIR: When the heads of those agencies get together, are they able to gather information and statistics and be able to say that within two years we will have a look at all of this information, know where we are heading, know what we need, and know what we have to reform?

Ms HAMILTON: No. Obviously there they are dealing more with anecdotal experience. It is nothing like you are talking about, which I think would be to have a separate unit that could gather information and see whether things are being dealt with consistently. I think that would be very good. Personally I do not think that would even need statutory amendment. I heard what Mr Wheeler was saying about confidentiality, but most organisations have the ability to disseminate information if they want to. I do not see why it is not for the purposes of those organisations to assist in making sure that, for example, we have a corruption prevention function, so it would be for the purposes of the Act to disseminate information to a body that had been set up to try to get statistics or information about how protected disclosures were being dealt with.

CHAIR: So it would be a question of enforcement as well as making guidelines and regulations and enforcing those with agencies to develop the systems and communicate them?

Ms HAMILTON: Yes.

CHAIR: That would be better coming from some sort of overarching body?

Ms HAMILTON: Yes, I think that is correct.

CHAIR: But you could still then have alongside that a system whereby the heads of agencies are meeting and, say, report back to that body on relevant information and policies or changes to legislation proposals.

Ms HAMILTON: And there is a big difference between looking at the broader-brush policy issues, which a body like that would be ideally suited to do, and when you get a recalcitrant agency taking serious action. That is where bodies like ICAC and the Ombudsman are better placed. That moves beyond education and training. That moves to some of the issues that we have been discussing today, including being able to take injunctions and being able to recommend criminal offences in serious cases.

I do support the introduction of the injunction power. It has been used in Queensland. I was involved in the case where the CMC obtained a mandatory injunction because we believed a council had sacked the CEO for providing information to the CMC. We obtained a mandatory injunction requiring them to rehire the CEO while the case was pending. Even though that was the only occasion on which we actually used an injunction, we used the threat of it for many years thereafter. You found after that that you just had to write a letter and say, "Look, we understand that you are about to sack the CEO. We take it very seriously if people are prejudiced." We found that they drew back because they knew we were serious and that we would take it to court if we had to. So I do agree with Mr Wheeler that the fact that a power like that is not used a lot is not necessarily an indication that it is failing. It may be an indication that the fact that it is there has meant that it has not had to be used more because people have not gone that extra step and sacked a person or prejudiced a person.

CHAIR: Was the injunction in Queensland under the CMC Act?

Ms HAMILTON: It was. That is right.

CHAIR: We are talking about an injunction power under the Protected Disclosures Act. Mr Wheeler said it is good to have it in there although it has never been used under other similar legislation around Australia—protected disclosure legislation in other jurisdictions. But it is good to have it in there as a deterrent. Could you see a level 5 clerk or someone in an office going to the Supreme Court and getting injunctive relief?

Ms HAMILTON: I do not support it being available to individuals. I support it being available to the agencies to whom the complaint was made because they are the people who should be supporting whistleblowers. I do not think most people could afford it or would know how to do it. I do not see the point really of giving individual whistleblowers the power to obtain an injunction. But I do think agencies and public authorities should have the power to obtain injunctions in appropriate cases.

CHAIR: If someone complains directly to their employer internally without coming to you and they think they are going to be sacked, you cannot see them as an individual using the injunctive relief provision?

Ms HAMILTON: The thing is if somebody is victimised even if they have not come to us the conduct of the person victimising them then becomes corrupt conduct. So then they can come to us and we could be looking at that corrupt conduct. I think then we could get an injunction perhaps under our Act. I am just trying to think. You could get an injunction to stop a reprisal. That is normally what the Act allows you to do. So I think we would still be able to protect that person because, even though they did not initially come to us, if they then came to us the later conduct would be the corrupt conduct that we would be investigating—that is, the attempts to sack them or the threats to sack them because they made an internal complaint.

CHAIR: What are your general views on this particular Act and its effectiveness? You have had a discussion about the practicalities of it on the ground in workplaces as to the type of conduct we are talking about and its effectiveness. Do you have any views or general major areas where you could see reform?

Ms HAMILTON: Yes. I think the Act presently is too restrictive. It puts people through a number of hoops before they can be said to have made a protected disclosure. They have to be the right kind of person, they have to have the right kind of information and they have to go to the right agency. If they do not get all of those things exactly right, they have not made a protected disclosure. As you referred to earlier, there has been a couple of cases that have very strictly interpreted the present provisions, for example, in respect of a corrupt conduct complaint to the commission to say that it cannot be just suspicions or allegations, the person has to have information that tends to show that corrupt conduct has occurred, not that it may have occurred. So it has put the bar very high.

In Queensland in respect of that issue, which you have also discussed, they have made the test that the person has information about it if they have an honest and reasonable belief that they have that information. I must say in terms of the matters that come to the commission, there is often a very thin line between serious maladministration and corrupt conduct. So I think it is a bit harsh to take the view that if somebody comes to us

saying that it is corrupt conduct and at the end of the day somebody says, "Oh no, it's not quite bad enough to be corrupt conduct; it's just maladministration", they have not made a protected disclosure. One reason that occurs is because this Act is very prescriptive and says that to be a protected disclosure to the ICAC it must be about corrupt conduct. To be a protected disclosure to the Ombudsman it must be about maladministration. There is a catch-all provision at the end—I think it is section 14—that says you can go to any public authority. But even within the steering committee everybody has a different view about what that means. It is not at all clear, for example, that if somebody mistakenly comes to the ICAC for something that turned out to be maladministration they would be protected.

So I am a big fan of the honest and reasonable belief. It appears in two places in the Queensland Act: one where it says you can make a public interest disclosure—which is what they call it—by going to a body that can investigate it but then it goes on to say or to a body that you honestly and reasonably believe can investigate it. It is the same about the information you have—if you honestly and reasonably believe you have information that shows misconduct or corrupt conduct. So it gives people a bit of leeway both regarding the sort of information they have and the body they can go to. So as long as they are making a genuine attempt to take the information to the right body they will still be protected. I really think the Act here could afford to do that without unduly widening the gates and opening the floodgates. It would just allow people to give it their best shot and go to the body they think would investigate the information.

CHAIR: As I understand it, if someone goes to your agency with something they think is corrupt conduct and it is in fact maladministration, they are not protected.

Ms HAMILTON: I do not agree with that view. At the moment I have told the assessment officers if it is about corrupt conduct, maladministration or the other category—

CHAIR: Serious and substantial waste of public money.

Ms HAMILTON: We will categorise it as a protected disclosure because I think it is arguable that the general section of the Protected Disclosures Act that says a public official can make a complaint about any of the three matters to a public authority—but it then goes on to say other things that muddy the water a bit about whether you have to be in that public authority or it has to be about that public authority—

CHAIR: You are saying that it is not clear.

Ms HAMILTON: I am saying that it is not clear. If even our steering committee cannot agree on it, obviously how are whistleblowers expected to know whether they will be protected if they go to this agency or that agency. So I think it is something that could be clarified just by adding, "If you have information that shows this or you believe it shows this or you go to this agency that can investigate it or you believe it can investigate it". That would clarify that people have a bit of leeway.

Mr DAVID HARRIS: Can you tell us not specifically but generally about any examples where the current legislation has not worked or are we talking about hypotheticals—if we strengthen it or do this or that rather than where it has actually gone wrong?

Ms HAMILTON: It is hard for me to talk about specific cases, but I know there has been at least one case that came to the ICAC where the people made it as a protected disclosure but at the end of the day, through very legalistic opinions from the Crown Solicitor, they said that, no, it was not serious enough to be corrupt conduct, it was at the most maladministration. Therefore, it was not a protected disclosure. It meant that those people who thought it was serious enough to amount to corrupt conduct—and they said they had been victimised as a result; I do not know whether it was true, and I am not saying it was in that case—we could not even begin to look at whether they had been victimised because it was not a protected disclosure because of that fairly strict and legalistic interpretation of the sort of information you have to give.

Mr DAVID HARRIS: My understanding of what Mr Wheeler told us is that at your level and at his level they give recommendations about what is a protected disclosure but it is not until it gets to court that the determination is made as to whether it was. Is that correct from your point of view?

Ms HAMILTON: That certainly seems to be the case according to the way it is worded at the moment because the courts have said that to be a protected disclosure it has to be information about something that actually amounts to corrupt conduct if it is true. So it does not allow much leeway for people to report

suspicions and allegations. Of course we encourage people to report suspicions and allegations even if they have not got the evidence. Some of our biggest cases have resulted from people reporting suspicions or reporting something they have heard just on the grapevine. You would not like to see that person victimised at the end of the day because they did not put the allegations in the right form. So I must say we are pretty generous, I guess, in assessing whether something is a protected disclosure. But that is just for our purposes. As you know, at the end of the day, if it went to litigation a court might say, "That was not a protected disclosure".

Mr DAVID HARRIS: Would broadening the legislation—broadening the definitions—change that?

Ms HAMILTON: I know Mr Wheeler thought that might make it harder to categorise, but it is not really because you mainly look at the objective part. The honest part might come in later down the track where it has to be determined whether this person was acting honestly. But if you just look at whether they have an objective belief, you can normally pick that up from the terms of their complaint. Does this person seem to have an objective belief that they have information about corrupt conduct? That has to be reasonable. So that is an objective test. If somebody thinks it is corrupt conduct for the mayor to wear a yellow tie into the Chamber, of course you can look at that and say, "He may honestly hold that belief but that is not reasonable; that is not an honest and reasonable belief". So you are mainly looking at the reasonable part. You are saying, "Could somebody reasonably believe this is corrupt conduct?" Yes, they could. This person seems to reasonably believe that so we will categorise it as a protected disclosure. So you are not looking so much at the evidence he has got and how specific he can be about what the corrupt conduct actually is, chapter and verse, which is what the cases seem to require for it to be a protected disclosure. I would support that, and I think it is something that was supported by the last Committee too.

CHAIR: That is correct.

Ms HAMILTON: I do not think it has caused any major problems in Queensland in interpreting when you classify something as a disclosure.

Reverend the Hon. FRED NILE: If we have a very strict definition of protected disclosure and that becomes known—obviously it would be known by public servants—is that a deterrent to people reporting matters when they should report them?

Ms HAMILTON: I think if someone has gone back to them and said, "Sorry, you didn't give exactly the right sort of information so this is not a protected disclosure", I think it would discourage them in the future. If they tell other people of course it does discourage them. I would like to see the Act as user friendly as possible. People should not have to jump through all these hoops; as long as they have a genuine belief that they have information about wrongdoing and they try to take it to the right body, I think they should get the protection. I think that is what we should be aiming for if they are acting in good faith.

Reverend the Hon. FRED NILE: To look at it from the other side, if somebody goes ahead and they do not get that protection are you aware of them suffering discrimination in the workplace in the public service?

Ms HAMILTON: Not down here. I have not been here long enough.

Reverend the Hon. FRED NILE: Could they suffer discrimination?

Ms HAMILTON: I guess it works both ways. If management knows that it is not going to be classified as a protected disclosure obviously that gives them a bit of freedom and leeway to think, "We don't have to worry too much about whether we transfer this person or deal with them because it's not actually being classified as a protected disclosure". Also, to be fair to management, I think it often makes it very hard for them to know. That was one of the biggest complaints in Queensland when I was on that committee. A lot of departments actually wanted the committee to go around and educate them and give them lectures because they said, "We don't know what a public interest disclosure is; we have no idea. We see the Act has all these offence provisions and we're scared we're going to do something wrong". I think most departments are trying to deal with them properly and it would help them if it were simpler; if they did not go through all these hoops of working out whether the person has given exactly the right sort of information to be a protected disclosure.

Reverend the Hon. FRED NILE: Is it clear that all public servants are covered by the Act? There was some doubt about public health staff.

Ms HAMILTON: I think that issue is still not entirely clear. There are people now who were contracted by departments who may not be covered. It all turns on the definition of "public official", which I think is broader than "public sector employee" but probably not broad enough to cover all the situations you now have where people are doing work for government but more as a contractor than as an employee. I do not think they would be covered.

Reverend the Hon. FRED NILE: But area health staff, there should not be any doubt about them?

Ms HAMILTON: There is some complicated reason because they are employed by the health services—I am not entirely across the problem there. I must say, there is exactly the same problem in Queensland, again with the health department, because of the way they employ their staff. There was some question as to whether they were covered. It certainly turned out that they were not covered by the definition of public officials in the Queensland Criminal Code for offence provisions, and that caused a lot of trouble, because if they took bribes they were not covered by the official corruption provisions in the code. The trouble is, the public sector is becoming very complex and diverse. It is not just all employees any more.

Reverend the Hon. FRED NILE: So, we need to change the definition. It could be people who are receiving public funds or public income?

Ms HAMILTON: Yes, or working with public sector agencies. You would have to be careful how you define it because you do not want it to be too broad. But certainly the idea that has been suggested about contractors working with the Government, I do not see why they could not be included without causing unintended consequences.

Mr DAVID HARRIS: Are you saying possibly now non-government organisations who receive government funding would not be covered under any of this?

Ms HAMILTON: I am not sure, sorry. It all depends on the definition of "public official" in the Protected Disclosures Act, which is fairly broad. An employee of a state-owned corporation, a subsidiary of a state-owned corporation, and local government is included. And it does include somebody carrying out public official functions or acting in a public official capacity. So, the question becomes when the departments contract out now some of their public functions to private certifiers, for example, as they do, do those people become public officials? As you know, with everything, if you ask two lawyers you will get two answers.

CHAIR: Or three.

Ms HAMILTON: That is right, three. I am having two bob each way on this question, you may have noticed. But I am not sure. I just know it is getting more complex all the time because you have the state-owned corporations and the NGOs and whatever. I think as a matter of policy I would like to see it kept as broad as possible because we want people who are dealing with government or know about government misconduct to be able to complain about it and be protected.

Mr ROB STOKES: One question in relation to the situation you raised where someone might raise a matter with ICAC on the basis they believed it to be corrupt conduct and when ICAC's view following the investigation was that it was not, it may be serious maladministration; in those circumstances the person who made the protected disclosure to both the ICAC and the Ombudsman would be protected because they have made it to the Ombudsman. The difficulty I can see with that is that you have two agencies doing pretty much identical investigations, duplicating the resources, and if someone does not do that then of course they are not protected. It is almost like a statement of claim—you are better off putting everything in, any possible claim in, and seeing where you go, which does not seem to me to be a terribly good way to run a process.

One of the ideas I got from Mr Wheeler—he may not have been saying this, it is my interpretation of what he said—was that there might be a useful role for a gateway authority to determine where a protected disclosure should go, because it seems to me the system puts a lot of onus on the employee to figure out what the nature of their protected disclosure is. What do you think of that sort of model?

Ms HAMILTON: My only concern is finding somebody who knows enough about all of the agencies to be able to give that sort of advice. I would say with respect to the first issue raised that we always ask people if they have complained to another agency so we do not just go off investigating what somebody else might be looking at. I personally think it would be better to fix the Act so that as long as the person complained to a

public authority that they thought was the right one they would be protected, because as you say, you cannot have people just putting it to everybody just in case they are not getting the right body. I think the Act needs to be amended to make it clear. I think that was the intention of that catch-all provision but it could be as simple as just saying that despite these earlier specific provisions, any public official can go to any public authority to make a complaint about any of these matters. So, I think it could be quite easily fixed, and I think that is probably better than trying to get our body, another level of people, deciding where people should go.

Mr ROB STOKES: Again, I thought Mr Wheeler was saying the Ombudsman could do that function. What is your view on that?

Ms HAMILTON: The Ombudsman is very knowledgeable about their own Act and their own activities and I am sure has a general knowledge about what the other bodies do, but I think it is putting too much responsibility on them to take on that role, because they may not get it right either and then you have somebody who has missed out on the protection because of action that they have taken and they are getting complained about. It relates to what one of the members raised with Mr Wheeler before. Once you start putting yourself too much into the fray and the decision-making process, then you start getting complaints about you that you have to investigate. They might say that was maladministration of you to refer me to that body when I should have gone to this other body. So I think once agencies are taking on those extra roles they have to think seriously about whether they will regret it at the end of the day because you become part of the decision-making process that has repercussions.

Mr JONATHAN O'DEA: Further to Mr Stokes' question, given the inherent imperfections therefore in a potential reform process, how confident would you be at the moment that there are not a number of cases where people go to the wrong public authority and, effectively, the matter gets buried because it does not fall within that authority's scope and it is not referred properly to the appropriate authority, whether it be for corruption or serious maladministration? If we take what you are saying on face value, the logical consequence is that probably currently a lot is going under the carpet?

Ms HAMILTON: I think it is a different issue to have complaints that come to you and you just have to look at them to see who it is appropriate to refer them to. That is a bit different to an agency having an overarching role and it is deciding where every complaint goes. Most of the agencies have a pretty fair idea about what the other agencies do, enough to decide this is not for me, it may be for you. Those referrals are normally done not on the basis that you are deciding it is maladministration or you are deciding it is for the Auditor; you are saying it is not for us and you just refer it to the other agency saying you might like to look at this and then they make their own decision. Most agencies try to send them somewhere themselves or refer the person to another body by saying "You should take this to X, we cannot do anything about it."

Mr JONATHAN O'DEA: That was my next question. When it does occur, how does it occur generally? Is it usually saying to the person, go here, or is there an internal referral between the two organisations? Is there a protocol or should there be a protocol?

Ms HAMILTON: Both, depending on how important it is. We can refer it ourselves under section 19, and that is what we often do. We then just write to the person and say we cannot deal with this but we have referred it to the Ombudsman, or we can go back to them and say you should go to the Ombudsman because we cannot deal with this. It just depends how seriously we view it. If we think it is serious enough that we want to bring it to the attention of the other body, we do it ourselves. Otherwise, we just ask the person to do it. But we do try to at least give everybody some idea who they could go to.

Ms LYLEA McMAHON: Early Mr Wheeler spoke about some investigatory agencies seeing complainants as a source of information rather than understanding and effectively managing the relationship. Your earlier comments were also that you are currently reviewing how you manage complaints and manage witnesses. Do you have anything further to add or any statement in response to Mr Wheeler's comments?

Ms HAMILTON: That process is looking at how internal witnesses are handled generally in other departments. As part of it that they have looked at how we handle witnesses. A lot find it very intimidating. It surprised me. Even simple things like they find it intimidating to be called up and have to sit outside waiting with a special constable in the office—what you do not tend to think of. It is interesting to hear what ordinary people have to say about the investigative process because everyone thinks no-one is going to worry just being called in as a witness to give a statement, but people do worry. So, we are always looking at that. It may be just business as usual to us but it is important to these people. We try to treat complainants well and we have a

statutory obligation to respond to them. If we are not going to look at their matter we are required to write to them and tell them we are not going to look at it and briefly why. As I said, the figures show we get a lot of our information from members of the public. We need for them to trust us. That is something we need to keep working on. I think most agencies probably need to work on that all the time.

Ms LYLEA McMAHON: You also said your own Act provides protections for witnesses, yet at the same time you are recommending enhancements to public disclosures. Why have that duplication if your own Act provides those protections?

Ms HAMILTON: Well, it only protects people who provide information to us. Sometimes we have people who have gone somewhere else first. They have provided it to someone else and it might eventually get to us, but we cannot protect them because they have not provided the information to us directly. So, there would be cases where we would still want to use the protected disclosures legislation. I think there is also some merit in the protections being as uniform as possible across the board. So, it does not mean if you are lucky enough to have information for this agency, you get the protection, but if you are unfortunate enough that your information only relates to this other agency you may not get the same level of protection. I would think it would make sense to try to make the protections available under all of the Acts as uniform as they can reasonably be.

Ms LYLEA McMAHON: I also asked Mr Wheeler about cultural change and what he saw as the key drivers to affecting that. In your earlier statements you referred to trying to ensure that agencies were more accountable and had much greater skill and ability in dealing with these sorts of issues. What do you see as the key drivers for cultural change that would affect that, keeping in mind that legislation in its own right is not always able to achieve those ends?

Ms HAMILTON: I think it always comes down to the tone at the top, as they call it. But I think that is true. If management shows a real commitment to supporting whistleblowers and protecting them, and not just paying lip service but everybody knows that they secretly love to get rid of them if they could, that is going to filter right down and even somebody who might be minded to be nice to the person and support the person will not because they think management will see them as a troublemaker too. So, I think you have to really change the way managers tend—and it is only human nature—to see these people as problems to be dealt with because it is causing problems for them, their agency is going to be investigated. They have to try to change that attitude: that it is a process and that they have an obligation to try to protect that person as much as possible—and not to see them as the problem but to see the conduct they are reporting as the problem, if it is true. They would not create the situation normally; they are just reporting it. But they are often seen as the problem and the trouble to be gotten rid of, instead of managers saying, "We've got a bit of a problem here. We are going to address it head on."

We have been doing a lot of work on whistleblowing, but more as part of that Whistling While They Work Project, as in looking at what is happening and doing research. But I would like to see us pick up a bit our education and training with the agencies for protected disclosures generally, because I think it is an area that can be misunderstood. The ICAC does have a broader jurisdiction than just the people who came to us. As I say, if somebody is victimised within the public sector anywhere, that becomes corrupt conduct. That is all within our jurisdiction and something we should be trying to prevent across the whole public sector.

Ms LYLEA McMAHON: What do you see as the key skills that need to be enforced, developed and enhanced in terms of dealing with this issue?

Ms HAMILTON: Obviously, knowledge is the first skill. They need to know what is a protected disclosure. It is probably the same skills that any good manager needs: communication with the person involved so they know what is happening; keeping them informed, but knowing when to keep things confidential from others. It is really just the skills of dealing with it and managing the situation.

Ms LYLEA McMAHON: Are our agencies well equipped to conduct investigations?

Ms HAMILTON: No, not most of them. With most of them, anything more serious they tend to contract out to the consultancy agencies that have sprung up. Some of the bigger departments have investigative areas, which I think are quite capable of conducting an investigation in terms of doing all the practical things. In terms of looking at the bigger picture and trying to make sure that the complainant is protected, I do not think that would be what they would see as part of their role; that probably goes back more to the manager to take care of.

The Hon. GREG DONNELLY: Mr Wheeler in his evidence spoke about the protected disclosures steering committee and the seminars it conducts, which I gather are across a range of agencies. I appreciate from what you said and from my research that the ICAC also considers important its role in terms of the education and training of people within agencies. With respect to the other agencies that make up the steering committee, do they also have a role in the education and training of people? Has that been discussed as an issue at committee level—that is, the levels and quality of training?

Ms HAMILTON: I am sure the police do training on whistleblower issues. Traditionally, they have quite good use of whistleblower handling skills, although I know not everybody would agree with that. I must say, in this State traditionally the Ombudsman seems to have taken the lead role in respect of protected disclosures—and has done a very good job. But I do think all agencies have to be responsible for their own whistleblowers at the end of the day, and have to be responsible for seeing that the agencies that come to them know how to treat whistleblowers. I would certainly like to see a coordinated approach. I think in Queensland the Ombudsman and the CMC got together and did quite a lot of joint workshops. That is something I would like to see here, because we have come at it from a slightly different direction. But hopefully we would all agree on what the basic law is—although, we do not always, but in terms of training we could do that. Obviously, we do discuss the interpretation of the Act, so hopefully that would lead to anybody who is doing any training being on the same page and knowing what everybody else on the committee thinks about an issue.

The Hon. GREG DONNELLY: On the issue of education and training, it is important to establish the effect of education and training in bringing about cultural change inside an organisation. I suppose there is a belief that if you do it, it must be having some good effect. Is there any real way of measuring or assessing that?

Ms HAMILTON: I wish I had Dr Waldersee here with me; he could talk to you for half an hour and you would not know what hit you. Obviously, there are very complex, statistical ways that they do try to review. But even he concedes that, in terms of measuring the effectiveness of some of this training, it is very difficult. The question they normally ask people is, "Do you think that everyone in your agency is now more aware of corruption or knows how to report a protected disclosure?" You do it before the education, and then you do it after, and hopefully after the education a lot more people think that the agency as a whole is better educated. It is simple things like that, but that seems to be the only thing you can do.

The trends do not always say it. The fact that there has been an increase in complaints may mean that, but it may not; it may be due to something else. We find that whenever we have a public inquiry the complaints really spike, and that is due to nothing except the fact that we are having a public inquiry. It is very hard to use statistics to show the effectiveness of it.

The Hon. GREG DONNELLY: Which goes back to your point about being something driven very much at the top in terms of the commitment by the senior officers?

Ms HAMILTON: Yes. All you can do is keep educating the senior officers so that they at least know what to do. It is probably easier to say then, if they do not do it, it is deliberate, and probably more serious than just a lack of knowledge.

The Hon. JOHN AJAKA: We are all aware that in various government departments you have those on the lower part of the ladder, then middle management, et cetera. If someone came along from the lower part of the management ladder, put the complaint in, came within the definition of being a whistleblower, and then suddenly had the support of others above him, and those others suddenly found themselves in a situation where they were being harassed or mistreated, would they still come within the definition of whistleblower? Because they do not fit the exact criteria, they are not afforded the same protection as the person who first came to you.

Ms HAMILTON: The short answer is, to get the protection of the Act you have to be someone who has provided information. The broader Acts, like the ICAC Act and the CMC Act, make it an offence to take detrimental action against, I think, anybody; it does not have to be the person who provided information. That is true of the CMC Act. I do not think it is true here actually, which is a bit of a flaw in the Act. I think it is still tied to: You have to be victimising someone who has provided assistance to the commission. If you have not provided the assistance directly, you would not be within it.

The Hon. JOHN AJAKA: Is that something this Committee should look at? It would be a terrible situation that if someone came along and provided the information, had the support of his immediate manager,

and suddenly the immediate manager was being discriminated against or harassed in some way and mistreated, finding he had no protection at all. You say it has to be from the top, but we are not really giving the incentive, or the protection more importantly.

Ms HAMILTON: The Act might say it is a reprisal if you take action against that person or another person because that person has provided the information. I know that that is what the Queensland Act says. I am sorry, your Act says that if you take the action against that person, that is reprisal for that person. I think if you look at the Queensland Act you will find it says, if you take action against that person or another person, because it recognises that sometimes the retribution will be against another person.

Mr JONATHAN O'DEA: We often talk about the different Acts and different jurisdictions, and sometimes it is a good thing that we have all different pieces of legislation. What scope is there for greater cooperation between the States in terms of having a more consistent or coherent and comprehensible approach across the States?

Ms HAMILTON: I was on the committee that worked on making all the controlled operations and various other legislation uniform, for example, the surveillance device legislation, et cetera. I think that is a very useful thing to look at. In principle, I do not see why all the States should not have generally similar whistleblower protection legislation. We are all trying to achieve the same things, and I think certainly there are some things in the Acts of the other States that are not in the Act here that would help, and maybe there are things in this Act that would work better there. I am a big believer in that, because I think it has worked very well with getting the uniform powers in for the other jurisdictions.

Mr JONATHAN O'DEA: Has there been a level of cooperation or discussion along those lines?

Ms HAMILTON: Not that I am aware of. I guess it would have to start with the Premier's Department. I know the Premier's Department in Queensland is very interested in the legislation and has a similar committee advising it as this one in the steering committee. I think anything to improve the legislation would be a step in the right direction.

Could I mention a matter that has not been raised. In respect of the suggestion about civil damages, I note the Queensland Act says that a reprisal is a tort, that is, a civil wrong. As far as I know, that has never been used. I would think that if anybody would use it, it would also be another cause of action. So I do not really support the idea of civil damages, for a couple of reasons. First, it allows the suggestion to creep in that people are just making allegations or claiming they were victimised just so they can get money. The second and more important thing is that by the time you reach a stage where someone has suffered such damage that they should get civil damages, you have already failed that person. I would like to see the legislation aimed more at making it an offence to take a reprisal, making it a disciplinary breach to take a reprisal, allowing agencies to take actions to stop it happening—for example, the injunction power—then, hopefully, you would not have reached the stage where somebody will have lost their job or will have suffered such damage that they need damages.

I think the whole issue of civil damages puts another dimension on it that is probably not desirable, not particularly helpful. I agree with the submissions that were made to the last committee that there are probably other causes of action already available if someone is wrongfully dismissed or in some way they suffer prejudice that results in financial loss, they will already have a civil action available to them. So I think it is probably best left out of the whistleblower legislation.

CHAIR: That was the objection to the suggestion. Firstly, they were available under other legislation. But, secondly, in certain sections, if they were to make that claim it would preclude them from making a claim under their own Act, such as the Police Act. I think your point is that it is a step beyond the essential objectives of this Act, that is, to stop things happening in the first place?

Ms HAMILTON: That is right.

CHAIR: I will take that on board. I think it coincides with Mr Wheeler's comments as well. Thank you very much for your appearance today.

Ms HAMILTON: I note you wanted written submissions by next Wednesday, 27 August. I would like for the commission to make a submission, but there is so much going on at the moment that it is very hard to get everything done.

CHAIR: I am sure we will be amenable to granting an extension of time.

Ms HAMILTON: Thank you.

(The witness withdrew)

(The Committee adjourned at 1.45 p.m.)