COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

# SENATE

## LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

**Public Interest Disclosure Amendment (Review) Bill 2022**

(Public)

MONDAY, 27 FEBRUARY 2023

CANBERRA



BY AUTHORITY OF THE SENATE

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**LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

**Monday, 27 February 2023**

**Members in attendance:** Senators Antic [by audio link], Green [by video link], Scarr and Shoebridge

**WITNESSES**

**EDGERTON, Mr Graeme, Deputy General Counsel, Australian Human Rights Commission**

**FINLAY, Ms Lorraine, Human Rights Commissioner, Australian Human Rights Commission**

**Committee met at 09:30**

**CHAIR (Senator Green):** I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022. I acknowledge the traditional owners of the land on which we meet, and pay my respects to their elders past and present. I would also like to acknowledge and welcome other Aboriginal and Torres Strait Islander people who are participating in today's public hearing.

The committee's proceedings today will follow the program as circulated. These are public proceedings being broadcast live via the web. I remind witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of the evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers evidence to be given in public, but, under the Senate's resolutions, witnesses have the right to request to be heard in confidence, described as being in camera. If you are a witness today and intend to request to give evidence in camera, please bring this to the attention of the secretariat as soon as possible.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground for which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I am chairing the hearing remotely, so my colleagues, the deputy chair, Senator Paul Scarr; and Senator David Shoebridge, who are in the room—gentlemen, if you could provide me any assistance. I won't be able to see the whole room if someone needs to answer a question or jump in or wants to get the call.

**Senator SCARR:** It's packed, Chair! The room is absolutely packed. It's overflowing with people in attendance, Chair, so we'll do our best. We've had to get more seats!

**CHAIR:** I can see the room. I just can't see the intricacies of people's facial expressions as well as you probably can, Senator Scarr. I appreciate your assistance, I really do, in making sure we could have this hearing in a timely manner. With those formalities over, I now welcome the Australian Human Rights Commission to the committee today. Thank you for taking the time to speak with the committee.

Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. Before you begin, I remind senators and witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall be not asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer and to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy, and does not preclude questions asking for explanations of policy, or factual questions about when and how policies were adopted. We have a short period of time with you in the program this morning, so would you like to make a brief opening statement before we go to questions?

**Ms Finlay:** Yes, thank you, Chair. Thank you to the committee for the invitation to provide evidence today. It's important for a strong, transparent and accountable Public Service that insiders who witness wrongdoing have the confidence to report that wrongdoing so that it can be addressed. Taking a stand in relation to institutional wrongdoing can come at great personal cost. In order to provide confidence to whistleblowers to come forward, they need to have protections for their privacy, protections from legal actions that may be commenced against them and protections against reprisals in their workplaces.

The commission supports the amendments to the Public Interest Disclosure Act proposed in this bill, which implement 21 of the 33 recommendations of the Moss report. There are other recommendations of the Moss review that, in our view, should also form part of this package of reforms. A set of further amendments, described in our written submission, focuses on making it easier for whistleblowers to get advice and help both before they blow the whistle and afterwards.

A key problem for whistleblowers in getting legal advice is that large swathes of government information come with a protective security classification. Information may be protected, secret or top secret. The Public Interest Disclosure Act provides that a whistleblower cannot disclose any classified information to a lawyer for the purposes of getting legal advice about making a public interest disclosure, if the lawyer does not have a relevant security classification. The commission recommends that the government publish a list of security cleared

lawyers to make it easier for whistleblowers to get the advice that they need. Further, the requirement to go to a security cleared lawyer should be limited to information that is secret or top secret. This would align the Public Interest Disclosure Act with changes to public sector secrecy offences legislated in 2018.

It is even harder for public servants in the Australian intelligence community to get legal advice about blowing the whistle on wrongdoing. As we have seen with a number of high-profile cases in this sector, despite disclosures having a high public-interest value, the risk of prosecution is real, and proper legal advice is vital. There need to be mechanisms to allow public servants to get proper advice about the disclosure of material that includes intelligence information. More generally, whistleblowers should be able to talk confidentially about the subject matter of their disclosure when seeking other advice and assistance, such as counselling as part of an employee assistance program, or when getting workplace relations advice from a union.

The commission agrees with the changes in this bill that narrow the scope of disclosable conduct so that it no longer applies to personal work-related conduct. The commission also agrees that agencies should be able to refer complaints to other agencies if they are better placed to investigate. However, once these changes are made, agencies should no longer have the ability to refuse to investigate a disclosure that meets the definition of a public interest disclosure on the basis that the agency considers it not sufficiently serious. Whistleblowers should also have greater ability to make a public external disclosure if agencies fail to comply with relevant time limits during the investigation process.

Finally, the commission recommends that parliamentary staff be included within the definition of 'public officials' and be given the protection offered by the act. This was a recommendation of the *Set the standard* report into Commonwealth parliamentary workplaces. Parliamentary staff often have insider information about the workings of both government and public agencies. If they are aware of wrongdoing, they should have the same protections as other public servants for speaking out. Thank you again for the opportunity to provide evidence today, and we are happy to answer any questions.

**CHAIR:** Thank you very much. Deputy Chair, you have the call.

**Senator SCARR:** I'll closely watch the time to make sure that others have an opportunity. I'll go straight to one point that I'm interested in, which is in relation to obtaining advice from other professionals. One of the issues that emerged from the deliberations of the Joint Select Committee on National Anti-Corruption Commission Legislation was that whistleblowers and others who were reporting corrupt conduct are typically, or can be, under great strain. This can be mental strain with health implications, due to the pressure involved and the stresses of the ramifications, for them personally and their family, of doing the right thing, which is to blow the whistle on conduct. It can put great strain on them. My question is: in terms of expanding the ambit whereby potential whistleblowers can seek advice, is there also room to consider whether or not they should be able to make disclosures to health practitioners who are giving them health advice and are therefore under obligations of confidentiality?

**Ms Finlay:** Potentially. That certainly forms a key recommendation of our submission in terms of expanding the range of advice that's available to whistleblowers. We focus particularly on obtaining advice from employee assistance programs and from unions, in terms of recognising that there are those impacts that you've described and there is a need to allow for broader advice to be obtained.

**Senator SCARR:** But my concern about just limiting it to employee assistance programs is that someone might have been seeing a health practitioner over a period of time; they might not have accessed the employee assistance program, but they're seeking equivalent sort of assistance privately, and that should also fall within the ambit of that expansion of advice. It's not just advice; it's also assistance with respect to support as they navigate what's a very complicated system. Do you think your comments could be expanded to include that sort of avenue?

**Ms Finlay:** Yes, we do, for all of the reasons that you've described.

**Senator SCARR:** The next point I wanted to touch upon is limiting the discretion not to investigate. I note there's a great distance between 'serious', on the one hand, and 'frivolous or vexatious' on the other. 'Frivolous or vexatious', depending on which way you look at it, is a very high or low bar to jump in terms of coming to a conclusion that something is frivolous or vexatious. My concern in this respect—and it's informed to some extent by my experience as Chair of the Joint Committee on the Australian Commission for Law Enforcement Integrity—is that resources are limited, almost by definition, and some of these disclosures warrant investigation on a very urgent matter. It seems to me, from a policy perspective, we need to achieve a balance in terms of making sure people are raising legitimate concerns in good faith and those concerns are considered but, on the other hand, making sure that resources are dedicated to the more serious complaints, which have greater public interest ramifications.

This is sort of a half comment dressed up as a question. Do you understand the concern I would have that, if you remove that discretion that an appropriate, independent decision-maker might have to consider whether or not something warrants further investigation, you could be imposing an additional workload on that person which compromises their ability to deal with the more serious types of allegations?

**Ms Finlay:** Certainly there is, as you said, a spectrum, and a need for that type of balance. We would say—and, again, we address this in our written submissions—that, by narrowing the definition of disclosable conduct, you go some way to addressing those concerns. If I refer you particularly to paragraph 91 of our written submissions, we look at the percentage of disclosures that were declined to investigate and the grounds on which they were declined, which provides some context to that submission. We would say, firstly, your point is met in part by the narrowing of that definition, but, secondly, the improvement of referral mechanisms allows for disclosures to be appropriately referred for investigation to the place where they're best dealt with. Both of those things together, we say, addresses that issue.

**Senator SCARR:** Ms Finlay, my problem with that response—not a problem with you making that response, which is very logical and makes sense—is that I've got concerns with the exclusion of personal work-related conduct the way it's currently drafted, because it seems to me that could be considered in a very broad range: what is personal work-related conduct? In fact, in many of these cases—this is informed to some extent by my experience as a whistleblower officer in a listed public company—there can be an intertwining of personal work-related conduct and the disclosable conduct which is the subject of a bona fide complaint. Is another potential check and balance the establishment of a whistleblower protection authority that can actually serve as a check and balance in terms of decision makers? It seems to me that if the decision maker is considering whether or not something is sufficiently serious to be warranted and you have that whistleblower protection authority sitting there as a check and balance then the decision maker is going to be very careful before they decide something is insufficiently serious.

**Ms Finlay:** We think that could be one element, and it does highlight one of the challenges this committee has in that we're looking at a set of serious reforms absent the full picture of other reforms that need to happen in this area as well. We'd encourage the committee, when considering these reforms, to also have regard for what is to come and the need at the end of the day to have a framework that is complete in the way it looks at these things.

**Mr Edgerton:** In terms of the thresholds that've got to be met at the start, one you have identified is excluding personal work-related conduct. But there are a couple of other things that mean there's a focus on more serious kinds of conduct coming out of this bill, and one of those is the definition of disclosable conduct. Previously the definition was 'conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against that public official'—which is quite broad. I think the proposal here now is it has to be action that would give grounds for termination, which raises the seriousness. One of the other gateway functions is you also have to have an authorised officer who is satisfied that that definition has been met before you get to the decision-maker saying it's not serious. You've already had someone referring it to the agency, saying, 'I think all of these standards, prima facie, have been met,' before the agency head makes the decision that it's not sufficiently serious in the circumstances. We're trying to balance those various things, saying if it has got through those hurdles, maybe 'not sufficiently serious' doesn't need to be there. But I understand what you're saying.

**Senator SHOEBRIDGE:** On that thread, whistleblowers often are quite often aggrieved by the agency's handling anyhow. This emphasises why, if we're going to have serious structural reform, some of these decisions need to be made by bodies or persons outside of the agency that's the subject of the complaint; doesn't it?

**Ms Finlay:** Yes, we'd agree with that.

**Senator SHOEBRIDGE:** Indeed, setting up these layers of internal review inside an agency, in light of the experience many whistleblowers have had with their agency, is not going to provide much comfort to them; is it?

**Ms Finlay:** In our view there's a role for that, but certainly we take your point and I think you're correct.

**Senator SHOEBRIDGE:** One of the other issues in relation to the exclusions in the bill, and it has been picked up by a series of submissions, is the personal work-related grievances exclusions, the 29A exclusions. Quite often when a whistleblower has an issue of substance with their organisation and they think they're acting unlawfully or unethically, they can be seen by the agency as a troublemaker, and often that creates an antagonistic relationship; would you agree?

**Ms Finlay:** Yes, Senator.

**Senator SHOEBRIDGE:** And then often that antagonistic work relationship may actually manifest itself in performance issues being raised with that employee and potentially allegations of bullying and the like. That's not an uncommon pattern; is it?

**Ms Finlay:** Correct.

**Senator SHOEBRIDGE:** So if we're going to carve out personal work-related conduct in the way that's proposed in this bill, which says adverse action that's taken in relation to personal work-related conduct is excluded from the PID Act, we have to be very careful about the boundaries; don't you think?

**Ms Finlay:** You do need to be very careful; however, we would note reprisals are still included and covered under the amendment. Again it's a matter of finding that balance and taking those different factors into account.

**Senator SHOEBRIDGE:** But often the management issue could be justified. A whistleblower may be aggrieved and may be unhappy in the workplace, it may be impacting on their work performance, it may be impacting on their relations with other staff and there may well be on one view, on a very narrow view, justifiable managerial responses to that. The person may be unhappy, may be turning up late, may be aggrieved in the workplace. There may be, on one narrow view, justifiable management responses to that, which I'm sure management would say is unrelated to their whistleblower complaint. That's what happens, isn't it? The concern that a number of witnesses and submissions have is that, if we're going to have a personal work-related conduct exemption, it should be where it's solely related to that and there's no potential for it to even be tangentially related to the whistleblower complaint, and make that test really clear. Do you support that very clear language of putting 'solely' or some similar test in, so that we ensure that whistleblowers are protected in those circumstances?

**Mr Edgerton:** I think it does make sense to separate out matters that are workplace grievances from substantive issues that whistleblowers are raising. If there's some mechanism to be able to distinguish between those—so that exclusion of solely workplace-related grievances is out, but, if somebody has raised an issue of substance, it is required to be considered—that makes a lot of sense.

**Senator SHOEBRIDGE:** This is why the Moss review spoke about 'solely' or 'only'. I can't work out why that language hasn't found its way into the bill. Have you got an explanation for why that language hasn't found itself in the bill?

**Ms Finlay:** We don't have an explanation and wouldn't want to speculate on that, Senator.

**Senator SHOEBRIDGE:** No, but it does seem to me to be a very real concern—how the bill, in this regard, deviates from the recommendations that came from the Moss review. Would you agree?

**Ms Finlay:** We would agree. Certainly, there is more that can be done within the bill to implement more fully the recommendations of the Moss review.

**Senator SHOEBRIDGE:** Unless we implement it with care, this risks causing real harm and seeing whistleblowers with even less protection. That's what concerns me. If we allow this exemption through, as drafted, a whole raft of whistleblowers may have none of the protections under the PID Act, unless they go through some torturous legal argument and are able to satisfy somebody that the adverse managerial conduct was in relation to their complaint.

**Ms Finlay:** I think you've identified a really central dilemma, when looking at this legislation. By necessity, there are technicalities and complexities in the way that it has to be drafted to make sure the legal framework works, but at its heart it needs to be simple and accessible and provide protections for people who are operating under very stressful situations.

**Senator SHOEBRIDGE:** Given that there are a number of whistleblowers right now who are facing criminal prosecutions and potentially significant jail time—even where, I think on anyone's view, it was bona fide whistleblowing and there were very genuine complaints—that means that people have a heightened sense of anxiety about blowing the whistle at the moment, wouldn't you agree?

**Ms Finlay:** We certainly understand the point you're making.

**Senator SHOEBRIDGE:** If we make the legal minefield even harder to negotiate, that might send a chilling impact through the Public Service and those who might want to blow the whistle.

**Ms Finlay:** We would agree with that, but we'd also point to amendments that are being put forward by this bill that we say do provide greater protection, and, to that extent, we do support those amendments.

**Senator SHOEBRIDGE:** I was reading through all this in the last week, and I was getting World War I analogies. You blow the whistle and then you run through a particularly nasty minefield and hope you make it to the other side. That shouldn't be how the law operates, should it?

**Ms Finlay:** Again, Senator, we would agree that the practical operation of this legislation is incredibly important.

**Senator SHOEBRIDGE:** One of the practical solutions you put is the list of approved lawyers who have security clearance. Before you run through a minefield, it's nice to have a map, isn't it? That lawyer will hopefully allow for some of that mapping to be done. I assume that's one of the reasons.

**Ms Finlay:** That's correct.

**Senator SHOEBRIDGE:** Your submission talks about section 67 of the PID Act, and how, if a lawyer has received a legal practitioner disclosure and then discloses it to any another person—I think it's on page 23, paragraph 75—they might face up to two years in prison or a $33,000 penalty. I can imagine circumstances where a solicitor might have somebody come and see them, and they're unsure about whether or not the secrecy provisions are actually activated so they might call counsel. They might seek some assistance from a barrister and may have unwittingly, on my reading of your submission, committed an offence which might see them up for two years in jail by calling the barrister. Is that one potential way this could happen if the barrister's not security cleared?

**Ms Finlay:** I think that is one potential. It's also one of the reasons we do highlight in the written submissions that there needs to be alignment between the different legislative provisions in different acts that deal with these types of situations. We note, for example, the difference with the Criminal Code in relation to the way that these provisions are defined and offences are created. Again, it highlights the need to really focus on ensuring there is alignment and consistency to make sure that the act is focused on practical impact rather than legal technicalities.

**Mr Edgerton:** To that particular technical point that you've made about disclosing to a barrister: it might be carved out with section 67.2, which says that the secrecy provision doesn't apply if the disclosure is for the purpose of providing legal advice or professional assistance. Arguably, if you've got a solicitor who is disclosing to a barrister to that they can get professional advice about the disclosure and it's for the purpose of ultimately providing that advice back to the whistleblower, that secrecy offence might not apply. That's my reading.

**Senator SHOEBRIDGE:** You would hold onto that with both hands, wouldn't you, if you were the solicitor?

One of the things I see as a theme in your submission—and I suppose it comes back to your initial point that our secrecy offences need systemic review because they're a mess and they're all over the place. One of the things that you speak to in a number of the recommendations is that, if you're going to have a criminal penalty and you're going to have an offence, it should be focused on harm rather than some technical source of where the information comes from. It should always have a harm focus. Is that correct?

**Ms Finlay:** Yes.

**Mr Edgerton:** That would be consistent with the amendments that have already been made to the general secrecy offences.

**CHAIR:** All senators have raised in some form the issue in the recommendations that you have made in relation to ongoing secrecy law reform. I understand the Attorney-General's Department is currently conducting a review of secrecy provisions. Can you make it clear for the committee—because we'll be considering as part of our report—what in your view are the further reforms that PID Act should take into account in terms of the intersection of secrecy laws? That review is ongoing at the moment, but, when forming the opinions in our report, we should be aware of the interaction between the two.

**Ms Finlay:** I think that's correct. There are two things to be aware of. First, we don't think that the need for future reform should stop improvements being made now that can be made now. Having said that, there is obviously a need to have regard to the next tranche of reforms and where they might go to ensure underlying consistency and that there is at the end of the day a framework that works in relation to this area of law.

**Mr Edgerton:** I think it's really important, when you're thinking about the scope of protections for whistleblowers, that you also think about the extent of obligations on public servants to keep material secret. The only reason you need the whistleblower protection is that people otherwise have obligations on them not to disclose particular material. Certainly, there are a lot of outstanding recommendations from the Australian Law Reform Commission's review into secrecy laws back in 2009. We're highlighting that these two reforms have to operate together. You need to rationalise the extent of secrecy provisions while you're also thinking about protections for people who are subject to those provisions.

**CHAIR:** The other point you raised as part of your submission and that has been touched on today in your opening statement is around application of the PID Act to parliamentary staff. This is an act or framework which has been set up based on department and agency structures. Why do you consider that it would be appropriate for parliamentary staff? I'm concerned that parliamentary staff do have a different working infrastructure and different reporting lines, and these sit in a different work environment. I wondered if you could step that out for

us, taking into consideration that there is ongoing work around the *Set the standard* report, particularly recommendation 23, which is being permitted by the Minister for Finance.

**Ms Finlay:** Certainly. We would first note that it is a recommendation from the *Set the standard* report that forms the basis of our recommendation to this committee. We say in a broad sense that members of parliament, while they do obviously have key responsibilities in relation to the parliament, also have regular interaction with agencies and broader obligations in terms of the work that they do day to day. It's for that reason that we think the extended protection is important. It takes into account the full extent of the work that's done by members of parliament and the potential for them to come into contact with disclosable conduct. In that sense, we note that the environment isn't entirely closed and that the *Set the standard* recommendation is one that we believe should be followed. We also note—and I believe this is mentioned in the Law Council of Australia's submission—that recently New South Wales's protection has, in fact, been extended to parliamentary staff, so it is something where there is now an example that can be followed.

**CHAIR:** Thank you. That's all we have time for today, unfortunately; I'm sure we could ask you a lot more questions. I want to thank you for your incredibly extensive written submission. It's provided our committee with a lot of food for thought, particularly around recommendations that you've made to improve provisions in the bill. Thank you for taking the time to give us evidence today and to prepare that submission.

**BROWN, Professor AJ, Professor of Public Policy and Law, Griffith University; and Board Member, Transparency International Australia**

**PENDER, Mr Kieran, Senior Lawyer, Human Rights Law Centre [by video link]**

**SHELTON, Mr James, Adviser, Transparency International Australia**

[10:01]

**CHAIR:** Welcome. Thank you for taking the tame to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. Thank you for taking time to give evidence today. I wanted to start by asking whether any of you want to make an opening statement before questions.

**Mr Pender:** I have an opening statement on behalf of the three of us. First, we wanted to thank the committee for inviting us to participate in the inquiry today. I'm joining remotely from the United States and I thank the secretariat for facilitating my virtual attendance. This bill is a worthwhile start, but it demonstrates that we need so much more. Even though it's intended in a first step in a larger process of whistleblower law reform, the shortcomings in this bill raise concerns about a continued piecemeal approach to whistleblower protections based on the process as announced to date. We wish to help ensure that the government and parliament approach this vital reform task with the level of ambition needed to overhaul Australia's federal whistleblower protections into an efficient, coherent and effective regime.

Recent events underscore the importance of effective whistleblowing and whistleblower protection regimes. The ongoing robodebt royal commission points to what happens when public servants do not speak up or are not heard when they do speak up in the face of unethical and unlawful behaviour. Unfortunately, proposed amendments in this bill—if they are not revised before being enacted—may make it less likely, not more likely, that people will have the confidence to speak up and be properly protected if they do.

As members of parliament, you would also be familiar with how often members of the public come to you to enable serious public interest concerns to be aired safely. Just a few weeks ago, Senator David Pocock used parliamentary privilege to air a whistleblower's concerns about environmental wrongdoing by Santos, including that an oil spill by the company led to dead dolphins and which it then, allegedly, conspired to cover up. The fact that whistleblowers feel the need to speak up to parliamentarians like Senator Pocock on matters like these, rather than navigating whistleblowing channels that may be available to them under other laws, demonstrates ongoing shortcomings in Australia's whistleblowing regimes.

Our whistleblowers really deserve nothing less than world-leading supports and protections to enable them to speak up; accessible remedies for repercussions they suffer; and a whistleblower protection authority to oversee and enforce these laws. There is also the need—and, indeed, a huge opportunity—for consistency in these provisions across the public, not-for-profit and private sectors. Presently, Australian whistleblowers face an impenetrable patchwork of protections and, while parts of this bill try to begin addressing the problem, other parts of it would, unfortunately, worsen rather than rectify it.

The Human Rights Law Centre, Transparency International Australia and Griffith University's Centre for Governance and Public Policy welcome the Albanese government's commitment to whistleblowing reform and the support shown by all sides of politics to reform in the past. However, we believe that we have a huge opportunity to realise this commitment in a more effective way. That's why our submission calls on the committee to recommend a clear vision for comprehensive reform delivered through an enhanced, whole-of-government process covering all federal whistleblower legislation to enable this government and this parliament to deliver for Australia's whistleblowers and the public at large. We firmly believe that an enhanced approach is needed to resolve issues of the kind raised by this bill.

On behalf of our three organisations, Professor Brown and I have recently authored a road map for federal reform, which is appended to our submission. We're delighted to be joined today by James Shelton, an adviser to Transparency International Australia. He is one of Australia's most important former whistleblowers and can share an important practical perspective on these issues. Thank you.

**CHAIR:** I'm going to kick off questions and then we'll go to other senators. Thank you for the written submissions that you made. I think they'll be incredibly useful as the committee prepares a report on which provisions in the bill might need to be amended or clarified to make sure that the object of the bill is achieved. I just want to go to that now. There has been a lot of public calling for whistleblower protections to be included in legislation, particularly by Helen Haines MP, who has welcomed the bill. She has made the point that there should be protections in place before the NACC commences operations in mid-2023. Can you outline why

whistleblower reform is urgent and long overdue? And what do you want to see from this committee in terms of provisions we should look at to make sure that the bill achieves that purpose?

**Prof. Brown:** I'm happy to head off on that. I think that all of us—especially those of us who campaigned very hard, over many decades in fact, for the establishment of the National Anti-Corruption Commission—are very supportive of the goal of making sure that there are some improvements, where possible, to the relevant whistleblowing protection laws before the NACC commences. That's a worthy objective, and there are things that can be done which are proposed in this bill. Those are reflected in our submission and perhaps we don't have to spend so much time on them, which will assist with the refinement of the current Public Interest Disclosure Act regime. That's very, very welcome.

One of the key areas of concern in terms of this bill is the issue of the definition and carve-out of 'personal work-related conduct', as it's defined. That will affect things right from the word go. The second is that, given these amendments are intended to trigger protections that will help support the commencement of the National Anti-Corruption Commission, there is a question over whether corruption whistleblowers from within the Public Service will be fully protected directly if they blow the whistle on corruption within their agency that touches either parliament or parliamentary staff. That's reflected in our submission.

I guess the third issue is a broad one, and this is reflected in our opening statement and the first few key points in our submission. The concern at the moment is that there needs to be a process for delivering that whole reform package in a coherent way that will be consistent, transparent and whole of government. To progress these amendments in the absence of that process being more clearly and fully developed in a way that will address all of those things—and currently it's not—is the third big area of concern.

That's why we've suggested that the committee has a crucial role to play in helping the parliament and the government set the agenda for that larger process. In our submission, it needs to be somewhat larger and more enhanced than anything that we've heard from in the debate. It can realistically and very easily be larger and more enhanced, consistent with previous parliamentary inquiries and the recommendations of parliamentary committees et cetera.

**CHAIR:** Thank you. I would like to go to one of the suggestions you made around the definition of 'detriment'. This is one of the things that's come up over a couple of submissions. Why is the proposed change to this definition better than what is currently in place, and what do you think we can do to improve or clarify the understanding for public servants so they understand what their obligations are?

**Prof. Brown:** I'm happy to lead off on that again, and then James might have something to say about the consistency issue. This is the single strongest part of the amendments, as proposed by the government, which is very, very welcome. It's a broader definition of detriment that makes it explicit that not simply workplace related conduct or employment actions are the focus of the type of detriment that whistleblowers may suffer, or often do suffer, and which will then trigger protections under the act—which is the state in the current Public Interest Disclosure Amendment (Review) Bill. The trouble is that is the only focus of the current definition of detriment and reprisal action.

There are two great things about the proposed broader definition of detriment. One is that it's broader and it makes it very clear that all forms of damage, including psychological damage, damage outside the workplace et cetera, are included, which sends a great message to public servants or, indeed, anybody who's covered by the legislation, that there isn't a question as to what kind of detriment might trigger the protections. That's the kind of simplicity and comprehensiveness that you need to have. The other great thing about this provision is that it directly replicates the definition of detriment in the whistleblower protection sections of the Corporations Act. It is the same as the definition of detriment that covers private sector corporate, banking, superannuation, finance et cetera, employees. That is deliberate; that was recommended. That consistency has enormous value for exactly the same reasons. Do you want to chime in on that, James?

**Mr Shelton:** Yes. It's a pleasure to be here today. I'm here to support Professor Brown on his submission, because I've been through the journey as a whistleblower. Eleven years of my life was taken up by that. I've come out at the end, and I have the battle scars but I'm a reasonably happy and healthy person who's come through it. My goodness, what a battle that was! The inconsistencies that I've seen, highlighted in this submission, must be addressed here and now. We can't have someone who is trying to do the right thing, expose wrongdoing or stop the bad guys doing whatever they're doing, fall through the cracks because of a technicality I didn't have any of those protections myself. I had to protect and support myself through what I went through. But this is the chance and this is the time to do this right. I strongly recommend this submission and some others to you. But consistency and making sure that whatever the whistleblower—and I can't speak for all whistleblowers; I can only speak for myself. If they're speaking up to put on the public agenda something that's criminal, corrupt or abusive,

then support them and help them get through this, and they might come out the other side and have a better result from it. Thank you.

**CHAIR:** Thank you. I will hand the call over to the deputy chair. I might have some questions at the end.

**Senator SCARR:** At the outset, can I give my deep respect to Professor Brown and also to Mr Pender for your advocacy in this respect. Mr Shelton, I want to give you an elevated sense of recognition. I used to use your example in training I gave to senior executives in the listed public company I was general counsel and company secretary of. I used to point your example as something we should all admire and follow. I think that your contribution has made a difference not just in an Australian context but also in an international context, as a lot of the corruption you unveiled through your whistleblowing, at great personal cost, related to corrupt practices in other countries. I think you did a great service to both the people of Australia and the people of South-East Asia in particular. So thank you very much for everything you've done.

I've got three areas of questions. The first relates to this vexed definition of 'personal work-related conduct'. Certainly, based on my experience—and Senator Shoebridge touched on this—there is quite often an intertwining of the matter which is the disclosable conduct, to use the language of the act, that falls within that realm and what the potential whistleblower is going through in terms of their performance management et cetera. If they've raised concerns internally, questioned issues, maybe in team meetings et cetera, they may be considered not to be a team player—that maybe they've got a wrong focus; they're going outside their bailiwick in terms of their roles and responsibilities. This leads to performance management issues and potential bullying. But at the same time there are these issues relating to disclosable conduct.

So I am concerned about the way that's being treated in this bill, and how you draw the demarcation between something which solely relates to personal work conduct and something where there is a bona fide matter which is disclosable conduct but it has attributes, or it's entwined with, personal work-related conduct. How do we navigate that complicated issue?

**Prof. Brown:** I'm happy to lead off, again, on that, and then James or Kieran may well be able to expand on it. I think the key concept is the one in the Moss review where it said that solely workplace-related grievances don't need to trigger the protections and the arrangements under these kinds of public interest disclosure protections, the operative word being 'solely'. The trouble with the way in which this provision has been drafted and the trouble, to a lesser degree but still to a significant degree, with the way the Corporations Act equivalent provision has been drafted is that that concept of 'solely' does not come through.

On a really technical analysis of the Corporations Act provision, it actually is there, but only on a very technical and analysis, and it is consistently misinterpreted in the private sector, and I think ASIC and those responsible for trying to administer that will tell you that. They're constantly battling exactly the problem that you've just described, Senator Scarr, because the message that solely workplace-related grievances don't trigger the protections is lost, because anything that has a whiff of a workplace related grievance is very often naturally, inadvertently or intentionally pushed down the wrong type of track for its resolution.

The problem with this bill is that, on a technical analysis, it doesn't even come through in law, in my interpretation. It certainly does not come through in terms of clarity to anybody using the legislation from a corporate organisation or public sector management or employee—that is, a whistleblower perspective. In fact, I think the more that we've looked at the provision, the more problems we've seen in it, because, in effect, its legal consequence appears to be that it wouldn't matter if it was corruption of the kind that James reported if there was also a workplace conflict involved, which—as you've rightly said, and we have the statistics from the research to confirm—in a large majority of public interest disclosure cases, there will be. In those circumstances, then, under the drafting as in this bill, not only is it highly likely that it'll be misinterpreted and pushed down the wrong track, but, in order to get it back on the right track, it has to pass an additional test of significance to the agency over and above the definition of corrupt conduct, which should already be applying if it's corrupt conduct. So in many ways, in our interpretation, it really significantly has the prospect of making life a lot worse in terms of the proper application of the scheme.

**Senator SCARR:** That's my concern, Professor Brown. We've got limited time, but there are a few issues I want to cover here. You raised the issue of the exemptions and how they're phrased. Perhaps just for the *Hansard* record, I'll state that you've got this definition of disclosable conduct. You then have an exclusion of personal work-related conduct, but you then have exemptions from the exclusion of personal work-related conduct, which is conduct that 'is of such a significant nature that it would undermine public confidence in an agency' or agencies 'or has other significant implications for an agency' or agencies. I'm looking at those words as someone who's been involved in the law since the early nineties, and I'm struggling to work out how someone in the position of a potential whistleblower—and even, for that matter, someone who has the official capacity to determine whether

or not that exemption to the exclusion is triggered—can work out if something is such a significant matter that it would undermine public confidence in an agency.

Just to give you one example—I was thinking about this—it could well be that the leader of an organisation, the chief executive officer, is bullying staff in such a way that they determine, 'I'm not going to report bad news up the chain,' right? So the bad news, the information that's required and needs to be acted on by policymakers, say, Senate committees or whatever, is not percolating up through the system as it should. And, if that one example of bullying by someone in a senior leadership position is actually totemic of a toxic culture in the organisation, which means the organisation is not operating as it should be, that has significant public ramifications. But if you looked at it just narrowly, you could say, 'All it is is a single issue of personal work-related conduct.' Isn't that a reasonable exposition of why we have to be careful in terms of this definition, the exclusion and then the exemptions?

**Prof. Brown:** Senator, I'd say it's more than reasonable. I'd say it's 100 per cent correct.

**Senator SCARR:** Okay. I want to move to my—

**Mr Pender:** I might just briefly expand on that problem and then offer a potential short-term solution. I think your example is a very good one. Another that I'm very concerned about—if you look at the explanatory notes within the proposed 29A, conduct related to interpersonal conflict is one, and it provides, 'including, but not limited to, bullying or harassment.' Even though harassment—sexual harassment, and harassment based on discriminatory attributes—is unlawful under discrimination law, we have the very real possibility that someone reporting sexual harassment, whether a target of the conduct or a bystander, might find themselves not protected by these provisions. So, if you go to the exemption of conduct that 'is of such a significant nature that it would undermine public confidence', I think that would then become a very discretionary question. Some officials may think that a single incident of harassment within an agency has significant implications; others might not. It's going to be extremely difficult, if this amendment is enacted, for a potential whistleblower to know whether or not they're protected.

In our submission, we provide a number of attributes that we say go to an improved definition, but I think, even as a short-term measure, mirroring the current approach of the Corporations Act to a personal workplace grievance carve-out is preferable to what is proposed. We say that the Corporations Act provision is not perfect, but it is better than what's currently proposed. For all of the reasons we've just discussed with the chair, as to the desirability of consistency, we think that mirroring the Corporation Act's approach as a starting point and then seeking to address all of it as a comprehensive second phase of reform would be preferable to what is proposed here.

**Senator SCARR:** Okay, understood. I'll move quickly to my second topic, which is the utility of a whistleblower protection authority. Mr Shelton, in trying to put myself in your shoes—which is very difficult to do—it seems to me that someone in your position as a potential whistleblower is standing at the entrance of an extraordinarily complicated legislative maze.

**Mr Shelton:** Yes.

**Senator SCARR:** You enter that maze, and there are inclusions, exclusions, defined terms, undefined terms and statutory cross-references. It's like you're trying to navigate the maze while solving a cryptic crossword puzzle. At the same time, you've got the personal pressure of what it means for you professionally and financially, and what it means for your family. And, at the same time, you've got the potential threat of reprisal action, right?

**Mr Shelton:** Yes.

**Senator SCARR:** While I was thinking about that situation—and Senator Shoebridge gave the analogy of someone having a map to guide them through a minefield, which is very evocative—I was also thinking about the potential utility of a whistleblower protection authority. It can potentially act as a guide, to provide guidance in navigating that maze. It can provide you with support, whether that's mental support or collegiate support. It can also potentially provide you with protection so that, in the event that you are subject to potential reprisal action, it can actually take the lead in assisting you to go to court et cetera to get remedies, because, in going to court, I'm not sure how an individual whistleblower could effectively translate the rights in the paper to the rights in practice, especially if you're part of a large organisation. There's such a disparity in power.

Also, it seems to me that the mere presence of that authority would act as a handbrake or a potential check and balance on the organisation that's the subject of disclosable conduct. I'm interested in your thoughts about the need for a whistleblower protection authority in that context, based on your experience.

**Mr Shelton:** Indeed, and I agree 100 per cent with what you've just said. Just briefly, for my experience there was no whistleblower protection authority. I had to get legal advice at $600 an hour each time I met the AFP or

did a witness statement. When it finally went to court, I was summonsed to appear as a witness, had to wait out the front of the court and then was cross-examined by QCs for two days. There was no path or guide; I did it all because I was determined to get this result.

An independent whistleblower protection authority, which could provide a guide, a way forward and a pathway on what you will experience, what's going to come up and what you will feel, and also provide some support services, would have made the world of difference to me. It's too late for me, but, for others who come after, yes—100 per cent—there needs to be an independent whistleblower protection authority that covers both the private and public sectors.

**Senator SCARR:** Chair, Senator Shoebridge has a supplementary question on the question I just asked. I'd like to maintain the call, but Senator Shoebridge can ask his supplementary question.

**CHAIR:** You will have to have to hand the call over soon.

**Senator SHOEBRIDGE:** Just on that, James, when you have a look at a number of whistleblowers whose substantive calls have proven to be correct about unlawful conduct and gross abuse of administrative powers but, as we speak, they're actually being criminally prosecuted by the same government—I can think of a number right at the moment—as someone who's been a whistleblower yourself, does that emphasise the need to have some substantial government agency on their side?

**Mr Shelton:** I think it does. Having that removed from the executive government, to have an independent authority make those decisions, is a much better, much fairer system to have. I can't comment directly on each of those cases because I'm not across them totally, but I certainly know that if it is proven that whatever you're disclosing does stack up to be a genuine claim, then how you are then prosecuted for doing so is beyond me.

**Senator SHOEBRIDGE:** If you think back to your mindset at the time, when you had to go out and blow the whistle—you had no institutional support, pretty much only the lawyer you could afford, basically—if you'd seen at the same time in the media a bunch of other whistleblowers facing criminal prosecution and years in jail, what impact, looking back, do you think that would have had on your decisions?

**Mr Shelton:** I knew when I started out that the history of whistleblowers in Australia was not a good one. It's getting better, and I am impressed by some of the changes that have been made and the National Anti-Corruption Commission, but, yes, if you see someone who's going down a path that you're considering and you see the pain and suffering they go through daily, it's most definitely going to put you off. Of course it would.

**Senator SCARR:** Professor Brown, having that sort of independent authority could also be of assistance to authorised officers et cetera who are trying to make decisions with respect to how to interpret some of the provisions we've been referring to. It actually provides them an avenue to contact someone and get a guide as to: 'Well, what do you think? Do you think this is something that should be pursued or not?' It can assist them, because it can be, I imagine, very difficult for those officers who get reports of disclosable conduct—and it could involve people they know, people they've worked with—to know what the right thing to do is. So, it could be an important source of advice and guidance for them. Is that correct?

**Prof. Brown:** That is correct. Under the existing whistleblowing schemes there is an agency for the PID Act, it's the Commonwealth Ombudsman who can and does do a significant amount of that work—or attempts to within limited resources. What is very different about a whistleblower protection authority concept is that it would not only support the effective administration of a scheme as an administrative exercise, which is fundamentally what the ombudsman does, but it would cut to the chase in terms having a responsibility to be the support and guide to make sure that whistleblowers don't fall through the cracks, so that it isn't just an administrative maze.

Even more importantly, they would be able to be part of those decisions in terms of significant government decisions that would have an adverse impact on the whistleblower. They would have a direct role in, where necessary, knocking those types of decisions back on track in terms of what's in the public interest. Even more importantly, they would set the standard for which cases are the ones that the whistleblower protection authority itself will take on, either recommending remedies in the face of detrimental action or, indeed, remedies being pursued through the courts or through Fair Work Australia or whatever. So, it would set the standard for what is unacceptable detrimental action, acts or omissions; what are breaches of duties to whistleblowers because it would cut to the chase by setting the standard by saying, 'These are the ones we're going to pursue and get a result on.' That helps all agencies get the message and get it right and supports the good people in existing agencies who are already trying to do the right thing.

**Senator SCARR:** Exactly. This is my last question, Chair. It seems to me, based on what I've seen of what the government is proposing at the moment, the ambit of a potential whistleblower protection authority—I might be

incorrect on this, but this is on the basis of what I've seen—is something limited to the public sector. We have potential whistleblowers conduct which should be the subject of a blowing of the whistle in the public sector, the private sector, all across civic society. This begs the question, in my mind: do you see a potential authority having a remit broader than just the public sector, and what's the utility of that?

**Prof. Brown:** I think James has already summarised the case for that. Kieran, you go.

**Mr Pender:** It's artificial to distinguish too narrowly between different categories—public sector, private sector, non-profit sector. We see a lot of overlap. James' case is a good example of the overlap and intersection between public sector and private sector whistleblowing. We see a lot of that. I'm not sure if the government has yet clarified its position—I think we're awaiting a discussion paper that might provide greater clarity—but our very strong position would be that the whistleblower protection authority or commissioner needs to have jurisdiction over all federal whistleblowing laws and all federal whistleblowers.

We are seeing that this is the international trend. I'm in the United States at the moment. I'm going to Washington DC this coming week. I'm going to meet with the US equivalent. In fact in the US they have two whistleblower protection authorities. They have the Office of Special Counsel, which is an independent statutory body, and then, within parliament, they have the Office of Whistleblower Ombuds that helps members of Congress and senators interact on committees, interact and deal with whistleblowers. In the Netherlands there's the 'house of the whistleblower', which I know gave evidence to the NACC legislation committee. In Slovakia there's a whistleblowing office. In the UK there has been a strong push for an office of the whistleblower. International best practice is moving inevitably towards a whistleblower protection authority being a central part of whistleblowing schemes, and Australia risk being left behind if we don't have a whistleblower protection authority operational soon.

**Prof. Brown:** I'll just round off and give a direct answer to Senator Scarr's question. The parliamentary committee in 2017, the Joint Committee on Corporations and Financial Services, recommended for the federal government a whistleblower protection authority that would enforce both public sector and private sector whistleblower protections for the reasons you say. James has just endorsed that concept.

The Labor Party went to the election in 2019 promising a whistleblower protection authority to implement that recommendation across both sectors. It's a key opportunity for Australia because our legal regime lends itself towards having a whistleblower protection authority that can cover both sectors because our workplace relations law at a federal level is comprehensive now and can cover both sectors et cetera. That's not the situation in countries like the United States, where whistleblower protections end up littered across perhaps 100 different pieces of legislation. We can go in the reverse direction and move from the five—we have at least five—federal whistleblowing regimes we have now and get it down to one or two administered and enforced by the same whistleblower protection agency.

And you're quite correct: in our correspondence with the government, the only indication we have so far is that the whistleblower protection authority is being considered in the context of reform of the public sector whistleblower regime. That's one of the reasons why we think some clarity around that and some clarity about a process that will ensure that we do it properly is critical now to establish that. Otherwise, we're going to end up going down various tracks—and this is the guts of our submission—that replicate or perpetuate a piecemeal approach, rather than taking the opportunity to do it comprehensively. Thank you, Madam Chair.

**CHAIR:** Thanks. Senator Shoebridge, I have a follow-up question and then I'll hand the call to you for the remainder of the time. Just on the public whistleblower authority, the government has committed to releasing for public consultation, as you say, a discussion paper on the whistleblower protection commissioner or authority as part of the second stage of reforms. Perhaps you could provide to the committee, on notice, what you see are the priority issues the discussion paper should raise. What are some of the things that we're looking for? I know we've covered a lot of them over the course of this discussion but taking that on notice would be helpful. Thank you. Senator Shoebridge, you have the call.

**Senator SHOEBRIDGE:** Thanks so much, Chair. And thanks to the three of you for all the work you and your organisations have done. When we're talking about a comprehensive whistleblower protection commission, Mr Shelton, you might know of instances where corporate corruption and its engagement with public authorities bleed seamlessly into each other. The conduct of a corporation which may be seeking to corrupt or improperly influence a government agency in Australia might also have a parallel with that corporation corruptly trying to influence agencies, foreign governments or the like. Do you want to speak about how hard it would be to put boundaries around a whistleblower commission if it were only dealing with public agencies?

**Mr Shelton:** Sure. To give you my example: I worked for Securency International Pty Ltd, a private company that was majority owned by the Reserve Bank of Australia and minority owned by a British plastics firm. So I was in the commercial sector when I went to the Federal Police. I went to them quite a few times, and they didn't act until it was on *Four Corners* and in the *Age*. They told me they weren't going to investigate it until they received a referral. I said, 'I've referred it to you several times,' but when the RBA referred it, they instantly got into a slow pace. I was stuck in that world of: I worked for a private company, but we dealt with central banks all around South-East Asia, Central America and Africa. The results are quite clear. There was serious criminal activity going on. But there is a crossover, and there must be lots of examples of that today, where there's a private and public sector crossover.

**Senator SHOEBRIDGE:** If there had been a public sector whistleblower available to you, you might well have knocked on the door, and the answer might have been, 'Thanks, Mr Shelton, but there's no help for you here.'

**Mr Shelton:** Potentially, yes. I guess that's always the case. That's why, when those systems fail, investigative journalists come to the fore. If it weren't for Nick McKenzie and Richard Baker, I wouldn't be sitting here today, and no-one would know about it. I prefer not to go down that path; I prefer to go to an authority that can provide you with support and assistance. It's easy to say that, but it's hard to do.

**Senator SHOEBRIDGE:** Could I go back to the carve-out for personal work-related conduct. We had a discussion with the earlier witnesses from the Australian Human Rights Commission, and they supported ensuring that the Moss review is implemented in its own terms, effectively. They acknowledged that this bill is not consistent with the Moss review when it comes to that carve-out. Is it as simple as putting 'solely' or 'only' into 29A: 'solely work conduct that is either or both'? Is it as simple a drafting exercise as that?

**Prof. Brown:** If only it were. That would certainly be the major step in the right direction for both this filter—it shouldn't even be described as a carve-out—and the equivalent filter in the Corporations Act. Section 31 of the PID Act has a filter on matters that are disagreements with government policy or government expenditure, and it uses the world 'only'. That is extremely helpful. I'm not aware of massive problems with the interpretation of that provision, but if there are problems—and there could well be a case on foot at the moment that raises that—then it's easy enough to be interpreted and easy enough to establish if it needs to be fixed to achieve the intention. So you're exactly right in that that fundamental concept is not transmitted by what's drafted currently. It's nakedly not transmitted by the way in which the current provision has been drafted, nor do the terms 'solely' or 'only' appear in the Corporations Act provisions, and that's its key problem.

We're going back to what Mr Pender said earlier. Given that the government understandably wants to try and start operationalising this filter in this bill because it was a key recommendation of the Moss review, there are really three options. One is to leave the drafting as it currently is, which would be a huge mistake. The second is to fix up the wording so that it means something closer to the intention, but it would still be different to the Corporations Act and quite possibly still very confusing and difficult to interpret, in which case the government would have to come back to it again anyway. The third option, which could well be the fastest option, would be to do what Kieran already indicated, which is to not do what they're planning to do currently with the drafting, but simply replicate the Corporations Act provisions word for word in the PID Act as an interim exercise. Then at least they're consistent, and parliament could come back and figure out a simplified way of stating the test—the filter—in both pieces of legislation, while it's considering how to simplify the entirety of the regimes.

That's what's led us to think that, given the time frame, the best option, from a practical point of view, is probably that third option—to just replicate the Corporations Act provisions. They have their own defects, but at least then they're consistent and at least we've got another part of the whistleblowing regime that, like the definition of 'detriment', is at least on track for consistency. We can keep going from there.

**Senator SHOEBRIDGE:** I might go to you, Mr Pender. Your submission talks about a number of options. One is to expressly use language that makes it clear that matters are solely or only personal work-related; that's one option. You also talk about adopting the more precise language that's found in part 9.4AAA of the Corporations Act. Do you want to talk us through those? Are they alternatives? Are they two sides of the same coin?

**Mr Pender:** Ideally, we'd adopt all of those points. They're not alternatives; they all go to a clearer definition. We need to remember that ultimately these laws need to be accessible to whistleblowers: people like James who see wrongdoing at work. One of the first things they're going to do, particularly in the absence at the moment of a whistleblower protection authority, and in the absence and the very limited legal profession—there are very few lawyers with expertise in private practice, and then you need to pay those lawyers. The Human Rights Law Centre is in the process of establishing a whistleblower project to provide whistleblowers with legal advice, but even then

the capacity will be limited. We need these provisions to make sense to whistleblowers who pick up this act and read it.

The Federal Court very clearly, in a case a few years ago, condemned the PID Act for being impenetrable, bureaucratic et cetera. We need to fix it. Recommendation 5 of our submission makes a number of points—the language of 'solely' or 'only', as comes through from the Moss review; 'grievance'; and then altering the current exemptions as well. As AJ says, at the moment, focusing on 'only' in that other provision, in relation to policy disagreement, seems to be working reasonably enough. The problem is that that's a more complicated exercise.

We agree with the government that it is extremely desirable to have some of these recommendations implemented before the NACC is operational. Although, in a perfect world, we would get this right once and for all, if that's not going to happen between now and when this act is passed by parliament, I think a better short-term solution is that we fix it by achieving consistency with the Corporations Act, and then we come back for phase 2 in the months ahead.

**Senator SHOEBRIDGE:** I can hear the Attorney-General's Department, when we ask them about how 29A would work in practice saying, 'You don't need to worry about that because there's a carve-out of the exclusion if the conduct is victimisation for the purposes of sections 19 and 13 of the act.' I can already hear them saying that. Can you take me through how hard it is to prove conduct for the purposes of sections 13 and 19—getting into the mind of somebody taking detrimental action?

**Mr Pender:** Certainly, and AJ might want to add to this. One of the problems at the moment is that there's not a reverse onus provision. In the Corporations Act there's a reverse onus that makes it a lot easier for whistleblowers to prove victimisation and to prove detriment reprisal. We don't have that in the PID Act at the moment. That is an important change.

There has not been a single successful reprisal case brought in the almost 10 years of operation of the PID Act so far. The Human Rights Law Centre has looked at every single whistleblowing case in Australia ever. They very rarely succeed; there hasn't been a single successful one under the PID Act. So, if we make it harder and not easier to qualify for these provisions, what it will mean is that whistleblowers who think they're doing the right thing, as in the cases of Richard Boyle and David McBride—albeit in a different context, I appreciate—and who step through this complex act will get to the other side and find they're not protected—whether, like David McBride and Richard Boyle, they find themselves on trial or they find themselves dismissed from their employment and seeking to bring reprisal litigation—if they haven't jumped through all of these hoops in quite the right way or if their disclosure has an element of a personal grievance. As Professor Brown says, his research shows extremely clearly that that it is the most common type of thing blended with whistleblowing. Really the crux of our concern is that this provision doesn't adequately deal with blended disclosures.

**Senator SHOEBRIDGE:** Professor Brown, one of the concerns I have is how on earth you would prove that the reprisal action taken against a whistleblower, who might be sacked or demoted or have their work taken off them, was taken for a reason that involves them whistleblowing. How do you get into the mind of the manager to prove that?

**Prof. Brown:** Senator Shoebridge, you're pointing to a very fundamental problem with the legal basis of the basic protections that are provided by the act. This bill goes nowhere near updating those basic protections, the access to remedies, and there are many, many other fundamental issues about the nature of the protections that this bill doesn't go near and is not going to go near. You're pointing to some of the consequences of this workplace related filter being so important and also just how much worse it could make things if it's not got right.

In terms of the fundamental issue, I simply refer the committee to section 6, page 13, of our report *Protecting Australia's whistleblowers: the federal roadmap*. It's one of the many fundamental issues not dealt with by this bill. I think the key thing about this workplace related conduct filter is that it's true that if it did satisfy, with great difficulty, the provable definition of reprisal then, yes, obviously if it were workplace related conduct then it would trigger. One of the problems, as Senator Scarr outlined, is the fact that, because these things become so mixed up in the first place, it's the classification at the beginning that determines what track it goes down, and you can't split them very often and say, 'Well, we'll deal with the foreign bribery over here but we'll deal with the workplace conflict over there,' because the foreign bribery will be dismissed and the workplace conflict will be found substantiated, and the whistleblower gets sacked legitimately, which is a very standard outcome.

Getting back to the point, the other difficulty about this act—and I notice that the Commonwealth Ombudsman's submission even points out that they don't believe that the effect of this act will be what the government is trying to achieve operationally—is that additional test of significance. If it's of such significance for the agency then, yes, it doesn't matter if it's workplace related conflict or conduct; it will still be back in. Not

only is that really unclear and very hard to administer and likely to lead to a lot of inconsistency, but it actually creates an additional threshold, as I was saying before. So, if there's workplace related conduct involved and there's corruption, serious wrongdoing or maladministration involved, it appears to me that, for it to stay as a public interest disclosure, it effectively has to satisfy this additional test of significance. So it's not just any corruption that would trigger a public interest disclosure; if there's workplace conduct involved as well then it would have to be corruption that is really significant for the agency. That's the way that some agencies would be likely to logically try to interpret it.

**Senator SHOEBRIDGE:** Mr Shelton, what do you think about the prospect of sitting down for hours and hours with your $600-an-hour lawyer as a whistleblower working your way through this legal minefield?

**Mr Shelton:** That would just be awful. I'm struggling to understand the technical detail of this myself, and I've been through a similar process. I don't know how you, as someone who's genuinely trying to do the right thing here, can rely on a very expensive lawyer, to whom you will pay your own money, to give you advice. You've probably already been sacked, so you don't have a lot of money to spare, by the way.

**Senator SHOEBRIDGE:** Unpicking this problem shows the deeper, systemic problems in our whistleblowing laws: the absence of a reverse onus and the impossibility of understanding how they interact with secrecy laws and the like. Is this part of what forms your No. 1 recommendation here, which is that the parliament needs to get onto this, not just leave it to the executive but establish a select committee that helps drive this reform? Is that part of what informs your No. 1 recommendation?

**Prof. Brown:** It's certainly part of it. I guess what we see here is an opportunity, a once-in-a-lifetime opportunity, for Australia and the Commonwealth parliament to take all of the previous parliamentary committees, all of the thinking, all of the experience, all of the different regimes, in order to do this competitively and systematically. Currently, although it's extremely welcome that this government has made some commitments in terms of a discussion paper on a whistleblower protection authority, in terms of trying to clean up the public sector whistleblowing regime, this is the opportunity to do the whole job properly, and it would be incredibly historic. It would be incredibly important on a world stage, in terms of setting the standard for how to approach these things, and it has a chance of completely changing the game in terms of outcomes.

The key problem with any process that is less than a comprehensive whole-of-government process that is fully transparent is that it will end up just somehow falling short and continuing a piecemeal approach. In the past, in the 2017 parliamentary joint committee inquiry, the parliament really provided a great forum for setting the standard for engaging with stakeholders, for setting the first principles, and it strikes me that five years, getting on for six years since that report, and seven years since the Moss review, the opportunity is there for the parliament to set that whole picture.

There are other ways that the government might pursue a process that would ensure that this isn't done in a piecemeal, episodic way, and really that's up to the government. But certainly, based on where we currently stand, one option—one very proven option—would be a very well resourced high-level parliamentary committee. But other things—as the chair said, the government's already starting some work on this—in terms of discussion of a whistleblower protection authority, and resetting that process in order to be more transparent and more explicit and to cover exactly what needs to be covered, would also start to provide that confidence.

**CHAIR:** Senator Shoebridge, we're getting to the end of our time. Do you have one more question? Or, Mr Pender, did you want to add to that?

**Mr Pender:** I briefly wanted to add that I believe that the discussion we've had today is indicative of the number of issues, and the overlap of the public and private sector regimes. That's a statutory review of the private sector whistleblowing regimes coming up next year. I think the concern that Professor Brown, Mr Shelton and I share is that, if we keep going forward one at a time and then leapfrogging between these different regimes, we're continue to see these issues. As the discussion we've had today demonstrates, it's a really good step forward to link the definition of 'detriment' across the two regimes. There are outstanding issues around the definition of personal grievance. We have this—as AJ said—once-in-a-lifetime opportunity to do this comprehensively and to get it right. The Attorney-General has long been a champion of whistleblowing and whistleblower protections. The Attorney-General chaired the parliamentary committee that led to the PID Act and introduced the PID Act as Attorney-General in 2013. It's really fantastic to see the government's commitment to stronger whistleblower protections, but we need to get this right because this is the opportunity to do so.

**Senator SHOEBRIDGE:** I'd agree with your observation that hopefully we have an Attorney here who is willing to see long-term structural reform. One of your key recommendations from the road map report was to ensure that we have a no-wrong-door approach to whistleblowing, and this bill seems to put a whole lot of

additional wrong doors in the place. It's more like an episode in *Alice in Borderland*, a Japanese drama, where scares the willies out of you if you go through the wrong door. This seems to be putting a whole bunch of wrong doors in the system. Do you agree, Mr Pender?

**Mr Pender:** I think that's a real concern, as our submission identifies. Adding these additional roadblocks, particularly the complexity we've all spoken to in terms of personal grievance or work-related conduct, will make it harder, not easier, for people to blow the whistle. As I said in my opening remarks, recent incidents such as the robodebt royal commission and whistleblowers using members of parliament, such as Andrew Wilkie MP and Senator David Pocock, demonstrate the need to make it easier, not harder, to blow the whistle safely and lawfully.

**CHAIR:** We'll have leave it there, Senator Shoebridge. We've got to move on to other witnesses. Do you have any other questions?

**Senator SHOEBRIDGE:** No, I note the time, Chair.

**CHAIR:** Thank you very much; I appreciate that. Thank you to all of our witnesses for giving evidence today. I think there might've been just one question on notice, and we'll give you the time frame to get that back to the committee. We do have a report we need to draft, so we'd appreciate your assistance in that.

**DROPPERT, Mr Graham, SC, Immediate Past National President, Australian Lawyers Alliance [by video link]**

**SCHIMMEL, Mr Julian, Principal Lawyer, Maurice Blackburn [by video link]**

**WHEALY, the Hon. Anthony, KC, Chair, Centre for Public Integrity [by video link]**

**WILLIAMS, Dr Catherine, Research Director, Centre for Public Integrity [by video link]**

[11:00]

**CHAIR:** I now welcome representatives from Maurice Blackburn Lawyers, the Australian Lawyers Alliance and the Centre for Public Integrity. Thank you very much for taking the time to speak to the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. We're going to start questions shortly, but do any of you have a brief opening statement that you'd like to make to the committee?

**Mr Droppert:** I have a brief opening statement, if that's of assistance. I appear on behalf of the president, Genevieve Henderson. The Australian Lawyers Alliance is a national association dedicated to the interests of the rights of the individual and promoting justice and freedom. The ALA welcomes the opportunity to have input on the committee's inquiry into the bill. In particular I join you from the lands of the Wajuk Noongar people in Western Australia, a block from the mighty Derbarl Yerrigan river, and I pay respect to elders past and present.

The ALA strongly believes that the protection of whistleblowers is essential to promoting integrity, accountability and trust in both public and non-public institutions. Many whistleblowers in the past have risked their health and their careers in acting as guardians of good governance and exposers of corruption and abuse. We all owe them an incalculable debt.

The ALA's written submissions endorsed reforms to further support and protect whistleblowers, supported the creation of a whistleblower protection authority and/or commissioner, set out concerns as to the exclusion of those employed under the Members of Parliament (Staff) Act from accessing whistleblower protections under the PID Act, expressed reservations as to the definition of 'disclosable conduct' and identified the urgent need to resolve inconsistencies within the broader whistleblower protections framework.

In my opening remarks, I wish to highlight the fundamental need to support and protect whistleblowers. There have been references to the 2016 Moss review, but it's clear that, in that review, Philip Moss identified that few respondents reported feeling well supported or confident in their public interest disclosures and that individuals who made such disclosures reported adverse long-term health and career effects. The act of blowing the whistle often requires great courage. Support and protection must be the priority. ALA welcomes the proposed addition of access to legal advice for whistleblowers. There should never be reprisals for seeking or providing legal advice.

The ALA also supports the creation of a positive duty to support whistleblowers and ongoing training and education for public officials. There must be a cultural shift in favour of protection and support. As I have mentioned in relation to the whistleblower protection authority or commissioner, we note that, in introducing the bill, the Attorney-General, the Hon. Mark Dreyfus KC, has committed to consulting widely. The ALA welcomes this commitment and contends that it must be addressed urgently.

In conclusion, the ALA notes that a number of royal commissions have revealed systemic abuse in aged care and disability care, but we should not have to rely on such expensive options to identify when things are going wrong. We are left with the thought that the failure in integrity in government decision-making, identified through the robodebt inquiry, could have been avoided with stronger whistleblower protection. We hope that comprehensive and powerful whistleblower protections will encourage and protect those who know what is going on and will call out abuse, corruption and illegal conduct. It will make for a better and safer society. We trust our written submissions, of course, are of assistance to the committee.

**CHAIR:** Thank you very much. I can assure you that your written submissions are very helpful and have helped a lot of us frame the questions we'll be asking today. Maurice Blackburn, do you have an opening statement?

**Mr Schimmel:** Yes, we do. For the record, Maurice Blackburn is a plaintiff law firm, with 34 offices throughout all mainland states and territories. Our interest in the whistleblower issue is essentially twofold. Firstly, my colleagues in the employment and industrial law area provide advice and legal representation to whistleblowers. Secondly, in my area of practice, class actions, we seek redress for individuals and companies who have been affected by corporate misconduct. Obviously, whistleblowers can be a critical way of exposing corporate misconduct, which is the first step towards seeking redress.

As we noted in our submission, Maurice Blackburn congratulates the government on the development of this important bill and its ongoing commitment to improving protections for whistleblowers. In our submission, we said that the bill represents a really positive step in improving appropriate protections for whistleblowers, both as disclosers and as witnesses. In our written submission, we've made a few suggestions about how the current bill might be able to be improved even more. I'm happy to talk through those in more detail a little later. These suggestions are, however—and I want to emphasise this—at the margins, and overall we think the provisions of the bill are appropriate and will make the PID Act even better.

We also welcome the indications from the Attorney-General during his second reading speech that the bill represents an important first step in a broader and long-overdue reform agenda relating to whistleblowers. There are a couple of areas in particular where we'd like to see consideration of further reforms. The first—and I think this was alluded to by the Australian Lawyers Alliance—is in relation to tackling private-sector whistleblower reforms in particular. As the parliamentary joint committee noted in its 2017 report, an analysis of whistleblower protections across G20 countries in 2014 found that Australia's laws were totally lacking in the private sector, so we believe it's important that focus soon turns to whistleblower protections in the private sector. In my view an appropriate starting point would be to revisit the 2017 PJC report and its recommendations to rationalise what we think is inadequate and inconsistent private-sector whistleblower legislation that currently exists.

The second area where we'd like to see some reform is in relation to one of the consequences of information coming to light from whistleblowers. Protecting whistleblowers and providing a safe and workable process for disclosure of wrongdoing, as will exist in the public sector if the bill is passed, is critical. But when wrongdoing is exposed often there is a victim of that conduct, someone who has been harmed in one way or another, so the next step in whistleblower reform that we'd like to see, both in the public sector and in the private sector, is removing the obstacles that currently exist and stand in the way of victims of misconduct being able to speak to whistleblowers and use the important information that they reveal in litigation seeking redress for any consequences of misconduct. We, again, hope that our written submission has been helpful for the committee, and we're happy to answer any further questions about the contents of our submission.

**CHAIR:** Thanks very much. Dr Williams, do you have an opening statement.

**Dr Williams:** I might invite Anthony Whealy KC, as our chair, to make that statement.

**Mr Whealy:** Thanks very much. I apologise for being late. I was wrestling with the difficulties of Webex, and I was rather like a naughty schoolboy who rushes in to take his desk and sees that the teacher is not very pleased. Please forgive me.

**CHAIR:** You're forgiven, Mr Whealy!

**Mr Whealy:** I'm pleased to say I'll be very brief in this opening statement. The Centre for Public Integrity very much appreciates the enormous research and work done by Griffith University, AJ Brown, Transparency International and Kieran Pender. We've looked at their submissions, and we would very respectfully adopt the detail of many of those. In our submission we've really confined ourselves to one point, and that is that, while we welcome the Public Interest Disclosure Amendment (Review) Bill, we do think that there is the one reform, which others have also addressed, and that is the need for an independent whistleblower protection authority.

As part of my post-judicial career, I had the opportunity to be an ICAC commissioner for a year or so. I saw there how important it is to have a proper relationship between an anticorruption agency and any whistleblowers who come forward with serious allegations of corruption. I have also noticed since that time, over the last seven or eight years, that one of a number of the problems that state anticorruption authorities have encountered is precisely that, that they come to the aid of whistleblowers because there is no-one to give support and guidance to whistleblowers and, in so doing, they can prejudice their own independence as an anticorruption body. We saw that in Queensland, with a very able lawyer, Alan MacSporran, having to resign as the head of the CCC there because of a joint parliamentary committee that was critical of his espousal of a whistleblower's cause. So, the point we simply make is: all that highlights, now that we have a national anticorruption body about to come into practical operation, is the need for another body, an independent whistleblower protection authority, that can provide that support and guidance and, as it were, direct the whole passage of the whistleblower's complaints without it interfering with the independence of the anticorruption body, which may then be called upon to address whether the whistleblower's concerns reveal serious corruption or not. So, that's our simple point. We're very happy to elaborate it, but it's a simple point and we hope that it's something that will be useful to the committee.

**CHAIR:** Thank you very much. I'm going to kick off the questions. Like the previous witnesses, I think all of your submissions or opening statements have indicated that there's a broader discussion about other reform in this area. I do have some questions about the bill. As the chair, I'm seeking to put together a report that means that this

bill is the best that it can be. I'm looking at some of the provisions that you've indicated might need to be revised or strengthened or just clarified. That's what I am interested in asking about today.

Firstly, I note that all of your submissions support the bill and make recommendations in that way. Mr Schimmel, in terms of Maurice Blackburn's submission, I want to ask you about expanding the category of internal disclosure first recipients to include an employer's lawyer or union representative where disclosure is for the purposes of seeking advice or assistance. Why is the expansion of this category important to do in such a way? Is there any way we can improve or clarify that provision or even just the advice that public servants receive about how they can go making a claim in this way?

**Mr Schimmel:** For context, if you're contemplating taking this sort of action and making a disclosure—and I think this has been noted frequently elsewhere—it's a fairly complex and intimidating process. People who are considering taking that sort of action might be in situations where it's a highly intimidating process to go through. In adding a union representative, in particular, as someone to who the disclosure can be made, we would think that union representatives could provide that support to someone who's in that situation and considering making this sort of disclosure and they could provide that bridge, essentially, between an intimidating process and that information coming to light.

**CHAIR:** Your recommendation is to expand the category. In terms of the way it's drafted at the moment, what is it about the expansion that you think is key to ensuring that people are supported through this process?

**Mr Schimmel:** It's altogether a fairly straightforward expansion. It's a fairly limited but important expansion to include the two categories that we've mentioned in our submission of a person's lawyer or a person's union representative.

**CHAIR:** There was another recommendation that you made around employers' liability to pay compensation. Can you talk us through the amendment of the section that requires an employer to establish that it took all reasonable precautions, not just reasonable precautions, and why that's important for establishing employers' liability?

**Mr Schimmel:** As you know, section 14(2) contains a defence of reasonable precautions.

What we'd like to see—and, as I said in my opening remarks, these are suggestions that are at the margins in terms of ways that we think the bill might be improved—is a sort of semantic but still significant change so that the defence is only open if the employer takes all reasonable precautions. We think that'll avoid later debate about where, for example, the employer might have done something, might have taken some precautions, but they haven't done everything that is reasonably open to them to avoid the reprisal action. So we just want to see that effectively just tightened up and made a little bit more watertight by requiring an employee to do everything that's reasonably necessary, to take all reasonable precautions, to avoid reprisal.

**CHAIR:** I think one other provision you referred to, which has actually been picked up by other witnesses, and I think the senators who are joining you today have a particular interest in, is the personal work-related conduct and the way that that is defined. In your submission you do raise some concerns in terms of the way that it's drafted. What would you like to see to make sure that the carve-out for personal work-related conduct is dealt with in the right way? You're from the class actions section of your law firm, but I know that your law firm would be dealing in particular with people who have been unfairly treated at work. I know there is a crossover, and we're keen to get the language right so that we deal with these in the right way.

**Mr Schimmel:** Yes, that's right. I caught a little bit of the end of the last session, where I think that issue was being discussed. There are probably a few different ways that it might be able to be done. We put forward one way to address that crossover issue where there's not necessarily a bright line between conduct that is only a personal work-related grievance and conduct that potentially has wider ramifications for the organisation. We've put forward a way of dealing with that, which would be to add a new section, 29B. We're not necessarily wedded to that as the only way of sensibly dealing with it, but our submission is that there does need to be a way to address conduct where it does relate personally to the individual but also has potentially a wider systemic or cultural or other broader consequence for the organisation.

I note that the Corporations Act provision which deals with a similar issue, section 1317AADA, puts it in sort of a negative way—that the information concerns a personal work-related grievance if it relates to the person's employment but the information 'does not have significant implications for the regulated entity to which it relates'. So it acknowledges the potential personal implications but then says that, where it does not have these other characteristics, then it's appropriate for it to be dealt with under the whistleblowing regime. So potentially there are other ways of dealing with it as well. But most importantly, in our submission, we just want to ensure that that crossover issue is appropriately dealt with in the bill.

**CHAIR:** I appreciate that. I'm sure others will have questions. There is just one last question from me, then I'll hand over the call. This is, essentially, I think, for the Australian Lawyers Alliance but also the Centre for Public Integrity. There has been a flagging of other reforms, particularly around a whistleblower authority or a public agency. The government has committed to releasing a discussion paper for public consultation on the need to establish a whistleblower protection commission or authority as part of the second stage of reforms. What do you see as some of the priority issues for any discussion in relation to that? You flagged some of those in your opening statement, Mr Droppert, but you might want to add to that so we can get a clear idea of what we should be looking forward to.

**Mr Droppert:** Without trying to duck it, given the very specific focus of Judge Whealy's observations and his organisation's interests, I'm happy to let him go first.

**Mr Whealy:** I suppose one of the interesting things that will need to come up in the discussion is where we place, in legislative terms, such an authority. I think the whistleblower protection authority, from our point of view, would fit very nicely within the structure of the National Anti-Corruption Commission. The proof of that, I think, is that, in the years before Labor came to power and was then able to make positive its commitment to have a national anticorruption body, the private members' bills that came forward all sought, in one way or another, to incorporate the whistleblower independent protection authority within the structure of that legislation. We think there's a lot of sense in that because of the propinquity of a whistleblower protection authority to the work that is to be done by the national anticorruption body.

But, as I said, the important thing, I think, is to ensure that, if the legislation is included within that confine, the independence and independent integrity of the national anticorruption body is preserved. I think that's one way it can be achieved, because there will be a close connection between, on the one hand, commissioners checking to see whether there's been any serious corrupt conduct, whether criminal or not, and, on the other hand, agencies seeking to protect the whistleblowers who have come forward and who have provided the information that leads to the commencement of those investigations. So that seems to us to be a very neat way of tidying up the legislation and also preserving independence, while at the same time recognising the close connection between whistleblowers and the investigation of corrupt practices.

**Mr Droppert:** Can I add to that by saying, in principle, the Australian Lawyers Alliance finds that also to be a suitable mechanism, but with one caveat, and that's to ensure that it's not confined to the subject matter of the NACC types of investigations and would also include private sector whistleblowing.

**CHAIR:** I will hand the call to you, Senator Scarr.

**Senator SCARR:** I want to touch on a few subjects which we haven't touched on this morning. I will go first to you, Mr Schimmel. I was very interested in the comments you made around waiver of confidentiality of discloser identity. I think you made some very good points, or Maurice Blackburn made some very good points, in that regard. From my reading of your submission, it comes down to the fact that, unless the provision is very carefully drafted, there can be an unintentional disclosure of the identity of the discloser, and great care needs to be taken, especially given the vulnerable position that many whistleblowers are in, that any disclosure of identity or any intention in that regard should be clear. And there needs to be some consideration of relevant factors in terms of assessing whether or not the whistleblower, the discloser, actually intended to disclose their identity. I'm wondering if you could expand on that point, please.

**Mr Schimmel:** Thanks for the question. As a general concept, we support the proposed amendment—I think it came out of recommendation 19 of the Moss review. I think things could be tightened up and improved a little bit in terms of what's being proposed, given that in some circumstances it might not be entirely clear the extent to which someone had that subjective intention to disclose their own identity. The easiest way to deal with that issue would probably be, as we noted in our submission, to insert some guidance into the bill, which sets out some of the factors that might be considered as to whether, and the extent to which, someone intended for their identity to be revealed. That's probably the easiest way, without interfering too much with the bill, to address that issue.

**Senator SCARR:** I certainly found your proposal quite attractive in that regard, I must say. I want to move on to another subject, and that is the categories of report receivers. One category which is not touched upon in your submission is that of health professionals. I'm interested in your thoughts around the need for whistleblowers—especially given the position of vulnerability they're in, the stresses they're under and the bullying they may be subjected to as a result of taking action which is in the public interest—to have the ability to actually be candid and open with health professionals who are perhaps assisting them and providing health support or other support in the course of their journey. Do you think the categories of report receiver should perhaps be widened to include health professionals?

**Mr Schimmel:** It's not a specific issue that I have thought about previously, but my first reaction to it is that it does seem to make sense. It may not be a circumstance that every discloser finds themselves in, but, certainly, it's something that should be available if need be. One could think in particular of a mental health professional as being an appropriate person to receive that information. My first reaction is that there does seem to be some merit in that and that it's probably a fairly straightforward amendment to the bill.

**Senator SCARR:** Mr Droppert?

**Mr Droppert:** I was going to agree with my friend and say that, of course, health professionals themselves have duties of confidentiality, so the risk that a protected disclosure to a general practitioner might then find its way into general circulation is fairly low. Of course, there could then be the proviso that ongoing publication from the recipient isn't part of the permissible disclosure process.

**Senator SCARR:** I now want to move on to the vexed question of personal work related conduct. As I described it to the other witnesses who appeared today, you've got this definition of 'disclosable conduct', you then have potential exclusion of personal work related conduct and then you have exemptions from the potential exclusion of personal work related conduct that you need to work through. It's quite a maze to try and navigate through that.

The first issue I want to raise is that there seems to be, in the explanatory memorandum and elsewhere, this distinction between systemic conduct and nonsystemic conduct. So, if conduct is systemic, it then perhaps falls more within the bailiwick of significant conduct or events that would trigger one of the exemptions from the exclusion. Uncovering systemic conduct always begins with someone first disclosing a single incident. It's that initial disclosure of a single incident which then perhaps triggers the identification that there's more to this than just a single incident—that there's actually a systemic problem, that it has not just been encountered by one person within an organisation but been encountered by many people and that appropriate action hasn't been taken. I'm interested in the witnesses' views with respect to that, if I could begin with you, Mr Schimmel, and then go around the panel.

**Mr Schimmel:** I guess the difficult part of addressing the issue is how you frame it. As you say, there is a definition with an exemption and there is an exemption to the exemption. There are probably different ways of doing it, and the trick would be to settle upon the most rational and accessible way of addressing the issue, but noting, as you've alluded to, that the single issue shouldn't be necessarily treated or regarded only as a single episode or a single issue where it does potentially have broader ramifications for the organisation. The difficult aspect to it is how to define that broader ramification, whether you define it as being systemic or significant or whatever else it might be. That's the difficulty in relation to this issue.

**Mr Droppert:** We would say another way in which this issue could be addressed is if there is a general override in relation to serious and illegal conduct, and that then wouldn't require it to be systemic and a single event could be the start of the capture.

**Dr Williams:** This is not an issue that we have particularly considered as part of our submission, but, on the point that you raise, we would agree with our colleagues that you would want it to be broader than systemic because a sufficiently serious single instance should also itself be enough.

**Senator SCARR:** I move to my final question, and that is in regard to paragraph 14 of the submission from the Australian Lawyers Alliance, which certainly captured my attention:

> Whistleblowers and their legal representatives should never have to contend with the possibility of being prosecuted and imprisoned—or face any other negative consequences—for seeking or providing legal advice relating to whistleblower public interest disclosures.

Mr Droppert, I want to give you an opportunity to expand on those comments because it seems to me, if we are going to have a whistleblowers system that is effective and provides support to whistleblowers who in many cases at great personal cost are performing a public good, then we need to make sure that those whistleblowers can obtain legal advice to assist them and to guide them through navigating a very complicated process. Is that correct?

**Mr Droppert:** Indeed, and without wishing to draw any direct parallel, there of course has been a very high-profile case that lasted five or six years in the end. It involved a lawyer who got caught up in, in a sense, the whole process of whistleblowing in the provision of advice. No-one should have to face that consequence, and there needs to be the express right to obtain advice and then the protection that goes with that to the lawyer. We support the proposed amendment to subsection (4) of section 20 of the PID Act.

**Senator SCARR:** Mr Whealy, I'm interested in your views in that regard as well. You made some comments with respect to the potential utility of a whistleblower protection agency and the need to make sure that potential

whistleblowers are given all the support they need in order to navigate somewhat of a legislative maze. It seems to me you referred to guidance and support, but there's also ensuring that those potential whistleblowers are given protection along the journey so that, in the many cases where there's a great discrepancy or disparity between the power of the individual whistleblower and the organisation which is the subject of their whistleblowing, they're given the support they need and the protection they need on that journey.

**Mr Whealy:** Yes, Senator, you couldn't have put it any better than that. We agree with what you've said entirely. The Bernard Collaery case was a classic example of where that protection was needed. Possibly, Mr Collaery didn't need much guidance, but he certainly needed a lot of support and protection, and that's what was missing. I think you're absolutely right.

I might also just go back to your previous question. I did have the privilege of listening in earlier, when you were discussing this matter with Kieran Pender and AJ Brown, and I thought the example you gave of bullying—that one instance of bullying could, of course, reveal some very serious systemic problems within an organisation—was correct. On both of those points, I agree with you entirely.

**Senator SCARR:** Thank you very much.

**Senator SHOEBRIDGE:** Thank you again for all the work you've done not only to put in submissions but also to support whistleblowers in the years preceding this. Should the first thing that we ensure with this bill be that it does no harm—that it doesn't actually make it harder for whistleblowers to seek the protection of the Public Interest Disclosure Act? Should that be one of the starting principles we apply to the bill? I might go to you, Mr Schimmel.

**Mr Schimmel:** I think that's a reasonable ambition. I think the difficulty is what that actually means in practice.

**Senator SHOEBRIDGE:** One area where I have difficulty with this bill in practice is the very broad definition in 29A of personal work-related conduct. In your submission, you say:

In our view, best practice whistleblower legislation should include a broad definition of reportable wrongdoing, and any narrowing of that definition should be approached with extreme caution.

Do you think that 29A, as currently drafted, has been drafted with that extreme caution in mind?

**Mr Schimmel:** I'd just repeat what I said earlier about striking that balance in the difficult situation where there is that crossover. As I said, there are probably a variety of different ways that you can address that. I'm not sure if I'd agree entirely with the way that you've characterised that, but I'd just repeat what I said earlier.

**Senator SHOEBRIDGE:** It doesn't seem, on my reading of it, to implement recommendation 5 of the Moss review, which said:

That the definition of 'disclosable conduct' in the PID Act be amended to exclude conduct solely related to personal employment-related grievances …

It doesn't adopt that 'solely' test, does it?

**Mr Schimmel:** No, it does not do that. I agree with that.

**Senator SHOEBRIDGE:** And the Moss review looked at the mess that public interest disclosure law was, and, if you read the review, it makes it clear that that word 'solely' is actually important to ensure that the carve-out doesn't cause harm. That's right, isn't it?

**Mr Schimmel:** Yes, that's right. It doesn't, in terms, adopt the recommendation from the Moss review. That gives rise to that issue that we've all been discussing today—that is, how to address that. And there are a number of different ways that you can do it.

**Senator SHOEBRIDGE:** It doesn't, in terms or in substance, address that recommendation, does it?

**Mr Schimmel:** I'd agree with that.

**Senator SHOEBRIDGE:** I'll open it up to the panel, and it's easier if I pick someone, so I'll go to you, firstly, Dr Williams. Do you think that inserting the words 'solely' or 'only' would be a good initial remediation for 29A?

**Dr Williams:** We would agree with that, if that would give effect to the Moss review recommendation.

**Senator SHOEBRIDGE:** Each of you have probably spoken to whistleblowers and followed at least some of the journey they have through an organisation. It often starts with whistleblowing and then has managerial responses and disciplinary action layered on it, and they become incredibly intertwined. Dr Williams, that's not an uncommon experience it, is it?

**Dr Williams:** No, that's right. That's consistent with our understanding.

**Senator SHOEBRIDGE:** Mr Droppert, did you have any views on this?

**Mr Droppert:** In general terms we would agree with you, Senator, that the insertion of the word 'only' or 'solely' would strengthen the overall objectives and, of course, is consistent with the Moss review.

**Senator SHOEBRIDGE:** The department and, no doubt, the Attorney will say, 'It's okay because, if there's reprisal action as defined in sections 13 and 19 of the PID Act, the exclusion won't apply.' Do you have a view about whether or not those reprisal provisions in section 13 and 19 actually would actually work in practice and would provide comfort for whistleblowers, Mr Droppert?

**Mr Droppert:** The answer is that they might work in practice if the person gets to that point. I think the major advantage of the insertion of the word 'only' or 'solely' is that it takes away a degree of uncertainty for somebody who is about to embark on the first step. If they know that their complaint is not solely about their personal situation but involves other issues, then they know that the protections that follow will be there for them.

**Senator SHOEBRIDGE:** One of the problems that have been pointed out in other submissions is that, with those reprisal provisions in the current act, there's no reverse onus. If you want to get the protection of the reprisal provisions for the purposes of the section 29A carve-out for your whistleblower, or the prosecution seeks to prove reprisal, you have to get into the mind of the manager of the person taking the reprisal and you have to prove that they intended it or were reckless about it. That's an extremely hard task for a lawyer, isn't it?

**Mr Whealy:** It's impossible, really, Senator. It's impossible. Time after time, you've seen prosecution cases brought that have failed just because of that difficulty, and often in situations where you would have thought that the position was clear. It doesn't work in practice; that's the simple thing. We take the view, as Dr Williams said, that, if the Moss review has made this recommendation, then it ought to be there, and at least it will provide a clearer picture for progressing protection.

**Senator SHOEBRIDGE:** I think, Mr Whealy, I can take from that that no whistleblower will take comfort from the idea that, if they can prove that it's a reprisal action, they're still covered by the whistleblower provisions. No whistleblower, if they spoke to a lawyer, would take comfort from that, would they?

**Mr Whealy:** They wouldn't take any comfort from it at all.

**Senator SHOEBRIDGE:** Of course, part of the concern for a whistleblower is that, simply by reading the PID Act, you can't understand the risk you're facing in speaking out, can you?

**Mr Whealy:** No.

**Senator SHOEBRIDGE:** You have to then understand five or six other pieces of Commonwealth secrecy legislation and work your way through a legal minefield. That task's pretty tough, isn't it, Mr Whealy?

**Mr Whealy:** Yes. I think somebody said it was a maze. It's a maze that has no beginning and no end, as far as I can see. You'd just be lost in the middle somewhere. So it all points again to the need for an independent whistleblower protection authority that can at least provide a pathway for somebody who wants to blow the whistle.

**Senator SHOEBRIDGE:** One of the recommendations by the Human Rights Law Centre, Transparency International and the Centre for Governance and Public Policy was that the parliament should step up here and create a select committee whose job is to simplify and to improve the law across the board in relation to both secrecy provisions and whistleblowers. Do you think that's a task—

**Mr Whealy:** Yes. It's a very difficult task, but it's one that I think has to be undertaken. It's happening in other countries, and I think, as somebody said much earlier today, Australia's lagging behind in this. It's only by addressing all of those issues and pulling it all together, rather than just making piecemeal reforms, that we'll get proper protection for whistleblowers and a really first-class, state-of-the-art whistleblower protection situation in Australia.

**Senator SHOEBRIDGE:** One of the points raised in, I think, Maurice Blackburn's submission is the absence of a provision for exemplary damages—for some kind of serious financial repercussions for an agency that breaches the law in this regard. One of the other options that's often spoken about is adopting a US-style qui tam jurisdiction, where, if a whistleblower identifies public misconduct and it has a financial cost to the public, they get a proportion of the savings. Have any of you looked at the qui tam is an alternative option? I might go to Maurice Blackburn first of all.

**Mr Schimmel:** To be honest with you, I hadn't thought about that. Whether that's appropriate in this sort of situation, I'm not sure. I'm happy to consider that further and provide a written response if that would be helpful. There are probably quite a few complexities that are wrapped up in that issue. It may be that what we've proposed is a more straightforward and simple way of creating that. And, really, the purpose of exemplary damages here,

we'd say, is to act as a deterrent. We think that availability of exemplary damages would achieve that aim. Whether you need to address that by means of a qui-tam type proceeding, I'm not so sure.

**Senator SHOEBRIDGE:** Has anybody else looked at qui tam in terms of providing some recompense for whistleblowers? It's one of the principal measures used in one of the biggest comparable jurisdictions, the United States. Have any of the other witnesses looked at it?

**Mr Whealy:** We haven't analysed it, but I have looked at the work that has been done by Kieran Pender in that area, and I certainly think that, prima facie, there's an argument there for introducing it in Australia.

**Senator SHOEBRIDGE:** Dr Williams?

**Dr Williams:** I was going to say that I would agree wholeheartedly with Mr Whealy on that point and also to highlight the exemplary damages point, because what we'd like to see is a system that strongly deters breach and also really incentivises reporting, so that's where, of course, this kind of scheme comes in. We would be happy to come to you with more information on notice if that would be helpful.

**Senator SHOEBRIDGE:** I would appreciate that. At the moment, all the incentives in the system on the part of the whistleblower are to do nothing, because you know the impact it's going to have on you personally; you know the impact it's going to have on you professionally. And so putting in place an exemplary damages provision or a qui tam kind of provision would at least provide some incentives for public interest whistleblowing to counteract all the negatives. Do you agree, Dr Williams?

**Dr Williams:** I agree entirely. And it's really important that those mechanisms are put in place, because we rely on whistleblowers. They play a vitally important role in achieving accountability within our system of government. Therefore, we should be doing all we can to incentivise them to report where there's a report to be made.

**Mr Droppert:** From ALA's point of view, exemplary damages are a fairly well known aspect of Australia's legal system. Often the awards made for exemplary damages are not large and don't really operate as a punitive influence on the recipient of exemplary damages awards, but we would be more inclined to go that route rather than incentivising a whistleblower with the prospect of a share of the savings, so to speak. But, if it proved over time that insertion of an exemplary damages clause wasn't operating in the way that it was intended, perhaps we might need look at American-style elements to change the landscape further.

**Senator SHOEBRIDGE:** The qui tam provisions at least have the benefit of aligning self-interest and public interest and have saved US taxpayers countless billions of dollars. These have that benefit, don't they? It would be one area where self-interest and public interest were actually aligned in whistleblowing—which is not a bad thing.

**Mr Whealy:** I think the other point is that the courts don't like awarding exemplary damages. When they do, they make a lot of fuss, generally, about how this is to act as a deterrent, and then they impose a bundle of damages that are pretty light on. I don't know why it is, but, if you look at all of the cases where exemplary damages have been awarded, it's almost inevitably the case that they're light on.

So I think the qui tam offers a better incentive to whistleblowers, even though it's not something we're used to in Australia. We still tend to regard whistleblowers as dobbers—people we don't really like that much and aren't liked at work that much. We've got the wrong attitude towards whistleblowers right from the start. It makes their life a misery. When they come forward and they actually have the courage to report something serious, they're treated dreadfully, really. I think giving them an incentive like this that does coincide with the public interest has got a lot to recommend it.

**Dr Williams:** In respect of the exemplary damages point and its ability to function as a deterrent, I suppose we would just need to think carefully about whether that will deter agencies—that the penalty will be using taxpayer funds, not their own personal funds. Obviously, if you're talking about an individual who themselves would bear the consequence of having to pay those damages, that might really deter them from wrongdoing. But, where we're talking about taxpayers' money being used to pay these exemplary damages, I'm not sure about the real potential to function as a strong deterrent.

**Senator SHOEBRIDGE:** You can almost hear the manager saying, 'Bite me, it's not my money!'

**Dr Williams:** Exactly.

**Mr Droppert:** Although I jumped in in favour of exemplary damages, having listened to Judge Whealy, can I say that the committee should give great weight to his observation. It was a very powerful point he made.

**Senator SHOEBRIDGE:** Indeed. In terms of seeking legal advice about being a whistleblower where one of a raft of federal secrecy provisions may be at issue, do you see merit in the Commonwealth urgently publishing a list of lawyers who have security clearance so that, if somebody is seeking to get some legal advice on the secrecy

provisions and whistleblowing, there's at least a door they can knock on—they can identify a lawyer? Is there a concern about there being a limited list or is that just an unambiguously positive thing?

**Mr Droppert:** On my part, the answer is yes.

**Senator SHOEBRIDGE:** It's an unambiguously positive thing?

**Mr Droppert:** Yes to the initial question, 'Should the Commonwealth make a list available?' And would doing that be a positive thing? Yes.

**Senator SHOEBRIDGE:** Do you have any other observations on that? It seems to be low-hanging fruit. This could be done without even legislative reform. It could be done tomorrow. Dr Williams?

**Dr Williams:** I agree, again, wholeheartedly, because we should be doing whatever we can to make the system as easy to navigate as possible, and that seems a very commonsense measure indeed to me.

**Senator SHOEBRIDGE:** Again, thank you all for your submissions. There are actually a bunch more questions, but we have run out of time.

**CHAIR:** Thank you very much, senators, and thank you to all of the witnesses for joining us today and providing evidence.

**Proceedings suspended from 11:58 to 12:16**

**ANDERSON, Mr Iain, Ombudsman, Commonwealth Ombudsman**

**DWYER, Ms Katrina, Acting Director, Public Interest Disclosure Team, Commonwealth Ombudsman**

**McLEAN, Ms Clare, Acting Assistant Commissioner, Integrity, Performance and Employment Policy, Australian Public Service Commission**

**WILSON, Ms Helen, Deputy Commissioner, Workforce Policy, Integrity and Operations, Australian Public Service Commission**

**CHAIR:** I now welcome the Office of the Commonwealth Ombudsman and the Australian Public Service Commission. Thank you for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. I just want to remind witnesses that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Thank you very much for all joining us today. Do any of you have an opening statement that you'd like to make before we go to questions?

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

**Mr Anderson:** I don't, so I'm happy to leave it to the commission.

**Ms Wilson:** The Australian Public Service Commission welcomes the proposed amendments to the Public Interest Disclosure Act 2013. Under the Public Service Act 1999 the Australian Public Service Commission's role includes custodianship of policy guidance on the APS Code of Conduct and functional responsibility to undertake inquiries into public interest disclosures relating to alleged breaches of the code in certain circumstances.

In this context the commission believes it is appropriate that the bill seeks to exclude from the category of disclosable conduct matters relating to workplace grievances or behaviours that would be handled more effectively through other mechanisms, such as a code investigation or a review of action. We envisage that the proposed amendments would result in more efficient and expeditious handling of such matters. It would enable agency resources to be used more effectively to the benefit of both general complainants and whistleblowers for whom the PID scheme is intended. The commission is of the view that individuals making complaints that fall outside of the scope of disclosable conduct will continue to be protected from reprisals ultimately through the code of conduct, as behaviour amounting to reprisal action would constitute a prima facie breach of the code. The commission's *Handling Misconduct* guidance provides advice to agencies on measures they can take to protect complainants.

The commission also welcomes the proposed requirement that principal officers provide education and training on the PID scheme, and on integrity and accountability more broadly. This would provide needed clarity on the scope and operation of the scheme, including the role it plays in the broader Commonwealth integrity landscape. We note that since February 2022 integrity training for new starters in the Australian Public Service has been mandatory through the APS Commissioner's Directions. We would be interested in exploring linkages between our foundational integrity e-learning module, delivered through the APS Academy, and the proposed PID education requirements for principal officers.

We are aware that subsequent tranches of amendments to the PID legislation are intended to include prescribing the APS Commissioner as an investigative agency for the purposes of the PID scheme. Provisions are already in place, in the Public Service Regulations 1999, to give this intention practical effect as the commissioner is empowered to inquire into public interest disclosures to the extent that they relate to alleged breaches of the code of conduct where the commissioner agrees it would not be appropriate for the disclosure to be made to an agency head, or where a disclosure has been considered by an agency head and the commissioner agrees the outcome of that consideration is not satisfactory. Currently the commissioner can investigate public interest disclosures of alleged breaches of the APS Code of Conduct by agency heads.

Our discussions with the Attorney-General's Department to date have reflected the context of the commissioner's current integrity functions under the Public Service Act and how the next phase of proposed whistleblower reforms may integrate the commissioner's existing functions and the government's other proposed integrity reforms. We are pleased with the outcome of these discussions and do look forward to continuing to work with the Attorney-General's Department on amendments to the PID Act.

**CHAIR:** Senator Scarr, do you have questions?

**Senator SCARR:** Yes, I do. I might start my questions to Mr Anderson. You didn't have an opening statement, Mr Anderson?

**Mr Anderson:** I'm happy to go straight to questions.

**Senator SCARR:** I would like to take you to paragraphs 12 and 16 of your submission with respect to what you refer to as a 'carve out of personal work-related conduct'. That has been the subject of some discussion during the course of this morning with different witnesses. In essence, we have a situation where you've got a definition of 'disclosable conduct', you then have an exclusion of so-called 'personal work-related conduct', and then you have some exemptions to the exclusion with respect to conduct of a particular level of significance.

**Mr Anderson:** It is all very simple and easily navigable.

**Senator SCARR:** I just wanted to take you in the first instance, perhaps to underline what my colleague Senator Shoebridge is intimating—hopefully *Hansard* can pick up irony—to the difference between your characterisation in paragraph 13 and the words in the proposed sections. You state, 'unless the personal work-related conduct relates to systemic wrongdoing or constitutes reprisal action in relation to a disclosure under the PID Act'—so you refer to systemic wrongdoing or reprisal action. When we actually look at the drafting in the provision there is actually no reference to 'systemic' at all. There's a reference to, 'of such significant nature that it would undermine public confidence in, or has other significant implications for, an agency or agencies.' Mr Anderson, is that an example of the subjective nature of the amendments that you've identified in your submission? It's hard to sit here and read the exemption to the exclusion and truly understand what that is intended to capture. It may well—and I would assume it does—include systemic wrongdoing, but it may include other things as well. It's hard to sit here reading those words and understand the full breadth of them, so I'm interested in your views with respect to that point first.

**Mr Anderson:** I absolutely agree, Senator. It's a complex act in the first place, and the amendments that are proposed in the bill don't change the fact that it's still a challenge for proposed disclosers and for agencies to step through the different tests for the different stages of the process. When we say 'systemic wrongdoing', we're talking about the reference in the bill to conduct being of such a significant nature that it would undermine public confidence in an agency or agencies or have other significant implications for an agency. In our experience—not just with PID but our experience generally—anything that requires a discretionary interpretation on a decision is more likely to be open to different interpretations. So we think that generally the way in which personal work related conduct is dealt with is more likely to generate a lot more complaints, because disclosers will say, 'Clearly my disclosure is of such a nature that it should proceed and be treated as a PID,' whereas a principal officer or authorised officer might be saying, 'We don't think it actually meets the test to be treated as a disclosure under these amendments.' So we think that there is absolutely a significant risk that what we'll end up with is aggrieved disclosers who feel that their complaint should have been treated as a disclosure for the purposes of the act, and they will then refer those complaints to my office.

**Senator SCARR:** That difference in perspective is a really important one, I think. I don't want to in any way besmirch how the authorised officers think in practice, but one can imagine an authorised officer, who's potentially dealing with numerous complaints, receiving something—and, as we've discussed earlier today, quite often there's an intertwining between the personal work related conduct and the disclosable act. The example I gave was that someone raises legitimate concerns in good faith and they get accused of not being a team player and they get an adverse performance assessment. So you've got the personal work related conduct but you also have the underlying issue that triggered that conduct, so the two are intertwined. One can imagine an authorised officer receiving that initial complaint and saying, 'Well, this is a personal work related complaint, because he or she has raised bullying.' My concern is about that significant hurdle that it's got to be 'of such a significant nature that it would undermine public confidence in an agency'. How does an authorised officer actually determine that in practice?

**Mr Anderson:** If the bill is enacted by parliament then one thing that my office would be looking at doing is to provide guidance for agencies. But, even then, guidance material will only take the matter so far in assisting authorised officers to understand the provisions. The first limb is also challenging, in that either it's of a significant nature or it constitutes taking a reprisal. If you're a discloser, you're likely to be seeing reprisals in almost anything that's being done with respect to you, but then, from the point of view of an authorised officer, that might again be just reasonable administrative action. So both limbs are open to that subjective question.

**Senator SCARR:** With respect to that issue around reprisal, Senator Shoebridge has raised, I think, a very good point about where the onus of proof lies. Certainly my experience—more in the private sector than in the public sector—is that, if someone is being performance-managed or has missed out on a promotion or some sort of opportunity, really the onus is on the organisation, which has the human resources department and the senior

management involved in the process, to document why that is the case, as opposed to the person who's blown the whistle, who potentially is in a very vulnerable position, having to show why it was reprisal, not a legitimate administrative action. I'm interested in your views in that respect.

**Mr Anderson:** I agree that it is in the first instance for the agency to say: 'What records do we have that go to the decisions that are complained about? Was it something that, for example, was in train prior to any question of the disclosure being made, or was it something that was commenced at a later date?' The timing will always be significant. Then, does the documentation actually point to a properly conducted process? Ideally, employment related matters shouldn't be coming as a surprise to an employee. There should be a pattern of discussions with supervisors, for example, before you end up with a performance management situation. The agency should be able to display that, yes, there was a proper, well documented process that's not going to be a surprise to the discloser. If they don't have that documentation, then it certainly lends a lot of credence to the allegation that, actually, this is a reprisal action rather than a proper administrative action.

**Senator SCARR:** I agree. Someone who is acting in bad faith within an organisation can also potentially generate a document trail that supports their position that it is just run of the mill performance management that has nothing to do with the disclosure, especially given that a person within an organisation might be looking ahead because someone's raised concerns internally and that person is then characterised as a troublemaker and someone that they have to performance manage out. Is that correct?

**Mr Anderson:** Absolutely. The bill does deal with the situation where a potential reprisal could occur well in advance of a disclosure being made, for exactly that situation. I think if you step outside the PID context, it's good administrative practice for agencies to document their employment processes and practices. I think the commission would agree that, whether it's a PID or generally dealing with your staff, you should have clear processes that are well documented so that no-one's caught by surprise, whether it's then perceived as a reprisal or just poor management practice.

**Senator SCARR:** Deputy Commissioner?

**Ms Wilson:** I absolutely agree that each agency needs to have the appropriate guidance in place for all these sorts of circumstances.

**Senator SCARR:** If an organisation and agency is conducting itself the way we would reasonably expect it to conduct itself, people in key roles relating to human resource management and executive management should be able to demonstrate that performance management or administrative decisions they've undertaken have been undertaken in good faith, and they shouldn't have any issue in demonstrating that if the onus were put upon them to demonstrate that on the balance of probabilities. Is that a fair comment?

**Ms McLean:** It is now, in the context of the Comcare scheme, where people make workers compensation claims in relation to particular performance management actions that may have affected them, aggravating or causing an illness or injury. Agencies would need to be able to properly document that if they're making an argument that decisions were made in relation to reasonable administrative action.

**Senator SCARR:** Excellent. Before I share the call, Ms Dwyer, I'm very interested to understand what the Commonwealth Ombudsman does now in terms of a potential whistleblower. Earlier today we discussed the legislative maze that a potential whistleblower is confronted with, the stress associated with having tried to raise concerns internally in an organisation, not getting any traction and getting severe pushback, and then, in that context—I can only try and put myself in the shoes of a potential whistleblower—the tension between wanting to put up your hand and bring these issues to account or sitting back, knowing that if you do put up your hand you're going to be going on a journey which may have consequences both for you personally and your family. If I'm that potential whistleblower and I reach out to the Ombudsman commission, what support, what guidance and what protection can the Ombudsman provide me today, as the law is today and in terms of your powers today?

**Mr Anderson:** I might start with that, and I'll defer to my colleague if I need.

**Senator SCARR:** I did my best, Ms Dwyer!

**Mr Anderson:** The first thing we can do is we can provide information. We do get contacts directly from people who are proposing to make a disclosure, and they ask us questions about what the process is. We also publish material. There is an education part of it. The 'support and protect' part is very challenging, though, and it's a common complaint from disclosers that they don't get any support and they don't get any protection. There are the formal protections that you get in terms of protection against reprisal, but our experience, from our limited visibility of the matters that are being handled by agencies, is that, while reprisal allegations are made, they're not substantiated when they're looked at by agencies. So it does seem that, in practice, disclosers are not able to prove

to the satisfaction of an authorised officer that there was in fact a reprisal, yet it's a very clear and common belief that there are reprisals happening.

I should say we did an own-motion investigation last calendar year that looked specifically at four agencies who have had a lot of PID experience, and we looked at how they deal with the question of reprisal, how they do reprisal risk assessments and things like that. We did find that, even if agencies are good at doing the assessments, they're not always as good at putting the assessments into practice. They might identify risk mitigation factors, but they're not necessarily that good at making those real live factors that are in play to mitigate any reprisal risk during an investigation. It is a real challenge. We're hamstrung both by our lack of visibility, in that we don't necessarily see very much about the average PID, and by a question of resourcing in terms of our ability to help people if they reach out to us. Disclosers can complain to us at the end of a matter if they have complaints about the handling of a PID, and we certainly look into those matters, but it might be too late in one sense if the discloser already feels that reprisals have occurred.

**Senator SCARR:** Complaining after the event is not the same as having an agency that's supportive and that's with you every step of the way as you go through the process, providing the guidance, the support and the real-time protection, is it?

**Mr Anderson:** Yes; we don't have that real-time role currently. Obviously, that's a question that the government said that they will consider in the second phase, which is: should there be an authority, commission or someone given that role of actively supporting and protecting whistleblowers? We've said in our submission that that's a role we could take on if government wanted us to, but there would need to be a question of resourcing as well.

**Senator SCARR:** Ms Dwyer, is there anything you want to add?

**Ms Dwyer:** Yes. I'll just follow on from the Ombudsman's comments there in relation to the own-motion investigation that we did and particularly some of the insights that we found in relation to reprisal risk assessments. We found a need for agencies to do regular reviews of those assessments—not just to do it upfront and then leave it but to be regularly checking back in on that assessment and, importantly, at the first stage of the engagement with a discloser, talking about what they perceive the risks might be to them. That is a critical part of the process in doing that risk reprisal assessment.

**Senator SCARR:** You were talking there, Ms Dwyer, about the commission, the Commonwealth Ombudsman, talking to the discloser about the risk to them. Ideally, best practice is potentially an agency, whichever agency it is, actually advising the discloser what the risks are to them, based on the agency's past practice, and helping the potential discloser to navigate through those risks. If you're doing it for the first time and you haven't done it ever before, you're really looking for guidance with respect to what may happen on the journey. Isn't that correct?

**Ms Dwyer:** My apologies; to clarify, I was talking about agencies needing to engage with disclosers about what they perceive the risks to be so that they have a voice in that process.

**Senator SHOEBRIDGE:** Thanks to both agencies for your submissions. Is it the Ombudsman's experience that once somebody in a public agency is a whistleblower and identifies themselves as a whistleblower that quite often they face a difficult pathway through the organisation? They can feel excluded, they can feel marginalised and they quite often have a very difficult pathway through the agency?

**Mr Anderson:** It is our experience that once someone pursues that option of whistleblowing that, yes, their pathway does become more difficult. That's not necessarily based on a lot of evidence, but that is based partly on our assessments of PIDs and what we see. There are a couple of factors at play there, of course. It's a pretty difficult thing for someone to actually gird themselves up and get themselves to that level of: 'Okay. I've tried internal disclosures. I'm going to now potentially do an external disclosure.' They're certainly not making themselves popular within the agency. That said, it doesn't have to be that way. But I will say, if I can round that out, we've also observed that there are scenarios where once you've bot yourself to the point of saying, 'This is what I need to do,' levels of trust are generally very damaged, if not irreparably damaged, so the whistleblower is likely to interpret any action that the agency does there through that lens of, 'It's because I'm a whistleblower,' and that's not necessarily the case either.

**Senator SHOEBRIDGE:** I'm not suggesting every instance where a whistleblower believes that the actions taken against them relate to the whistleblowing is proven or provable in substance. But that relationship, which I think you've articulated well with the breakdown in trust, can be a very fractious relationship between the whistleblower and the agency once the whistleblowing is done. That's a not uncommon pattern.

**Mr Anderson:** Absolutely. The agency can seek to repair that, depending on what the outcomes are with the disclosure. Philip Moss, when he did his review, said that secretaries came forward and said there were some significant substantial benefits that could come from whistleblowing. So, if you had a scenario where something significant happened and people were moved out of roles and agency behaviour changed significantly, then that will hopefully help to start rebuild the confidence and trust of the whistleblower.

**Senator SHOEBRIDGE:** Ms Wilson, would you agree with that summary of the relationship between whistleblowers and agencies, that it's not uncommon for the relationship to become quite fractious?

**Ms Wilson:** I don't think I can comment on that. I think it's case by case, agency by agency. What I would note is that there is protection from reprisals available outside the PID scheme. Retaliation against someone who has made a complaint in good faith could be a potential breach of a number of elements of the code. I would make that broader point too, that the protection against reprisals is available outside the PID scheme.

**Senator SHOEBRIDGE:** Do you have any numbers or instances you can point to where the code's been used to protect whistleblowers in that way?

**Ms Wilson:** I don't to hand.

**Ms McLean:** We don't have that level of visibility of the way agencies use the code, either before or after a PID may or may not have been made.

**Senator SHOEBRIDGE:** So that's a theoretical protection that lies in the code—that's what you're putting before us?

**Ms McLean:** It's a prima facie breach of the code to—

**Senator SHOEBRIDGE:** But you can't point to any instances where the code's been used?

**Ms McLean:** I can't; no.

**Senator SHOEBRIDGE:** Recommendation 5 of the Moss Review is one of the critical recommendations that the government says they're seeking to implement with this bill. But of course recommendation 5 of the Moss review talks about how:

the definition of 'disclosable conduct' in the PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless the Authorised Officer considers that it relates to systemic wrongdoing.

There are two parts about that recommendation that I might take you to, but I'll start with the first point. That is, it should 'exclude conduct solely related to personal employment-related grievances'. Do you accept that 29A of the bill doesn't implement recommendation 5 because it doesn't use or seek to engage with that term 'solely'? I might go to you, Mr Anderson. It's dissonant to recommendation 5, isn't it?

**Mr Anderson:** I'm just double-checking the bill before I agree with you.

**Senator SCARR:** That's very prudent, Mr Anderson.

**Senator SHOEBRIDGE:** It's page 5, clause 4 of the bill. The proposed 29A doesn't use 'solely' or 'only'.

**Mr Anderson:** No. 'Solely' is not language that's used. Philip Moss's recommendation was a very clear recommendation. His report talks about the particular challenge of having a very large volume of personal disclosures that seem to relate very much to personal work-related conduct. That's not how it's been put into practice. That's really a matter for the Attorney-General's Department later today.

**Senator SHOEBRIDGE:** The effect of not using the word 'solely' is that that carve-out is significantly broader for recommendation 5. That's the effect of it.

**Mr Anderson:** I'm not sure that I'd agree that it's significantly broader.

**Senator SHOEBRIDGE:** We can have an argument about 'significantly' later, but it's broader, isn't it?

**Mr Anderson:** It's a question of semantics. It certainly doesn't completely align with recommendation 5. I think it would be a useful thing if it did, but we've pointed to challenges in our submission.

**Senator SHOEBRIDGE:** Your challenges relate to the second half of recommendation 5 in the Moss review, and we'll come to that. Dealing with the first half, Ms Wilson, do you agree that the language in 29A does not align with recommendation 5 in the Moss review?

**Ms Wilson:** That's a question best asked of the Attorney-General's Department.

**Senator SHOEBRIDGE:** Your agency, the Public Service Commission, has given wholehearted support to this bill. I assume, as part of that, you looked at the Moss review, and you worked out whether the bill was implementing the Moss review.

**Ms Wilson:** We did.

**Senator SHOEBRIDGE:** Did you do that basic due diligence when you were looking at writing that two-page letter?

**Ms Wilson:** We did. I can assure you we did, and we still support the amendments, but I think that's a question best answered by the Attorney-General's Department.

**Senator SHOEBRIDGE:** It's going to have a significant impact on the Public Service Commission, whether or not the Moss review is implemented. You didn't turn your mind to whether or not 29A actually implements recommendation 5—the key recommendation?

**Ms Wilson:** We did turn our mind to it. I'm going to pass to my colleague, Clare.

**Ms McLean:** I think we took the view, at the time, that this was an iterative process and that the consultations were to be done in a limited period of time. We provided our comments on the text of the bill in the time frame that we were given. I don't think it's a question of due diligence, in terms of comparing against the Moss review's specific wording.

**Senator SHOEBRIDGE:** We can have a semantic discussion, but it just doesn't implement recommendation 5, does it? Recommendation 5 talks about solely personal work-related conduct, and clause 29A of the bill doesn't replicate that, does it? They're not the same.

**Ms McLean:** I accept that's your view.

**Senator SHOEBRIDGE:** I'm asking you, though. You've looked at the Moss review and you've looked at the bill. You said it was a short time frame to get the submission in, but you've now had time to reflect on it. I'm asking you now.

**Senator SCARR:** You've now had time to listen to Senator Shoebridge's analysis.

**Senator SHOEBRIDGE:** And the other witnesses and all the other analysis we've got on this.

**CHAIR:** Senator Shoebridge, I'd just draw your attention to those opening remarks that I made about what public officials are and aren't able to answer. I appreciate that you've put the question in a few different ways, but there are certain things about opinions that they're not able to answer in this forum. Do you have any other questions?

**Senator SHOEBRIDGE:** I do. Thanks, Chair. The second part of recommendation 5 of the Moss review talks about a carve-out from the exclusion—to go back to that convoluted language—where the authorised officer considers that what might otherwise be a personal employment related grievance relates to systemic wrongdoing. I'm assuming that the wording in your submission from the ombudsman reflected that systemic wrongdoing in recommendation 5 of the Moss review. Is that right?

**Mr Anderson:** Yes, but it also reflects, as I explained earlier, the way in which the bill is drafted in terms of conduct:

> … of such a significant nature that it would undermine public confidence in an agency (or agencies); or
>
> (ii) has other significant implications for an agency (or agencies).

We think that's a way of saying systemic wrongdoing.

**Senator SHOEBRIDGE:** That's 29(2)(2A)?

**Mr Anderson:** Yes.

**Senator SHOEBRIDGE:** The ombudsman's concern is that that language is potentially extremely broad, and, indeed, from the view of a whistleblower, very, very often—

**Mr Anderson:** That's the reason why they've made the disclosure. They believe it's going to tick one of those boxes.

**Senator SHOEBRIDGE:** Your concern is that, if an authorised officer of an agency says, 'Oops, doesn't satisfy the proposed new 29(2A),' you're caught by the exclusion and inevitably that complaint is going to come to your office because they're dissatisfied with that decision.

**Mr Anderson:** That's our perception of what's going to happen because it's a broad and subjective test.

**Senator SHOEBRIDGE:** I'll go to the Public Service Commission. Again, you endorse this bill unambiguously, but it seems to me—

**Ms McLean:** They're your words, Senator. I don't think we've ever said—

**Senator SHOEBRIDGE:** I can read from your letter.

**Ms McLean:** We've endorsed certain measures in the bill that relate directly to the Public Service Commission's role in the integrity system.

**Senator SHOEBRIDGE:** It seems to me that that proposed new clause 29(2A), particularly subsection (b), is going to create enormous uncertainty for authorised officers. I can't tell—

**Ms McLean:** I would disagree.

**Senator SHOEBRIDGE:** Let me finish—what an 'other significant implication' is, let alone identify whether or not a matter is of such a significant nature that it would undermine public confidence. These seem to me to be hugely subjective tests that reasonable minds will repeatedly differ on.

**Ms McLean:** Our view is that agencies would be able to take an agency position on what that means for that agency in terms of the nature of their functions and operations and would take the initiative to educate their own public officials about what that means in the context of that agency. That would give more certainty and clarity to the authorised officers and the principal officer in that agency.

**Senator SHOEBRIDGE:** How many different agencies are there in the Commonwealth?

**Ms McLean:** I can't give that figure off the top my head.

**Ms Wilson:** It depends on how you clarify it, if you're just thinking about the Australian Public Service, Commonwealth agencies or non-APS. But we will take that on notice and get straight back to you. Someone will be listening.

**Ms McLean:** We can only speak on behalf of the APS.

**Senator SHOEBRIDGE:** There are a lot of them. Don't you see a problem, Ms McLean, if each agency is going to take their own interpretation of clause 29(2A)? That seems to me to create even more complexity. Agency 1 will have one interpretation, agency 2 will have another interpretation, all on a highly subjective test. That seems a recipe for organisational complexity, chaos, unhelpfulness.

**Ms McLean:** That agency position would be taken in the context of guidance provided to them by the Ombudsman.

**Ms Wilson:** I think you're again asking for our opinion, agency by agency. These questions might be better directed to each agency. I would make the broad point that a lot of the amendments, as we said in our submission, are going to provide much needed clarity for everyone right across the Australian Public Service who engages with the PID scheme.

**Senator SHOEBRIDGE:** You say 'clarity', Ms Wilson. Give me an example of conduct that has other significant implications for an agency. You say 'clarity', so give us some clarity here, give us an example.

**Ms McLean:** We would take the view that there are types of misconduct that go to the PID scheme and that are only really handled via an individual code of conduct investigation or a process at the end of a PID investigation, which involves an enormous amount of delay and inefficiency in the handling of an individual complaint. Carving those out from the operation of the PID scheme is something that we are conscious needs to be done as a matter of—

**Senator SHOEBRIDGE:** But this is a carve in, not a carve out. This is something that has other significant implications for an agency, so it's not a carve out.

**Ms McLean:** I appreciate that.

**Senator SHOEBRIDGE:** This proves, doesn't it, this exchange we're having, how complex this is, particularly on your position—

**Ms McLean:** I don't disagree that it's complex.

**Senator SHOEBRIDGE:** that different agencies are all going to have different approaches to clause 29(2A)? This seems like a recipe for chaos.

**Ms McLean:** Agencies already have their own approaches to the triaging of a PID that comes in when determining whether it's eligible or not. This gives some greater clarity about the eligibility of a PID in the first place.

**Senator SHOEBRIDGE:** I asked for clarity, an example—just one example—of the carve in—

**Ms McLean:** I'll give that to you today.

**Senator SHOEBRIDGE:** but you can't give me one. I'm having trouble with clarity here. If the Public Service Commission can't give one example where this carve in will actually work, how on earth is it giving clarity?

**Ms McLean:** I take that on board.

**Senator SHOEBRIDGE:** I had misunderstood the role of the Public Service Commission as trying to get some consistency in agency responses—

**Ms McLean:** But that isn't our role in the PID scheme.

**Senator SHOEBRIDGE:** when the evidence is that you think this will be implemented agency by agency.

**Ms McLean:** We don't have a lot of visibility of how the PID scheme is implemented because we only see what is referred to us in the context of the commissioner's own powers.

**Senator SHOEBRIDGE:** But when I asked you about the code of conduct, which is part of your business, you said you also don't have visibility over that.

**Ms Wilson:** Not over how they're implemented in each agency.

**Ms McLean:** I recall that exchange, yes.

**Senator SHOEBRIDGE:** I'm troubled. That exchange makes your answer more troubling.

**Ms McLean:** Our goal is to provide guidance, which we do, on the code of conduct and the APS values and how processes under the code of conduct may be best administered. We also provide an evaluative function on how code of conduct procedures comply with the act and the commissioner's directions. We don't have a policing role over the code of conduct in agencies, and we certainly don't have a policing role over the PID scheme.

**Senator SHOEBRIDGE:** In terms of the ombudsman's office and the level of information that's provided to your office about how the PID Act is currently operating from different agencies, are there some concerns about the level of systemic reporting that's coming to the ombudsman's office, or is that working at the moment?

**Mr Anderson:** Before I answer that, it probably would be useful for the sake of the *Hansard* and listeners to this process to note that the ombudsman's office does produce agency guidance material, that we do have a PID handling guide and that we would look to produce additional guidance material about how to interpret this section—

**Senator SHOEBRIDGE:** I read that in your submission, and I think that will actually provide at least some clarity if it goes through as currently drafted. Nevertheless, I'll come back to my earlier question.

**Mr Anderson:** In terms of that question, we do get quite a limited amount of information. Agencies are required to, for example, provide us with notifications when they allocate a disclosure and when they decide not to investigate a disclosure or not to investigate a disclosure further. Then we get statistical reports about the number of disclosures, the kinds of disclosable conduct to which they relate, the number of investigations conducted and actions taken by principal officers in relation to recommendations. So we get that sort of information, and that is quite limited. It's certainly the case that individual agencies, for example, in disclosing actions taken might simply say that actions were taken or might describe in some detail actions that were taken. It's the same with the question of giving reasons not to allocate or reasons not to investigate. They might say there were reasons and might describe those in a very summary form, or they might actually set out what the specific reasons were in some detail.

**Senator SHOEBRIDGE:** In terms of your oversight of the PID Act, that means that at the moment you have a statistical oversight but you're not really getting a sense of the substantive responses from different agencies unless they volunteer the information to you.

**Mr Anderson:** Or unless we were to do an own motion investigation and go out there and seek information. At the moment, it's best described, I guess, as limited visibility.

**Senator SHOEBRIDGE:** The Attorney-General's submission talks about enhancing the oversight of the PID Act, and they say that item 28 in part 2 of schedule 1 will implement recommendation 3 of the Moss review. Have you looked at that—as to whether or not it's going to address some of those concerns?

**Mr Anderson:** I note that Philip Morris, in paragraph 41 of his review, says, 'The review concludes that these agencies'—he's talking about the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, the two agencies that currently have oversight of the PID Act—'must be better resourced to assist agency heads to instil pro-disclosure cultures across the Commonwealth public sector.' The new powers that are proposed for us and the new information that we'll have will be welcome. The challenge for us will be that, unless we receive some resourcing to carry out those functions, it'll be challenging for us to fully utilise the ability. We'll have to get more information.

**Senator SHOEBRIDGE:** So it's a good thing you get the reporting?

**Mr Anderson:** It's a good thing we get the reporting. The question is: what will we choose to do with that reporting if we don't have any resourcing to actually look at the reports? Senators are used to hearing agencies

complaining about resourcing, and times are always tough. There's resourcing in terms of staff ability to actually look at things. There are some additional obligations where we have to do six-monthly reports, which we don't currently do, and then we need to do some IT changes as well to be able to properly receive the reports and things like that and make sure we can track them all. That's where the resourcing issue is.

**Senator SHOEBRIDGE:** Have there been any promises on resourcing to allow the ombudsman to implement this? Have there been any commitments made that you're aware of?

**Mr Anderson:** As you'd expect, we have engaged in discussions with the Attorney-General's Department, but ultimately that's going to be a matter for government through the budgetary process. So that's not something we can say as to what's going to happen.

**Senator SHOEBRIDGE:** These resourcing concerns may, in fact, be amplified if, as you fear, the bill gets implemented and then a whole series of aggrieved whistleblowers come to your office after different agencies have said their matters have been excluded from the PID Act because they're related to personal employment issues?

**Mr Anderson:** Absolutely. That would be a growth in work for us.

**Senator SHOEBRIDGE:** It might be a pincer movement for you—an unhappy one.

**Mr Anderson:** That's certainly the case. All I can say is we've made representations to the Attorney-General's Department. It's a matter for government.

**Senator SHOEBRIDGE:** Thanks very much.

**CHAIR:** I have some final questions. Thank you to both agencies for your submissions. They're really helpful. I just want to touch on something that was raised in the previous questions on guidance materials. You said you will be redrafting guidance material for agencies. Can you take us through what that guidance material relates to in relation to this act and how that will assist agencies or employees looking at how their relationship with the referral process will go ahead?

**Mr Anderson:** Currently, for example, we have an agency handling guide with respect to PIDs—I think it's around 79 pages or so—that seeks to step agencies through the process. That's also available to potential disclosers because it's a published document. We also provide some other material about the PID process that we also publish. We do regular forums for agencies as well, at which we seek to talk with PID handling officers, in particular, about how to step through the act. Occasionally we've done bespoke processes for individual agencies, where appropriate, to provide information for an agency that either wanted, or seemed to need, more information about the PID scheme. It's particularly aimed at agencies, in terms of understanding their obligations under the PID Act, but that can also be of use to people who are considering making disclosures.

**CHAIR:** From the Australian Public Service Commission point of view, do you currently provide guidance on these types of provisions? You would have been thinking ahead to if the bill is passed—what sort of training or guidance materials would you be looking to implement?

**Ms McLean:** We already have what we consider to be adequate and comprehensive guidance materials on the Code of Conduct, which is our remit. In particular, the handling misconduct guide has some examples of mitigation strategies regarding identified risks of reprisals in the code process. I would consider that in developing guidance on the changes to the PID Act. We'd be very happy to work with the ombudsman to share some of those examples.

**CHAIR:** I wanted to go to another issue raised in the previous questions, Commissioner, and it's regarding the personal employment related grievances. I know that there's been a lot of discussion today about the best way to deal with this type of situation that arises. One of the things that I think the deputy commissioner pointed out was the impact on a matter being almost drawn out if it goes through the PID process. Am I right? I don't want to put words into your mouth. But the PID process would need to play out before a code-of-conduct process, and I think in your submission you were talking about it being more efficient and effective for complainants and for agencies. As I am not someone who's had to go through that long process before, what are we talking about as a time frame? What would be the impact on a person with a code-of-conduct issue they're looking at, if it was dealt with through this process?

**Ms McLean:** I might make an observation, having been an authorised officer in the past at other agencies. A PID that would predominantly relate to personal workplace grievances would go through the normal time frames of the PID process, which can be up to 104 days. I think that was mentioned in the Ombudsman's submission. Certainly, there's a 90-day time frame to provide a report to the discloser. If the ultimate findings of that report are

that the misconduct should be handled through a code-of-conduct process, that will add delay to that process being carried out.

We are thinking that, if these sorts of matters can be moved to the appropriate handling mechanism at a much earlier stage of the process, it would be more conducive to actually settling or addressing the issue at hand in the workplace and could lead to greater trust and integrity in the workplace itself. That would obviously be better for the complainant and certainly better for the agency. You would then be moving to a process that has clearer mechanisms for procedural fairness as well for the persons against whom the allegations have been made.

**CHAIR:** I guess, in a perfect world, we'd be dealing with all of these different mechanisms at the same time. We're not dealing with this proposed PID legislation in a vacuum; we've got the *Set the standard* report as well, and the recommendations coming out of that. So I thought I'd touch on the implementation of the Parliamentary Workplace Support Service. That's been established since the PID scheme was established, and that provides an alternative avenue for current or former parliamentary staff to make complaints of misconduct in the workplace. Can you explain the role of the service in dealing with complaints of misconduct, and is there an interaction with the Parliamentary Workplace Support Service since it's been established? It's only recent.

**Ms Wilson:** I'll try to answer the latter part of your question first. We do provide support to the Parliamentary Workplace Support Service from that corporate perspective, but we have no role and very little interaction with the Parliamentary Workplace Support Service when it comes to the role that they're playing to allow current or former parliamentary staff to make a complaint of misconduct in the workplace. Those questions about the cases that they handle and how they go about their processes are much better directed towards the Parliamentary Workplace Support Service themselves.

**Ms McLean:** Yes, or potentially the task force that's been set up to implement the *Set the standard* report.

**CHAIR:** Okay. I have just one last question for the Ombudsman. One of the things that our committee report can recommend is obviously amendments to the bill, but I also note that sometimes the explanatory memorandum needs a little bit of clarifying, because the explanatory memorandum actually helps people to understand the purpose of provisions. Your submission notes that paragraph 2.73 mischaracterises the OCO's abilities upon receipt of an investigation report. Can you explain why there's a mischaracterisation here? What would be a recommendation around clarifying that mischaracterisation, because I think it does have an impact on how the legislation will be applied later on?

**Mr Anderson:** It is true that recommendation 3 does say:

That the PID Act be amended to require a Principal Officer to provide the Commonwealth Ombudsman or the IGIS with a copy of the investigation report within a reasonable period of time.

That is what is commented on in 2.73. But it's the underlying intent of what actually comes from providing a copy of the report to the Ombudsman or the IGIS. Philip Moss said in his report that that would enable agencies with oversight of the PID scheme to then be able to better inform themselves, take a range of actions, seek more information from agencies and question whether they should have done something in a different way, for example. But that all depends upon actually being able to do something with the reports.

So it comes back to the question I mentioned before about having the capacity in terms of resourcing to in fact be able to do something in a timely fashion. When you get a report saying, 'We have decided not to investigate,' 'We have decided not to allegate,' or 'The investigation has been concluded,' that might mean that the agency has now completed all of their action and some time might have passed before we in fact receive the report. For us to then be able to step in and say, 'You should do something now in the context of the investigation,' because, when it is already completed, it might be too late.'

**CHAIR:** Thank you. I appreciate that. Thank you very much to the Commonwealth Ombudsman and to the Australian Public Service Commission. Thank you for providing evidence for us today.

**CRAWFORD, Ms Kristin, Director, Administrative Law Section, Attorney-General's Department**

**MORAN, Ms Celeste, First Assistant Secretary, Integrity Frameworks Division, Attorney-General's Department**

**REEVE, Mr Parker, Acting Assistant Secretary, Transparency and Administrative Law Branch, Attorney-General's Department**

[13:13]

**CHAIR:** I now welcome officers representing the Attorney-General's Department. Thank you very much for taking the time to speak with the committee today. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you and is available from the secretariat. I remind senators and witnesses that the Senate resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and doesn't preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Would anyone like to make an opening statement before we go to questions?

**Ms Moran:** No, we're happy to go straight to questions.

**CHAIR:** Senator Scarr, I'll hand the call to you.

**Senator SCARR:** Thank you to all the witnesses for joining us today. This must be the most satisfying part of your job! I commend everyone who's been involved in this process. It's one thing for us to sit here and ask questions about the drafting et cetera and ask the questions we need to ask in order to discharge our responsibilities, but I recognise the obviously substantial work that's gone into this amendment bill.

**Senator SHOEBRIDGE:** And the usefulness and quality of the submission. Actually engaging with the issues is really helpful.

**Senator SCARR:** Excellent. My first question—this won't come as any surprise—is in relation to the definition of employer work-related conduct. I just want to walk through it. As I understand the legislative scheme, you have a definition of disclosable conduct, and you then carve out, or exclude from that, a definition of employer work-related conduct, but then there are exemptions with respect to that employer work-related conduct, which could bring it back within disclosable conduct. One of the concerns that have been raised during the course of today is that the Moss review referred to 'solely' employer work-related conduct, and, from our reading of the bill, we're concerned that that qualifier 'solely' is not there to qualify what 'employer work-related conduct' means. I'm interested in your response to that concern.

**Ms Moran:** I'll start at a high level, and then I'll get my colleagues to give you the technical aspects of it as we go. We've been following along today, and we've heard the issues raised. I think we're clear on what Mr Moss's recommendation said and on the intention around the use of 'solely'. We obviously worked very closely with the Office of Parliamentary Counsel in the drafting of the bill and have had extensive discussions with them about achieving that policy outcome. Our view is that, while we don't use the word 'solely' in the bill, the way the provisions are drafted means they do actually have that effect. What I'll do now is get either Mr Reeve or Ms Crawford to run you through our understanding of how that actually works in practice.

**Ms Crawford:** If I may, I'll walk you through some of the provisions in the PID bill.

**Senator SCARR:** Please.

**Ms Crawford:** I appreciate that it's challenging to navigate, as we work through it.

**Senator SHOEBRIDGE:** Is there a better way of talking about the carve-out to the exclusions to the exemptions?

**Senator SCARR:** I'm not sure that's a question, Ms Crawford!

**Senator SHOEBRIDGE:** If you could help us with that term, Ms Crawford, that would be helpful.

**Ms Crawford:** We've been working on it as we've been drafting. The key thing is that—and this has been in the conversation today—the Moss review uses the word 'grievance', while we're using the term 'personal work-related conduct'. That is because the Public Interest Disclosure Act works in terms of instances of conduct. The key thing that I would point you to is in section 26, which is the meaning of public interest disclosure, where it talks about what an internal disclosure is—that's where you start the chain. It says:

The information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.

Then we go to the definition of disclosable conduct, which is in section 29. That's where we are now are putting this new 29(2A), which says that disclosable conduct is not personal work-related conduct. That means that only personal work-related conduct is excluded, but, if there are other instances of disclosable conduct, they are still part of the disclosure. That's part of the distinctiveness of how the drafting of the PID Act works. It's different to the Corporations Act, which talks about disclosure of information and doesn't use a concept of conduct at all. It has a 'to the extent that', whereas this works on the basis of one or more instances of conduct. So it always works on the basis of being contained to conduct.

**Senator SCARR:** Ms Crawford, you've been following the evidence and the testimony, and you've had the benefit of reviewing the submissions. Given this testimony and those submissions, is the department going to reflect on whether or not there might be an opportunity to perhaps put the matter beyond doubt regarding that meaning, as Ms Crawford has walked through? I understand the nuances, but is there potentially a way that the Attorney-General's Department could reflect on perhaps making that more accessible in terms of the drafting?

**Ms Moran:** I think it's fair to say we have been, prior to today but today as well, reflecting on the issue. One option is to include an explanatory note in the bill to make that abundantly clear. That's something we're thinking about.

**Senator SCARR:** Another option would be, for the avoidance of any doubt, to put (a), (b), (c), (d) in a subclause. Clearly, you have esteemed stakeholders who are experts in this area who have raised this concern. Members of this committee have raised the issue as a matter of concern. I would have thought that, with some enhancement of the drafting—notwithstanding I respect Ms Crawford's analysis—it perhaps could be made beyond any doubt and more accessible to readers of the legislation. Do you think that's a fair comment to reflect on, Ms Moran?

**Ms Moran:** I think we can take that on board.

**Senator SHOEBRIDGE:** Could you take me through, again, how section 26 impacts on section 29, in such a way that I read section 29A differently to how it's expressed in black and white? I wasn't quite sure I followed how it had that impact on 29A.

**Senator SCARR:** It's the 'one or more'.

**Ms Crawford:** It's the 'one or more instances' section. It might help to note—it's one of those tricks with the PID Act—that there are all these defined terms that are linked throughout the act. All the protection provisions that are in the PID Act—reprisal, compensation and so forth—apply to public interest disclosure, which is defined in section 26. So you go to section 26, and then you're looking at satisfying—

**Senator SHOEBRIDGE:** Where in section 26?

**Ms Crawford:** In section 26, it says the disclosure needs to be by a person who's a public official, the recipient needs to be a person who's an authorised recipient, and all the requirements set out in column 3 need to be satisfied. When we're looking at internal disclosure, which is usually your first step, the information disclosed should tend to show 'one or more instances of disclosable conduct'. Then you have to go to section 29 to work out what disclosable conduct is. It shows you a long list of 'kinds of disclosable conduct'—which I guess is another kind of language used—in that table, so it's thinking about it as instances. Then you've got the new 29(2A), which will say that personal work-related conduct is not disclosable conduct unless it's meeting those exceptions to that exclusion.

**Senator SHOEBRIDGE:** But, when I then go to 29A, it makes no reference back to section 26. It just seems to have a fairly unambiguously broad definition of personal work-related conduct. For example, if somebody is demoted and the demotion is because they were late turning up to work for six months or were cranky with their manager, that would, on the face of it, amount to personal work-related conduct. How do we then go behind that and say, 'Actually, that all related to how they were being marginalised and responded to because of the whistleblower complaint'? How do we bridge that gap, through your reasoning?

**Ms Crawford:** Section 29A is simply defining personal work-related conduct for the purposes of 29(2A), which is excluding it from disclosable conduct. In terms of working out whether it's excluded, you would ask, 'Is it personal work-related conduct?' If, yes, it is, you would ask if any of those exemptions apply to that: Is it a reprisal action in relation to other disclosable conduct? Is it of a significant nature? Or does it have significant implications? Then you would bring it back in as 'disclosable conduct'.

**Senator SHOEBRIDGE:** But none of that relates to what you took us through in section 26. I don't see how section 26 helps us on this journey.

**Ms Crawford:** Section 26 is just illustrating that in terms of being a public interest disclosure, which is what attracts the protections, it can sit underneath it more than one instance of disclosable conduct. Disclosable conduct could be fraud, maladministration or whatever else, and could also be personal work-related conduct. So the way that 29(2A) is operating is only pulling out conduct that is personal work-related conduct from the disclosure, but not the other conduct that is disclosable conduct.

**Senator SHOEBRIDGE:** I understand it could be a separate instance of something that's protected. But then, to prove that, you have to prove either reprisal or one of the other two tests in the proposed new (2A)(b). We heard from witnesses earlier that proving reprisal, getting into the mind of the person taking the adverse action, has proven to be impossible. So it doesn't really help.

**Ms Crawford:** I mean, in terms of getting past having made the disclosure, the authorised officer who receives it isn't investigating and making determinations about whether there has or hasn't been reprisal. They can only decide not to allocate it and do nothing with it if they're satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered an internal disclosure.

**Mr Reeve:** I might just add to Ms Crawford's point on that. At the stage of allocation, so at the stage that an authorised officer is considering whether an investigation should be commenced, the relevant threshold there is that the disclosure tends to show or the discloser themselves reasonably believes that their disclosure tends to show that there has been reprisal action.

I think the point about the difficulty in proving reprisal action—in particular, to that criminal threshold—is a well-made point, and there are some amendments in the bill to address that stage of the process, at the back end of an investigation, where there is a criminal allegation that there has been reprisal action. But, at the point of the authorised officer making a decision as to whether or not to allocate a matter for investigation, the threshold there is simply that the disclosure tends to show or that the discloser reasonably believes their disclosure tends to show that there has been reprisal action.

**Senator SHOEBRIDGE:** But both 'tends to show' and 'reasonably believes' are tests separate to the mindset of the whistleblower. That's a view that the authorised officer will take. So the view that the whistleblower has, that it did relate, which is the subjective view of the whistleblower, doesn't inform the decision of the authorised officer. The ombudsman told us that the problem is it's all going to end up on their desk, if you go down this pathway.

**Mr Reeve:** I think the other point that's probably worth making here, just on the point of it landing in the ombudsman's office, and I did hear Mr Anderson's testimony earlier—the intent of the Moss recommendations and of these amendments is to allow disclosures that deal with personal work-related grievances or conduct to be investigated under frameworks that are better designed for the investigation of those processes, rather than not being investigated at all.

**Senator SHOEBRIDGE:** Which has a systemic benefit. I get that, Mr Reeve. There are systemic benefits there.

**Mr Reeve:** Yes. I think the question of whether or not a discloser is going to take a matter to the ombudsman's office because it is not being investigated under the PID Act will, in some significant part, turn on whether an agency then is investigating that matter as a code of conduct matter, as a breach of the discrimination acts or as a matter within the Fair Work Commission's jurisdiction—under one of those other investigative frameworks.

**Senator SCARR:** Senator Shoebridge, I've given you a lot of indulgence because I've been very interested in your chain of questioning, of course. Mr Reeve, you recognise that in cases such as this there can be intertwined factors, where a potential or actual whistleblower has been subject to what is defined as employer work-related conduct but also has raised, potentially, legitimate concerns in good faith internally in an organisation.

One of the concerns we have is that an authorised officer receiving that initial notification simply looks at it and says, 'Well, this is an officer who has a bullying complaint; therefore, that should be dealt with under this stream as opposed to being dealt with under the PID regime.' Do you recognise that what I think is a legitimate concern?

**Mr Reeve:** Absolutely. What we would say is that the way the framework is set up—and this goes to the reprisal concept remaining within the scope of disclosure-like conduct under the act—means that where there is a connection between the personal work-related complaint or grievance or conduct and another substantive public interest disclosure—fraud, misconduct et cetera—those matters can continue to be dealt with together. If there is some allegation that a person has been bullied or subject to performance management, either because they have made a public interest disclosure or under the amendments contained in this bill that expand the reprisal framework to include circumstances where a person could make a public interest disclosure, that then covers the

circumstance where a person has been subject to some form of bullying, harassment or undue performance management simply because they would be in a position to make a public interest disclosure. So in those circumstances, where there is a connection between the personal work-related conduct and the balance of the public interest disclosure, focusing on those integrity related issues, the bill does permit those matters to be dealt with together. Where there is no such connection—where there is perhaps an allegation of fraud and an allegation of bullying that have no nexus to one another—those matters are the ones that would be separated and dealt with separately.

**Senator SCARR:** Right, but that can be very hard for, especially, a discloser or whistleblower to demonstrate on the face of it. As we heard from some previous witnesses, really the onus is on the agency itself to properly record evidence with respect to workplace administrative action that's taken, performance management et cetera, and that onus shouldn't be on the person who's whistleblowing or disclosing the information. How does the bill take into account that discrepancy, if you like, in the ability to demonstrate the reasons for the performance management or whatever administrative action is being taken, where I think the onus needs to be on the agency?

**Mr Reeve:** Certainly. As Ms Crawford referred to previously, the basis upon which an authorised officer can elect to not deal with the matter as a public interest disclosure is where there is no reasonable basis for it to be a public interest disclosure. That's a reasonably high bar that imposes something of a bias towards dealing with matters as a public interest disclosure. Additionally, there's section 27 of the existing Public Interest Disclosure Act, which allows a discloser to indicate that there is an associated allegation to their disclosure and to put to the authorised officer that there are several allegations—several instances of disclosable conduct—that are related to one another. The core of it is that there is something of a bias in the act, and in the bill, towards dealing with matters together, and the threshold for the authorised officer is that there is no reasonable basis to consider that the instance of personal work-related conduct is one that remains within the definition of disclosable conduct.

**Senator SCARR:** We haven't got much time. I've got a heap of questions, and I'm alive to the fact I need to share the call. I want to move to the exemptions to the exclusion, which—if you refer to amendment 3 in the bill—are where:

(b) the conduct:

(i) is of such a significant nature that it would undermine public confidence in an agency (or agencies); or

(ii) has other significant implications for an agency (or agencies).

Paragraph 1.8 of the explanatory memorandum, in the context of disclosable conduct, says 'unless it relates to systemic wrongdoing or constitutes reprisal action'. So there's a disconnect or a difference—maybe it's not a disconnect—between the wording which is used in paragraph 1.8 of the explanatory memorandum and the actual drafting in the bill. How did we get from 'systemic wrongdoing' to 'is of such a significant nature that it would undermine public confidence in an agency or has other significant implications for an agency or agencies'?

**Mr Reeve:** I might pass to Ms Crawford if she wants to add further to my answer. Paragraph 1.6 of the explanatory memorandum, two paragraphs previously, sets out the actual provisions, talking through significant implications.

**Senator SCARR:** Yes, I've got that. I've read that.

**Mr Reeve:** Paragraph 1.8 then talks through, I think, what is an example of those limbs, which is where there are systemic implications.

**Senator SCARR:** With respect, 1.8 doesn't couch the reference to systemic wrongdoing as an example. It actually says—and this is a key interpretation document—'unless it relates to systemic wrongdoing or constitutes reprisal action', so reprisal action is dealt with in clause 29(2A)(a) and therefore, reading it, one's left to ponder whether (b) is simply referring to systemic wrongdoing.

**Ms Crawford:** If I could add to that, that reference in 1.8 really seeks to paraphrase what Moss is recommending, rather than the words in the bill itself, though the bill is to give effect to the intent behind Moss's recommendations. The wording in the Moss review picks up to say 'personal employment-related grievance', acknowledging it can be a part of the larger systemic concern. Systemic issues would be an example of something that would fall under paragraph (b). The 'significant implications' is the same language as in the Corporations Act whistleblower personal work related grievance carve out, so that's an alignment for that component.

**Senator SCARR:** The issue I have—and I served as a general counsel of a listed public company, so I was the chief whistleblower officer—is that I'm looking at that and in my mind trying to interpret what that means in practice. We heard from Mr Anderson, the Ombudsman, that from the perspective of someone who is making a disclosure, they wouldn't be making the disclosure unless they thought it was of a significant nature and there was a public interest in them making the disclosure, assuming they're doing it in good faith. Yet, from the position of

the authorised officer who needs to consider this, they're going to be looking at the threshold that, if you consider it as some sort of hierarchy—and I'm not sure that's the right way to consider it—this is disclosable conduct, but then does it fall within employer work related conduct and is it brought back in? Is it 'carved in', to use Senator Shoebridge's phrase from earlier today, by reference to 1 or 2 in terms of: is it of such a significant nature? I'm not clear, with due respect, about what's captured by that. Systemic wrongdoing I can understand is certainly captured by that. The point I raised earlier was: how do you uncover systemic wrongdoing? There is always the first disclosure, and that first disclosure could be the first step on the road to discovering systemic wrongdoing. Do you understand the point?

**Mr Reeve:** Yes. On the final point you raised, obviously if a person makes a disclosure, either under the PID Act or under any of the other Commonwealth frameworks that provide protections for whistleblowers or simply as a code of conduct matter within their agency or department, that can be the first disclosure that then leads to further matters being uncovered. I entirely agree with that. On the broader question though, of—

**Senator SCARR:** Before you move on from that, this is a really important point. For example, if someone in a sensitive position is bullied by a senior executive in an agency, that could be totemic of a toxic culture which is impeding the flow of information to committees such as this or to boards of directors, and that could have great public significance even though, on the face of it, an authorised officer might view it as just one isolated complaint of bullying. But it could be of a significant nature in terms of the culture of the organisation. Do you take that point?

**Mr Reeve:** I think I do. You may have even pre-empted what I was about to turn to, which is that, in terms of what it is of a significant nature, we of course wouldn't want to try to exhaustively define that or get into hypothetical examples about a particular case. But, as is indicated in the explanatory memorandum, we certainly would be looking at issues that are of a systemic nature. We'd be looking at issues that affect—

**Senator SCARR:** But that's not necessarily systemic.

**Mr Reeve:** I take that point.

**Senator SCARR:** If you're the authorised officer considering that—it might be bullying at a very high level, but if you've only received one report, almost by definition it's not systemic, but it could be very material and significant. Do you understand the distinction?

**Ms Moran:** We do. Mr Reeve is trying to give you a list. This is only one, in terms of systemic nature, of the other types of conduct we think would fall within this definition without having an exhaustive list in the bill.

**Mr Reeve:** Conduct that affects the management or control of an agency, at a very senior level, where the allegation of bullying or harassment could have that broader effect on an agency—I take that point. As is set out in the bill, there's a question of whether it would affect the public confidence in the agency itself. Again, that could go to its impact on a major program, or on the delivery of services or something of a significant nature. This is an area where guidance material, that we intend to develop in consultation with the ombudsman—or rather, we would consult with the ombudsman on their development of that guidance material—could do quite a bit of work. To take your point: if the explanatory memorandum itself doesn't provide sufficient detail on that, then that is also something that we could look at.

**Senator SHOEBRIDGE:** If an authorised officer has had five separate complaints put before them, perhaps from five different employees, can the authorised officer, on the fifth one, have reference to facts outside of that complaint in order to satisfy themselves that it's significant? Or—on one reading of the bill—are they trapped to look at the one instance in front of them? Which is it? Can they look at all five? On one reading of the bill they can't; they're looking at them all discretely, and they might fall into error if they look at the other four to give context to No. 5.

**Mr Reeve:** That may be an issue. We'd want to take it on notice and come back to you very quickly.

**Senator SCARR:** It's a complicated question. The same question occurred to me, to be frank. This is one of the issues in terms of that word 'systemic'. If someone can only consider disclosures that are made on a piecemeal basis, or whether or not they can consider the impact of the aggregate—that's the issue. I'm not sure what the answer is either, but that same issue concerned me.

I've only got limited time, so I'd like to quickly run through some other issues. Feel free to take some of these on notice. Both Senator Shoebridge and I were on the Joint Select Committee on National Anti-Corruption Commission Legislation, and there were carve outs included in terms of restrictions on disclosure to health practitioners. We were concerned, especially on the testimony we received, that people in this situation can be under immense psychological stress and may well be seeing a health practitioner to obtain assistance. I'm asking

whether or not that can be accommodated in the context of the bill. I'm happy for you to take that on notice unless you've got an immediate response.

**Ms Moran:** Mr Reeve actually developed that legislation, prior to coming to work on the PID legislation, so I'll get him to respond to you.

**Senator SCARR:** There you are; there's a handpass for you, Mr Reeve!

**Mr Reeve:** Precisely. I am quite familiar with the issue you're raising, and the government did make amendments to the NACC legislation to address that issue. That's something we can have a look at for this bill as well.

**Senator SCARR:** We've received very compelling testimony today with respect to the complexity. Ms Crawford, I think your very intelligent and articulate analysis of the clauses as you walked us through them demonstrates that we're dealing with a very complicated piece of legislation here. I note that the second stage of reform is going to include consideration of a whistleblower protection authority, which perhaps could provide guidance and support, and potentially assist someone to implement the protections against reprisals that are contained in the legislation. Indeed, its mere presence could, in itself, assist in terms of militating against reprisal activity. Is it envisaged by the Attorney-General's Department that its consultation will encompass a whistleblower protection authority that would extend to both the public and private sectors?

**Ms Moran:** I will start by saying that I think the way that it has been framed by the Attorney-General currently has been in relation to a public sector whistleblower protection authority or commissioner. We will have to take away the evidence that has been given today about it having a broader application and have a discussion with the office and the Attorney.

**Senator SCARR:** Okay.

**Senator SHOEBRIDGE:** And how it is quite often mixed. We heard from one of the witnesses earlier about how often that's mixed and how you would disentangle that if you only have a public service related commission. Will you take that on notice too, Ms Moran?

**Ms Moran:** We will. I know you're under time pressures, but the government has committed to a discussion paper about the need for it. So we can have a look at this issue as part of that.

**Senator SCARR:** Thank you. In their submission, Maurice Blackburn referred to some of the issues that could arise in the waiver of confidentiality of discloser identity, in particular where someone under an immense deal of personal pressure and stress maybe confides in a trusted work colleague and that could inadvertently lead to them compromising the ability to keep the ability to keep their identity confidential. Can I ask you to take on notice Maurice Blackburn's suggestion and provide a response to their suggestion in that respect?

**Ms Moran:** Yes.

**Senator SCARR:** Finally, I've gone through the Law Council of Australia submission. As always, this committee takes very seriously the recommendations and suggestions from the Law Council of Australia. Can I ask you to take on notice the recommendations which they've made and to provide a response to those recommendations, if you could? I am happy for you to do it in short form. Instead of me running through all of the recommendations—some of which we have already canvassed—I just want to make sure that this process includes a comprehensive response to the recommendations that have been made and suggestion from the Law Council of Australia. Can you take that on notice, Ms Moran?

**Ms Moran:** Yes.

**Senator SCARR:** Thank you very much.

**Senator SHOEBRIDGE:** Before we dive back into 29A, there was one discreet issue that arose in the earlier evidence we had, and it is also picked up in the Law Council's submission. At paragraph 17 of their submission they say:

In December 2020, the Australian Government indicated, when responding to the Moss Review, that it was 'considering options for creating a list of security cleared lawyers that may be used by public officials who wish to seek legal advice in relation to information that has a national security or other protective security classification'.

I know that that's a response from the former government. The evidence we had was that that would be extremely helpful for many whistleblowers if they are concerned about a national security or other secrecy provision. Is that progressing in any way? Can you shed any light on that?

**Mr Reeve:** We are aware of the evidence on this, and we will look at it further. In relation to some of the evidence today around publishing that list of lawyers with security clearances, I would want to note the Director-General of Security's statement in his annual threat assessment last week around the risks of publishing the

identities of security clearance holders. I think there is a balance to be struck there between providing that transparency around who a person might go to without sort of identifying that person as someone who may hold classified information. That's just a point I wanted to flag immediately on that issue, Senator. But that's something we can look at further.

**Senator SHOEBRIDGE:** Well, if there's a balance there, at the moment the balance is harming whistleblowers, because they don't know where to go to get legal advice. How is the harm caused to whistleblowers, who just don't know where to go to get legal advice, being weighed up in those considerations?

**Mr Reeve:** I take the point. It depends where an official is working, but particularly in those agencies working in quite high-security environments, where this issue is most likely to rise, a lot of those agencies do have procedures and policies in place to pair up their staff with external legal representation with appropriate security clearances where that is required. That is not limited to the public interest disclosure framework obviously. It relates to employment matters and the like as well. I wouldn't want there to be an impression that there are no arrangements in place. That is generally handled at the agency level or in consultation with external agencies as well.

**Senator SHOEBRIDGE:** You don't have to necessarily whack it up on the Attorney-General's website in order to have the information go where it needs to go. But, if across the public service people who have security clearances and access to secret or top secret information also had access to the list of lawyers that could help them if they had a whistleblowing problem in relation to that information, that seems to me to be an achievable resolution of those two conflicts so that you don't just simply leave it up to the agencies, case by case, to maybe or maybe not implement that.

**Ms Moran:** Adding to what Mr Reeve said, I think we are thinking about the options for how you deal with it, noting the comments from the Director-General. We had had in our head that this would be part of the stage 2 reforms to deal with the issue of legal advisers more generally.

**Senator SHOEBRIDGE:** But it doesn't seem to require a legislative reform if there was a directive across agencies to say, 'If you have this level of clearance, you also have access to a list of lawyers who can help you out if you've got a problem.' That doesn't seem to require 12 to 18 months of considered interdepartmental review. That seems to be something that could be implemented quite easily.

**Ms Moran:** We can take that on board.

**Senator SHOEBRIDGE:** Could I go back—I'm not quite sure if we call it a carve-out or an exemption or an exemption to a carve-out. We'll call 29A a carve-out, and then we can call 29(2A) an exemption. Going forward that might work, unless you've got a better term? So, going to the carve-out in the proposed new 29A, do I understand it was the intention of the drafters that it only cover personal work-related conduct where it's solely in relation to personal work-related conduct?

**Ms Crawford:** That's correct.

**Senator SHOEBRIDGE:** If that's the intention, could you take on board whether or not there might be some merit in just unambiguously legislating that—not with an explanatory note, but just unambiguously saying 'solely'—to be consistent with recommendation 5?

**Ms Moran:** What I'll say is we've heard the evidence today and what we will do is have a look at that exact point. What I can't commit to is saying that we will include the word 'solely' in the bill.

**Senator SHOEBRIDGE:** I understand that. I'm not asking you to say, 'Yep, we're going to sort it and amend it.' I know that there are a couple of steps to go through.

**Ms Moran:** Thanks.

**Senator SHOEBRIDGE:** But, if we're looking to the Corporations Act as an example, or perhaps at least partly the model you used for this—and I understand that is the case, you looked at the Corporations Act partly as a model—do you accept that one of the fundamental differences between the two is when we're talking about establishing reprisal action that section—I think—1317AD in the Corporations Act has a reverse onus for particularly that critical element of the offence, which is the subjective intention of the person taking the reprisal action. The onus is on the agency or corporation to disprove the reason, and that's a critical difference between the two schemes, isn't it?

**Ms Crawford:** Yes, that is a difference at the moment.

**Senator SHOEBRIDGE:** That means having a reprisal exemption to the carve-out in the PID Act is very, very different to having it in the Corporations Act, because in the Corporations Act the whistleblower has the

benefit of the reverse onus, that the corporation has to disprove the reason, whereas there's no such benefit for the whistleblower in the PID Act, is there, Ms Crawford?

**Ms Crawford:** When you get to the point of proof, we've made some changes to the offence provision for a reprisal offence in this bill that does have a shifting onus in terms of the reasonable administrative action, which is different to the definition of 'takes a reprisal' in section 13. The observation I'd make—it goes to some of our earlier evidence as well—is that allocating the treating of the disclosure by the agency is not going to that beyond-reasonable-doubt proof benefit. Again, it's pointed to in section 43 that an authorised officer has to be satisfied on reasonable grounds that there's no reasonable basis it could be an internal disclosure. As Mr Reeve said, that's quite a high bar. So I wouldn't see it as needing to go down to proving that state of mind. If there is a suggestion that it is a reprisal action, we would expect it to carry through and be treated as a PID.

**Senator SHOEBRIDGE:** But it's still an objective determination by the authorised officer under section 43, and the very passionate belief of the whistleblower that the reprisal action is connected to the whistleblowing is not going to satisfy an objective test, is it?

**Ms Crawford:** That would depend on the nature of the disclosure and the information given at the time.

**Senator SHOEBRIDGE:** You would agree it's an objective test? Although at a lower threshold, it's an objective test in section 43 for the authorised officer.

**Ms Crawford:** Yes.

**Senator SHOEBRIDGE:** If it's an objective test, they're going to have to look and see whether there's evidence of a critical element. And one of the critical elements, even under the amended section 13—section 13(1)(c)—is whether or not the 'belief or suspicion is the reason or part of the reason'—the belief or suspicion here being the making of a whistleblower complaint. How is an authorised officer ever going to be satisfied, on any kind of objective basis, of what's in the mind of the person taking the reprisal action? We heard here from Mr Whealy that it's impossible. Has that been improved in any way in this bill? I don't know what you're thinking, Mr Reeve, for example.

**Mr Reeve:** This bill is implementing a number of the priority recommendations from the Moss review. The bill does make a number of amendments to the reprisal framework, as Ms Crawford has outlined. But you're correct: it does not adopt the Corporations Act framework for reversing that element of the burden of proof. It does reverse other elements of the offence.

**Senator SHOEBRIDGE:** But that's the most critical one—isn't it?—in terms of reverse onus, because the only person who really can give evidence about what's in the decision-maker's mind is the decision-maker. That's why the reverse onus lies in the Corporations Act. But, for some reason, that hasn't been included in these amendments. So, first of all, do you agree the only person who can really give credible evidence about what's in someone's mind is the person themselves, unless they've written a note saying, 'I'm doing this because I'm mean and I want to take action against a whistleblower'? That's why we have a reverse onus.

**Mr Reeve:** I'm not sure I would agree with that entirely. As Mr Anderson gave evidence earlier today, the documentary record inside an agency may allow inferences to be drawn and may point one way or the other, particularly where the performance management or other conduct only commenced after a public interest disclosure is made, for example. More broadly, on the architecture and structure of the reprisal offences, as with many other parts of the PID Act, the government has committed to the second stage of reforms.

**Senator SHOEBRIDGE:** But, without that second stage, the broad exemption that's proposed in section 29A has a potentially unintended breadth of reach. Without having done that other work—fixing the reverse onus and making it easier to prove reprisal action—29A, as drafted, has potential overreach, doesn't it? It excludes things that might otherwise be legitimately included within the PID Act.

**Mr Reeve:** I think we probably can't go much further beyond the evidence we've given on the high bar for an authorised officer to form a view that there is no reasonable basis on which the disclosure could be a public interest disclosure. The threshold for that is that the evidence tends to show that there has been reprisal action or that the discloser themselves reasonably believes that the evidence tends to show that there has been reprisal action.

**Senator SHOEBRIDGE:** But the critical thing that's going to be missing, 99 times in 100, is any evidence about the belief or suspicion of the officer taking the alleged reprisal action. That's why the reverse onus exists in the Corps Act, isn't it, Mr Reeve, because it's so hard to prove?

**Mr Reeve:** I probably couldn't comment on the Corporations Act itself, but the Corporations Act certainly reverses the onus of proof.

**Senator SHOEBRIDGE:** Ms Crawford, you said—I think it was you—that some of this drafting is to reflect how the Corporations Act worked, so when you were looking at the whistleblower provisions in the Corps Act there must have been some consideration about whether or not the reverse onus would be included in this raft of reforms. Was there?

**Ms Crawford:** It was looked at, but given the complexities in amongst all of that and looking at the protections framework as a whole, it'll be considered in the second stage, more so, while this one's focused at the Moss recommendations themselves. The other thing I would just add, if it's helpful, is that the role of an authorised officer is not to investigate the disclosure and make findings about whether it is or isn't reprisal action. The role is to determine where the appropriate place is to allocate or not allocate that disclosure. Mr Reeve pointed out the 'tends to show' language in the definition of public interest disclosure, the 'on reasonable basis' is not making a conclusive finding at that stage.

**Senator SHOEBRIDGE:** Did anyone ever try to do a flowchart of how these decisions are made within the A-G's Department?

**Ms Crawford:** I think we have a lot of flowcharts.

**Senator SHOEBRIDGE:** Could you, on notice, provide a flowchart of how these decisions happen?

**Senator SCARR:** Or multiple.

**Ms Crawford:** We can take that on notice and see which ones we already have.

**Senator SHOEBRIDGE:** As I see it, if this gets legislated in its current form, it can be a question of I don't know whether it's snakes and ladders or some kind of sewerage plumbing diagram, but it's got to be very hard to follow without some kind of—the polite term I'm going to use is flowchart for decision-makers. So could you provide one on notice?

**Ms Moran:** We'll take that on notice. I know Mr Anderson said earlier, and Mr Reeve has also mentioned it, that we will be working with the Ombudsman's office on guidance to agencies around how these new provisions operate.

**Senator SHOEBRIDGE:** You must have known, when you were going through this process, that there are many people who are concerned about becoming whistleblowers because they fear criminal prosecution. We have outstanding cases against key whistleblowers, like David McBride or Mr Boyle. You must have known that putting in more legal complexity could send a signal to other potential whistleblowers not to go down that path, because it's a minefield already. Did you take into account the potential damage of even more legal complexity, in this space, when drafting these provisions?

**Ms Moran:** I might start and then Ms Crawford and Mr Reeve can supplement. It's always our intention when we draft legislation to make it as simple as possible. We haven't intentionally drafted a bill that adds complexity, is what I would say.

**Senator SHOEBRIDGE:** I wasn't saying that. It's more the other side—the impact of complexity—because this bill does make it more complex. Did you take into account the impact of more complexity?

**Ms Moran:** I think the amendments that we've made at this point, as we've said, are the priority amendments to respond to Moss and the other two parliamentary committees. The overarching complexity of the scheme is not lost on us, and we are hoping to address that in the stage 2 reforms.

**Senator SHOEBRIDGE:** It would be remiss of me not to ask about resourcing to the Ombudsman. We had the Ombudsman's office here concerned about resourcing issues, concerned that they're being given more tasks, some of which, in terms of looking at reporting, I think they welcome, some of which they potentially don't welcome. Has there been a discussion or a commitment to provide more funding to the Ombudsman?

**Ms Moran:** I'll just echo what the Ombudsman said, which is that he's in discussions with the Attorney-General's Department's about their resourcing needs and that decisions around their resourcing are ultimately a matter for government.

**CHAIR:** Thank you for your evidence, and thank you for your submission. It has been really helpful. I just want to go through a couple of the things picked up in your submission and raised by some of the witnesses today. The issue around personal work-related conduct has obviously been a theme throughout today but also through the submissions. Can you explain pretty plainly for the committee why the bill removes personal work-related conduct from the scope of the act? We've talked a bit about the Corporations Act and the difference in the wording there. Why has there been a deliberate choice to use the word 'conduct' instead of 'grievance'?

**Ms Moran:** I'll start while Ms Crawford is finding her paperwork. At the simplest level the reason the carve-out exists is to respond to recommendations 5, 6 and 7 of the Moss review.

**Ms Crawford:** In terms of the drafting language for personal work-related conduct rather than grievance, as I mentioned earlier, 'conduct' is fitting with the terminology already used in the Public Interest Disclosure Act, so it's really a drafting decision. It already talks about disclosable conduct, so it makes sense to talk in terms of conduct. By contrast the Corporations Act does haven't a conduct concept in it all; it's a disclosure of information. That's why it has picked up the grievance language there. I believe there is a concern that 'grievance' may be less clear in terms of being able to confine it to a particular one or more instances to fit in with the drafting of the act.

**CHAIR:** One thing we haven't touched on too much in our conversations today but I know is an issue is around sexual harassment and other unlawful forms of discrimination. Will they be covered by the PID Act going forward, and what's the rationale behind how those matters should be dealt with?

**Mr Reeve:** Obviously, bullying and harassment and sexual harassment in particular are very serious matters, and the amendments around personal work-related conduct in the act are in no way intended to suggest or provide that allegations of that nature should not be investigated. However, as I think the Moss review itself noted, the overlaying of the process requirements in the Public Interest Disclosure Act onto the investigation of personal work-related conduct, including bullying and harassment and including sexual harassment, can prevent agencies from applying best practice approaches to resolving those issues and prolong disclosers' exposure to the situations they are in and the conduct they are suffering. As I think as the Public Service Commission gave evidence on, the standard time lines in the Public Interest Disclosure Act can take up to 104 days to go through, which in those contexts can delay the resolution of those matters. In relation to sexual harassment specifically the Sex Discrimination Act contains detailed protections for people who make allegations of sexual harassment, including protections against victimisation where they make those complaints, so to the extent that a complaint of sexual harassment is not covered by the Public Interest Disclosure Act, because it is personal work-related conduct, those protections under the Sex Discrimination Act could apply.

**CHAIR:** Another issue raised by some of the submissions and not really the evidence we've heard today is how we're going to deal with parliamentarians and their staff going forward. I know there has been a lot of work done through *Set the standard*, it has to be said, to implement those recommendations, and I think we're almost getting to the point where a lot or most of those recommendations have been implemented, which is fantastic. Why does the bill expressly exclude parliamentarians and their staff from the scope, and how is the government dealing with recommendation 23 of *Set the standard*, which does relate to whistleblower protections? It's two-part question there, sorry.

**Ms Moran:** I might kick off and then have my colleagues jump in if I've missed anything. I think what is primarily being implemented with this bill is recommendation 26 of the Moss review, which recommended expressly excluding parliamentarians and their staff from the operation of the scheme, which was, at the time it was drafted, the policy intention. I think you know that the PID Act was designed to operate within the public sector agencies and wasn't designed to apply to parliamentarians or their staff. So this amendment is making that abundantly clear on the face of the legislation. That's the answer to the first part of your question.

The second part goes to what's happening in relation to *Set the standard*. You'd appreciate that that's not work that we are leading, but there is a task force set up in the Department of the Prime Minister and Cabinet who is leading on the implementation of the government's recommendations. There are a couple of things I'll mention. Earlier, you asked the APSC about the PWSS, the Parliamentary Workplace Support Service. That is an independent complaints mechanism that was established following the Foster review and is a new complaints mechanism that's independent and is doing, from previous work experience, very good work for parliamentarians and their staff, in being able to take complaints and allegations of misconduct and wrongdoing to that independent mechanism, which did not exist at the time that the PID Act was put in place.

Equally, recommendation 23 has been partially implemented by government, by ensuring that there are adequate and strong protections for staff of parliamentarians if they make a disclosure to the NACC. The protections in relation to doing that are very similar, if not the same, to those contained in the PID Act. I also understand that there is still work ongoing in relation to whether or not further protections are needed in the development of the independent parliamentary standards commissioner, and that's work that is currently underway. I hope that answers your question.

**CHAIR:** Yes, it does in terms of *Set the standard*. That leads into a broader question. A number of witnesses today have raised the prospect of further reforms, and we know that this piece of legislation is occurring in an environment where we've got the National Anti-Corruption Commission legislation and the establishment of that body. We've got other reviews, I think, into secrecy laws happening, and it's been flagged by the Attorney-General that there will be a proposed broader stage 2 reform process. I wonder whether you might be able to explain or provide information you already have about that work that's underway, what that work will be

consisting of and how the development of those further proposals feeds into this piece of legislation being almost the first step that's needed to then inform the rest of the proposals.

**Ms Moran:** I would say that we see the initial stage of this bill as being one aspect of the broader government integrity agenda and an uplift in that space. So these priority amendments will complement and support the broader integrity agenda, which is an immediate aspect, and ideally these amendments will come into play at the same time as the National Anti-Corruption Commission ideally kicks off. As you mentioned, there are a range of initiatives underway, some of which you've talked about, but there are others ongoing. We are in close discussions with a range of departments who are leading different parts of this integrity agenda. So some of them, and a bulk of them, do sit within the Attorney-General's Department and within our division, and that goes to the establishment of the NACC, the introduction of an amendment to the fraud rule under the PGPA Act to add corruption into that and the requirement for agencies to take steps to prevent, detect and deal with corruption.

I think you know that in the Attorney-General's portfolio as well, we've just closed a discussion paper in relation to a federal judicial commission. There's a range of work happening in relation to the appointments process and ensuring that that's a transparent and merit based process. We work with the APSC in terms of the work that they're doing in this space, and also the APS Reform Office in Prime Minister and Cabinet. There's also the bulk of work in relation to *Set the standard*. We're seeing stage 1 as having an immediate impact, but then stage 2 is dealing with, as I said earlier, the complexity of the overarching scheme, looking at the PID Act scheme in the context of what is now a range of additional infrastructure that was not in place when the PID Act was initially passed by the parliament. Have I missed anything? I hope that answers the question.

**CHAIR:** Yes. This is just my final question, and I think Senator Shoebridge has a follow-up around the interaction with the PID Act and the National Anti-Corruption Commission. There have been public calls for the public interest disclosure whistleblower provisions to be implemented as soon as possible because the National Anti-Corruption Commission will be up and running fairly soon, hopefully. What's the relationship with getting these reforms through in time for the commission to be established, and why is that so important to do together?

**Mr Reeve:** To start with the last part of your question first, as to the importance of these reforms—hopefully it goes without saying, but perhaps for the *Hansard*'s benefit at least—obviously the National Anti-Corruption Commission will benefit from whistleblowers bringing forward allegations of serious or systemic corruption in the Commonwealth public sector. A free flow of those disclosures under that framework of referrals to the commission is important for its functioning. It is important that there are strong protections for people who make referrals to the commission. The National Anti-Corruption Commission Act contains a number of strong protections for people making referrals that are modelled on the Public Interest Disclosure Act. This bill makes a number of amendments and implements a number of the Moss review recommendations to further strengthen those protections and applies those back to the National Anti-Corruption Commission.

**CHAIR:** Thank you. I think that was important to understand. Senator Shoebridge, you said that you have a follow-up question?

**Senator SHOEBRIDGE:** I do. Just on that last point, Mr Reeve, getting this right before the NACC opens its doors is actually critical, isn't it? Getting the whistleblower protections right before the National Anti-Corruption Commission opens its doors is one of the drivers for dealing with it so quickly—is that right?

**Ms Moran:** Yes, Senator.

**Senator SHOEBRIDGE:** So if there's an inadvertent negative impact on whistleblower protections—and here I suppose I'm particularly focused on carving out those mixed employment grievance whistleblower matters—if we get that wrong before the NACC opens its doors, that would have quite serious negative consequences on the NACC, won't it, if whistleblowers don't feel free to come forward?

**Mr Reeve:** I think on that point the protections in the National Anti-Corruption Commission Act apply to any person who provides the National Anti-Corruption Commission with information in relation to serious or systemic corruption. Those protections in the NACC Act do operate independently of those within the PID Act, so the amendments around personal work related conduct in no way limit the operation of the NACC Act in that respect.

**Senator SHOEBRIDGE:** But that's also missing any of those reverse onus provisions to prove intent and to prove the rationale of the reprisal action. The NACC legislation is also barren of any of those reverse onus provisions, isn't it?

**Mr Reeve:** I think yes, the provisions in the NACC legislation do align with those in the PID Act in that regard.

**Senator SHOEBRIDGE:** I note that when you were discussing the implementation of recommendation 26 of the Moss review with the Chair, which is about not having the PID apply to alleged wrongdoing by senators, members and their staff, your answer, as I understand it, is that you think that's largely being dealt with by PWSS at the moment.

**Ms Moran:** No. The chair asked a two-part question. One was: why have we put the amendment in to be explicit in the legislation that the protections don't apply to MOP(S) Act staff and parliamentarians? My first response was that we were responding to recommendation 26. The second part of the question was: what was more broadly happening in parliamentary space? I went on to say that there are a range of things happening that I understand. I said one of them was that there was a PWSS in place, and that that happened in response to the Foster report. There is now the NACC legislation that's passed, which will include protections for MOP(S) staff who make a disclosure to the NACC. The third part of it is that, as part of the development of the Independent Parliamentary Standards Commission, there is further work going on in relation to protections for disclosures under that provision.

**Senator SHOEBRIDGE:** Where does that leave recommendation 27 from the Moss review, which is:

That consideration be given to extending the application of the PID Act to members of Parliament or their staff if an independent body with the power to scrutinise their conduct is created.

**Ms Moran:** In relation to that, our idea was that we will have a look at this broader application as part of stage 2 of our reforms.

**Senator SHOEBRIDGE:** And that would include, potentially, extending the PID Act to cover those members of staff and then potentially operationalising that through one of those agencies. Is that the thinking?

**Ms Moran:** There a number of options or models to work through with new infrastructure in place like a National Anti-Corruption Commission or an Independent Parliamentary Standards Commission, which, at the time of these two recommendations, didn't exist.

**Senator SHOEBRIDGE:** Do you accept, though, that one of the benefits of extending the PID Act to members of parliament staff is that's consistent with the no wrong door approach? That if there's a whistleblower and concerns being raised, there should be no wrong door, and that's one of the benefits of extending the PID Act to members of parliament staff?

**Ms Moran:** I think what we'd say is that we, along with our colleagues in the Department of the Prime Minister and Cabinet are looking at the application of these different bodies and models to MOP(S) Act staff.

**Senator SHOEBRIDGE:** Right. Thank you.

**CHAIR:** Senator Scarr, you don't have any other questions?

**Senator SCARR:** No, I'm done, thank you.

**CHAIR:** Thank you very much. Thank you to the representatives from the Attorney-General's Department. That concludes our hearing today. I don't think we've had any tabled documents. For the purpose of questions on notice, I just seek to move a motion from Senator Scarr to determine a deadline for returning answers to questions taken on notice as Friday 3 March 2023. The committee has agreed that answers to questions on notice should be returned by close of business on that day. I thank all witnesses who have given evidence to the committee today. Thank you also to Hansard, broadcasting, and the secretariat.

**Committee adjourned at 14:23**