CLOSED PROCEEDINGS

INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION COMMITTEE

Melbourne — 21 March 2016

Members

Mr Kim Wells — Chair
Ms Marsha Thomson — Deputy Chair
Mr Sam Hibbins
Mr Danny O'Brien
Mr Simon Ramsay
Mr Tim Richardson
Ms Jaclyn Symes

Staff

Executive officer: Ms Sandy Cook
Research officer: Ms Kirstie Twigg

Witness

Professor A. J. Brown, professor of public policy and law, Griffith University *(via teleconference)*.

The CHAIR — Good morning. Welcome to the closed hearing of the Independent Broad-based Anti-corruption Commission Committee. All evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and is further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and, where applicable, the provisions of reciprocal legislation in other Australian states and territories.

This hearing is closed to the public; however, it will be transcribed by Hansard and the transcript will be published when the committee tables its report in Parliament. However, it is important that you note that any comments that you make outside the hearing, including effective repetition of what you have said in evidence, may not be afforded such privilege. Have you received and read the guide for witnesses presenting evidence to parliamentary committees?

Prof. BROWN — Yes, I have. Thanks very much.

The CHAIR — Thank you. It is important to note that any action which seeks to impede or hinder a witness or threaten a witness for the evidence they would give or have given may constitute or be punishable as contempt of Parliament. We are recording the evidence and will provide a proof version of the Hansard transcript at the earliest opportunity so you can correct it as appropriate. I would like to invite you to make a verbal presentation, and we will ask questions as appropriate. Once again, thank you very much for your time.

Prof. BROWN — Thank you, Mr Chairman, for the opportunity to talk to the committee, and the invitation. I will not make much of an opening statement because really I am here to answer your questions I think. I guess the most useful thing for the committee to be aware of is that apart from having been involved in whistleblowing-related research and policy and practice for over 20 years now, I have had a fair familiarity with the history of the Victorian legislation since it was the Whistleblowers Protection Act and was involved and consulted by the Premier's department, the Ombudsman's office and others in proposed reviews of that quite some years ago now and involved in consultations. I then had discussions with Minister McIntosh under the previous government about the importance of reforming the then legislation. So I think it is extremely valuable that it is on the committee's radar as an important issue to address as part of IBAC's responsibilities, but also even more broadly than that it obviously affects the integrity system in Victoria much more broadly than IBAC.

I suppose in summary I would say that the reason why I think it is such an important and valuable issue for the committee to have on its agenda, and the Parliament generally, is that unfortunately, even though everybody involved had identified that there were problems with the Whistleblowers Protection Act as it previously existed, the 2012 act in fact did not fix many of the identified problems with the previous legislation and in some ways, while providing some elements of a more workable framework, actually created new problems. So in some ways, if we look at the legislation in Australia on a comparative basis, then even though it was only recently introduced or replaced in 2012, it is pretty close to being probably the worst piece of legislation in Australia when it comes to management and protection of whistleblowers for the public sector that currently exists. So I think it is very valuable that it is on the committee's radar to figure out what should be done with this particular framework and this particular piece of legislation. Apart from that, Mr Chairman, I am really in your hands as to what is most useful to focus on or if people have got more questions about the background and the basis of even those remarks, I am happy to explain.

The CHAIR — Okay. I will start the ball rolling. When you are actually measuring the effectiveness of a whistleblowers regime, where do we look and how do we measure?

Prof. BROWN — Well, when it comes to the quality and the comprehensiveness of the legislation itself, then it is not hard to benchmark the current regime. There are really some quite clear and well-accepted principles for best practice legislation that now exists, including ones that I have been involved in and have drawn up in conjunction with the integrity agencies right across the country that have had experience and responsibility for this. That is one way that we can benchmark the legislative regime.

In terms of its actual effectiveness, that really comes down to accurate statistics and empirical research on what is changing at the coalface within agencies primarily in terms of awareness of obligations to report, willingness to report, whether people are actually reporting and indicators of the outcomes, both in terms of the substance of what is being dealt with as a result of reporting but also outcomes for reporters and others. So all those things are empirically measurable, and that information exists to varying degrees for different jurisdictions.

Most of what I would say to the committee is based not only on my own previous experience working in government in this sort of field, but on the empirical research we did as part of the major research project *Whistling While They Work*, which you may have seen references to, which the Victorian Ombudsman was a partner in along with a lot of other integrity agencies nationally. That is 10 years old now, but the empirical research we did across 118 federal, state and local agencies gives a pretty good idea about how the effectiveness can be measured. We are just embarking on a big new project now in which IBAC is the partner organisation, along with Ombudsman Victoria again, but in which every jurisdiction is participating plus New Zealand and the private sector. So we are in the process of providing that sort of research again, but bigger and better than previously.

Ms THOMSON — What is the detail of that project?

Prof. BROWN — I am sorry, I missed your question.

Ms THOMSON — I was just asking: what is the basis of the project, given the review?

Prof. BROWN — The new project, which we are calling *Whistling While They Work II*, has as its mission improving managerial responses to whistleblowing in the public and private sectors. It is an Australian Research Council linkage project, and together with the funding from about 15 partner organisations, including IBAC and Ombudsman Victoria, it is about a $700 000 project in terms of cash resources over the next three years. In fact every public sector agency in the country is going to be approached to participate, as well as about 25 000 public companies, listed and non-listed. The project is also running in New Zealand. We are doing a mixture of evaluating and benchmarking organisations' whistleblowing policies and procedures under various and in some cases non-existent legislative regimes and surveying their organisations for those types of actual outcomes and indicators of what is actually happening in the organisation.

Ms THOMSON — I just want to ask a follow-up question from the opening statement. You identified that Victoria was one of the worst jurisdictions in relation to whistleblowing legislation. I was just wondering, what you would see as the priority areas that would require addressing?

Prof. BROWN — I think Sandy may have provided you with my shortlist of 10 major issues, and that is a very summary list. It is a very brief list of problem areas.

Ms THOMSON — Are they in order?

Prof. BROWN — Sorry?

Ms THOMSON — Are they in order of your priorities?

Prof. BROWN — Well, not necessarily. I guess they are in a logical order in terms of trying to understand the legislation, but they really reflect the same rough type of order as the list of principles we tend to use for evaluating the legislation. Some are always more important than others when it comes to the crunch of amendments, but I guess one of the problems with the Victorian legislation is that all of those 10 issues are pretty significant. Once you get to a list of that size and issues of that significance, it becomes a real question in my mind — and I have advised governments on legislation previously and been involved in its drafting — of it being a six of one and half a dozen of the other question really whether it would be better to do major surgery on the Protected Disclosure Act in order to address most or all of those or whether you would be better off looking at a fresh start and then designing the new legislation in order to make it as easy as possible for the previous and existing systems and approaches under the old Whistleblowers Protection Act and the new Protected Disclosure Act to roll through while abandoning all the detritus that you do not need.

I think if the committee could develop a picture as to which path it is best to go down based on its consultations, then you are in a very good position to do that, because you do not want to lose momentum on the good work that IBAC is doing making a very bad piece of legislation work as best it can. But at the same time I think everybody knows that it could be much, much easier, and that this piece of legislation was as much a step in the wrong direction as a step in the right direction.

Mr RICHARDSON — Thank you, Professor Brown, for joining us today. I am keen to understand what in your view is the most effective pathway towards legislative reform and what in your experience is the best way to bring about some of the changes that you are talking about, because I think some of the protected disclosure

issues and whistleblower protection issues have been around for some time. What do you think are the most effective pathways to take when undertaking that reform?

Prof. BROWN — I think in your situation, because the issue is on the agenda and because you are focusing on it, if the committee were to persuade the government — whether it is major surgery to this piece of legislation or a replacement piece of legislation, I think if the government was persuaded to give enough priority to simply take either of those paths and get on with it without really the need for massive consultation or inquiries, then that would be the most efficient way forward, because there has been plenty of examination of these issues before. It is not like the basic objectives of the legislation are in doubt or the need for the legislation is in doubt or the purposes are in doubt. It is simply a matter of what is the most effective piece of legislation for putting in place the frameworks to do it. So if I was in your shoes or in the Victorian government's shoes, I would simply get on with it with some fresh drafting instructions based on having answered that basic question: is it major surgery or is it replacement legislation?

In other circumstances, such as previously in some state jurisdictions, relatively recently at the commonwealth level, there has been either specific purpose parliamentary inquiries or larger inquiries to engage people. I actually think that given the level of consensus around the basic objectives, the basic purpose, that that does not necessarily save any real effort. For example, for the private sector currently there are really big design questions about the regulatory framework for whistleblower protection that is needed. Greg Medcraft, the chairman of ASIC, was speaking on that today and has been on the radio on that just this morning. But that is the sort of thing that requires either a law reform commission inquiry or a major public inquiry or a specific purpose parliamentary committee process or something to really thrash out what the regulatory options and impacts might be, because it is such a greenfield site. But for public sector whistleblower protection it is really just something that the government could and should get on with if it was of a mind. Hopefully, with the support and impetus of the committee, it would be of a mind.

Mr RICHARDSON — Just on that point, Professor Brown, what jurisdiction do you default to as the lead across Australian territories and states at present?

Prof. BROWN — Well, the simplest, clearest and apparently easiest to operate legislation at the moment is the ACT Public Interest Disclosure Act 2012. I am not saying that that would be a direct copy into the state jurisdiction, but the good thing about it is that it does deal with some national government and state/territory-type responsibilities. If the ACT can make it work, then it is a sign that it is sufficiently flexible that any government should be able to make it work. It is just a particularly well drafted and simple piece of legislation that really covers all the main bases. I guess the lessons in that were that the policy people and the drafters were taking account of all the published principles and analyses. They were part of our previous project and were trying to implement the recommendations from that. They did involve me in the drafting of it, but really they had very good policy people and drafting people of their own so that my involvement was really quite limited.

That would be the starting point, because part of the key to this legislation is not only getting the legal protections right and the objectives right but keeping it as a reasonably simple and flexible framework within which all the real work needs to be done, which is work by the oversight agency and responsibilities and obligations that fall upon each individual public sector agency and managers. So it has to be more than a symbolic piece of legislation that is full of principles and nothing else, but it cannot be so prescriptive and onerous in its operation that it becomes inflexible and actually defeats the purpose, which is to provide a framework for other obligations to operate. In my view the ACT result ended up striking that balance pretty well.

Ms THOMSON — Can I just follow up Tim's question?

The CHAIR — Yes, by all means.

Ms THOMSON — You have talked about the ACT, but I was wondering about jurisdictions further abroad than Australia even. Is there a best practice that we should be looking to? Given that the ACT is a fairly small structure, I was just wondering if there are any others that would be more comparable?

Prof. BROWN — The most comparable jurisdictions in terms of how you would adapt the basic style and structure of the ACT approach would be other states and territories in Australia obviously. The fact is that on an

international scale on most of the key elements and principles we are actually ahead of basically almost everywhere, if not everywhere. There are specific aspects of the Public Interest Disclosure Act regime in the UK that are still pretty good, but only on specific issues, not overall frameworks or off-the-shelf precedents. Because whistleblower protection laws in every jurisdiction that have to dovetail closely with existing employment law and other public sector management laws and public integrity laws, definitions of corruption and corrupt conduct et cetera, et cetera, they tend to be highly customised by necessity to their environment, so that is why there is no off-the-shelf precedent from other countries.

But the fact is that on a world scale the country that has been putting most effort into thinking about what are the key elements of the obligations that need to fall on actual agencies and departments, on public sector managers and CEOs, and basically what should be internal disclosure procedures and what are good operating systems at the organisational level, and then how can the legislation create the framework for that and require that to occur — we are far ahead of anywhere else in the world in terms of having had a track record in that area. This is an issue that in Britain they are only just getting around to. The United States — it has been largely missing in action when it comes to those issues of operational obligations on agencies. And then the rest of the world sort of trails behind that. We can be positive in that Australian jurisdictions are on the cutting edge when it comes to those key types of obligations and requirements, but Victoria is behind the rest of the country.

Mr RAMSAY — Thank you, Professor Brown. I understand you have a list of the questions so I am going to refer you to question 8 and around that question, which is a follow-on from other questions on what other states are doing in relation to their different acts for protected disclosure. The work you have been doing through the *Whistle While They Work* research and the current act we have, the Protected Disclosure Act, I am wondering if you could cite examples where other states have broadened out their approaches to their different disclosure acts. We are restricted to 'improper' or 'specified' conduct, and criminal offending and dismissal behaviour are the two key areas. Could you cite examples where other jurisdictions have broadened out their specificity, I guess, to the disclosures?

Prof. BROWN — Yes, certainly. In fact I think every other jurisdiction has got a broader and more comprehensive category of the types of wrongdoings that amount to disclosable conduct. The standard approach I guess, which is the dominant approach in New South Wales and Queensland, is that the type of conduct that should trigger the legislation should cover corrupt conduct or serious improper conduct, which obviously you have got, but it should also cover — the terminology that is often used, which is the Queensland terminology, is serious and substantial maladministration, as a second head. A third head is waste and mismanagement of resources, again sometimes with a seriousness filter onto it. And then the fourth standard category is risks or dangers to public health, safety or the environment.

After that you can also get more specific to ensure everything that basically you would want public servants to be able to — all types of public interest misconduct or wrongdoing that is of real public interest significance should be able to trigger the protections of the act, because typically they may or may not trigger partial protections under some legislation at the moment. But the overall message of the legislation, especially in terms of when it is operationalised by agencies, is that they need to give a clear message to their staff that they should speak up about any of those types of things and that the protections will apply to them.

At the other end of the extreme though is what the commonwealth decided to do in 2013, which was not on my advice, which was to have a definition of disclosable conduct that attempted to be comprehensive, which is good, but the way in which it was operationalised was to make every and any breach of the Australian public service code of conduct disclosable conduct under the Public Interest Disclosure Act. That is too broad because clearly not every single breach of the Australian public service code of conduct, such as whether somebody is wearing the right clothes or whether they have sworn at a colleague or whatever, is a public interest disclosure, so it is a bit mad. That is in the sights of the current review that is occurring into the commonwealth Public Interest Disclosure Act 2013. So you can go too broad, but there is no doubt that the Victorian legislation is absurdly narrow at the moment for its purpose.

Mr RICHARDSON — Thank you, Professor Brown. Just going to protected disclosure and the culture within a department, I was just having a look at a paper that you wrote, *Towards 'ideal' whistleblowing legislation?*, and just the interaction between a substandard system, as you have put it, and changing the culture within the public service. How does that operate or act when — what I am trying to get to is: is the legislation

the driver of that cultural change and having those better frameworks? Or are there things that the public service can do in between that to strengthen their protected disclosure protections, so to speak?

Prof. BROWN — Well, the short answer is no, legislation really never drives cultural change. It may support it. If there is commitment to doing it, then it may vary dramatically increase the chances of it occurring, especially in the public sector, especially if it flows through into agency heads and senior management — SDS-type — responsibilities. If it becomes part of the terms of employment contracts of SDS officials — for example, that their performance in terms of creating positive reporting climates and disclosure climates et cetera becomes a front and centre part of their job — then obviously cultural change happens much more quickly. But the research has shown some clear correlations between awareness of legislation, which is confidence that it is reasonable legislation — whether that confidence is accurate or not is a different thing, but confidence of staff and managers and an awareness of the legislation — and both better procedures and more positive outcomes. So the things do relate to one another empirically, and that stands to reason.

At the moment — and this is true of Victoria — there are lots of agencies that are doing very good work despite the legislation. On Friday I was at IBAC talking to protected disclosure coordinators from across Victoria. They are learning to embed the requirements under the Protected Disclosure Act into their broader corporate governance regimes and trying to make them all fit together, but the legislation is hard to fit into those other regimes so their requirement is under it. The risk is always that, because it is so narrow and because it is so clunky, there will be a lot of organisations and agencies that it is simply too hard and it simply falls to the bottom of the list of priorities to try to figure out how to make it work. So it will be something that they look at in a crisis, or they will try to figure out ex post facto that in fact they failed to fulfil obligations because it is not connecting, it is not easily communicable — it is not connecting with their processes and policies and procedures.

So part of the problem with these regimes is that, if they are not well constructed, what you get across the Victorian public sector is a huge variety, a huge diversity — from agencies that are making a very good effort using the legislation as best they can through to agencies that would not have a clue. And the legislation is part of the problem, part of the complexity that makes it impossible for them to put in place the systems that would reflect and operationalise a better culture. So the legislation is very, very important, but there are plenty of examples of jurisdictions with no legislation where you get that same diversity — from organisations that, due to their own management commitment, are putting in a really big effort in terms of encouraging and managing whistleblowers through to others that would not have a clue.

Mr RICHARDSON — And is that a reason you think that there has been a real emergence or a significant increase in public whistleblowing or public disclosures from public servants?

Prof. BROWN — Yes. I mean, we do not really have accurate evidence to track whether levels of disclosure are increasing or not. We will start to once this new project starts to show some results. But what generally is happening in most jurisdictions that are introducing or upgrading their PID regimes is that the stats start to flow through that suggest that more public servants are blowing the whistle. In fact, they are probably just stats that are just starting to capture what was already occurring and doing it more accurately, which is their purpose, so that these cases can actually be tracked and managed better.

All my indications are that public servants — in an Australian environment, in a lot of agencies, a lot of public servants have always been prepared to blow the whistle and continue to be prepared to blow the whistle, and that is great, That is really positive, it is part of our system, but we have not actually been tracking and managing them and we have not been trying to influence the outcomes to make sure that that information is used properly and that the welfare of those people is being properly managed. So I do not know that there is any great sort of significant upswing in the internal disclosures in the public service. There is in some agencies from time to time, depending on what is happening, and no doubt it suppresses in other agencies, but the key question is: are we tracking those people and are we actually managing the processes correctly? If reforms are introduced which suddenly start to track higher numbers of protected disclosures or public interest disclosures, then that is probably not an indicator that whistleblowing is increasing; it is just an indicator that we are putting the systems in place to actually track what is going on.

Mr D. O'BRIEN — Professor, just in the 10 problems that you have listed, no. 3, 'Fails to deal with public disclosures', refers to a three-tiered approach. What is that?

Prof. BROWN — A three-tiered approach is basically recognising that you need to have systems and protections in place for three levels of disclosure. One is internal disclosures within the agency. Two is regulatory disclosures, so that is disclosures outside the agency but to regulatory agencies. In the Victorian situation that is to IBAC, the Ombudsman, the Auditor-General, the police et cetera. Then the third tier is the ability to go public in circumstances where that is justified. Again, the New South Wales legislation, although in a fairly dysfunctional way, was probably the first in the world to actually embed all three tiers. That was 1994. The UK legislation in 1998 was the first to do it in a much clearer and systematic way, where the thresholds in terms of standard of knowledge, proof, confidence and whatever are different for each of the three tiers but the three tiers are all very clearly built into the system.

Since then, New South Wales, Queensland and the commonwealth here have all basically adopted that approach. It is imperative for a number of reasons. One is that it describes the practical reality of the way in which whistleblowing and regulatory systems actually work. The third — public — tier is actually crucial for making the first and second tiers work, because we know from experience and from the research that the fact that somebody can go public or could go public and that the public expects that whistleblowers should go public at the end of the day if necessary actually is a huge driving influence on agencies trying to get it right in the first place. It is probably the single most important driving influence in the current time. Those are the three tiers and that is why they are all important.

Mr D. O'BRIEN — Does our legislation not currently cover all three?

Prof. BROWN — No. It is really just the second tier, unfortunately. One of the single most stupid things about the Protected Disclosure Act 2012 is that anything that might amount to a protected disclosure is automatically an IBAC matter and has to be referred to IBAC and only IBAC can investigate it, which really defeats — that undermines the ability of agencies to receive and handle disclosures in the first instance in the most effective way. So the first tier is weakened in the Victorian regime, and there is no third tier because there is still no guidance on the rules that would apply if people do go public. In the ACT, Queensland and the commonwealth there are now varying rules with vague degrees of consistency — and in Western Australia for that matter. The legislation must provide the rules on what are the circumstances in which it is reasonable for a public servant to go public and then still receive some protections under the act. That is one of the most important issues that needs to be addressed, but no means the only one because the reality is that such a tiny proportion of public officials will ever go public or want to go public, but it is really important that that mechanism is there for the circumstances where we need it.

I was just going to add before I forget it that this is all massively complicated by having legislation which promises whistleblower protection to any person as opposed to public officials and insiders to the system. That is another issue. That is on my list of 10 as well because that is a significant design problem/issue that impacts on what are the appropriate systems in response to all of these other issues.

Mr D. O'BRIEN — That is actually the question I was going to ask. I will follow up with that question exactly, Professor. Is it good or bad that we have got such broad coverage?

Prof. BROWN — On balance in my view it is bad because normal complainant protection and citizen protection is something that should be provided as a base by other legislation. If people want to complain to the Ombudsman's office and they are ratepayers complaining about a council or whatever, then there should be a basic protection against victimisation that is contained in the Ombudsman Act, but they do not need the special measures and systems and procedures that are intended to encourage whistleblowers from within the system. The problem with the definition being open to anybody to make a protected disclosure is that it loses that focus and so it tends to undermine the real purpose of whistleblower protection legislation.

Having said that, the jurisdictions that have done what Victoria did originally — there are quite a few and the ACT is one of them. What the ACT did in their 2012 legislation was start to introduce basically a two-track process within the legislation to try and make it clearer: well, here are protections and here are processes that are triggered in relation to disclosures by any person, any member of the public, and then here are the ones that are triggered in relation to people who are actually whistleblowers and insiders, because that triggers a whole set of different employment processes and all sorts of things that simply just do not apply to somebody who is outside the organisation.

The ideal in my view would be to go back a step on this issue and pull it back to public officials, public contractors and public contractors' employees, which is the approach in New South Wales and the commonwealth. But I recognise it is hard for governments to do that if they are seen to be taking away people's rights and protections. So the compromise, which is the only thing that I can think of, is to create more of a two-track process within the legislation so that it actually cannot be abused by people who are basically just citizen complainants trying to trigger all of the protections and processes and requirements that are really designed for protecting public employees and people within the system.

Mr D. O'BRIEN — Thank you. We know those citizen complainants pretty well.

The CHAIR — Well said, Danny. With regard to question 2, I know the committee has received the 13 best practice principles for establishing a view on the whistleblowers legislation. I just wonder if you could step us through the main points, please.

Prof. BROWN — Sure. They are really consistent with the 10 specific things that I have said about the Victorian legislation. On both lists the first principle is objectives and title and the significance of having a title that successfully communicates the objectives of the act. They are all pretty basic things. The second one is subject matter of the disclosure. Again, that touches on the issue of the breadth of the wrongdoing that can be reported that will trigger the act. We have already touched on that. So really they are covered by the questions you are asking and by my 10 points.

I suppose the fourth principle, which is about receipt of disclosure, is the same as that question about having a three-tiered approach — a three-tiered system in effect. I guess the thing that I would emphasise there is that the good legislation and the good policies not only say that the protections under the act will be triggered if somebody discloses internally within their agency in general terms, as in to the CEO or to some authorised officer or to the head of internal audit, but actually make it clear that if they make the disclosure to their own supervisor or another manager, then that is the point at which the obligation to protect and support them gets triggered. So if that obligation is not met, then it is quite clear that their rights to compensation or other remedies date from that point, rather than having to wait.

At the moment it might be 6 months or 12 months after they first made their internal disclosure that it eventually turns into something that makes its way to IBAC and gets formally acknowledged or defined as being a protected disclosure under the act. The legal arguments that an agency or an employer can introduce to then wriggle out of the protection obligations in those circumstances are just enormous. They are unbeatable. So it is basic things — carrying through basic principles like that into the design of the legislation is the important thing.

The CHAIR — Okay, thanks. We will get Sandy to follow up those 13 and we will get them distributed to the committee members.

Ms SYMES — Thank you, Professor. One of the issues that I find continually comes up when we are talking about whistleblower protection laws, and was certainly feedback that we have received from both the police and the Ombudsman, is individuals trying to trigger the legislation for protection for workplace disputes that may more suitably be dealt with using HR/IR systems. I think it is particularly evident in Victoria because of the lag time with that only option of going to IBAC. Do other jurisdictions that have the three-tiered system avoid that problem?

Prof. BROWN — It is basically an unavoidable problem, and so it is more a question of not trying to design it out of the legislation as trying to ensure the legislation and the standards for agency procedures build in the need for processes to quite clearly sort those issues at the front end. It is important to the legislative design in that example I gave earlier about how the commonwealth has included all APS code of conduct breaches in their definition of disclosable conduct. That is clearly going in the wrong direction, and that makes it very difficult and increases the likelihood of all the types of problems you are talking about. But at the other end of the spectrum, obviously going too narrow does not help either because the message that goes into the organisation is effectively, 'Well, you're only protected if you disclose about this'. Well, what if I disclose about that? So there is all this grey area, and then the grey area sucks in the workplace grievances that should not be there as well. So it is important to get that right.

It is also important to recognise that serious and systemic workplace grievances can also translate into public interest matters. For example, there are some forms of bullying or sexual harassment or discrimination or unfair personnel practices that are offences or are regulatory breaches, so it is impossible to have a 100 per cent clear dividing line in all instances. What the legislation can do is make it quite clear that where there is a public interest component, then the requirements for the Public Interest Disclosure Act or the Protected Disclosure Act are triggered but other processes can also run in parallel with that, especially investigative processes and resolution processes. This applies not just to workplace grievances but to things like corruption investigations. So just because it is a PID does not mean that it is not also still corrupt conduct and therefore PID investigations are not separate from other types of investigations.

There are ways that the legislation can strike the balance in terms of the articulation of what types of wrongdoing amount to public interest disclosure, and that is why 'public interest disclosure' is a better term than 'protected disclosure' for a start. That was a big step backwards. At the same time as New South Wales was abandoning protected disclosure as a title, that was when Victoria decided to adopt it, which made no sense whatsoever. That helped set the framework in place, but the key thing is actually to have legislative requirements that make it clear that you can have matters pursuing down parallel tracks at the same time. But you have to have processes and procedures in place at the agency level to triage matters and to coordinate that, and to provide the discretion to management, with some external oversight, as to how they handle those matters so that the agencies have the flexibility to do it properly and say, 'This is 25 per cent of public interest matters, but it is 75 per cent of workplace grievance. We will manage it in this particular way accordingly', and have clear authority to do that so that the discloser cannot say, 'Oh, no, no, no, no. You have to treat it this other particular way'. That is really the only way in which these sorts of issues can be managed.

The CHAIR — Can I just finish, Professor, in regard to some of the work you are doing with the Australian Research Council, 'Assessment for outcomes for assessing the performance of IBAC and VI'. Where is a good starting point for us?

Prof. BROWN — That is a very good question. Is this in relation to protected disclosures or more generally?

The CHAIR — More generally. Part of our role as the oversight parliamentary committee will be to assess the performance of IBAC and VI.

Prof. BROWN — Yes. There are a number of things. There has been some previous research and discussion that has been led by a number of the committees interstate, especially the New South Wales parliamentary committees, on what is an effective performance assessment framework for parliamentary committees to use in relation to anti-corruption and integrity agencies. A lot of that has not come to full fruition yet, but there are previous efforts that you can pick up on, which I am happy to help your secretary identify.

There is another initiative which is new. In my other capacity as a board member of Transparency International Australia there is a new initiative which is just getting off the ground across the Asia-Pacific, sponsored by Transparency International, which is specifically an anti-corruption agency strengthening initiative with a new evaluation and benchmarking package that has been designed for anti-corruption agencies. I am happy to fill the committee in on that. It has been piloted and is in its first stage at the moment of rollout in a number of countries, and it would be great to see it operationalised in Australia. As with all these frameworks, it is as much about trying to benchmark and measure activity and efficiency and outputs as it is about outcomes, because outcomes are notoriously hard to measure in this sort of territory. It is at least a more structured window on the issues that should be being considered when evaluating the activity and performance of anti-corruption agencies and being able to compare more systematically what they are doing and what is happening as a result of it. It is the best we could come up with so far. I am happy to provide some information on that anti-corruption agency strengthening initiative to the committee in case it looks like something that you think the Victorian government should be looking at.

The CHAIR — Okay. If there are no further questions, I will close this hearing. Professor, we thank you for your exceptional expertise and assistance to the committee. We hope that we can draw on your expertise over the coming months to assist us in preparing a very good report for Parliament.

Prof. BROWN — I would be more than happy to do that — anything I can do to help.

The CHAIR — Thanks very much.

Prof. BROWN — Thanks, Mr Chairman. Thank you, everybody.

Committee adjourned.