REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 1 – PREMIER AND FINANCE

PUBLIC INTEREST DISCLOSURES BILL 2021

CORRECTED

At Macquarie Room, Parliament House, Sydney on Monday, 15 November 2021

The Committee met at 2:30 pm

PRESENT

The Hon. Adam Searle (Acting Chair)

Ms Abigail Boyd
The Hon. Trevor Khan
The Hon. Taylor Martin
The Hon. Peter Poulos

CORRECTED

The ACTING CHAIR: Welcome to the first public hearing of the Portfolio Committee No.1 - Premier and Finance inquiry into the Public Interest Disclosures Bill 2021. In fact, it will be the only hearing. Before I commence I acknowledge the Gadigal people, who are the traditional custodians of the land on which we meet today and on which the Parliament sits. I pay respect to Elders past, present and emerging of the Eora nation, and extend that respect to other Aboriginal persons present. Today is the first and only hearing of this inquiry. Today the Committee will receive evidence from the NSW Ombudsman and from representatives of the NSW Council for Civil Liberties, the NSW Bar Association and Professor A J Brown, Professor of Public Policy and Law at Griffith University.

Before we commence I will make some brief comments about the procedures. Today's hearing is being broadcast live via the Parliament's website. A transcript of the hearing will eventually be placed on the Committee's website when it becomes available. In accordance with the broadcasting guidelines, media representatives are reminded that they must take responsibility for what they publish about the Committee's proceedings. While parliamentary privilege applies to witnesses giving evidence today, it does not apply to what witnesses say outside of their evidence at the hearing. Therefore, I urge witnesses to be careful about comments they may make to the media or to others after they complete their evidence, although I do not think that is a problem with this subject matter.

Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. In that regard, it is important that witnesses focus on the issues raised by the inquiry terms of reference and avoid naming individuals unnecessarily. All witnesses have a right to procedural fairness according to the procedural fairness resolution adopted by the House in 2018. Witnesses are not allowed to take questions on notice in this inquiry by resolution of the Committee. If a witness wishes to hand up documents they should do so through the Committee staff.

With reference to the audibility of the hearing today I remind both Committee members and witnesses to speak into the microphone. I note that the Deputy Ombudsman is beaming in via Webex and Professor Brown will also appearing via videoconference. Finally, and this applies to me more than most, could everyone please turn their mobile phones to silent for the duration of the hearing.

CORRECTED

PAUL MILLER, New South Wales Ombudsman, affirmed and examined

HELEN WODAK, Acting Deputy Ombudsman, before the Committee via videoconference, affirmed and examined

The ACTING CHAIR: Do you want to give a brief opening statement of no more than a couple of minutes, given that you have two submissions?

Mr MILLER: I think our submissions speak for themselves.

The ACTING CHAIR: Committee members, who would like to commence the questioning?

The Hon. TREVOR KHAN: I will be brief. Whilst the first submission—I will not necessarily describe it as yours because it seems to be wider—is very lengthy and canvasses a wide range of issues, do I take it that your essential submission is submission 1a which is the second submission?

Mr MILLER: I think both submissions are consistent in terms of the position we take. The second submission sets out the views of the full steering committee, so us plus all of the other integrity agencies, plus a number of other agencies like the Department of Premier and Cabinet and police. Our submission, as you say, is longer and more detailed but ultimately comes to the same conclusion.

The Hon. TREVOR KHAN: But your position today as a witness would include that you consider the bill as an ambitious and comprehensive rewrite of the legislation that addresses the weaknesses of the existing public interest disclosures [PID] legislation?

Mr MILLER: Most of the weaknesses, yes. I saw that the Auditor-General has made a short submission which is even pithier than our second submission and I would respectfully agree with that submission if you want the shortest encapsulation of our view.

The Hon. TREVOR KHAN: It seems to me that, really, this is only question for this Committee: If we are to do anything more than simply note the evidence that we are to receive the question is whether the bill in the form that it is written should be passed unamended or whether there are amendments that the Opposition and crossbench should consider introducing. And if those are introduced whether they will be supported in the lower House and the bill is flicked back, or whatever else, as you would be aware, could happen with the bill. Do I take it that notwithstanding the picky details, you would support the passing of the bill in its current form?

Mr MILLER: Yes, we would. We saw our job primarily in relation to this bill to ensure that the recommendations of the previous parliamentary committees were faithfully reflected in the bill. So that was the purpose of our first report primarily: to assess the bill against those recommendations. Our assessment is that all but one of those recommendations has been implemented in the bill. The Government's position on the last recommendation, the one relating to external disclosures to MPs and journalists has not changed in the three years since the parliamentary committee made the recommendation. Our view is that it would be a shame if the bill did not pass simply because of that one recommendation not being adopted.

The ACTING CHAIR: You have provided in your appendices a useful ready reckoner of where you outline that the bill either has implemented recommendations made by the two oversight committees—one from ICAC and one from the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission in which both Mr Khan and I have participated.

The Hon. TREVOR KHAN: Indeed—a long time ago.

The ACTING CHAIR: Only four years. Your evidence is that every one of those recommendations has either been implemented or that issue has been addressed—if I can use that neutral term—except for recommendation 11 which is found in clause 28 of the bill which essentially maintains the status quo on the current PID legislation which requires a disclosure to be substantially true and that the previous disclosure was not anonymous, and there are various other requirements in clause 28 of the bill. That is a very high threshold for a whistleblower to meet, not just that they have an honest and reasonable belief that there has been serious wrongdoing but that it is true. An individual in a big organisation, whether it is the public sector, a corporation or what have you often does not have the means or the resources to truth ground all of the information they get.

The Hon. TREVOR KHAN: Is this a question or a speech?

The ACTING CHAIR: Given that, is this not a problem? Is the threshold for external reporting not too high, given the history of whistleblowers?

Mr MILLER: The Ombudsman's position has been consistently the same as the previous parliamentary committee's position which is that that threshold is too high. Our view is that it should be amended so that it is lower in accordance with the Committee's recommendations. That is not the position of the Government and it is not, what has been included in this bill.

The ACTING CHAIR: Your view is that it is a longer-term proposition to try to address that issue but we should take what is on offer?

Mr MILLER: As I said before, given the significantly positive reforms that are contained in the bill it would be unfortunate if we were left with the current Act because of an intractable dispute over that one provision. That said, in our report—I think it is in annexure D—we do put forward what might be described as somewhat of a compromise position in relation to that external disclosure issue. But at this stage, as I said, the Government has been clear on its position that it does not wish to change the threshold for external disclosures.

Ms ABIGAIL BOYD: I want to clarify that. The annual report of the Public Interest Disclosures Steering Committee that you provided to us has a membership of a whole bunch of different agencies—everything from the NSW Police Force, the Audit Office and ICAC. They are the members of the committee. The committee, from what I can tell, unanimously supported recommendation 11 in relation to the thresholds relating to the treatment of external disclosures to members of Parliament and journalists. Is it correct that they unanimously recommended to the Government that that be included in the bill?

Mr MILLER: No, not exactly. The parliamentary committee made that recommendation. At least the Ombudsman is on record that we agree with the parliamentary committee's recommendation. I am not sure that all of the other members of the steering committee have expressed a view on that recommendation. What all of the members of the steering committee have said is that irrespective of their view on that recommendation they would recommend that the bill pass in its current form if that is, in effect, the only option.

Ms ABIGAIL BOYD: Looking at the functions of the committee under the Public Interest Disclosures Act, it states in a dot point, "provide advice to the Premier…on the operation of the Public Interest Disclosures Act and recommend any necessary reform and consult with and provide advice to a joint parliamentary committee to inform their review of the Public Interest Disclosures Act". Did the committee make a recommendation to the Government at any point either directly or through the parliamentary committee?

Mr MILLER: No, it did not.

The Hon. TREVOR KHAN: What did the committee do?

Mr MILLER: For those members who were on the previous committee you would be aware that a number of members of the steering committee gave evidence to the parliamentary committee. Subsequent to the parliamentary committee's report, six months or so later when the Government responded to the committee and said that it would be introducing a bill, the role of the steering committee from that point on was to, essentially, provide comment on, initially, drafting instructions and then, subsequently, draft bills that the Government prepared. That has been the role of the steering committee primarily over the last couple of years—to respond to each of those drafts of the bill.

I have to be clear, because I am wearing two hats here. I am the NSW Ombudsman but I am also in that capacity the chair of the PID steering committee and that is why you have two documents. The first document is the Ombudsman's view and does not purport necessarily to represent the views of all of the members of the committee, noting that, for example, DPC sits on that committee. Whereas the PID report represents the views of the PID steering committee. So some of the analysis that is contained in our report - for example, the assessment of the bill against the parliamentary committee's recommendations was something that the steering committee also considered. I can faithfully report that none of the PID steering committee members are going to have any demurral with what is contained in annexure A, for example, of that report.

Ms ABIGAIL BOYD: When the Government decided not to adopt recommendation 11 can they say that is because the steering committee did not recommend it to them?

Mr MILLER: No.

The Hon. TREVOR KHAN: I do not think that is their position.

The ACTING CHAIR: I think I have been very plain about why they are saying that.

The Hon. TREVOR KHAN: Yes.

The ACTING CHAIR: We have been down this road before.

The Hon. TREVOR KHAN: Yes.

Ms ABIGAIL BOYD: I am just trying to clarify—

The Hon. TREVOR KHAN: I do not think it is contained in the second reading. I just think it is a bad idea. We got it wrong.

The ACTING CHAIR: Mr Miller I have three or four areas in the bill about which I would like to ask you questions. One is the definition or meaning of "serious wrongdoing" which has a number of descriptors. Some of the submissions we have received suggest that that may be too narrow. In fact, I have even had a couple of barristers ring me to say, in fact, it may be narrower than the existing PID legislation. For example, one submission in particular points out that it does not cover conduct that endangers health, safety or the environment. For example, let us suppose a private company has a contract to carry government waste and instead of taking it to an approved facility they are dumping it into the river. They may be in breach of a contract with the Government but that conduct would not be covered by clause 13, arguably. Is that something we should be concerned about?

Mr MILLER: I think it is something that definitely needs to be explored. I do not want to put words into the previous parliamentary committee's mouth but there was a clear view expressed in the committee's report that there were significant, essentially operational problems with the current PID Act that needed to be reformed. They needed to be reformed essentially before those more conceptual issues about what is and what is not covered are explored. That said, those issues still remain. There are a number of them. The serious risk to public safety and environment and health is one of them. There are other issues, and we have teased out some of them at a high level in our report around disclosures regarding clinical judgement, sexual harassment which may or may not constitute maladministration—things of that nature where, perhaps if you were coming to this area new and someone said to you, "The PID Act covers serious wrongdoing" you might expect that it would cover those sorts of things but it does not necessarily.

What we have recommended in our report is that that be a matter that the steering committee provide advice on during the course of the next, say, 12 months prior to the commencement of this bill. Our view, again, is that we would not want the bill to be held up while those issues are being further examined simply because we think that the reforms that are contained in the bill are so important and the current Act is, in some ways, so deficient that we would rather just get on with correcting the operational issues, if I can put it that way.

The ACTING CHAIR: In clause 26 a couple of things struck me as being of concern. One is that a disclosure does not comply with the section to the extent that the information relates to a disagreement with government policy—that is clause 26 (2). Leaving aside the fact that it is an inquiry and not conducted by ICAC, arguably a whistleblower trying to disclose details relating to a clay target shooting grant process would not be covered because it is a disagreement with government policy. Should that perhaps not be narrowed to a disclosure relating only to a disagreement with government policy as opposed to the current wording? Similarly subclause (3)—

The Hon. TREVOR KHAN: Why do you not let him answer that first?

The ACTING CHAIR: Because I want him to have a think about this because they fall into the same category. Subclause (3) also says a disclosure does not comply to the extent the information discloses an employment grievance, with some exceptions. Again, should those two things not be narrowed from what they are?

Mr MILLER: I am not a legislative drafter so I will take the first question first which is whether clause 26 (2) should include the word "only". I saw in the submission of the NSW Bar Association, I think, some criticism of this provision that it is in some ways opaque. I would agree with that. There is an existing provision in the current PID Act. Because I saw the Bar Association's submission I have put together—and I know I cannot take questions on notice—some documents which might help which I will tender.

The ACTING CHAIR: Thank you.

Mr MILLER: The current provision in the PID Act essentially says that a disclosure made by a public official that principally involves questioning the merits of government policy is not a PID. The parliamentary Ombo-LECC committee, considered that provision and made a recommendation that it be amended to clarify that a disclosure that principally involves a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure be not protected under the Act. On the reverse page is the new provision of the PID bill. I assume that—and I have not been given any indication to the contrary—the Government's intention in the new PID bill provision is simply to implement the existing provision subject to the parliamentary committee's recommendation.

Looking at it closely now myself I am not sure that the new provision is necessarily any less opaque than the existing provision and certainly has the potential to raise issues, particularly for us, in terms of the

Ombudsman's office being the one that will be required, for example, to provide advice, guidance, et cetera, to public officials who may be wishing to make a public interest disclosure as to what is included or not. What I would say in response to that question is I think it is worth looking at that provision more closely.

The ACTING CHAIR: Of course subclause (3) deals with employment disputes. The history of whistleblowers is often the case that when they try to draw things to the attention of people and their organisation, more senior to them, they can get into difficulties in the workplace—sometimes justified, sometimes perhaps less so. Again that provision seems to raise the prospect that an employment dispute could be used to preclude the possibility that someone's disclosures are protected.

Mr MILLER: I am less concerned with that provision because of the way that it is drafted. When Professor A. J. Brown speaks this afternoon he will be able to give more evidence about this. A large number of disclosures are what we call "mixed disclosures" so they contain some element of grievance and some element of PID. The drafting here, and the way the bill has changed from the current Act, is to focus on 'to the extent that'—and I do think that this provision works more clearly both than the current Act but also the provision we just discussed about disagreement with policy. If there is a mixed disclosure it is only to the extent that it is a grievance, is it not a PID. Essentially the allegation of the wrongdoing part remains a PID.

The ACTING CHAIR: I have two final questions. One relates to clause 14 and the definition of "public official". I think this is quite a good provision, if I understand it correctly. Clause 14 (1) (e) and (f) appear to me to extend the definition of "public official" to persons in private companies that are providing, if you like, services to the New South Wales Government. If the Government has an activity, or engages a private company in a contract for the provision of services, people working in that company are covered by the definition of "public official" under this provision. Is that consistent with your understanding?

Mr MILLER: Yes, it certainly expands the definition to include some staff within private sector organisations. Again in our more detailed report we have highlighted there are still some ambiguities around when private sector employees are and are not included. For example, if a very large global company is providing services on behalf of a New South Wales government agency, it is only the staff who are involved in the provision of those services that would be covered, not, for example, staff who are providing services in an unrelated arm of the business. One of the neat aspects of the definition is the ability for regulations to be made both to bring people in but also to clarify that people should be taken out of that definition. One of the things that will need to be considered in more detail before this bill commences is: do regulations need to be made to make more clear who is in and who is out in terms of the private sector?

The ACTING CHAIR: Presumably, consistent with what you have just said, not only would only those employees providing those services to the New South Wales Government be covered; they would only be covered to the extent that they are doing that. So to the extent that there might be disclosures based on other things they are doing that would not be covered. So the private sector is not generally captured here?

Mr MILLER: That is correct. The disclosures would still need to relate to serious wrongdoing which is corrupt conduct, maladministration. So that there is that requirement for it to tie into the public sector in some respect through the definition of wrongdoing.

The ACTING CHAIR: I am sorry if this was covered in the PID steering committee report, but since the two oversight committees did their reports a few years ago, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 passed the Commonwealth Parliament and has been assented to. I do not know whether it has been brought into force and effect but it covers the private sector—at least the finance sector—in regard to disclosures made about financial reporting and irregularity. Does that legislation cover the private sector more generally or is it really limited to financial misconduct and reporting?

Mr MILLER: No, my understanding is that the amendments to the Commonwealth Corporations Act cover the corporations generally throughout the private sector. There is a provision in this bill which excludes the Corporations Act provision from applying to essentially State government corporations, say Sydney Water and the like, but private sector companies that provide services, for example, to the New South Wales Government will still be covered by the Commonwealth Corporations Act whistleblower provisions.

The ACTING CHAIR: There is some prospect that they might be covered by both provisions.

Mr MILLER: There will be some overlap not in terms of the organisation itself—so that provision that we were just talking about potentially brings staff of private sector companies within the meaning of "public official" but it does not bring the company itself into the definition of "public sector agency".

The ACTING CHAIR: Is that an important distinction?

Mr MILLER: It is deliberate because the obligations are on the government agencies. So they are the ones who should be, for example, investigating the wrongdoing, taking steps to protect public officials who report it.

Ms ABIGAIL BOYD: On page 13 of your report you mention—I am paraphrasing—that significant new resources will also need to be available for your office. Can you expand on how much you are talking about here and how confident you are in getting those resources?

Mr MILLER: If I may, I will hand over to the Deputy Ombudsman to answer at least the first part of that question on how much resourcing we will need. I might answer the second question about how likely are we to get it.

Ms WODAK: In terms of that question of how much, we are actually in the process of attempting to quantify that. In terms of how many positions, what technology changes we will be looking to use and to implement in terms of the new functions that we will be developing, to benchmark those across similar developments in other jurisdictions. We are in the process of preparing a detailed analysis that goes to that question of exactly how much and how many new positions. I do not have an exact figure at this point in time but we are very much engaged in trying to work through that.

Mr MILLER: Just to add to that: there are two aspects to our role. There are new functions for us under the bill that will be ongoing in terms of reporting, et cetera. In addition to that, and of more immediate concern, I suppose, is the work we will need to do before the bill commences in order to build up our capacity, but also to build up the capacity of the sector. I do not want to underplay the significance of the change for the sector. Under the current Act there are large numbers of public officials who can safely say the PID Act is probably never going to be relevant to me. They will go, "I am not a disclosure officer so I am never going to receive a PID and I cannot imagine that I am ever going to be in a position to have to report wrongdoing." They may be wrong but that is probably a fairly common attitude.

Under this bill, because of the no wrong door policy every single public servant who is in a supervisory role will need to know about this legislation and how it works. It is not like PIDs come in the door where a staff member comes to you and says, "I want to make a PID." They might not ever do that; they just disclose something to you and then, as a manager or a supervisor, you have all of these obligations. Your primary obligation is to make sure that it is reported up so that it can be properly investigated. But the work that will be required to get across the entire public sector to ensure that the bill works is daunting to say the least.

In terms of assurances of receiving funding, we have not received any funding to date, although we did make a submission to government and to Treasury for that purpose. The response which is probably not unreasonable from Treasury at least is, "At the moment there is no law, so there is no function, so we are not going to give you money until you have got the function." We are relying essentially on assurances from the Government that it understands the need for additional resources. As my colleague Ms Wodak mentioned, we are doing the work now to firm up essentially the business case to explain exactly what resources we will need.

The ACTING CHAIR: Any other questions?

The Hon. TREVOR KHAN: No.

The ACTING CHAIR: I might have asked this question before but I was not sure what the answer was. Are the Commonwealth provisions limited to financial mismanagement and disclosure according to Commonwealth reporting requirements or is it about a wider set of misconduct or serious misconduct?

Mr MILLER: My understanding, and I am obviously not an expert on the Commonwealth regime, is that they are wider. They talk about misconduct or improper state of affairs which is potentially very wide.

The ACTING CHAIR: Mr Miller and Ms Wodak, thank you for your evidence. The Ombudsman has handed up one document which will be regarded as a tabled document.

The Hon. TREVOR KHAN: Yes, I confirm that.

(The witnesses withdrew.)

(Short adjournment)

MICHELLE FALSTEIN, Secretary, NSW Council for Civil Liberties, affirmed and examined

The ACTING CHAIR: In addition to the submission made by the NSW Council for Civil Liberties you have also provided a 1½ page document to the Committee which we will treat as a tabled document. Do you wish to give a brief opening statement of no more than a couple of minutes?

Ms FALSTEIN: That I think is what this is really meant to be.

The ACTING CHAIR: There is no obligation to do so.

Ms FALSTEIN: I just wanted to make the point that there are a few other submissions that I have read and the NSW Council of Civil Liberties would also support some of those amendments. I have set that out in the brief letter.

The ACTING CHAIR: We will proceed to questions from Committee members. Do Committee members have questions for this witnesses? If not, I am happy to start.

The Hon. TREVOR KHAN: Yes, you start.

The ACTING CHAIR: One of the issues made in the submission of the Council for Civil Liberties is that the definition of "serious wrongdoing" may be too narrow. It does not cover alleged crime breach of the law, official misconduct and it also, importantly, does not cover activities which would pose a risk to health, safety or the environment. Are those serious omissions in the current bill?

Ms FALSTEIN: I think they are. These were things that you probably heard from the Ombudsman as well because they were picked up by them. I think there is an argument to be made for the fact that something like an alleged sexual assault or sexual harassment would not be picked up. Given especially what we know from matters like the Brittany Higgins matter, that is a very important omission. I have looked at the definitions of those particular items that do come under serious wrongdoing and I cannot see where those sorts of things will be picked up. It does not fall within corrupt conduct. The other particular matters tend to relate to legislation in particular areas like the Local Government Act, and a serious administrative wrongdoing relates to administration. I think it would be a long bow to pick up anything like an alleged sexual assault or something of that nature.

The ACTING CHAIR: For example, the complaint was that there was harassment or an assault in an organisation; the organisation does not deal with that properly; some discloser feels that this is an affront and wishes to then blow the whistle. Your concern is that that would not be covered.

Ms FALSTEIN: That is correct. I mean it is not a situation where someone might necessarily complain themselves about the assault. The victim might not complain but it might still be something that someone might want to disclose.

The ACTING CHAIR: In fact, the history of sexual assault matters is quite often the victim does not make a complaint, at least for some time.

Ms FALSTEIN: Yes, that is correct.

The ACTING CHAIR: The substantially true threshold in clause 26, is that also a concern for you that it might be too high?

Ms FALSTEIN: It is. I think that because of other parts of the bill which I think we have identified that do not really meet certain thresholds, the fact is that there might be matters which can only be made to a journalist or a member of Parliament, for example, a sexual assault matter. If that were not picked up, if it is not a serious wrongdoing then the discloser is not going to get the protection of the Act so they have no alternative then but to perhaps go to a member of Parliament or a journalist. I suppose the issue is they need to be able to go to that external party and still get some protection without actually having to prove that this particular event was a fact, which is what the—

The ACTING CHAIR: Or that it must be substantially true is a pretty high threshold?

Ms FALSTEIN: Yes, that is right.

The ACTING CHAIR: And often people with information only know what they see. They do not have the resources or the time to—

The ACTING CHAIR:

Ms FALSTEIN: They cannot investigate it, yes. That is the issue.

The ACTING CHAIR: I am sorry, that was in clause 28. Clause 26 (2) has a couple of other issues. It states:

> A disclosure does not comply with this section to the extent that the information disclosed relates to a disagreement with a government policy...

On my reading of it that provision might be used as a means of public sector agencies cancelling the protection of a disclosure by simply saying, "Yes, it might be about serious wrongdoing but it is really also a disagreement with government policy", and that might countermand it.

Ms FALSTEIN: Yes, it might be that that disallows it, or does not give the discloser protection because of that. I think that was something that was in the Bar Association submission as well. They felt that public policy was certainly something that might bring up things that were serious matters that needed to be dealt with.

The ACTING CHAIR: Maybe that could be narrowed by the insertion of the word "only"?

The Hon. TREVOR KHAN: Is that your proposition, that in your view there could be a disclosure about public policy per se?

Ms FALSTEIN: Yes, certainly there could be. I think the Bar Association submission gave some examples of that.

The ACTING CHAIR: It still has to be serious misconduct though within the definition.

Ms FALSTEIN: But it is not in the definition of "serious wrongdoing" at the moment.

The ACTING CHAIR: No, but that would have to be an expressed amendment to that section, not this section.

Ms FALSTEIN: That is correct, yes.

Ms ABIGAIL BOYD: Before we leave clause 28, the Ombudsman suggested a compromise drafting for that clause. Are you aware of that? Have you looked at that?

Ms FALSTEIN: Yes.

Ms ABIGAIL BOYD: Are you supportive of that?

Ms FALSTEIN: No, I am not.

Ms ABIGAIL BOYD: Will you explain to the Committee why not?

Ms FALSTEIN: I am just trying to remember. They were suggesting that in some sections, to the extent that there had already been an investigation by an internal party, you would have to comply with the other threshold. We do not think that that should be the case because there may be a number of reasons why—depending on where and how you took your complaint or who you took it to, for example, if you took it to the head of your department—there might be a situation where there was a cover up. So in those circumstances you have, for all practical purposes, made a complaint but you would be precluded from having the lower threshold if you were then to take it to a member of Parliament or a journalist. You would have to—

Ms ABIGAIL BOYD: So having tried to go through an investigation would then act against you by lowering the threshold.

Ms FALSTEIN: Yes, exactly.

Ms ABIGAIL BOYD: Sorry, the other way around.

Ms FALSTEIN: You would have to show that it was substantially true, and you would not have had a full investigation so you would not be able to prove that. The onus is on the person who is disclosing to show that it is substantially true.

The ACTING CHAIR: One of the things that this legislation—I guess, like the current legislation—requires you to go through is an internal process before you make the external disclosure and, of course, the protection is limited to certain disclosures only. For example, if there is someone, let us say, in an agency who is concerned about what they see as serious wrongdoing, they may not know a journalist or a member of Parliament, they may be concerned about reaching out themselves, and they may also be concerned about going through an internal process that identifies them as a difficult person. They may then take the material and give it to someone they do trust—maybe, for example, their lawyer or someone they trust—who then passes it on to a journalist or member of Parliament. These are empirical records. That kind of two-step process would not be protected by this or the existing legislation. Should it not extend to those sorts of disclosures?

Ms FALSTEIN: I am just trying to remember offhand. I did note that you cannot have self-incrimination under it, but I am just trying to remember. I thought that there was protection if you went to somebody else—for example, that you had legal—

The ACTING CHAIR: Legal advice.

Ms FALSTEIN: Yes.

The ACTING CHAIR: I will have to reflect more carefully on it too.

Ms FALSTEIN: I just do not remember that part, sorry.

The ACTING CHAIR: That is all right.

Ms ABIGAIL BOYD: To your knowledge, the threshold that has been suggested here in clause 28, how does that compare with other jurisdictions in Australia?

Ms FALSTEIN: I understand that other jurisdictions do not have the substantially true—there is no substantially true requirement in the Commonwealth public interest disclosure laws.

Ms ABIGAIL BOYD: It is an anomaly?

Ms FALSTEIN: I think it is, yes. I believe so.

Ms ABIGAIL BOYD: Going back a step, when you were talking about some serious types of wrongdoing not being included, is that also out of step with other jurisdictions?

Ms FALSTEIN: I understand that there are other jurisdictions that, for example, include things like environmental issues and safety, public health issues. That seems to be included in other jurisdictions; it is not in this.

Ms ABIGAIL BOYD: Thank you.

The ACTING CHAIR: The Hon. Taylor Martin.

The Hon. TAYLOR MARTIN: In the recommendations in point (b) "Direct external disclosures should be permitted in limited circumstances without the same disclosure having had to be made to a relevant public authority or investigation authority first." Why is that a recommendation?

Ms FALSTEIN: That goes to what we were saying about the fact that not everything is included as a serious wrongdoing. The trouble is that a lot of these small things lead to bigger things, bigger problems. So if you included, for example, or made that definition of serious wrongdoing wider, then you could perhaps not be as concerned about the necessity for people to go to external sources with their information. So it is really about ensuring that you are capturing all those matters that are considered serious wrongdoing and you are giving the maximum protection that you can to people who are disclosing those things.

The Hon. TAYLOR MARTIN: But then if you are given those protections should you not also have to follow the appropriate pathways of reporting to the relevant authority or the investigation authority rather than having the protection and just going public?

Ms FALSTEIN: If you have the protection I suppose that is one thing, but if there is a cover-up, for example, you still want to be able to appeal to another body and at the moment there is no appeal process. So that is an issue. As we were saying, the issues about sexual assault, it is not a voluntary disclosure under this Act, so what do you do about that? If no-one is going to listen to you, you will need to go and report it to someone else and, hopefully—well, you will not have protection anyway, but if there was a public interest offence, then you might have protection. So these are the sorts of gaps that all kind of relate to each other.

The Hon. TAYLOR MARTIN: Okay. Thank you.

The ACTING CHAIR: Just in relation to the provisions in the bill that deal with, I guess, the protection of whistleblowers, the recovery of damages provision at clause 35 and the employee liability at clause 46 and the injunction power at clause 37, how do they stack up against similar provisions in other jurisdictions? Are they fit for purpose in providing the protection, as far as you can tell before something has been put into place?

Ms FALSTEIN: I did look at the injunction provisions; I did not look too carefully at the others. It is appropriate that there is an injunction provision there, and that is in other jurisdictions. I cannot remember if it is in the Commonwealth one, but I think certainly in other countries that is something that is recommended and I think that is in the UK public interest disclosure bill, but do not quote me necessarily on that; I believe that I have seen it there.

The ACTING CHAIR: Clause 37 covers, obviously, a range of bodies. At clause 37 (1) (c) it says it may protect the maker of a public interest disclosure—where someone has not made a public interest disclosure yet but they may be on the verge of doing so, something has come to their attention, they have raised it internally and they have not yet made the external disclosure. Clause 37 (1) (d) states "another person against whom detrimental action has or may be taken". Would that extend to protect somebody who has not yet made a disclosure, or does this provision kick in once a disclosure has only been made?

Ms FALSTEIN: I will go to clause 37. I have the printout here but I have not actually looked at 37. You are referring to 37—

The ACTING CHAIR: Both subclauses (c) and (d). I am trying to think about the process at which someone might be able to be protected by this provision. Does it require that a disclosure has already been made before any person might apply for an injunction, or would it extend to a circumstance where someone may be about to make a disclosure but has not yet? Or is it unclear?

Ms FALSTEIN: It says that it applies to the possible commission of a detrimental action offence. I am not quite sure how you would go about proving a possible commission of a detrimental action offence. I mean, how would you know that that is going to happen to you?

The ACTING CHAIR: That is true, although often with whistleblowers there are the signs and portents that their employer might be about to engage in some detrimental action or reprisal.

Ms FALSTEIN: If they have got a transfer to some other department pending, or something like that, yes.

The ACTING CHAIR: Or you have been transferred to Broken Hill or to somewhere else.

Ms FALSTEIN: Yes.

The ACTING CHAIR: All right. Does anybody else have any further questions for this witness?

The Hon. TREVOR KHAN: I am interested in something that arose partly out of some events on some committees of recent times; that is, your view on what constitutes a journalist.

Ms FALSTEIN: I think a journalist, the definition in this bill was quite wide, or wider than the Act, which I thought was good. I think that it is quite endless the versions of what a journalist is, from what I have read, but I think that you can certainly say broadly that it is someone who publishes information and purports to provide an opinion that they want to publicise, which is wide.

The Hon. TREVOR KHAN: If it is that wide, then it would cover, dare I say, somebody like Friendlyjordies.

Ms FALSTEIN: Yes.

The Hon. TREVOR KHAN: Whereas I do not think it is actually that wide.

The ACTING CHAIR: Not presently.

The Hon. TREVOR KHAN: Not presently. I have some views which are probably different from Mr Searle's, but it seems to me that the definition contained in the bill essentially means that, with the other hurdles having been met, the disclosure has to be made to a member of what one would know as a journalist, that is, somebody employed in the print or electronic media. That does not extend to that wide group of vloggers, bloggers, et cetera, that are out there that may be quite significant in the minds of opinion makers.

Ms FALSTEIN: It probably does not apply to people like—not to Friendlyjordies or other people who would say that they are political activists and political commentators. Julian Assange, it would not apply to him.

The ACTING CHAIR: WikiLeaks is another example where there is a hot debate about whether or not it is journalistic. But just for the avoidance of doubt, schedule 2 to this bill defines "journalist" as having the same meaning as in the Evidence Act, and the Evidence Act definition seems to include "a person engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium". I think that is the definition, so it does seem to be broader than—

Ms FALSTEIN: That is quite broad, yes. I did look at it, yes.

The ACTING CHAIR: Interesting. Any further questions for this witness?

The Hon. TREVOR KHAN: I will ask this, which is what I asked the last witness: Would you agree that this bill is a significant improvement over the current bill?

Ms FALSTEIN: Absolutely. I do not think anyone is going to disagree with that.

The Hon. TREVOR KHAN: I would be surprised if I hit a debate on that. The question really becomes: If the Government is essentially at its limit in amendments, you would understand that in all likelihood amendments can be moved in the Legislative Council and, within the scope of reason, will get through. But when the bill returns to the lower House those amendments can be rejected or the bill can simply die. There are many examples, are there not, Adam, of that having occurred with bills.

The ACTING CHAIR: I can think of half a dozen at least.

The Hon. TREVOR KHAN: At least. Would you agree that that is an unsatisfactory position to—

Ms FALSTEIN: It would be very unsatisfactory. I think the current Act needs to be replaced and this is a good bill. I think it does not give all the protections that a discloser needs, and I think there are going to be people falling through the gaps and there will still be problems, but I think this is certainly a big improvement and I think it is worth having it pass.

The Hon. TREVOR KHAN: Right, good. I have asked my question then, thank you.

The ACTING CHAIR: My last question is this: There is no reason why you should have but have you or your organisation had any cause to look at the whistleblower protections in the corporations law which cover the private sector?

Ms FALSTEIN: Yes, I had a bit of a look at it, but it was a couple of years ago.

The ACTING CHAIR: This bill extends to private sector employees to the extent that they are providing services to the New South Wales Government. Does the Federal legislation currently provide proper whistleblower protections for the private sector more generally, or is that something that should be looked at?

Ms FALSTEIN: I think we came to the view, and I just cannot remember the specifics now, that it does not. Even though this particular bill has some of the elements of the Commonwealth public service bill, the one that applies to corporations, apart from the complaints that it was very onerous on corporations itself, I think there is still a lot of issues about the investigatory powers that could be made in corporations, because again you have to appeal within the corporation first, and there are issues like that. I think they were the main things that we were concerned about when we were looking at that. Basically you could not really appeal easily to an independent organisation, and you need to have an independent whistleblower organisation.

The ACTING CHAIR: Ms Falstein, thank you very much for your evidence. Unless anyone has any last questions, you are excused. Thank you.

(The witness withdrew.)

A J BROWN, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, and Board Member, Transparency International Australia, before the Committee via videoconference, affirmed and examined

The ACTING CHAIR: Thank you, Professor Brown. If you start to break-up, I think my experience with these Webex hearings has been if you turn off your video, that improves the audio. So if we are having trouble hearing you we will try to identify that with you and you might turn off your video. Would you like to make a brief opening statement?

Professor BROWN: Certainly, thank you very much. I just open by saying thank you very much for the opportunity. I have provided just a short while ago a short document with some [audio malfunction] more detailed submission, but I am hoping that [audio malfunction]

The ACTING CHAIR: Professor Brown, I am having trouble hearing you. Maybe just turn your video off.

Professor BROWN: Does that assist the Committee? Is this better?

The ACTING CHAIR: That is much better, Professor Brown. Sorry about that.

Professor BROWN: No problem. Just to say thank you very much to the Committee for the opportunity to address you in relation to the bill. As I understand it, I am hoping that a short document that I have been able to provide with some key points on the bill might be being provided to you now by the looks of it.

The ACTING CHAIR: Yes.

Professor BROWN: My apologies for not having provided a more detailed submission. I think it may just help to focus on those five points, but to get the first one out of the way, my opening statement would be that I certainly agree with the NSW Ombudsman that the bill is a major and positive step change or will, if successfully implemented, represent a major and positive step change for the way in which whistleblower protection and management for the New South Wales public sector should proceed. I also think it is worth reinforcing the Ombudsman's submission right from the word go that all of the experience with this type of legislation in Australia and globally continues to reinforce all the time that this type of legislation is not self-administering, it is not self-enforcing; it requires an oversight agency to ensure that it is happening and does require significant resources for that to be effective. In opening I really wanted to reinforce that recommendation that has been made to Parliament by the Ombudsman as well, but I am happy to take the Committee's questions or to work through the other four points, if that would assist.

The ACTING CHAIR: Thank you, Professor Brown. I will turn now to Committee members to see whether they have questions or whether they would like me to open the batting.

The Hon. TREVOR KHAN: You can open the batting, I think.

Ms ABIGAIL BOYD: Yes.

The ACTING CHAIR: By popular request, Professor, I will commence the asking of questions. You have dealt with this in part in your submission, clause 13, the meaning of "serious wrongdoing". We have had submissions from the Council for Civil Liberties and also the NSW Bar Association that suggests that it might be too narrow, it does not include public health or environmental impacts or things of that nature, sexual harassment. Should the definition of "serious wrongdoing" be broader than it is in the current bill?

Professor BROWN: It could be broader. My point there—you will see some reference in the points that I have just distributed—point 3 in that short document is about the meaning and the content of public interest disclosure. I would see that as a sort of useful, if only cosmetic, in effect, type of improvement to the bill. The reality is that the administration of the existing legislation has been able to proceed reasonably effectively on the understanding that "maladministration" is a very broad term that captures many other types of unjust, oppressive and wrong conduct and therefore would include conduct that was amounting to breaches or risks to public health and safety, et cetera. I think it would be better if that was explicit, that those types of harms, those types of risks if disclosed amounted to disclosable conduct, as it is sometimes termed under other legislation. But I would not see that as fatal to the operation of the bill. It would be better practice to have those types of harms spelt out or for it to be clear that the definition of "serious wrongdoing" does include those types of harms. But I would not see it as being something that would necessarily have to get in the way of effective implementation of the bill.

The ACTING CHAIR: Thank you. At point 3 of your paper that you have provided to us you reflect on the current drafting of clause 26 (2) and (3). I think, if I have understood what you say there, your view is it

would be better if it could be remedied in this bill, that those two provisions would be narrowed so that they did not, in effect, preclude disclosures being protected. Is that your evidence?

Professor BROWN: That is correct. I had the benefit of hearing what the Ombudsman said to you a short time ago and I would agree with him in relation to clause 26 (2), but I would also extend that to subclause (3) in relation to both of these issues. When I read the clauses as proposed, their intention in both cases seems relatively clear to me. Being somebody who has worked on policy and legislation in this field for a long time, they seem relatively clear to me, but I am not sure whether their legal interpretation or their interpretation by the average lay person or the average lay agency would be as clear.

I think it is fairly clear that in relation to government policy the effect of the clause should be—and I think that this is what is intended—if the disclosure relates only or purely to a disagreement with government policy, then that would not be a public interest disclosure protected under the Act. I think that language that is in both subclauses at the moment, to the extent that it is intended to capture that, I think it is still open to the misinterpretation that if there is a disagreement with a government policy involved, then nothing in it is a public interest disclosure and it attracts no protections. I think that would be a retrograde step for it to be interpreted in that way and I do think it is at risk of being interpreted in that way. That is with respect to clause 26 (2). I do not know if you have any questions about that. I am also happy to speak a bit more about subclause (3)—

The ACTING CHAIR: Yes, please.

Professor BROWN: —in relation to workplace-related grievances. Here the key precedent, I guess, is what the Commonwealth has done with the Corporations Act whistleblowing provisions that were introduced in 2019, which I have heard some reference to in the hearing this afternoon. I would not recommend the wording in the Corporations Act as the solution because it too—well, it is even more complex and complicated and, for that reason, subject to misinterpretation, but the legal effect of it is, without doubt, that if it is purely an individual's own workplace-related grievance or employment grievance, then automatically that does not attract the protections of the Act because it will have its own grievance procedures.

The challenge is that anything broader than that, potentially may raise matters that should come under the purview of the Act. So while it is important to be able to exclude individual grievances because they should be being dealt with via other grievance procedures and amicable avenues for employment remedies, it does need to be clear that the exclusion relates to—and I think that this is intended by the current wording—individual grievances or complaints of that individual. Once it becomes broader than that then it may well be quite possible that there are matters there which need to be handled as a public interest disclosure because they go to a whole range of issues, potentially a whole of range of issues which are much broader. So, again, I would say that some relatively simple wording for that subclause would make that intention crystal clear and would be beneficial because it would reduce the ability for a wide range of people to misinterpret what this subclause is intended to achieve.

The ACTING CHAIR: At point 5 you talk about concerns about clause 28, which is the requirement that a disclosure be substantially true. There is also a requirement that internal disclosure was not anonymous. Those are pretty onerous obligations to place on a whistleblower, are they not? Should that not be addressed in this bill?

Professor BROWN: I fully agree with the Ombudsman and the Law Enforcement Conduct Commission's original recommendations that this provision be very substantially reworked and revised and not include a requirement such as that the disclosure has to be shown to be substantially true, because that is very difficult, if not impossible in some circumstances, and not necessarily relevant. The remarks that I have made in my notes there for the Committee are really intended to recognise—and I think it is important for the Committee and the Parliament to understand—that there is no acceptable type of provision approaching what I would consider to be best practice in Australia at the moment on this specific issue, this issue of effectively when a public disclosure should retain protections.

This is a matter that has been subject to a lot of public debate and will be subject to more public debate, and there is a burning need at a Commonwealth level to address the fact that the current provisions at a Commonwealth level are certainly not best practice, but nor is there any consistency or any obvious best practice amongst the different State and Territory provisions as they currently exist. So I would say that this is an area where the Government and the Parliament need to keep their mind open to contributing to that debate and being ready to adopt a more effective best practice type solution on this issue as it emerges in public debate hopefully sooner rather than later over the next few years.

In short, the New South Wales Parliament by retaining this type of restriction in the provision at the moment would effectively be staying stuck where it currently is, to a large degree, which is with a provision that

is not really fit for purpose. But it is not alone in that respect because there is no other jurisdiction in Australia which has managed to find a provision that is really fit for purpose on this issue yet either, and it is very important because we are dealing with fundamental principles of when should a public servant be entitled to go directly to the Parliament or directly to the public with the type of information that is contained in a public interest disclosure? We are talking about rights and obligations relating to free speech and the public right to know that really should be very common across the Commonwealth. So if we can have a public debate which ends up with a higher level of fundamental consistency in the first principles with which we think that the question should be solved, with jurisdictions generally attempting to then implement those fundamental principles, I think we would all end up better off.

The ACTING CHAIR: Just on the fundamental principles, I found an article written by you and some others, titled "Best-Practice whistleblowing legislation for the public sector: the key principles", I think from 2008. You were the author along with Paul Latimer, John McMillan—who, of course, was both a Commonwealth and New South Wales Ombudsman—

The Hon. TREVOR KHAN: And one of my former lecturers.

The ACTING CHAIR: —and one of the Hon. Trevor Khan's former lecturers—

The Hon. TREVOR KHAN: A long time ago.

The ACTING CHAIR: —and Chris Wheeler. In that article you had a section dealing with realistic compensation mechanisms where you look at the mechanisms existing in different enactments and look at some of the cases that have been decided, chiefly in Victoria and Queensland, and found that there was a bit of a patchy quality. Looking at the provisions in this bill, particularly in division 2—that is, clauses 32 and following, particularly clauses 35, 36 and 37—do you think that these are best practice in Australia or at least amongst the best?

Professor BROWN: I would say yes and no, and this is really point 2 on my two-page document, I think.

The ACTING CHAIR: Point 3.

Professor BROWN: In some respects when it comes to the fundamentals of providing a framework for delivering the type of protection that whistleblowers need most often, then the bill, as proposed, is actually a very historic development. In some respects it would be, if passed, a world-first achievement, particularly in relation to the question of the recognition that public employers should be liable and should provide compensation or other remediation for damage that is suffered by whistleblowers where there has effectively been a failure to assess or to minimise the risks of detriment to them, which go much broader than deliberate or intentional reprisals or punishment, because we know from a wealth of research now that the types of detriment that whistleblowers can experience do include direct and deliberate and known reprisals, but they also flow from a range of collateral damage that is very often the beginning of the slippery slope, if you like, to the type of repercussions and damage that whistleblowers suffer. So that aspect of the bill, as proposed, is a world first which I would certainly welcome.

I think that the New South Wales Government and the New South Wales Parliament would rightly be able to celebrate for setting a really important new stand. It goes somewhat beyond the only other legislation in the world currently, which is also Australian, that recognises that kind of responsibility to assess and prevent and minimise risk and damage to whistleblowers and to support them proactively; that is, in the Federal Corporations Act and the Federal Registered Organisations Commission legislation. So that really relates to clauses 61 and 62 and that is really a very significant development, not just in Australia but in fact worldwide towards whistleblower support and protection being taken much more seriously and being potentially much more effectively delivered, and having the triggers for that across the public sector.

When it comes to the other sections in part 3 of the bill, clauses 32, 33 and 35, there are a number of really important improvements to the current Act in there in terms of the ability of whistleblowers to achieve remedies where detrimental action occurs, not just as a result of that kind of omission or failure on the part of an agency but through the actions or the omissions of individuals. Those provisions which replace the existing reprisal and detrimental conduct provisions are definitely an improvement and an improvement in a number of respects. But they still tried to spell that out there, just so that the Committee is fully aware, they still suffer some of the limitations that other laws still suffer in Australia, in particular, and to a lesser degree overseas.

On one hand the bill is taking a really big step forward in the first respect; it is taking a number of other small steps forward in the second respect. I think it has to be recognised that the difficulty of proving and satisfying a court or tribunal as to the circumstances in which a reprisal or detrimental act or omission has occurred, for which whistleblowers deserve to compensated or achieve some remedy, the difficulty of achieving that really

means that these provisions are going to need to be continued to be monitored for their effectiveness. I think it is highly likely that further improvements are going to be needed at some stage. But again these are issues which New South Wales legislation would continue to share with other legislation in Australia. Certainly at a Commonwealth level it is similarly complicated by the current content of the law.

I guess just to reinforce that, part of the general problem here—and this continues in part 3 of the bill—is that the characterisation of detrimental conduct or detrimental action, even though it is defined to mean detrimental omissions as well as detrimental acts, the fact that the primary remedy that is presented is, in fact, a criminal prosecution for this creates all sorts of obstacles and difficulties of process and expectation and interpretation that then actually complicates and restricts, in practice, the extent to which remedies can be pursued and obtained because of the presence and the domination of that criminal offence requirement in the way in which the detrimental action provisions are framed. That is something which is common with other Australian legislation and it is going to require some more unpacking and reform before that is rectified in a range of legislation.

Finally, I would like to draw the Committee's attention to my final dot point under point 2 which is that this imbalance, or this unhelpful domination by the concept of reprisal as a criminal offence as opposed to detriment as being something where the focus should really be primarily on preventing and then remediating detriment that occurred, whether or not a criminal offence is involved, is also unfortunately still reflected in the otherwise proved requirements for agency policies and procedures under clause 43 (1) because, for example, that requires agencies rightly to have procedures for dealing with allegations of offences of detrimental action. But there is no explicit requirement there in the legislation itself for agencies to have procedures for remedying detriment, whether clause 2 offences or not.

I guess that is just another indicator, another reinforcement of the fact that under this bill, like other Australian jurisdictions, we continue to have the problem that actually achieving remedies and putting things right for whistleblowers who do suffer detrimental action continues to take a bit of a second seat behind this challenge of attempting to identify and prosecute criminal offences which is a much more difficulty activity.

The ACTING CHAIR: Professor, in relation to clause 35, the detrimental action recovery of damages, is it your view that successfully being able to use that provision may be complicated because of the existence of the detrimental action offence in clause 33? That is, because the foundation of section 35 is that there has to have been detrimental action, and because that detrimental action offence has to be proved beyond reasonable doubt, is it your view that that complicates clause 35? Should there be a simpler provision?

Professor BROWN: Yes, it is. My submission would be that ideally, whether it is achieved in this version of the bill or in the future, there would be a greater separation and distinction between the requirements to prove a criminal offence, most of the way in which the bill is currently framed includes elements which are appropriate for proving a criminal offence, but separating that from the grounds on which a person can show that they are entitled to relief for not only acts but, in particular, omissions that have resulted in detrimental action. In fact, many of your requirements that are there currently are still predicated on being able to prove a positive, particularly prove that actions were taken in the presence of particular requisite elements as opposed to being to being able to show that there was a duty, and that there was failure to fulfil that duty and that the damage resulted from the failure to fulfil that duty.

I would emphasise that the very historic positive developments in clauses 61 and 62 change that game enormously when it comes to the liability, or the potential liability and the responsibility of agencies themselves as employers. The responsibility and the potential liability of agencies themselves, and their need to provide remedy, or their exposure to the need to provide remedies, is very strongly presented in the bill. That is the historic dimension of the bill. But when it comes to individuals and their liability for, or the need for them to be liable for damages or for remedies or for the general principle that where damage occurs that is unfair and unjust that there be a ground for seeking remedies for that in part 3 of the bill, then the bill unfortunately still does labour under some of those same problems that flow from that—that combination and confusion between the criminal offence and grounds of employment or civil relief.

The ACTING CHAIR: Just on that, clause 35 (10) states:

> To avoid doubt, liability under this section is not liability in tort.

Does there need to be a provision in clause 35 that makes it clear that you only need to establish the required elements on the balance of probabilities to avoid the confusion with the criminal offence in clause 33?

Professor BROWN: If necessary it should. Certainly the intention behind the provisions and the intention of the provisions that provide that the wronged can seek remedies irrespective of whether there is a criminal prosecution or a criminal prosecution is even possible is intended to reinforce that this all about civil employment responsibilities, obligations and liabilities that would be provable to the normal standard for those

types of matters. If necessary it would be better to be explicit about that. But I think there are other constituent elements that the requirement for the suspicion, belief or awareness of the fact that a disclosure is being made or that a disclosure might be made, that actually the court or the tribunal has to be satisfied that that was a contributing factor.

The ACTING CHAIR: Yes.

Professor BROWN: That is effectively saying it needs to be a positive reprisal; that it was done effectively, deliberately or knowingly in response to, or as a result of, the disclosure as opposed to being damage that has flowed to a disclosure as a result of a failure to fulfil a duty to support and protect that person, or as a result of turning a blind eye, for example, to risks of reprisal or detriment that we know from research now will logically and predictably flow to a whistleblower through ostracism or through stress or other forms of collateral damage. It is quite easy to cause damage to a whistleblower without actually doing anything positively. So that is the confusion that still unfortunately exists in this provision to a degree.

The question of whether the other improvements to this provision in terms of the onus of proof and the change from substantially in reprisal to a contributing factor, there are a number of improvements that should improve the situation under this bill but whether they will do the whole job in delivering remedies where they should be able to be delivered, I guess I am just sounding a note of caution. I think there may well be more of the road to travel but New South Wales is not alone in this.

The ACTING CHAIR: In summary, in your 2008 article I think you make the case for the simplification of this in the form of a positive duty and then you have the failure to discharge the duty. That is a simpler way to protect whistleblowers rather than necessarily what is currently in the bill.

Professor BROWN: For the purposes of civil remedies or employment remedies, yes.

The ACTING CHAIR: I have two last questions. Is it your view that the definition of "serious wrongdoing" is a narrowing of what is currently in legislation or does this also represent an improvement on the status quo?

Professor BROWN: To my quick read, the definition of "serious wrongdoing"—I mean I do not know whether the insertion of the term "serious" really helps or not. On balance, it probably does not help but in substance I do not read the bill as really changing the game when it comes to the scope of serious wrongdoing to which the bill is directed. Like I said originally, I think there is probably scope for improvement in the bill in respect to this issue but it is not the biggest problem with the bill. Certainly it does not interfere with the capacity of this new bill to be implemented with an even higher degree of effectiveness than the current legislation.

The ACTING CHAIR: There is Commonwealth legislation that provides for some protections for whistleblowers to people who work in private corporations. Are they adequate or should this bill also seek to extend to whistleblowers everywhere to the extent it is permissible under the constitutional arrangements?

Professor BROWN: I would say that this bill is appropriately focused on protecting whistleblowers within the New South Wales Government and that that should remain its primary focus. That needs to include whistleblowers who are working within contracted-out services or areas of delivering services or contracts to the New South Wales Government. I do not see any particular benefit of this bill to be extended to the point where it attempts to deliver, effectively, private sector whistleblower protection to every private sector employee in New South Wales. I think the much more effective starting point for that now is the Commonwealth Corporations Act legislation. Even though it does not extend to every type of employee it covers the vast bulk of employees in the private and not-for-profit sector now. There is an ongoing debate obviously about recommendations that have been previously made in the Commonwealth Parliament for further developing that scheme so that it is just not entirely reliant on the Corporations Act and that it is clearer what types of wrongdoing are captured by that legislation.

I think in this day and age that is the most effective primary vehicle. I think the answer to that is in further evaluation of exactly how that legislation has panned out and who is being left out and, where necessary, those are gaps that States may usefully be able to help plug. But it would be better if that were done on a uniform and consistent basis around the country for the benefit of clarity and simplicity and consistency for the private sector wherever it operates rather than different States having different rules, particularly as it relates to protecting whistleblowers who are employees in the private and the not-for-profit sectors.

The ACTING CHAIR: Does any other Committee member have other questions flowing from any of that?

The Hon. PETER POULOS: It is not a question, but just a very quick comment. I extend my appreciation—and I imagine the Committee feels the same way—to Professor Brown for sharing those research

results. Professor, I found the data and the analysis behind it incredibly revealing. Thank you for sharing this information with the Committee.

Professor BROWN: That is a great pleasure. If I might reinforce, it is with the support and the participation of the NSW Ombudsman and earlier the New South Wales Independent Commission Against Corruption that we have conducted quite a lot of this research along with integrity agencies and regulators from the public and private sectors right around Australia and New Zealand. I am very conscious that in 2017 when the Ombudsman and the Law Enforcement Conduct Commission committee made its report, the most recent largest wave of research that you have got there in front of you was still underway. The 2019 report contained many key points and recommendations that go to some of these issues and that was not available to the Committee back in 2017. Similarly, some of this analysis that we have circulated to you now, which is ongoing, is brand new—only released last week.

I think it does reinforce that every jurisdiction in Australia remains on a learning curve as to what is working and what is not, and the size of the challenges that are involved. If anything, I would just simply reinforce that even if the bill possibly with some further minor but significant improvements, I think, to make sure that it its intention currently is crystal clear on some of those key operational issues goes ahead as proposed, which would represent a major step change, as I said, and would involve, particularly in that area of risk assessment and prevention and employer liability for the New South Wales public sector if it fails to do that. These are really historic developments.

From that respect, I think, we can safely say that this bill would take into account those sorts of lessons from our research in a big way. But there are still other issues on which it is quite clear that the size of the challenge of getting this right means that this is still an unfolding story. Whatever provisions are included in the bill, or whatever understanding the Parliament proceeds on, in terms of the need to continue to revisit some of these issues, then I think that is a very sensible approach to take. But I am very glad if our research has been able to assist the deliberations of the Parliament.

The ACTING CHAIR: Just on that, Professor you make the point on the last page of your research that the most common repercussions are collateral damage and most legislation is really directed otherwise. Do the definitions of "detrimental action" and "detriment" in division 2 go far enough to cover collateral damage or do they still suffer from the disadvantage of really only dealing with direct action?

Professor BROWN: I think the widened definition of "detriment" covers most of those potential types of damages. I think that the definition that is in the Commonwealth Corporations Act is slightly wider again. There are a few more heads of damage in there. But they are all indicative; they are not exclusive in any event. So I think that the definition of "detriment" itself in the bill is quite capable of reinforcing the approach that is clearly intended by the bill, especially in clauses 61 and 62 and the associated provisions that clauses 61 and 62 help reinforce.

From that point of view I think the bill is on a very good track and I would not get too hung up about necessarily needing to add more components of detriment into that definition. I think the bigger challenge, as we have already discussed, is that sort of implicit limitation of what types of detriment are actionable by virtue of what is in part 3, the criminal offence and the grounds on which detriment can be shown in that part of the bill.

The Hon. TREVOR KHAN: Professor, I go back to your submission point 3, dot point 1, that being serious wrongdoing. I am not quite sure why you would draft the bill in this way. But if I go to serious wrongdoing and then go down to clause 3 (d) we get to serious maladministration. We then spool through, as I do, onto the dictionary which is in schedule 2. To me it is an interesting turn of phrase. If you then go to serious maladministration it means conduct, other than conduct of a trivial nature, of an agency. Whilst it is described as "serious maladministration" one way of looking at maladministration is it is maladministration other than of a trivial nature.

The ACTING CHAIR: Yes, probably a better description.

The Hon. TREVOR KHAN: The definition is different from the descriptor, one might think.

The ACTING CHAIR: It is.

The Hon. TREVOR KHAN: Certainly as a Government member it would be terrible to suggest an amendment but could it be more clearly put either by removing the reference to "serious" from maladministration, but more particularly by moving the definition of "maladministration" into a subsection of clause 13 so it is all in one spot for a start?

Professor BROWN: I think providing the whole definition in one place is always a desirable thing especially if, as has been said by the Government and by the Ombudsman, that part of the purpose of this

redrafting, even though it enlivens the Act was to be more intuitively logical for lay people to interpret, not just lawyers. But otherwise I would not get too hung up on it personally. I think the concept of seriousness as being non-triviality, and non-triviality as being seriousness, is not too problematic. To implement or to understand effectively the definition just simply makes it clear that where people on reasonable grounds who are administering the Act want to reach a conclusion that a matter might be maladministration but that fundamentally it is trivial, that that is a basis for basically saying, "This is not the right legislative scheme to be delivering protections to somebody who is making a complaint of effectively what is trivial maladministration."

Even trivial maladministration might need a remedy but it does not need the types of protections and processes that this Act brings into play. So I think having the flexibility to be able to be clear on that is not problematic from my point of view. I think the general term "serious" is applied to everything. Serious wrongdoing is slightly more problematic because sometimes what appears to be quite minor wrongdoing may, in fact, be the tip of the iceberg for something which does deserve protection and which can lead to reprisals or detrimental outcomes that this Act should be able to remedy. In fact, I think the Act at law would still be interpreted that way and can still be applied that way but it still sends a bit of a message to people that unless it is serious you are not going to get protected, and that can create a bit of undesirable uncertainty in the minds of many public officials, I think.

There is a problematic aspect to that blankety term overall of seriousness for serious wrongdoing. If anything we would be able just to define that wrongdoing that is disclosable under the Act includes corrupt conduct, serious maladministration, et cetera, rather than laying descriptors of seriousness over the top of other descriptors of seriousness. I am not sure it is the biggest problem with the bill.

The Hon. TREVOR KHAN: No, I am certainly probably in agreement. Is your summary of that, that if you take maladministration as being a quite broad term covering a whole multitude of sins, and in this bill it covers maladministration which is not of a trivial nature, then the coverage of the bill is far broader than some of the submissions that we have received would suggest?

Professor BROWN: Yes, I think the coverage of the bill is broad. The definition of "serious maladministration" that is in the bill is broad. It includes a lot of things. I think it would include things like conduct and policy failures that are putting people at risk of public health or safety risk, for example, or environmental risk. They would all be included in that. The problem is that the term "maladministration" of itself does not clearly communicate that to most people and to the average person.

The ACTING CHAIR: The dictionary states that serious maladministration includes anything which is unjust. That could, for example, cover sexual harassment?

The Hon. TREVOR KHAN: Indeed, and that was where I was going. There has been a suggestion that it does not cover it, but it seems to me that—

The ACTING CHAIR: You have got to get digging—

The Hon. TREVOR KHAN: —when you look at the items included, a potpourri of sins—I like that term—is covered by that definition.

Professor BROWN: Yes, I would agree with you. That is why I think I used the word "cosmetic". Cosmetic is probably not the right word but it would be fair from the community's point of view for it to be clearer to the average person that crimes like sexual assault, or risk to public health and safety or environmental harms were included, which I think they are. It would be better if that was explicit to remove doubt and to make it easier to communicate to people.

The ACTING CHAIR: But not the hill to die on?

The Hon. TREVOR KHAN: Yes.

Professor BROWN: That is correct.

The ACTING CHAIR: Professor, thank you for your evidence. It has been most learned and I am sure all Committee members, like me, are very grateful for the time and energy you have put into it.

The Hon. TREVOR KHAN: I am left much more comfortable.

Professor BROWN: Thank you very much for the opportunity.

The ACTING CHAIR: It is a pleasure.

(The witness withdrew.)

HUGH DILLON, representative, NSW Bar Association, sworn and examined

The ACTING CHAIR: Professor, you have provided to the Committee a one-page document?

Professor DILLON: Yes.

The ACTING CHAIR: I take it that is your opening statement, as it were?

Professor DILLON: Yes, it is.

The ACTING CHAIR: We will take that as a tabled document. Do you wish to speak to it briefly?

Professor DILLON: I do not need to read to it if you all have a copy of it.

The ACTING CHAIR: Please, if you want to share some of your thoughts.

Professor DILLON: I am very happy to do that. First, of all I should say that although I have the honorary title of "Professor" I am not an expert in whistleblowing law. I have another area of expertise. I am a member of the NSW Bar Association's Inquests and Inquiries Committee which is how I come to be here. On behalf of the NSW Bar Association, I thank the Committee for the opportunity to make submissions concerning the bill now before the Parliament. Like most of the other organisations that have made submissions we support this bill as a significant advance on the current legislation.

The Ombudsman's submission details improvements that the bill makes. Nevertheless, we consider that the bill can be further enhanced. Our submission essentially speaks for itself but I would highlight four aspects of it. First, we think that as a matter of general legislative drafting practice it is beneficial for all bills affecting the rights of citizens, such as this, to incorporate guiding principles. They illuminate the broad context of the legislation and provide guidance to those who must interpret and apply it. We have touched on guiding principles for this bill in some detail. Second, we submit that the threshold for protected public disclosure set out in clause 26 (1) is set too high. Disclosure based on honest and reasonable grounds to suspect serious wrongdoing would be a better level at which to set the threshold.

Third, we have expressed concern about the opaqueness of some of the concepts in the bill and how they may be applied. In particular we have raised the possibility that a "government policy", a term which is not defined in the bill, may itself facilitate serious wrongdoing or maladministration. As currently drafted the bill may not protect public officials who disagree with a policy because of its tendency to stimulate what they believe to be serious wrongdoing or maladministration. Fourth, we have expressed reservations about the strength of the internal review mechanisms.

The ACTING CHAIR: Thank you, Professor. Committee members, who would like to open the questioning?

The Hon. TREVOR KHAN: I refer to clause 26 (1)—which is point 2 of your opening submission—which provides:

> A disclosure complies with this section if the maker of the disclosure honestly, and on reasonable grounds, believes the disclosure shows or tends to show serious wrongdoing.

Your view is that it suspects serious wrongdoing.

Professor DILLON: Yes. If a person believes something, obviously they have some sort of basis for that belief. But to suspect something is to be in a state of uncertainty. In the criminal law you can have reasonable grounds to suspect something may be untoward; for example, police officers can stop people, cars or whatever and search them on the basis of a reasonable ground to suspect that there may be evidence or there may have been an offence committed but at that stage they do not necessarily believe it—it is when they get some more evidence that starts to crystallise that belief. That belief starts to crystallise. We think that the level is too low. Because someone has seen or heard something, maybe even third-hand hearsay, that raises a reasonable suspicion because it comes from a source that is apparently reliable; it is not just some sort of a conspiracy theory. Because you, the official figure, cannot go further than that in exploring this, investigating this, that should be the time at which you become a protected person if you take your suspicion to an appropriate official.

The ACTING CHAIR: Clause 26 (1) states, "A disclosure complies with this section if the maker of the disclosure honestly, and on reasonable grounds…". That is for internal disclosures. But when you go to clause 28, which is external disclosures, there is a sort of requirement that it must be "substantially true". You also have to have made a previous disclosure and the previous disclosure has to be not anonymous. Those are very high thresholds for any whistleblower to discharge, are they not?

Professor DILLON: Sure, they are high. We considered that and we know what the Press Council has said about that. The NSW Council for Civil Liberties has said they think that there should be available to a public official the possibility of making a public disclosure directly to the media or members of the Parliament. I suppose it is fair to say that the Bar Association is reasonably conservative on this point. We think it is appropriate that public disclosures first be made internally, and that is because public disclosures may be untrue although honestly believed or honestly suspected. There may have been a misunderstanding. There may have been an incomplete picture developed, as I was explaining to Mr Khan.

Many of us on this Committee have had public sector service and we know how the public sector works and policy is developed internally first. It is not a public process until it gets to a certain point. We think that it is necessary for governments and agencies to be able to operate with at least some reasonable confidence that their internal processes, if conducted properly and appropriately, should be protected to a certain point. If they then try to cover up stuff though, which is what clause 28 goes to, then it is utterly appropriate in our view that people should be able to go to the press or members of Parliament and say, "Look, this is what we honestly believe is happening or we honestly suspect is happening."

The ACTING CHAIR: That might be understandable if we are dealing with the public sector where it is to be hoped that there might be all sorts of policies and procedures in place. There might be designated persons who might deal with disclosures of this nature who can evaluate them. But clause 14 extends the definition of "public official", as I read it, to the private sector insofar as private sector bodies are contracted to provide services to the New South Wales Government.

Professor DILLON: Yes.

The ACTING CHAIR: So you might be talking about a person working in a private company who sees what they would regard as serious wrongdoing. The private sector works differently. They may not have policies and procedures. They may not be as genteel at dealing with dissent in the workplace. Going through those internal processes might put somebody at risk. Requiring an internal and identified disclosure before you can make an external disclosure, is that not just a threshold that is too high that will make this not extend the protections to people who truly are whistleblowers?

The Hon. TREVOR KHAN: I thought you were pleased that the PID was applying—

The ACTING CHAIR: I am, but it may not go far enough.

Professor DILLON: I am not quite sure what Professor Brown has said on this and he may have had some very illuminating things to say about it. If a person is contracted to or in some sort of relationship of that nature with a government agency—and it is easy to imagine the sorts of scenarios we are talking about—

The ACTING CHAIR: I will give you a scenario which is something that I have had to deal with the in past. You might have, shall we say, a private sector waste disposal entity contracted to perhaps a local government body to provide waste services. Instead of disposing of that waste in the appropriate way they dump it in a river or put it in a wooded area. Someone who works for that company thinks, "This is the wrong thing to do." Let us assume it comes within the definition of "serious maladministration" because it might be unjust. Requiring that person to make an identified internal disclosure within that company, if that is what the legislation does, before they can make a disclosure to a member of Parliament or a journalist, that seems to me to be fairly unrealistic. You are asking people to take a very big risk before they are able to make those disclosures.

Professor DILLON: Yes, assuming that the employee of the people dumping the toxins or whatever they are may be taking a risk in respect of what happens internally to them if they go to the council. But I would have thought that they could identify themselves to an appropriate person within the council but on the condition that that disclosure remains confidential to the public disclosure official.

The ACTING CHAIR: Yes.

Professor DILLON: Because it is the council's responsibility then to investigate itself on what is going on and it has an interest. I do not see it as necessarily a contradictory thing. I would agree with you that people in the private sector may be more exposed to detrimental action.

The ACTING CHAIR: Apart from the matters you have identified in your two submissions is there anything particularly egregious with the current bill that must be remedied before it becomes law that really is of that sort of pressing nature?

Professor DILLON: We did not really think so. Our suggestions are more proposed refinements of a bill which is overall, I think, pretty highly regarded by most of the people who really know what they are talking about—the Ombudsman, in particular, is very supportive of it.

The Hon. TREVOR KHAN: I have to say Professor Brown could not be described as highly critical either.

The ACTING CHAIR: No, I think that is a fair assessment.

Professor DILLON: Just from listening to him I thought well, obviously he knows what he is talking about and he is very supportive and he expects that the Act, once it is in operation, will also be subject to further refinements. So some of the more clunky aspects of the current legislation have been cleaned up and so on. So yes, we are supportive of the bill in essence.

The ACTING CHAIR: One area where Professor Brown did venture an opinion—and he did not suggest that it should hold up the legislation—is he thought that the existence of the criminal offence in clause 33, and if you like, the recovery of damages provision in clause 35, the existence of the criminal provision might somehow confuse the ability to practically claim the benefit of clause 35. He thought a simpler way might be to have a general duty and then a departure from that duty through act or omission. He seemed to think that there was at least a risk that in seeking the benefit of clause 35 you might have to prove, for example, beyond reasonable doubt that a criminal offence was committed.

Professor DILLON: I listened fairly carefully to that because, to be perfectly honest, we did not give consideration to that. But that was very interesting to me and I thought it had some force.

The ACTING CHAIR: Does anybody have any additional questions for this witness?

The Hon. TREVOR KHAN: No, we are grateful for the evidence.

The ACTING CHAIR: Thank you very much for coming and sharing your views with us today, and that of the organisation you represent.

Professor DILLON: Thank you so much, Mr Chair and Committee members.

(The witness withdrew.)

The Committee adjourned at 16:45.