

PARLIAMENT OF NEW SOUTH WALES



# Committee on the Independent Commission Against Corruption

## REVIEW OF THE PROTECTED DISCLOSURES ACT 1994

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Incorporating selected submissions  
and edited transcripts of evidence

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# TABLE OF CONTENTS

MEMBERSHIP & STAFF.....	v
FUNCTIONS OF THE ICAC COMMITTEE .....	vii
FUNCTIONS OF A PARLIAMENTARY COMMITTEE APPOINTED UNDER THE PROTECTED DISCLOSURES ACT 1994 SECTION 32.....	viii
RESOLUTIONS AUTHORISING THE INQUIRY.....	ix
CHAIRMAN'S FOREWORD .....	1
EXECUTIVE SUMMARY .....	5
RECOMMENDATIONS .....	9
CHAPTER 1 - CONDUCT OF THE REVIEW .....	15
Statutory requirement for review of Protected Disclosures Act 1994	
Joint House resolutions	
Invitation for submissions	
Public hearings	
CHAPTER 2 – PREVIOUS REVIEWS OF THE PROTECTED DISCLOSURES ACT 1994 .....	17
CHAPTER 3 – THE CURRENT REVIEW AND PRIORITIES FOR REFORM .....	19
Approach to the review	
Commonwealth Legislation	
Policy objectives of the Protected Disclosures Act 1994	
Comparison of the objectives of Australian whistleblowing legislation	

Enhancing and augmenting established procedures for making disclosures (Section 3(1)(a))

- Internal reporting procedures
- Clarifying the right to protection
- Definition of “waste” and “serious and substantial waste”
- Funding of protected disclosure investigations
- Definition of "public official"
- Health Care Complaints Commission

Providing for disclosures to be properly investigated and dealt with (Section 3(1)(b))

- Lack of clarity of requirements for the making and investigation of disclosures
- Protected Disclosures Unit
- Developing effective strategies for managing protected disclosures
- Members of Parliament
- Development of a statistical base for the purposes of monitoring and reviewing the implementation of the Protected Disclosures Act 1994

Protecting persons from reprisals (Section 3(1)(b))

- Confidentiality of disclosures
- Anonymous disclosures
- A right to seek damages
- The right to seek injunctions
- Nomination of a prosecuting authority

Other issues raised in submissions

- ‘Serial’ disclosures
- Enforcement of Protected Disclosures Act 1994
- Investigation of history of person making an accusation
- Support base for Protected Disclosures Act 1994
- Absence of detailed, enforceable regulations and procedures
- Need for a ‘friendlier’ Act
- Abolition of the Protected Disclosure Act 1994
- Need for a more efficient administration of the Protected Disclosures Act 1994

CHAPTER 4 – CONCLUDING COMMENTS ..... 47

- Review period for Protected Disclosures Act 1994
- Protected Disclosures Act statutory advisory committee
- Conclusion

ANNEXURES ..... 53

## LIST OF ANNEXURES

- Annexure 1 List of submissions.
- Annexure 2 Extract from the Ombudsman's Issues Paper, April 2004.
- Annexure 3 Letter dated 5 April 2006 from Mr Bruce Barbour, NSW Ombudsman, containing the costs and benefits of establishing a Protected Disclosures Unit.
- Annexure 4 Notes by the Chairman of the Protected Disclosures Act Implementation Steering Committee for the public hearing on 4 August 2006.
- Annexure 5 Selected submissions received from public authorities and investigating authorities.
- Annexure 6 Extracts from the minutes of the Committee on the Independent Commission Against Corruption regarding the review of the Protected Disclosures Act 1994.
- Annexure 7 Reports of the Committee on the Independent Commission Against Corruption.



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## MEMBERSHIP & STAFF

Chairman	The Hon. Kim Yeadon MP, Member for Granville
Members	Ms Kristina Keneally MP, Member for Heffron
	Mr Malcolm Kerr MP, Member for Cronulla
	Mr John Mills MP, Member for Wallsend (Chairman of Committees)
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	Mr John Turner MP, Member for Myall Lakes
	The Hon. Jenny Gardiner MLC
	The Hon. Peter Primrose MLC (Vice Chairman)
Reverend the Hon Fred Nile MLC	
Staff	Mr Ian Faulks, Committee Manager
	Mr Jim Jefferis, Senior Committee Officer
	Ms Elayne Jay, Senior Committee Officer
	Ms Annette Phelps, Committee Officer
	Ms Millie Yeoh, Assistant Committee Officer
Contact Details	ICAC Committee Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 2161
Facsimile	02 9230 3309
E-mail	<a href="mailto:icac@parliament.nsw.gov.au">icac@parliament.nsw.gov.au</a>
URL	<a href="http://www.parliament.nsw.gov.au">www.parliament.nsw.gov.au</a>





## FUNCTIONS OF THE ICAC COMMITTEE

(1) The functions of the Joint Committee are as follows:

- a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
- b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
- d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
- e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

(2) Nothing in this Part authorises the Joint Committee:

- a) to investigate a matter relating to particular conduct, or
- b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
- c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

# FUNCTIONS OF A PARLIAMENTARY COMMITTEE APPOINTED UNDER THE PROTECTED DISCLOSURES ACT 1994 SECTION 32

## 32. Review

- (1) A joint committee of members of Parliament is to review this Act.
- (2) The review is to be undertaken as soon as practicable after the expiration of one year after the date of assent to this Act, and after the expiration of each following period of 2 years.
- (3) The committee is to report to both Houses of Parliament as soon as practicable after the completion of each review.

## RESOLUTIONS AUTHORISING THE INQUIRY

### Resolution of the Legislative Assembly, Wednesday 6 April 2005

Reference

Motion, by leave, by Mr Carl Scully agreed to:

- (1) That the review under section 32 of the Protected Disclosures Act 1994 be referred to the Committee on the Independent Commission Against Corruption;
- (2) The review is to determine whether the policy objectives of the Protected Disclosures Act 1994 remain valid and whether the terms of the Act remain appropriate for securing those objectives; and
- (3) That a message be sent requesting that the Legislative Council pass a similar resolution.

### Resolution of the Legislative Council, Thursday 7 April 2005

Consideration of Legislative Assembly's message of 6 April 2005.

Motion by the Hon. Henry Tsang agreed to:

That:

- (a) the review under section 32 of the Protected Disclosures Act 1994 be referred to the Committee on the Independent Commission Against Corruption, and
- (b) the review is to determine whether the policy objectives of the Protected Disclosures Act 1994 remain valid and whether the terms of the Act remain appropriate for securing those objectives.

Message forwarded to the Legislative Assembly advising it of the resolution.



## CHAIRMAN'S FOREWORD

The Hon. Kim Yeadon MP  
Chairman  
Committee on the Independent Commission Against Corruption

**disclosure** n. The act or process of revealing or uncovering.  
Something uncovered; a revelation.

This report presents the findings and recommendations of a review of the Protected Disclosures Act 1994 (NSW).

The report identifies the areas for priority reform of the protected disclosures scheme in New South Wales. It represents the third occasion on which a review committee, established by Parliament to examine the adequacy of the Protected Disclosures Act 1994, has supported the need to establish a protected disclosures unit to provide a formal, properly resourced advisory body to assist and monitor the handling of protected disclosures affecting the New South Wales public sector. The establishment of this unit is again one of the central recommendations emerging from the current review. The important differences in the present case, as opposed to similar recommendations made by previous review committees, is that this recommendation now has the unanimous support of all members of the Protected Disclosures Act Implementation Steering Committee, and the costs and benefits of the proposal have also been satisfactorily identified.

The terms of reference of the Committee of the Independent Commission Against Corruption (the Parliamentary Committee) call upon it to determine whether the policy objectives of the Protected Disclosures Act 1994 remain valid and whether the terms of the Act remain appropriate for securing those objectives. In the past, the extent to which the Act has been achieving its objectives has been largely anecdotal as there is not in place any system for the reporting of activity under the Act. The Parliamentary Committee's recommendations address this problem.

The Parliamentary Committee examined comparable Australian whistleblowing legislation and is satisfied the objectives of the Protected Disclosures Act 1994 (NSW) retain the necessary relevance and scope, although there may be room to extend the coverage of disclosure protection to address significant issues affecting public health, safety, or the environment. The three central themes present in whistleblower protection legislation Australia-wide are to: facilitate the disclosure of corrupt conduct in the public service; provide appropriate protection to whistleblowers; and, ensure the disclosures are properly investigated and dealt with. The objectives of the current public interest disclosure laws across the Australian jurisdictions are therefore largely consistent. The principal difference in the scope of the objectives is that Western Australia, Queensland and South Australia also cover public health, safety and environmental damage. The Parliamentary Committee recommends that the Protected Disclosures Act Implementation Steering Committee examine and report to the Minister on whether the Protected Disclosures Act 1994 should be amended so as to bring dangers to public health, safety and the environment clearly

within the scope of the Act. These are matters of obvious public concern that at present do not clearly fall within the definition of maladministration in section 11 of the Act.

Evidence presented to the Parliamentary Committee demonstrated the need for enforceable internal reporting procedures to govern the handling of protected disclosures. There had been some attempt to achieve this in 1996 under a circular issued by the Premier. However this lacked any effective widespread implementation because it had no legislative standing and because the picture was confused by the confidentiality of the material. These difficulties are addressed in the Parliamentary Committee's recommendations, which, in brief, propose an amendment to the regulation making power so as to expressly provide for established, standardised and enforceable procedures as to the investigation, handling and reporting of protected disclosures. The Parliamentary Committee's object is to ensure fairness to all parties. There is a need for authorities to expedite their examination of disclosures. Evidence presented to the Parliamentary Committee revealed this process could take two years or more during which a person's guilt became unfairly ingrained in the mind of their colleagues. Another serious issue is the removal of a person from their place of work during the period that a disclosure is being examined. The Parliamentary Committee was told that when this happens, gossip and innuendo usually follows. Uniform precedents need to be developed to guide authorities contemplating this course so that such action is only taken when it can be demonstrated that it is in the public interest to do so. A person who is the subject of a disclosure should be given a reasonable time to address the issues in the disclosure. This has not always been the case. Where a disclosure proves unfounded there should be a capacity to purge the record.

The Parliamentary Committee found there was a large degree of uncertainty surrounding the issue of who determines if a disclosure is protected. Section 7 of the Protected Disclosures Act 1994 says a disclosure is protected if it satisfies all the applicable requirements of Part 2. Section 10 says a disclosure concerning corrupt conduct has to be a disclosure of information that shows or tends to show a public authority or official has engaged or proposes to engage in corrupt conduct.

The issue of whether facts fall within the provisions of a statutory enactment is a question of law. This means that only a court or appropriate tribunal could conclusively determine the question of whether a disclosure meets the requirements for protection under the Protected Disclosures Act 1994. This would not include an investigative body such as the Independent Commission Against Corruption, as it exercises administrative, not judicial, functions. The same can be said of the other investigating authorities, even though the Parliamentary Committee found that they currently advise—apparently with confidence—on whether a disclosure meets the criteria for protection.

In this situation, a New South Wales whistleblower could never be certain of protection unless a court or tribunal found the facts met the criteria of the Protected Disclosures Act 1994. The Parliamentary Committee recommends changing the Act so as to protect the whistleblower where that person had an "honest belief on reasonable grounds". This test is easier to satisfy because the belief need not be correct but only that the officer held the belief and that there were reasonable grounds for it. Other Australian jurisdictions have adopted this approach. In New South Wales, even if the whistleblower has reasonable grounds for his view he gets no protection if he turns out to be wrong. The appropriate course is to bring the New South Wales legislation into line with other states.

Another area of confusion disclosed in submissions and evidence to the Parliamentary Committee arises from the lack of any specific obligation on authorities to investigate a disclosure. To correct this the Parliamentary Committee recommends an amendment of the Protected Disclosures Act 1994 so as to impose an explicit requirement on an authority to adequately assess and properly deal with a disclosure.

The submissions made by New South Wales agencies and investigating authorities have been included as an annexure to the report. It is important to publish the views of these agencies and investigating authorities, as these bodies have the principal responsibility for making the protected disclosures scheme work. It has not been possible to publish all of the submissions that were received (a number are considered by the Parliamentary Committee to be confidential in nature, and some individual submissions included a significantly large volume of documents). However, I emphasise that all of the submissions received have been scrutinised in the course of the review process, and the relevant issues raised by submission have been examined and reported. The submissions received during the inquiry—excluding those considered confidential—have been tabled in the Parliament. I would like to express my thanks to all the parties who made submissions to the inquiry or who gave evidence at the public hearings.

The Parliamentary Committee's report concludes with supporting remarks on the value of holding a national meeting of representatives of key integrity bodies and relevant government representatives from each Australasian jurisdiction to discuss the fundamental principles that should support whistleblowing legislation to see if they can develop a clear consensus position. The meeting would build on the issues identified for discussion in the course of the collaborative national research project "Whistling While They Work".

## Acknowledgments

It has been a pleasure to work with my colleagues on the Committee—government, opposition, and cross bench members—during this inquiry. I wish to acknowledge their diligence in conducting the inquiry into the New South Wales whistleblowing legislation, and their contributions to the findings and recommendations of this report.

As part of the process of review of the Protected Disclosures Act 1999, each Minister in the New South Wales government was invited to consult with the agencies in their portfolios and make any comment they thought relevant. This consultation coincided with the resignation of the past Premier, the Hon. Bob Carr MP, the election of the Hon. Morris Iemma MP to the premiership, and a restructuring of portfolio responsibilities. I thank my Ministerial colleagues for continuing this consultation process despite the reshuffling of responsibilities. The comments from the Ministers and their public sector agencies were very valuable to the Committee's consideration of the Act.

I would like to acknowledge the assistance and hard work of the secretariat to the Committee: Mr Ian Faulks, Committee Manager, Mr Jim Jefferis, Senior Committee Officer, Ms Elayne Jay, Senior Committee Officer, Ms Annette Phelps, Committee Officer, and Ms Millie Yeoh, Assistant Committee Officer. No request was too difficult for these staff to fulfil.

I also thank the staff of the various areas who support committee activities—Hansard, the Parliamentary attendants, the Catering section, and the Printing Section—for their assistance during this inquiry.



## EXECUTIVE SUMMARY

This report arises out of the requirement in section 32 of the Protected Disclosures Act 1994 to review the Act after the expiration of one year from its date of assent and, as much as practicable, at intervals of two years thereafter. In its submission the Protected Disclosures Act Implementation Steering Committee recommends that the review period for the Act should be changed from the current two-year review cycle to a more realistic and practicable period of five years. Currently, principal Acts of Parliament are the subject of a single review after five years. The Parliamentary Committee therefore recommends one further review of the Protected Disclosures Act at the expiration of five years.

The report identifies the areas for priority reform of the protected disclosures scheme. It is the third occasion on which a parliamentary committee, set up to examine the adequacy of the Protected Disclosures Act 1994, has supported the need to establish a Protected Disclosures Unit to provide a formal, properly resourced advisory body to assist and monitor the handling of protected disclosures. This again is one of the central recommendations emerging from the review. The important difference in the present case is that this recommendation now has the unanimous support of all members of the Protected Disclosures Act Implementation Steering Committee. The costs and benefits of this proposal have also been satisfactorily identified.

The regulation making power in section 30 of the Protected Disclosures Act 1994 should be amended to expressly provide for the making of enforceable regulations or guidelines as to the lodgement, investigation, handling and reporting of protected disclosures. This will support the work of the Protected Disclosures Unit. Those regulations will make it mandatory for agencies to have in place an internal reporting system to facilitate the making and handling of disclosures.

The Parliamentary Committee considers that public authorities, investigating authorities, whistleblowers and those persons the subject of disclosures would benefit from established, standardised and enforceable procedures as to the investigation, handling and reporting of protected disclosures.

In his evidence to the Parliamentary Committee, the Chair of the Protected Disclosures Act Implementation Steering Committee said these changes were the most important amendments currently required to the Protected Disclosures Act 1994.

The tenor of the evidence to the Committee, particularly from the Protected Disclosures Act Implementation Steering Committee, was that the terms of the Protected Disclosures Act 1994 do not currently go far enough to ensure its objectives are achieved.

The main limitation on the review was the lack of any empirical evidence detailing the performance of the provisions of the Act. The Parliamentary Committee's recommendations address this problem. A professionally designed statistical program should be put in place to provide a reliable foundation for any future performance assessment.

The Parliamentary Committee examined comparable Australian whistleblowing legislation and is satisfied the objectives of the New South Wales Act retain the necessary relevance

and scope. The three central themes present Australia-wide are to facilitate the disclosure of corrupt conduct in the public service, provide appropriate protection to whistleblowers and ensure the disclosures are properly investigated and dealt with. The objectives of current public interest disclosure laws are therefore largely consistent.

The principal difference in the scope of the objectives is that Western Australia, Queensland and South Australia also cover public health, safety and environmental damage. The Parliamentary Committee recommends that the Protected Disclosures Act Implementation Steering Committee examine and report to the Minister on whether the Protected Disclosures Act should be amended so as to bring dangers to public health, safety and the environment clearly within the scope of the Act.

It also recommends that the name of the Protected Disclosures Act 1994 be altered to 'Public Interest Disclosures Act 1994' so as to take in the broad public interest considerations of the Act. This again, is in line with the Protected Disclosures Act Implementation Steering Committee's recommendation.

The Parliamentary Committee found there was a large degree of uncertainty surrounding the issue of who determines if a disclosure is protected. Section 7 of the Protected Disclosures Act 1994 says a disclosure is protected if it satisfies all the applicable requirements of Part 2. Section 10 says a disclosure concerning corrupt conduct has to be a disclosure of information that shows or tends to show a public authority or official has engaged or proposes to engage in corrupt conduct.

The issue of whether facts fall within the provisions of a statutory enactment is a question of law. This means a court or appropriate tribunal could only conclusively determine the question of whether a disclosure meets the requirements for protection under the Protected Disclosures Act 1994. This would not include an investigative body such as the Independent Commission Against Corruption as it exercises administrative functions. The same can be said of the other investigating authorities even though the Parliamentary Committee found that they currently advise, apparently with confidence, on whether a disclosure meets the criteria for protection.

In this situation, a New South Wales whistleblower could never be certain of protection unless a court or tribunal found the facts met the criteria of the Protected Disclosures Act 1994. The Parliamentary Committee recommends changing the Act so as to protect the whistleblower where that person had an "honest belief on reasonable grounds". This test is easier to satisfy because the belief need not be correct but only that the officer held the belief and that there were reasonable grounds for it. Other Australian jurisdictions have adopted this approach. In New South Wales, even if the whistleblower has reasonable grounds for his view he gets no protection if he turns out to be wrong. The appropriate course is to bring the New South Wales legislation into line with other states.

Another area of confusion disclosed in submissions and evidence to the Parliamentary Committee arises from the lack of any specific obligation on authorities to investigate a disclosure. To correct this, the Parliamentary Committee recommends an amendment of the Protected Disclosures Act 1994 so as to impose an explicit requirement on an authority to investigate a disclosure subject to such exceptions as may be prescribed by regulation. Precedents can be drawn from the legislation in other Australian States that generally

exclude trivial, frivolous and vexatious disclosures and those which have already been properly investigated or in respect of which there is no prospect of obtaining sufficient evidence because of the time that has elapsed since the occurrence of the matter.

The Parliamentary Committee supports, in the circumstances outlined in this report, a right to seek damages where a person who has made a protected disclosure and suffers detrimental action in reprisal.

The Parliamentary Committee also gives in principle support to providing for a person who has made a protected disclosure to take out an injunction against the taking of a reprisal.

The Parliamentary Committee's review was well supported by public involvement both at the public inquiry and through well researched and presented submissions. Those submissions were a primary source of the recommendations made in the Parliamentary Committee's report.

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## RECOMMENDATIONS

### **Recommendation 1**

The Parliamentary Committee recommends that the name of the Protected Disclosures Act 1994 be altered to Public Interest Disclosures Act 1994 so as to focus it on the public interest objectives of the Act. This change is supported by the Protected Disclosures Act Implementation Steering Committee. (after Para.3.13, Page 23)

### **Recommendation 2**

The Parliamentary Committee recommends that the long title of the Protected Disclosures Act 1994, which currently reads “An Act to provide protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector; and for related purposes” should be re-worded to reflect the broader objective in section 3. (after Para.3.13, Page 23)

### **Recommendation 3**

The Parliamentary Committee recommends that the Protected Disclosures Act Implementation Steering Committee examine and advise the Minister whether the Protected Disclosures Act should be amended so as to bring dangers to public health, safety and the environment clearly within the scope of the Protected Disclosures Act 1994. These are matters of obvious public concern that at present do not clearly fall within the definition of maladministration in section 11. In that examination the cost implications of creating additional investigating authorities such as the Department of Health, Workcover and the Department of Environment and Planning should be assessed. (after Para.3.13, Page 23)

### **Recommendation 4**

The Parliamentary Committee recommends that the regulation making power in section 30 of the Protected Disclosures Act 1994 be amended to expressly provide for the making of enforceable regulations or guidelines as to the lodgement, investigation, handling and reporting of protected disclosures. (after Para.3.24, Page 26)

### **Recommendation 5**

The Parliamentary Committee recommends that Part 2 of the Protected Disclosures Act 1994 be amended so as to protect a disclosure where the public official has an honest belief on reasonable grounds that it is true. This will bring New South Wales into line with other States and give improved protection to the whistleblower. This change is not intended to replace the existing criteria but to provide an additional alternative protection to the purely objective test that is currently in place. (after Para.3.30, Page 27)

## **Recommendation 6**

The Parliamentary Committee recommends that:

- (a) the NSW Department of Health seek advice from the Crown Solicitor on whether the current definition of “Public Official” includes Area Health staff that are employed under the Health Services Act 1997; and
- (b) if the Crown Solicitor is of the view that the definition does not include these employees, then an appropriate amendment should be made to the Act. (after Para.3.36, Page 30)

## **Recommendation 7**

The Parliamentary Committee recommends that consideration be given to including the Health Care Complaints Commission as an investigating authority under the Protected Disclosures Act 1994. (after Para.3.39, Page 30)

## **Recommendation 8**

The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to require each public authority and investigating authority to adequately assess and properly deal with a protected disclosure. This requirement will bring New South Wales into line with other Australian States who, with the exception of South Australia, already have a similar provision. (after Para.3.44, Page 31)

## **Recommendation 9**

The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to enable the establishment of a Protected Disclosures Unit within the Office of the Ombudsman, funded by an appropriate additional budgetary allocation, to perform monitoring and advisory functions as follows:

- (a) to provide advice to persons who intend to make, or have made, a protected disclosure;
- (b) to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, and general legal advice on interpreting the Act;
- (c) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems concerning protected disclosures;
- (d) to audit the internal reporting policies and procedures of public authorities, (other than investigating authorities);
- (e) to monitor the operational response of public authorities (other than investigating authorities) to the Act;
- (f) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
- (g) to publish an annual report containing statistics on protected disclosures for the public sector in New South Wales and identifying any systemic issues or other problems with the operation of the Act;
- (h) to coordinate education and training programs, in consultation with the Protected Disclosures Act Implementation Steering Committee, and provide advice to public authorities seeking assistance in developing internal education programs;

- (i) to publish guidelines on the Act in consultation with the investigating authorities;
- (j) to develop proposals for reform of the Act, in consultation with the investigating authorities and Protected Disclosures Act Implementation Steering Committee; and
- (k) to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.

In order to enable the proposed Public Interest Disclosures Unit to monitor trends in the operation of the protected disclosures scheme, there should be a requirement for:

- (i) public authorities and investigating authorities to notify the Protected Disclosures Unit of all disclosures received which appear to be protected under the Act;
- (ii) public authorities (excluding investigating authorities) investigating disclosures to notify the Protected Disclosures Unit of the progress and final result of each investigation of a protected disclosure they carry out; and
- (iii) investigating authorities to notify the Protected Disclosures Unit of the final result of each protected disclosure investigation they carry out.

All members of the Protected Disclosures Act Implementation Steering Committee support this amendment. If Recommendation 1 is adopted, the name of the unit should be changed for consistency, to the Public Interest Disclosures Unit. (after Para.3.56, Pages 36-37)

### **Recommendation 10**

The Clerk of the Legislative Assembly and the Clerk of the Parliaments ensure that appropriate training and supportive documentation is made available to members of Parliament regarding the receipt of a disclosure from a public official under section 19 of the Protected Disclosures Act 1994. (after Para.3.61, Page 38)

### **Recommendation 11**

The absence of a statistical base has been a central weakness in the implementation of the Protected Disclosures scheme to date. To rectify this, the Protected Disclosures Unit should develop uniform standards and formats for statistical reporting. For this purpose, it should seek professional advice on the development of an appropriate statistical model or framework for the on-going assessment of the effectiveness of the Protected Disclosures Act 1994. This framework, including the information that needs to be captured, should be established before the regulations are finalised. (after Para.3.63, Page 39)

### **Recommendation 12**

The Parliamentary Committee agrees in principle that the Protected Disclosures Act 1994 should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action in reprisal, but suggests that before the matter proceeds further the Protected Disclosures Act Implementation Steering Committee should review and develop this proposal in more detail and to consult with relevant authorities to resolve the issues mentioned in this report. Subject to the satisfactory resolution of those matters the Committee recommends that an appropriate amendment go forward for inclusion in a Statute Miscellaneous Provisions (Amendment) Act. (after Para.3.78, Page 43)

### **Recommendation 13**

The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended so as to authorise a person who has made a protected disclosure (or a public authority or investigating authority on behalf of such a person) to apply for an injunction against the making of a reprisal. This amendment will assist persons and authorities to limit detrimental action occurring during the management of a protected disclosure. The inclusion in the Act of a suitable provision for injunctive relief has been recommended by the Ombudsman, the Protected Disclosures Act Implementation Steering Committee and in other evidence or submissions. Similar injunctions against reprisals are available in Queensland and in the Australian Capital Territory. (after Para.3.79, Page 44)

### **Recommendation 14**

The Parliamentary Committee recommends that sections 20 and 28 of the Protected Disclosures Act 1994 be amended to include a statement specifying the Director of Public Prosecutions (DPP) as the prosecuting authority for the purposes of those provisions, in order to remove the uncertainty that currently exists as to the prosecuting authority in relation to these provisions. The change recommended should not preclude a criminal action by an individual. (after Para.3.83, Page 45)

### **Recommendation 15**

In its submission, the Protected Disclosures Act Implementation Steering Committee recommends that the review period for the Protected Disclosures Act 1994 should be changed from the current two-year review cycle to a more realistic and practicable period of five years. Current Government policy requires one review after five years in respect of principal legislation. No further reviews are required thereafter. The recommendations of this report, if implemented, will result in important practical changes to the protected disclosures scheme, which would benefit from a further review after five years. The Parliamentary Committee accordingly recommends that section 32 be amended to require one further review at the expiration of five years. Section 32 should sunset after that review. (after Para.4.3, Page 49)

### **Recommendation 16**

The Parliamentary Committee notes that the Protected Disclosures Act Implementation Steering Committee is an ad hoc body established by the various New South Wales investigating authorities as a means of co-ordinating and sharing concerns and experiences with the practical implementation of the Protected Disclosures Act 1994. The Parliamentary Committee recommends that consideration be given to establishing this function under the Act, as a statutory advisory committee. (after Para.4.5, Page 50)



## **Recommendation 17**

The Parliamentary Committee recommends that a national conference of representatives of key integrity bodies and relevant government representatives from each Australasian jurisdiction be convened under the auspices of the Office of the Ombudsman to discuss, with a view to reaching consensus on the fundamental principles for whistleblowing legislation. The conference would build on the issues identified for discussion in the course of the collaborative national research project 'Whistling While They Work'. The conference should be organised on the basis that participants pay their own travel and accommodation expenses, with the convening organisation providing the venue, refreshments and lunches, settling an agreed agenda, chairing the conference and preparing minutes setting out what was agreed. Organised on this basis, the conference should not involve a significant financial impost on the convening agency. The conference should be supported by a suitable supplementation of funds. (after Para.4.8, Page 51)



# CHAPTER 1 – THE CONDUCT OF THE REVIEW

## Statutory requirement for review of Protected Disclosures Act 1994

1.1 Section 32 of the Protected Disclosures Act 1994 requires a joint committee of Parliament to review the Act one year after the date of assent and after each following period of two years. Two reviews have been undertaken; the most recent was completed in August 2000. Both were conducted by the Committee on the Office of the Ombudsman and the Police Integrity Commission.

## Joint House resolutions

1.2 In early 2005, the then Premier, the Hon. Bob Carr MP, wrote to the leaders of both Houses requesting the passage of an appropriate resolution for a review of the Protected Disclosures Act 1994 to be conducted by the ICAC Committee. By Joint House resolutions, the ICAC Committee was required to act as a joint committee of members of Parliament under section 32 of the Protected Disclosures Act 1994 to review the Act. The Committee considered the joint resolutions at its meeting of 6 April 2005, and, after considering procedural advice, resolved to conduct an inquiry to review the Protected Disclosures Act 1994.

1.3 Under the terms of the resolutions the review is to determine whether the policy objectives of the Protected Disclosures Act 1994 remain valid and whether the terms of the Act remain appropriate for securing those objectives. The Committee notes that the requirement in section 32 is to review the Act. Nothing material flowed from this difference.

1.4 One other matter, however, is worthy of comment. The resolutions explicitly refer the review of the Protected Disclosures Act 1994 to the ICAC Committee. Section 64(1)(e) of the Independent Commission Against Corruption Act 1988 provides for the ICAC Committee to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question. It has been suggested that none of the statutory functions in section 64 of the Independent Commission Against Corruption Act seem adequate to authorise the Committee to undertake the review. A more appropriate mechanism for any future review might be to establish a joint select committee whose membership comprises the same members who form the ICAC Committee or other nominated committee. The powers and terms of reference of that committee would be those of a normal select committee established by joint resolution for a particular purpose.

## Invitation for submissions

1.5 The ICAC Committee (hereafter the Parliamentary Committee) called for submissions on 23 May 2005 with a closing date subsequently extended to 1 December 2005 as a consequence of the resignation of the Hon. Bob Carr MP from the premiership and the

subsequent reshuffle of portfolio responsibilities. There was also significant debate amongst the members of the Protected Disclosures Act Implementation Steering Committee on some specific matters, and these issues were not resolved until mid-2006. A list of submissions relating to the review can be found at Annexure 1. Some submissions have been treated as confidential because of the personal material they contained or because they contained information that had been lodged under a claim of being a protected disclosure.

## Public hearings

1.6 The Parliamentary Committee held public hearings for the review on Thursday 3 August 2006 and Friday 4 August 2006 and heard evidence from the following officials, individuals and authors of key submissions:

### Thursday 3 August 2006

Dr Peter Bowden	President (New South Wales) Whistleblowers Australia,
Mr Robert Sendt	Auditor-General, NSW Audit Office
Ms Jane Tebbatt	Acting Assistant Auditor-General, Audit Office of NSW
Ms Jill Hennessy	Director, NSW Department of Health
Ms Frances Waters	Employee Relations, NSW Department of Health
Ms Michelle O’Heffernon	Principal Policy Officer, NSW Department of Health
Mr Christopher Ballantine	Assistant Director, NSW Department of Education and Training
Ms Leslie Tree	Director-General, Ministry for Police
Senior Sergeant Wendy Upton	Professional Standards Command, NSW Police
Mr Andrew Allen Dr Thomas Benjamin	Secretary, Medical Consumers’ Association

### Friday 4 August 2006

Mr Chris Wheeler	Chairman of the Protected Disclosures Act Implementation Steering Committee
Ms Margaret Penhall-Jones	
Mr David Sheehan	
Dr Grahame Wagener	
Mr Michael Cranny	

## CHAPTER 2 – RESULTS OF THE TWO PREVIOUS REVIEWS OF THE PROTECTED DISCLOSURES ACT 1994

2.1 Two previous reviews of the Protected Disclosures Act 1994 have been conducted. Annexure 2 of this report puts the previous recommendations of the earlier reviews in the form of a table showing the recommendations that have or have not been implemented or have been partly implemented (from Appendix A of the Issues Paper of the NSW Ombudsman of April 2004).

2.2 The submissions by the Protected Disclosures Act Implementation Steering Committee and by the Ombudsman to this inquiry to review the Protected Disclosures Act 1994 have detailed the problems that make a continuation of existing arrangements inefficient and inequitable for those public officials dependant upon a reliable protected disclosures scheme. In part, the reasons for the absence of progress on previous reviews were put down to the lack of an identified need for a Protected Disclosure Unit. It will be seen in this report that the Protected Disclosures Act Implementation Steering Committee has now given unanimous support to establishment of such a Unit and the Ombudsman has provided costings for the establishment of a unit. (Annexure 4 of this report)

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## CHAPTER 3 – THE CURRENT REVIEW AND PRIORITIES FOR REFORM ARISING FROM IT

### Approach to the Review

3.1 The approach taken by the Parliamentary Committee in the conduct of this review has been to evaluate, in accordance with the terms of reference, the priority areas for reform of the protected disclosures scheme operating in New South Wales.<sup>1</sup> The main limitation in regard to the review arises from the lack of any empirical evidence detailing the performance of the provisions of the Protected Disclosures Act 1994. Dr A.J. Brown puts this succinctly:

“Two jurisdictions (SA, NSW) lack any system of public reporting of activity under the Act, so its implementation is largely unknown.”<sup>2</sup>

3.2 In the past, the view of the Office of the Ombudsman has been that any assessment of the Protected Disclosures Act 1994 and the extent to which it has been achieving its objectives has been largely anecdotal.<sup>3</sup>

### Commonwealth legislation

3.3 The Federal Parliament has used its constitutional powers to provide for whistleblower protection in relation to breaches of the Corporations Act 2001. This was done in 2004 by inserting Part 9.4AAA into the Corporations Act to provide protection for any company employee who reported a suspected violation of the Corporations Act. This legislation extends whistleblower protection to employees of companies and subcontractors throughout Australia.

3.4 In 2004, the Federal Parliament passed the Workplace Relations Amendment (Codifying Contempt Offences) Act 2004 which introduced whistleblower protection into the Workplace Relations Act 1996. In 2005, changes were considered to the Trade Practices Act 1974 to encourage whistleblowers to assist in exposing cartels.

3.5 The Parliamentary Committee notes the two previous reviews of the Protected Disclosures Act 1994 did not examine the possible application of Commonwealth legislation in areas covered by the State Act. The Protected Disclosures Act Implementation Steering Committee should at a suitable time clarify this relationship if it leads to uncertainty in regard to the application of State legislation. The matter does not appear to currently give rise to any difficulties. Dr Brown provided the following helpful remarks to the Committee in regard to this matter:

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<sup>1</sup> In his letter dated 13 October 2004, the then Premier said that the third review provides an appropriate opportunity for an evaluation of the priority areas of reform.

<sup>2</sup> Dr AJ Brown, Public Interest Disclosure Legislation in Australia: Towards the Next Generation? P v.

<sup>3</sup> See page 31 of the Second Review of the Protected Disclosures Act 1994.

The Commonwealth provisions you refer to, currently have no direct impact for your review of the Protected Disclosures Act (NSW) or similar public sector legislation in other jurisdictions.

Part 9.4AAA of the Corporations Act 2001 extends protection to officers, employees, contractors or employees of contractors to a company, who report breaches of the Corporations Act. This legislation therefore largely parallels the PD Act for the private sector, in relation to public interest matters that can be raised as breaches of the Act, which is very broad e.g. breaches of directors' duties. But to the best of my knowledge none of this would apply to public sector agencies covered by the PD Act.

The 2004 amendments to the Workplace Relations Act inserted Part 4A (ss.337A-337D) into Schedule 1, Chapter 11 of the Workplace Relations Act 1996. These provisions simply extend protection to officers, employees and members of 'organisations' (i.e. unions or employer associations) who report breaches of the Schedule or the Act by an organisation, or by an officer or employee of an organisation. The Schedule itself deals only with 'Registration and Accountability of Organisations'. In other words, these provisions only provide protection to whistleblowers from within unions or employer associations, who blow the whistle on breaches of the rules that govern how industrial and employer organisations are established and how they are meant to behave as players in the workplace relations system. It does not provide any general protection to employees who wish to blow the whistle on public interest matters under the control of their employers (whether public sector or private sector). There is minimal overlap or relationship with the type of general scheme for the making of public interest disclosures attempted by the NSW Protected Disclosures Act.<sup>4</sup>

## Policy objectives of the Protected Disclosures Act 1994

3.6 The Parliamentary Committee's terms of reference require it to determine whether the policy objectives of the Protected Disclosures Act 1994 remain valid. The Committee takes this to mean whether those objectives remain sound, just, and well founded. The Committee is then required to determine whether the terms of the Act remain appropriate for securing those objectives.

3.7 The object of the Protected Disclosures Act 1994 is set out in section 3, which reads:

(1) The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters, and
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and
- (c) providing for those disclosures to be properly investigated and dealt with.

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<sup>4</sup> Email dated 6 September 2006.



(2) Nothing in this Act is intended to affect the proper administration and management of an investigating authority or public authority (including action that may or is required to be taken in respect of the salary, wages, conditions of employment or discipline of a public official), subject to the following:

- (a) detrimental action is not to be taken against a person if to do so would be in contravention of this Act, and
- (b) beneficial treatment is not to be given in favour of a person if the purpose (or one of the purposes) for doing so is to influence the person to make, to refrain from making, or to withdraw a disclosure.

3.8 This provision shows the Protected Disclosures Act 1994 has a single object or end towards which efforts are to be directed. That objective is “to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector”. The function of the remainder of section 3 is to set out the ways by which this objective is to be achieved. Those ways are by enhancing and augmenting established procedures for making disclosures, protecting persons from reprisals and by providing for disclosures to be properly investigated and dealt with.

3.9 The long title and short title of the Protected Disclosures Act 1994, which legally are intended to serve as a guide to the general legislative purpose of the statute, do not adequately reflect the broader objective in section 3. The Chairman of the Protected Disclosures Act Implementation Steering Committee, Mr Chris Wheeler, made this point in his evidence to the Committee:

**Mr WHEELER:** To my mind, one of the problems with the legislation is its title. It talks about "protected disclosures". A number of other jurisdictions have used "public interest disclosure" in the title, which sets the scene at the outset. We have it in the objects clause. But when you think about the legislation, it is designed to facilitate public interest disclosures. Protecting whistleblowers is one way of achieving that, but its aim is to bring to light matters that would not come to light or otherwise. To my knowledge, the Act should have that in its title so it is clear at the outset. Okay, it is about protecting people, but the Act is primarily there to get public interest disclosures.

3.10 Dr Brown, in his Discussion Paper, states that the name of the New South Wales Act has the potential to create unrealistic expectations about the protection on offer and that the Act should be altered to put the focus on the public interest substance of disclosures rather than on personalities.<sup>5</sup> He says ‘protected disclosure’ has connotations of a security designation akin to ‘top secret’.

3.11 The submission by the Protected Disclosures Act Implementation Steering Committee supports a change in name to focus it on the object of the Act. The Parliamentary Committee agrees with this course and recommends that the name of the act be altered to “Public Interest Disclosures Act 1994” or “Public Interest Disclosure Act 1994” either of which would be satisfactory. A similar change is supported by the Minister for Planning in his submission. The long title, which currently reads “An Act to provide protection for public

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<sup>5</sup> Brown, *Op cit.* p7

officials disclosing corrupt conduct, maladministration and waste in the public sector; and for related purposes” should be re-worded to reflect the broader objective in section 3.

### *Comparison of the objectives of Australian whistleblowing legislation*

New South Wales: The object of the Protected Disclosures Act 1994 is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by enhancing and augmenting established procedures; protecting persons from reprisals; and providing for the disclosures to be properly dealt with.<sup>6</sup>

Queensland: The Whistleblowers Protection Act 1994 promotes the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector or who disclose danger to public health or safety or who disclose danger to the environment.<sup>7</sup>

South Australia: The aim of the Whistleblower Act 1993 is to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally by providing means by which such disclosures may be made and by providing appropriate protections for those who make such disclosures.<sup>8</sup>

Tasmania: The Public Interest Disclosures Act 2002 is an act to encourage and facilitate disclosures of improper conduct by public officers and public bodies, to protect persons making those disclosures and others from reprisals to provide for the matters disclosed to be properly investigated and dealt with.<sup>9</sup>

Western Australia: The Public Interest Disclosure Act 2003 is an act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures.<sup>10</sup>

Victoria: The purposes of the Whistleblowers Protection Act 2001 are to encourage and facilitate disclosures of improper conduct by public officers and public bodies; to provide protection for the person making the disclosure and others who might suffer reprisals; and to provide for the matters disclosed to be properly dealt with.<sup>11</sup>

3.12 An appropriate way to examine the validity or soundness of the objective in section 3 is to compare it with the objectives of other Australian whistleblower legislation. That comparison, which follows, shows Australian States have a high degree of commonality of purpose in this legislation. The New South Wales Act reflects the three central themes that

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<sup>6</sup> Protected Disclosures Act 1994, section 3.

<sup>7</sup> Whistleblowers Protection Act 1994, section 3.

<sup>8</sup> Whistleblower Protection Act 1993, section 3.

<sup>9</sup> Public Interest Disclosures Act 2002. See Long Title.

<sup>10</sup> Public Interest Disclosure Act 2003. See Long Title.

<sup>11</sup> Whistleblowers Protection Act 2001, section 1.

occur in Australian whistleblower legislation. These are to facilitate disclosure of corrupt conduct in the public service, provide appropriate protection to whistleblowers and ensure the disclosures are properly investigated and dealt with. In his Issues Paper the NSW Ombudsman describes these as three almost universal pre-requisites for the vast majority of employees to make a disclosure when they become aware of serious problems within the management or operation of their organisation.<sup>12</sup>

3.13 The principal difference in the scope of the objectives is that Western Australia, Queensland and South Australia also cover public health, safety and environmental damage. The Parliamentary Committee recommends that the Protected Disclosures Act Implementation Steering Committee examine and report to the Minister on whether the Protected Disclosures Act 1994 should be amended so as to bring dangers to public health, safety and the environment clearly within the scope of the Act. These are matters of obvious public concern that at present do not clearly fall within the definition of maladministration in section 11. In that examination, the cost implications of creating additional investigating authorities such as the Department of Health, Workcover and the Department of Environment and Planning should be assessed.

### **Recommendation 1**

The Parliamentary Committee recommends that the name of the Protected Disclosures Act 1994 be altered to Public Interest Disclosures Act 1994 so as to focus it on the public interest objectives of the Act. This change is supported by the Protected Disclosures Act Implementation Steering Committee.

### **Recommendation 2**

The Parliamentary Committee recommends that the long title of the Act, which currently reads “An Act to provide protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector; and for related purposes” should be re-worded to reflect the broader objective in section 3.

### **Recommendation 3**

The Parliamentary Committee recommends that the Protected Disclosures Act Implementation Steering Committee examine and advise the Minister whether the Protected Disclosures Act should be amended so as to bring dangers to public health, safety and the environment clearly within the scope of the Act. These are matters of obvious public concern that at present do not clearly fall within the definition of maladministration in section 11. In that examination the cost implications of creating additional investigating authorities such as the Department of Health, Workcover and the Department of Environment and Planning should be assessed.

<sup>12</sup> NSW Ombudsman Issues Paper April 2004, *The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, p.8

## Enhancing and augmenting established procedures for making disclosures (Section 3 (1)(a))

### Internal reporting procedures:

3.14 One of the criteria in section 8 for a protected disclosure is that it complies with an internal reporting procedure of the relevant authority. This requirement relates to a disclosure made by a public official to another officer of the same authority. The intention seems to have been to oblige authorities to set up such a reporting system as a pre-condition for a disclosure to get protection. Witnesses in earlier reviews said confidence in the internal reporting system was crucial to the success of the scheme.<sup>13</sup>

3.15 In a circular to Ministers in November 1996, the Premier instructed public agencies to put in place documented internal reporting procedures that provided clear and unequivocal protection to employees who report corrupt conduct, maladministration and serious and substantial waste of public money. A copy of these procedures was required to be forwarded to the Premier's Department. The difficulty of achieving this in the absence of a body with statutory powers and functions for implementation of the Act was made clear in the evidence of Mr Chris Wheeler, Chairman of the Protected Disclosures Act Implementation Steering Committee, who said:

**Mr WHEELER:** The circular went out to all agencies, and it was followed up by a letter. Not all agencies complied. As a matter of fact, only 63 per cent of the agencies responded to the circular. The follow-up letter got another 21 per cent. It was only when we wrote to the remaining agencies and said, "We are going to name you" that we got most of the rest—but not all—to comply. So then we had to name them in front of the Joint Committee and in a report. This is an example of what can happen if there is not a statutory power, and it is merely a discretionary matter of, "Please do X." Unless something is going seriously wrong in an agency, this is not an issue that a lot of them regard as vitally important. They have other operational priorities that take precedence.

3.16 The Protected Disclosures Act 1994 requires a disclosure to be made in accordance with the relevant investigation Act. In the case of a disclosure to the Independent Commission Against Corruption, section 10 says it has to be made in accordance with the Independent Commission Against Corruption Act 1988. In the case of a disclosure to the Ombudsman section 11 requires it to be in accordance with the Ombudsman Act 1974. Where the disclosure is to the Auditor General, section 12 says it must be in accordance with the Public Finance and Audit Act 1983. In all these cases regulations could have been made relating to the making of disclosures. However, to date no regulations have been made for this purpose.

3.17 Similarly, there seems to have been no effort to use the regulation making power in section 30 that permits the making of regulations that are necessary or convenient for carrying out or giving effect to the Protected Disclosures Act 1994. It appears as if no one has examined the scope that these existing powers afford to regulate disclosures. This situation does not lessen the need for clear heads on which enforceable disclosure regulations or guidelines can be made but it would have made the case for them more

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<sup>13</sup> See page 56 of the September 1996 Report of the Review Committee.

evident if there had been an effort to bring in, by regulation, the procedures sought by the Protected Disclosures Act Implementation Steering Committee and that this had failed because of insufficient regulatory powers.

3.18 The submission received from the Protected Disclosures Act Implementation Steering Committee recommends that the Protected Disclosures Act 1994 be amended to place an obligation on the agency to have in place an internal reporting system to facilitate the making of disclosures to protect the whistleblower when those disclosures are made and to require the agency to deal with the disclosure in accordance with guidelines of either the agency or from a Protected Disclosures Unit.

3.19 In his evidence to the Parliamentary Committee, Mr Chris Wheeler, Chairman of the Protected Disclosures Act Implementation Steering Committee, said these changes were the most important amendments currently required to the Protected Disclosures Act 1994. Dr Brown also stresses the necessity for the development in New South Wales of clearer statutory guidance for whistleblower systems and that this is a major priority.<sup>14</sup>

3.20 In the course of evidence to the Parliamentary Committee, persons who had been the subject of disclosures raised a number of issues. These issues mainly concerned natural justice and procedural fairness. These matters should be suitably covered in guideless or regulations.

3.21 The first of these is the need for authorities to expedite their examination of a disclosure. Evidence given to the Parliamentary Committee was that this process could take two years or more during which a person's guilt becomes unfairly ingrained in the mind of their colleagues.

3.22 Another serious issue is the removal of a person from their place of work during the period a disclosure is being examined. The Parliamentary Committee was told that when this happens, gossip and innuendo follows. Uniform precedents need to be developed to guide authorities contemplating this course so that such action is only taken when it can be demonstrated that it is in the public interest to do so. A person the subject of a disclosure should be given a reasonable time to address the issues in the disclosure. This has not always been the case. Where a disclosure proves unfounded there should be a capacity to purge the record.

3.23 The Parliamentary Committee considers that public authorities, investigating authorities, whistleblowers and those persons the subject of disclosures would benefit from established, standardised and enforceable procedures as to the investigation, handling and reporting of protected disclosures.

3.24 The Parliamentary Committee recommends that the regulation making power in section 30 of the Protected Disclosures Act 1994 be amended to expressly provide for the making of regulations or guidelines on these matters.

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<sup>14</sup> Brown, *Op cit.* pv.

## Recommendation 4

The Parliamentary Committee recommends that the regulation making power in section 30 of the Protected Disclosures Act 1994 be amended to expressly provide for the making of enforceable regulations or guidelines as to the lodgement, investigation, handling and reporting of protected disclosures.

### Clarifying the right to protection:

3.25 The Parliamentary Committee examined who determines if a disclosure is protected. Unfortunately, this central issue was not examined either in the Ombudsman's submission or in the submission of the Protected Disclosures Act Implementation Steering Committee. A hint of the problem can be seen in the Protected Disclosures Fact Sheet attached to the Steering Committee's submission. That fact sheet contains phrases such as "It is most likely this is a protected disclosure" and "It is probably not a protected disclosure."

3.26 Section 7 of the Protected Disclosures Act 1994 says a disclosure is protected if it satisfies all the applicable requirements of Part 2. Section 10 says a disclosure concerning corrupt conduct has to be a disclosure of information that shows or tends to show a public authority or official has engaged or proposes to engage in corrupt conduct.

3.27 In Collector of Customs v Agfa-Gevaert Ltd 1995-1996, the High Court of Australia said the question of whether facts fall within the provisions of a statutory enactment is a question of law. This means a court or appropriate tribunal could only conclusively determine the question of whether a disclosure meets the requirements for protection under the Protected Disclosures Act 1994. This would not include an investigative body such as the Independent Commission Against Corruption as it exercises administrative functions. The same can be said of the other investigating authorities even though they currently advise, apparently with confidence, on whether a disclosure meets the criteria for protection.

3.28 In this situation, a New South Wales whistleblower could never be certain of protection unless a court or tribunal found the facts met the criteria of the Protected Disclosures Act 1994.

3.29 At the Second Reading in the Legislative Assembly of the Whistleblowers Protection Bill (No. 2) on 15 November 1994, the then Minister, the Hon. Chris Hartcher MP, said the primary test for securing protection "is a purely objective one, namely, a disclosure by an individual must 'show or tend to show' that there has been misconduct." The test agreed upon by the Government of the time was contrary to the provision that had been recommended in the Legislation Committee's report of 30 June 1993, at page 36. In that report, the Legislation Committee recommended that the test be that the person had an "honest belief on reasonable grounds." This test is easier to satisfy because the belief need not be correct but only that the officer held the belief and that there were reasonable grounds for it. This may explain why other Australian jurisdictions have adopted this approach. Queensland requires an honest belief on reasonable grounds (Whistleblowers Protection Act 1994 s14); Victoria requires the person to believe on reasonable grounds (Whistleblowers Protection Act 2001 s5); South Australia requires a belief on reasonable grounds that the information is true (Whistleblowers Protection Act 1993 s5); Tasmania requires a belief on

reasonable grounds (Public Interest Disclosures Act 2002 s6); Western Australia requires a belief on reasonable grounds (Public Interest Disclosure Act 2003 s5); the Australian Capital Territory requires a belief on reasonable grounds (Public Interest Disclosures Act 1994 s3); the Senate Public Interest Disclosure (Protection of Whistleblowers) Bill 2002 also adopted the reasonable grounds test.

3.30 In New South Wales, even if the whistleblower has reasonable grounds for forming a view that corrupt conduct, maladministration, or serious and substantial waste has occurred or may have occurred, there is no protection if the disclosure turns out to be wrong. The appropriate course is to bring the New South Wales legislation into line with other states so as to improve what appears to be a precarious situation for a New South Wales whistleblower. The Parliamentary Committee recommends that Part 2 of the Protected Disclosures Act 1994 be amended so as to protect a disclosure where the public official has an honest belief on reasonable grounds that it is true. This approach had the support of the then Auditor-General, Mr Sendt, in the evidence he presented to the Committee.<sup>15</sup> The change is intended to provide an additional alternative protection to the purely objective test that is currently in place.

### Recommendation 5

The Parliamentary Committee recommends that Part 2 of the Protected Disclosures Act 1994 be amended so as to protect a disclosure where the public official has an honest belief on reasonable grounds that it is true. This will bring New South Wales into line with other States and give improved protection to the whistleblower. This change is not intended to replace the existing criteria but to provide an additional alternative protection to the purely objective test that is currently in place.

### Definition of “waste” and “serious and substantial waste”

3.31 In its submission, the Protected Disclosures Act Implementation Steering Committee said the words “waste” and “serious and substantial waste” which appear in section 12B of the Protected Disclosures Act should be defined as they lead to confusion. This matter was examined in the course of the public hearing on 3 August 2006 at which the then Auditor-General, Mr Sendt, gave evidence.

**Hon. Kim YEADON (CHAIRMAN):** Overall, are you satisfied that whistleblowers are afforded the necessary protections to encourage the exposure of financial impropriety? Is there a need to define more accurately what constitutes serious and substantial waste?

**Mr SENDT:** Perhaps if I could answer the second question first and Ms Tebbatt might want to expand on what I say. The issue of what constitutes serious and substantial waste is one we have wrestled with over the years. It has been suggested that a definition might be put into the legislation.

<sup>15</sup> See page 12 of evidence before the Committee on 3 August 2006.

I think that would probably be difficult to do, in the sense that it would add greatly to a potential complainant's understanding of what the criterion meant. We interpret serious and substantial waste in a number of forms. We have three criteria: one is if the waste is, or appears to be, in the order of \$500,000 or more; secondly, and this would apply more to smaller agencies, if it is less than that amount but is nevertheless quite material to the size of the organisation and the services it delivers; or, thirdly, if the dollar value is not that great but the nature of the allegation is such that it could suggest a systemic problem in the organisation or one, even if not systemic, because of the nature could compromise the ability of the organisation to deliver services effectively.

We use those three criteria to try to determine whether an allegation falls into that category. You could put similar words into the legislation; but the problem with that is it might set them in concrete and it may be that circumstances change. There may be particular allegations that come to us that we think might be appropriate for us to investigate that are of a different nature to those three criteria. I am not necessarily sure that putting words in the legislation achieves a lot.

**Ms TEBBATT:** The judgment of substantial waste is much a professional judgment and knowledge of the organisation and its operations. If a complainant had to make that judgment he or she may exclude himself or herself from the legislation rather than us making the judgement about whether it is systemic. As the Auditor-General said, it is a moving feast; it may change over time. The way it is at the moment with an internal definition, it is not seen as problematic.

3.32 This evidence does not disclose any significant practical problems that would justify attempting to precisely define “waste” and “serious and substantial waste” at this time. Mr Sendt’s evidence shows that the Audit Office gets only approximately 10-15 protected disclosures in a year and that the Audit Office favours the current flexibility.

### **Funding of Protected Disclosure investigations**

3.33 In its submission, the Audit Office argued that the costs of investigating protected disclosures should be funded separately by a special appropriation of Parliament. The Office expressed concern that the small surplus that results from performance audits would be eroded by these investigations. However, it does not appear from the evidence provided by the Auditor-General that it is a material issue.

**Mr SENDT:** I do not want to make a lot of that point. At the time that was written, it was in the context of some more significant investigations we were doing in the protected closure area. The reality is, because we get perhaps a maximum of two dozen per year, the sorts of dollars we are talking about are fairly minimal. If the Committee were prepared to recommend that we get some funding I would not object, but I would not want to labour the point too much.

3.34 Accordingly, the Parliamentary Committee resolved to take no action on the matter aside from suggesting the Audit Office seek the views of the Treasurer as to the appropriateness of such a payment.



**Definition of "public official"**

3.35 In the course of evidence given on behalf of the NSW Department of Health, Ms Hennessy said that there was some doubt whether the current definition of "public official" took in Area Health staff that are employed under the Health Services Act 1997 rather than the Public Sector Employment and Management Act 2002. Ms Hennessy stated that it was the view of the General Counsel of the Department that it is ambiguous.

**Ms HENNESSY** I suppose one particular issue that is relevant for NSW Health is it is concerned that the current definition of "public official" may not cover the vast majority of employees within the NSW Health system. The majority of staff who are employed through area health services are employed under the Health Services Act. And that Act provides that the Government of New South Wales employs all Area Health staff. The Act also provides that the director general of the department exercises the employer functions of the Government in relation to staff employed in NSW Health. The definition of "public official" under the Act does not seem to cover that particular group of individuals and we believe that there could be some clarification to make it clear. Certainly in practise the way that the Act is being administered within NSW Health is on the basis that we assume that all of our employees are covered, but we think there would be benefit in clarification on that point. They are probably our key points.

**Mr PEARCE MP (ICAC COMMITTEE):** What is the definition of a "public official" in the Act?

**Ms HENNESSY:** The definition is: "a person employed under the Public Sector Management Act" which does not apply here; "an employee of a State-owned corporation" which does not apply; "a subsidiary of a State-owned corporation or a local government authority"; and the final category may apply but it is not clear "or any other individual having public official functions or acting in a public official capacity".

**Mr PEARCE MP (ICAC COMMITTEE):** That is a catch-all phrase?

**Ms HENNESSY:** It may cover them but I guess we are just saying that for clarity if there is an opportunity to review it we would like it considered.

**Hon. Kim YEADON MP (CHAIRMAN):** Has the department sought legal advice particularly on the last definition proposed in the Act in relation to that question?

**Ms HENNESSY:** It is the view of the general council of the department that it is ambiguous.

3.36 The Parliamentary Committee recommends that the Department of Health seek clarification from the Crown Solicitor.

### **Recommendation 6**

The Parliamentary Committee recommends that:

- (a) the NSW Department of Health seek advice from the Crown Solicitor on whether the current definition of "Public Official" includes Area Health staff that are employed under the Health Services Act 1997; and
- (b) if the Crown Solicitor is of the view that the definition does not include these employees, then an appropriate amendment should be made to the Act.

3.37 The Parliamentary Committee further notes that the Public Sector Employment Legislation Amendment Act 2006 may have had the effect of bringing more employees within the purview of the Protected Disclosures Act 1994 by amending the definition of 'public official'.

### **Health Care Complaints Commission**

3.38 Currently, the relevant investigating authorities listed under the Protected Disclosures Act 1994 are the Auditor-General, the Independent Commission Against Corruption, the Ombudsman, the Police Integrity Commission, the Inspector of the Police Integrity Commission, the Director-General of the Department of Local Government, the Inspector of the Independent Commission Against Corruption. It is unclear why the Health Care Complaints Commission, which is an independent body for the purposes of receiving and investigating complaints relating to health services and health service providers in New South Wales, prosecuting serious complaints, and resolving or overseeing the resolution of complaints, is not a defined investigating authority under the Act.

3.39 The Parliamentary Committee recommends that consideration be given to including the Health Care Complaints Commission as an investigating authority under the Protected Disclosures Act 1994.

### **Recommendation 7**

The Parliamentary Committee recommends that consideration be given to including the Health Care Complaints Commission as an investigating authority under the Protected Disclosures Act 1994.

## **Providing for disclosures to be properly investigated and dealt with (Section 3(1)(b))**

### **Lack of clarity of requirements for the making and investigation of disclosures**

3.40 A matter that the Parliamentary Committee finds deficient relates to the difficulty of identifying the provisions (to the extent they exist) that impose obligations on authorities to investigate disclosures. At page 31 of his paper Dr Brown says

"... in South Australia and New South Wales there is no specific obligation on authorities to investigate the disclosures they receive, other than as contained in other legislation."

Dr Brown says the lack of detail is because it is assumed the laws and procedures of other legislation apply.

3.41 This other legislation includes the Ombudsman Act 1974. In May 1995 the Ombudsman received legal advice from the Solicitor-General to the effect that when the Protected Disclosures Act 1994 says a disclosure has to be made in accordance with the Ombudsman Act that this means that the disclosure has to be made in the same way as a complaint is made, that is, it has to be made in writing and lodged in time. The advice was accompanied by the further view that this would not give rise to a spate of new matters because section 25(2) of the Protected Disclosures Act requires the Ombudsman to decline to investigate matters outside his normal jurisdiction. The exceptions to this are disclosures relating to the Independent Commission Against Corruption and the Auditor-General, which are referred to in section 5(3) of the Protected Disclosures Act.

3.42 This appears to lead to the situation that, with those exceptions, the Ombudsman can only investigate a disclosure if it could have been made and dealt with under the Ombudsman Act 1974. The same situation would apply in regard to the Independent Commission Against Corruption Act because section 10 of the Protected Disclosures Act 1994 also requires disclosures to that investigating authority to be made in accordance with the Independent Commission Against Corruption Act 1988.

3.43 The linkages between the Protected Disclosures Act 1994 and the Acts for investigating authorities are unclear. For instance, how does a disclosure that is made or referred to the Independent Commission Against Corruption get picked up by the complaint provisions of the Independent Commission Against Corruption Act 1988? The only reference in the Independent Commission Against Corruption Act to the Protected Disclosures Act is in section 111D which deals with complaints to the Inspector by a public official within the meaning of the Protected Disclosures Act. The word 'complaint' is not defined in the Independent Commission Against Corruption Act. It is easy to assume a complaint would involve a disclosure, but rather more difficult to categorise all disclosures as a complaint.

3.44 The Parliamentary Committee recommends the amendment of the Protected Disclosures Act 1994 so as to impose an explicit requirement on an investigating authority to adequately assess and properly deal with a disclosure.

### **Recommendation 8**

**The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to require each public authority and investigating authority to adequately assess and properly deal with a protected disclosure.**

3.45 This requirement will bring New South Wales into line with other Australian States who, with the exception of South Australia, already have a similar provision.

### **Protected Disclosures Unit**

3.46 The setting up of a Protected Disclosures Unit to provide a formal, properly resourced advisory body to assist and monitor the handling of protected disclosures in New South Wales has been the central recommendation emerging from the two previous reviews of the Protected Disclosures Act 1994. A reading of the Protected Disclosures Act Implementation Steering Committee's submission indicates it would like the legislation modified to give a more proactive role to an authority and to carry this into the area of actually protecting the whistleblower from retribution. It concedes such an approach cannot be effective without the establishment of a Protected Disclosures Unit.

3.47 The Protected Disclosures Act Implementation Steering Committee supports the setting up of an oversight body in the Ombudsman's Office to which public sector agencies, other than Investigating Authorities and the NSW Police, would report on a case-by-case basis or periodically. This Unit would have the duty of improving awareness of the Protected Disclosures Act 1994, providing advice, training, collecting statistics, monitoring trends and reporting to the Government and the Legislature. The Unit would, in effect, be the agency charged with responsibility to see the Protected Disclosures Act was effectively implemented across the public sector. The tenor of the evidence to the Committee, particularly from the submission of the Steering Committee, was that the terms of the Act do not currently go far enough to ensure its objects are achieved.

3.48 The Protected Disclosures Act Implementation Steering Committee says a survey of 100 New South Wales agencies shows there is a need for a formal, properly resourced advisory body and that the functions proposed for it would give agencies the incentive to comply with the Protected Disclosures Act 1994 and the formal guidance on how to do so. The statistics gathered by the Unit would give an accurate indication on the working of the scheme.

3.49 Although the proposal for a Protected Disclosures Unit was adequately justified in both previous reviews it lacked unanimous support from the investigating authorities. That has now changed as is evidenced from the submission of the Protected Disclosures Act Implementation Steering Committee, and in the evidence of Mr Wheeler, the Chairman of the Steering Committee.

**The Hon. Kim YEADON MP (CHAIRMAN):** Some of the submissions we have received have suggested that a unit within the Office of the Ombudsman would be the best model to fix the ownership problem. What is your view on that type of model?

**Mr WHEELER:** That has long been the view of the Ombudsman's office, and it has been the view of the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission in its two reviews. You will see from the submission of the Steering Committee that it is now the view of the Steering Committee that such a body should be set up.

**The Hon. Kim YEADON MP (CHAIRMAN):** Given such unanimity, why has it not been adopted?

**Mr WHEELER:** I put it down to three reasons. The first would be that there was not unanimity in relation to the investigating authorities in the past.

**The Hon. Kim YEADON MP (CHAIRMAN):** Has that recently been arrived at?

**Mr WHEELER:** That has been arrived at as demonstrated in the submission from the committee. In the past there were misgivings by certain of the investigating authorities.

**The Hon. Kim YEADON MP (CHAIRMAN):** What were those misgivings based on?

**Mr WHEELER:** The impact of such a unit on their operations.

**The Hon. Kim YEADON MP (CHAIRMAN):** If we want to be blunt about it—turf wars?

**Mr WHEELER:** Whether it was a turf war or they did not want to have to report to a committee or a unit within the Ombudsman's office about what they were doing.

**The Hon. Kim YEADON MP (CHAIRMAN):** You could not have the Independent Commission Against Corruption going down to the Ombudsman?

**Mr WHEELER:** I could not really comment on that. The first reason why it did not work is because of the lack of uniformity. The second was confusion by Government. The Government was of the view that the implementation committee could do the roles. The point is it just cannot. It is not a body that owns that Act. It does not have any powers under the Act, it has no function under the Act. The second reason that has been given in response to recommendations has been "The committee can perform those functions."

**The Hon. Kim YEADON MP (CHAIRMAN):** What about finance?

**Mr WHEELER:** That was the third.

**The Hon. Kim YEADON MP (CHAIRMAN):** What is your view of the funding requirements in general or broad terms to set up such a unit?

**Mr WHEELER:** We have done some costings on that and we have sent a letter to the Committee on setting out what we think would be reasonable costs. We think we would need between three and five staff to perform the various functions set out in the recommendations of the previous two reviews of the Act. They are functions that we believe need to be performed to make sure this Act works properly. If it does not work properly the outcomes can be catastrophic for individuals, not just the ones who have blown the whistle but their colleagues, and for the agencies concerned. We have witnessed circumstances where agencies have almost been brought to a standstill in dealing with morale problems, legal issues and all the rest that can arise where a disclosure is not dealt with properly and the whistleblower is not properly protected.

**The Hon. Kim YEADON MP (CHAIRMAN):** On a cost benefit analysis you would say it is money well spent?

**Mr WHEELER:** Absolutely. We are talking about maybe \$300,000 a year. I can point to a couple of court cases—the Wheadon case, even before the Act came in but about the same issue, even back then was \$264,000 in damages, leaving aside the legal costs. There have been numerous court cases since then that relate to disclosures. The money involved is huge. Anything that can be done to try to reduce the chances of that sort of cost is, I think, well worth it.

3.50 The establishment of the Unit in the Ombudsman’s Office would reflect the de facto advisory role performed by this Office regarding the Protected Disclosures Act 1994. The Ombudsman, in his current submission, has supported the case for a Protected Disclosures Unit by providing his research results on the costs of such a unit. This is set out in a letter to the Parliamentary Committee dated 5 April 2006, a copy of which appears in Annexure 4 of this report. As indicated in Mr Wheeler’s evidence, the Ombudsman estimates 3-5 full time staff would be needed to carry out the functions that have been proposed for the unit. He calculates the total cost for 3 additional staff at these grades would be in the order of \$300,000 for 2006-2007.

3.51 The Chairman of the Protected Disclosures Act Implementation Steering Committee has supplied to the Parliamentary Committee a detailed comparison showing what can be achieved under the current administrative arrangements as against what can be expected to be practicable under a Protected Disclosures Unit. This is set out in Annexure 5.

3.52 Mr Wheeler said that one of the problems that the Ombudsman’s Office identified early in the operation of the Protected Disclosures Act 1994 was that there was no agency that had primary responsibility to ensure the effective implementation of the Act across the public sector. In July 1996, a year after the Act had been in operation, the Premier found it necessary to establish the Protected Disclosures Act Implementation Steering Committee. Its function is to implement strategies to meet the information needs of agencies and improve implementation of the Act. However, the Steering Committee has no statutory powers or functions under the Act and it and the Ombudsman are in practice prevented from gathering information or offering guidance in relation to particular disclosures because of the uncertain application of the confidentiality requirements of various acts such as the Privacy and Personal Information Protection Act 1998 and the Health Records and Information Privacy Act 2002.

3.53 The Parliamentary Committee is advised that although these acts exclude from their application information arising from the investigation of a protected disclosure often the answer to this question is not clear-cut. It is often difficult to apply the particular circumstances of a case to the limited guidance available in the Act. In practice, in many instances, authorities are forced to make their best guess and to act accordingly. Agencies receiving disclosures from their staff are in the same position. This often creates great uncertainty as to whether it is valid or safe to rely on the protected disclosures exclusions in the privacy legislation.

3.54 Confusion arising from the lack of co-ordination between agencies was well demonstrated by the then Auditor-General, Mr Sendt, in his evidence:

**The Hon. Kim YEADON MP (CHAIRMAN)** In your submission you indicated that you would like to see greater co-ordination between the agencies that deal with protected disclosures. The Committee has received other submissions that nominate the Ombudsman's Office, and indeed the setting up of a unit within that office, to deal exclusively with protected disclosures. What do you say to that as against your proposal of greater co-ordination? Would you elaborate on how that co-ordination might work and why it would be superior or better to nominate one agency to deal with this? For example, the Committee has been given the model of the Ombudsman's Office and a unit within that office.

**Mr SENDT:** Our comments were not directed to an alternative to the establishment of a central unit. The comments in our submission derived from our concerns at the way that complaints could be handled. Quite often we find people writing to us, writing to the Ombudsman and/or the Independent Commission Against Corruption as well. Sometimes when writing to us they make it clear that they have done that. In other cases they do not make that clear. There are secrecy provisions in our Act that can create difficulties for us when dealing with other agencies.

For example, the Independent Commission Against Corruption Act effectively overrides our secrecy provisions in that the Commission can come to us and ask for information in relation to protected disclosures, and we can provide that. That assumes that the Independent Commission Against Corruption knows that we have a protected disclosure. We do not have the same ability to go to the Independent Commission Against Corruption and say, "We have a protected disclosure, do you have any information relevant to that? And will you provide it to us?" We have a memorandum of understanding with the Ombudsman's Office, which overcomes some of those difficulties. Occasionally we find that a complainant has written to two or three of those major organisations involved in protected disclosures and each agency will take a different view as to the core of the complaint.

We might take the view that while there is an allegation of serious and substantial waste, it is really more to do with maladministration. The Ombudsman might look at it and decide that it is more a matter of serious and substantial waste. Sometimes we have each found ourselves writing to the same complainant, "No, go to the other organisation." That is not terribly helpful to either the individual or to promoting the concept of protected disclosure and public interest generally.

3.55 The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to enable the establishment of a Protected Disclosures Unit within the Office of the Ombudsman, funded by an appropriate additional budgetary allocation, to perform monitoring and advisory functions as follows:

- to provide advice to persons who intend to make, or have made, a protected disclosure;
- to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, and general legal advice on interpreting the Act;
- to provide advice and assistance to public authorities on the development or improvement of internal reporting systems concerning protected disclosures;

- to audit the internal reporting policies and procedures of public authorities, (other than investigating authorities);
- to monitor the operational response of public authorities (other than investigating authorities) to the Act;;
- to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
- to publish an annual report containing statistics on protected disclosures for the public sector in New South Wales and identifying any systemic issues or other problems with the operation of the Act;
- to coordinate education and training programs, in consultation with the Steering Committee, and provide advice to public authorities seeking assistance in developing internal education programs;
- to publish guidelines on the Act in consultation with the investigating authorities;
- to develop proposals for reform of the Act, in consultation with the investigating authorities and Protected Disclosures Act Implementation Steering Committee; and
- to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.

3.56 In order to enable the proposed Protected Disclosures Unit to monitor trends in the operation of the protected disclosures scheme, there should be a requirement for:

- public authorities and investigating authorities to notify the Protected Disclosures Unit of all disclosures received which appear to be protected under the Act;
- public authorities (excluding investigating authorities) investigating disclosures to notify the Protected Disclosures Unit of the progress and final result of each investigation of a protected disclosure they carry out; and
- investigating authorities to notify the Protected Disclosures Unit of the final result of each protected disclosure investigation they carry out.

### **Recommendation 9**

The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to enable the establishment of a Protected Disclosures Unit within the Office of the Ombudsman, funded by an appropriate additional budgetary allocation, to perform monitoring and advisory functions as follows:

- (a) to provide advice to persons who intend to make, or have made, a protected disclosure;
- (b) to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, and general legal advice on interpreting the Act;
- (c) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems concerning protected disclosures;
- (d) to audit the internal reporting policies and procedures of public authorities, (other than investigating authorities);
- (e) to monitor the operational response of public authorities (other than investigating authorities) to the Act;



- (f) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
- (g) to publish an annual report containing statistics on protected disclosures for the public sector in New South Wales and identifying any systemic issues or other problems with the operation of the Act;
- (h) to coordinate education and training programs, in consultation with the Protected Disclosures Act Implementation Steering Committee, and provide advice to public authorities seeking assistance in developing internal education programs;
- (i) to publish guidelines on the Act in consultation with the investigating authorities;
- (j) to develop proposals for reform of the Act, in consultation with the investigating authorities and Protected Disclosures Act Implementation Steering Committee; and
- (k) to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.

In order to enable the proposed Protected Disclosures Unit to monitor trends in the operation of the protected disclosures scheme, there should be a requirement for:

- (j) public authorities and investigating authorities to notify the Protected Disclosures Unit of all disclosures received which appear to be protected under the Act;
- (ii) public authorities (excluding investigating authorities) investigating disclosures to notify the Protected Disclosures Unit of the progress and final result of each investigation of a protected disclosure they carry out; and
- (iii) investigating authorities to notify the Protected Disclosures Unit of the final result of each protected disclosure investigation they carry out.

3.57 The Parliamentary Committee understands that all members of the Protected Disclosures Act Implementation Steering Committee support this the establishment of this unit.

3.58 The Parliamentary Committee notes that if the proposal advanced as Recommendation 1 is adopted, the name of the unit should be changed, for consistency, to the Public Interest Disclosures Unit.

### **Developing effective strategies for managing protected disclosures**

3.59 A principal task of the Protected Disclosures Unit should be to develop effective strategies so that protected disclosures can be handled equitably and efficiently. Dr A J Brown details the aims of this type of management:

1. To devise the best path by which workplaces can remain, or re-establish themselves as, positive and harmonious working environments, despite the inevitable tensions and potential conflicts raised by whistleblowing matters;
2. To support the integrity of agency investigation and review processes, by promoting the fairest possible outcomes for all individuals involved (i.e. internal complainants and witnesses as well as those subject to investigation); and
3. To promote staff and public confidence in the agency's ability to handle such matters professionally in the future.<sup>16</sup>

### **Members of Parliament**

3.60 Under section 19 of the Protected Disclosures Act 1994, a public official may, under certain circumstances, make a disclosure to a member of Parliament, or to a journalist, and that disclosure is protected by the Act. To attract protection:

- the public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of the Act;
- the investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred (a) must have decided not to investigate the matter, or (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or (c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or (d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated;
- the public official must have reasonable grounds for believing that the disclosure is substantially true; and
- the disclosure must be substantially true.

3.61 The Parliamentary Committee noted that there was a lack of training and supportive documentation available to members of Parliament regarding the receipt of a disclosure from a public official under section 19 of the Protected Disclosures Act 1994, and accordingly recommends that the Clerk of the Legislative Assembly and the Clerk of the Parliaments ensure that appropriate training and supportive documentation is made available.

### **Recommendation 10**

**The Clerk of the Legislative Assembly and the Clerk of the Parliaments ensure that appropriate training and supportive documentation is made available to members of Parliament regarding the receipt of a disclosure from a public official under section 19 of the Protected Disclosures Act 1994.**

3.62 In doing so, the Clerk of the Legislative Assembly and the Clerk of the Parliaments should consult with the Protected Disclosures Unit regarding the development of appropriate education and training materials about protected disclosures—see Recommendation 9 (h).

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<sup>16</sup> Brown, *Op cit.* p 48

## Development of a statistical base for the purposes of monitoring and reviewing the implementation of the Protected Disclosures Act 1994

3.63 The absence of a statistical base has been a central weakness in the implementation of the Protected Disclosures scheme to date. To rectify this, the Protected Disclosures Act Implementation Steering Committee should develop uniform standards and formats for statistical reporting. For this purpose, it should seek professional advice on the development of an appropriate statistical model or framework for the on-going assessment of the effectiveness of the Protected Disclosures Act 1994. This framework, including the information that needs to be captured, should be established before the regulations are finalised.

### Recommendation 11

The absence of a statistical base has been a central weakness in the implementation of the Protected Disclosures scheme to date. To rectify this, the Protected Disclosures Unit should develop uniform standards and formats for statistical reporting. For this purpose, it should seek professional advice on the development of an appropriate statistical model or framework for the on-going assessment of the effectiveness of the Protected Disclosures Act 1994. This framework, including the information that needs to be captured, should be established before the regulations are finalised.

## Protecting persons from reprisals (Section 3(1)(b))

### Confidentiality of disclosures

3.64 In the course of the public hearing on Friday 4 August 2006, Mr Chris Wheeler, the Chairman of the Protected Disclosures Act Implementation Steering Committee, was asked whether the confidentiality provisions were adequate:

**The Hon. Kim YEADON MP (CHAIRMAN):** What about confidentiality for whistleblowers as it stands under the Act at the present time? Do you think that is adequate, or do you think there needs to be further safeguards? How do you balance confidentiality on the one side against procedural and legal fairness, and justice on the other side for the accused?

**Mr WHEELER:** My view is that the confidentiality provision has basically got it right. It is not a criminal provision. It says that this is a guideline. This is what you should try to achieve. Keep the identity confidential unless there are good and proper reasons not to—procedural fairness, you have to disclose something to investigate the matter, you have the written consent of the whistleblower. Our problem in this area is whether confidentiality is an option in the first place. Around the world the general view that is held is that confidentiality is the primary protection for a whistleblower, which is quite correct provided people do not know or cannot work out who the whistleblower is. It is a practical aspect, but our experience has been that in most cases people know because the whistleblower has raised the issue in the workplace beforehand, the whistleblower has told friends about the disclosure and word has got out, or the information

disclosed points directly to the whistleblower as soon as it starts to be investigated.

But, for one reason or another, in most cases people either know or reasonably suspect who made the disclosure. In our view this makes it very important for agencies to identify at the outset: is it practically possible to keep this matter confidential or not? If it is not possible to keep it confidential, they need to adopt a very different management approach to the protection of the whistleblower—a proactive management approach—not just sit back and say, "We are not just talking about this. We will try to keep it under the carpet." They need to go out and do certain things. We have set that out in an information sheet that we have publicised widely around the public sector, and I have copies here if you would like me to distribute them.

What we have set out is that while confidentiality is good in theory, there are serious problems in practice. We have tried to set out the practical alternatives to confidentiality when it is not going to work. We have done this in three categories. We have set out the minimum steps that should be taken in all cases, whether or not there is confidentiality by an agency to manage a matter. Then we have talked about approaches available where the identity of the whistleblower is known or likely to become known, and the approaches where the identity of the whistleblower is unknown and is likely to stay that way. It is a very practical guideline. We have had quite good feedback on it from agencies and from whistleblowers. The informal feedback we have had from Whistleblowers Australia is that they agree with that approach. I would not recommend a change in the confidentiality provision.

3.65 These comments by the Chairman of the Protected Disclosures Act Implementation Steering Committee, a person who has carefully observed the practical operation of the Protected Disclosures Act 1994, suggest the provision is operating equitably though his remarks clearly reveal the limited reliance on confidentiality that can be expected from section 22. This is one aspect that needs to be publicised more widely. Ms Hennessy, representing the NSW Department of Health, said:

**Ms HENNESSY:** I would like to refer to the department's submission, which I believe you have all seen, and I want to summarise its key points. I suppose in the experience of the department the Protected Disclosures Act has led to some misconception amongst some employees that they believe that their identity will be protected when they make a complaint. Clearly section 22 of the Act provides circumstances under which a complainant's identity may be disclosed. We have found in our experience that in some cases complainants then express some reluctance to take the matter further. We believe that section 22 as it stands at the moment is probably a reasonable balance between the aim of protecting disclosure of identity and also the requirement for procedural fairness in investigating complaints. So we do not suggest any change to the terms of section 22 but we believe that there may be some benefit in having further education to make it clear that the Act in itself does not necessarily protect the identity of complainants.

3.66 The Parliamentary Committee supports this approach and notes that the Ombudsman in his Information Sheet on the practical alternatives to confidentiality is currently endeavouring to give public officials and authorities a more realistic appraisal of the difficulties an organisation faces in attempting to maintain confidentiality of the person making the disclosure and the details of it. The Protected Disclosures Unit should take over this task.

### **Anonymous disclosures**

3.67 The current practice is to protect anonymous disclosures when sufficient evidence becomes available to demonstrate that the person lodging the disclosure is a public official.

3.68 Some submissions called for a provision in the Protected Disclosures Act 1994 that specifically allowed the making of anonymous disclosures and accorded them protection. This type of proposal was examined in the first review of the Act in 1996. Evidence presented to the parliamentary committee showed there were problems associated with such disclosures including difficulties in assessment and investigation, obtaining further information and providing notifications in accordance with section 27. It was argued that if measures were taken to encourage confidence in the internal reporting systems that this would obviate a major reason for anonymous disclosures.

3.69 Mr Bennett QC, in his evidence to the first review, said that if the anonymous discloser is careful about his or her anonymity, that person does not need the Protected Disclosures Act 1994 because no one knows who made the disclosure. He said there was a procedural fairness danger arising from formalising the protection of anonymous disclosures and that there was also the danger that it would encourage people to be anonymous and not rely on the protection of the Act.

3.70 In its report the earlier parliamentary committee resolved that it was not necessary to amend the Protected Disclosures Act 1994 to include a reference to the status of anonymous disclosures. However, it said that guidelines on the Act and other advisory material prepared by the Protected Disclosures Unit should contain a statement that anonymous disclosures can be protected disclosures under the Act in the event that the identity of the person making the disclosure becomes known. The present Parliamentary Committee endorses that approach.

### **A right to seek damages**

3.71 The Ombudsman in his submission said that New South Wales is the only state where a whistleblower has no rights in the Protected Disclosures Act 1994 to seek damages where he or she has suffered detrimental action in reprisal for a protected disclosure. Members of the Protected Disclosures Act Implementation Steering Committee, with the exception of the NSW Police, supported a provision for compensation.

3.72 In the course of the first review of the Protected Disclosures Act 1994, a proposal that the Act should be amended to provide for a civil action for damages where detrimental action had been committed in reprisal for the making of a protected disclosure was examined.<sup>17</sup> The

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<sup>17</sup> Report of the Committee on the Office of the Ombudsman and the Police Integrity Commission – September 1996, pp70-72

suggestion had the support of the investigating authorities. In these proceedings the plaintiff would be required to prove his or her case on the basis of the civil standard, that is, on the balance of probabilities. Mr Bennet QC, in his evidence the first review, generally supported the proposal and commented that once the conduct is regarded as serious enough for a criminal sanction (section 20) it seemed surprising that there was no civil sanction.

3.73 The report of the first review of the Protected Disclosures Act 1994 said that at present the protection afforded to persons who made disclosures was limited to the criminal sanction provided in section 20 and there was uncertainty about the extent to which such a matter would be pursued by investigative and prosecution authorities. The central point, however, is that even if a person is successfully prosecuted this will not compensate the whistleblower for the loss they may have suffered.

3.74 A solution to these difficulties was to establish a civil cause of action, which a victim of reprisal action could take. As civil proceedings were involved, the lower standard of proof would facilitate the prospects of success. By providing a more effective remedy the likelihood of reprisal action would be diminished. The fact that the damages would be received by the victim would mean any loss could be compensated. The compensation should be confined to actual financial loss suffered as a result of the detrimental action and that punitive damages should not be recoverable. This would lessen the prospect of litigation being initiated for financial gain. These considerations led to a recommendation that the Protected Disclosures Act 1994 should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.

3.75 The Cabinet Office responded to this recommendation by pointing out that avenues for redress may already exist under the Victims Support and Rehabilitation Act 1996 in respect of acts of violence and under the Industrial Relations Act 1996 in respect of unfair dismissal or discrimination in employment. The Protected Disclosures Act Implementation Steering Committee in its current submission replied to these comments by arguing that for the Protected Disclosures Act 1994 to be effective the system it establishes must itself provide adequate remedies for a whistleblower. It said that an employee who has suffered as a result of making a protected disclosure should not be required to resort to trying to find a breach of another Act or a common law duty. This response does not adequately meet the objection raised by the Cabinet Office because under section 90 of the Industrial Relations Act a person would lose their entitlement to reinstatement, remuneration or compensation if they proceeded with an action for damages under the provision contemplated by the Steering Committee. Cabinet's concern was that uninformed persons might therefore jeopardise their own position by commencing a civil action for compensation.

3.76 A further objection to this proposal was raised by NSW Police who are uncertain of the impact that the proposal will have on the Police Act 1990. Senior Sergeant Upton, on behalf of NSW Police, also questioned the need to codify the right to make a claim for compensation under the common law.<sup>18</sup>

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<sup>18</sup> Evidence of Senior Sergeant Wendy Upton, of NSW Police, on 3 August 2006.

3.77 The situation in other Australian jurisdictions is as follows:

- Australian Capital Territory - a person is liable in damages to a party who suffers detriment as result of an unlawful disclosure (s29). Section 30 also provides for an injunction where a person may suffer an unlawful reprisal;
- Western Australia - s15 says a person who takes detrimental action commits an act of victimisation, which may be dealt with as a tort. (Note; remedies in tort can take the form of compensation for damages or injunctive relief. There would also be scope for exemplary damages that are awarded as an example to others);
- South Australia - s9 says an act of victimisation may be dealt with as a tort;
- Victoria - s19 authorises a person to take proceedings for damages for reprisal and s20 provides injunctive relief to stop detrimental action;
- Queensland - s43 says a reprisal is a tort and a person who takes a reprisal liable in damages; s 47 gives a right to apply for injunction;
- Commonwealth - the former Commonwealth Public Interest Disclosure (Protection of Whistleblowers) Bill 2002 made provision for damages and injunctive relief (See ss30-32).

3.78 The Parliamentary Committee agrees in principle that the Protected Disclosures Act 1994 should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action in reprisal. However, the Committee believes that before the matter proceeds further it will be necessary for the Steering Committee to develop this proposal in more detail and to consult with relevant authorities to resolve the issues mentioned in this report. Subject to the satisfactory resolution of those matters the Committee recommends that an appropriate amendment go forward for inclusion in a Statute Miscellaneous Provisions (Amendment) Act.

### **Recommendation 12**

The Parliamentary Committee agrees in principle that the Protected Disclosures Act should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action in reprisal, but suggests that before the matter proceeds further the Protected Disclosures Act Implementation Steering Committee should review and develop this proposal in more detail and to consult with relevant authorities to resolve the issues mentioned in this report. Subject to the satisfactory resolution of those matters the Committee recommends that an appropriate amendment go forward for inclusion in a Statute Miscellaneous Provisions (Amendment) Act.

### **The right to seek injunctions**

3.79 The Parliamentary Committee recommends that the Protected Disclosures Act be amended so as to authorise a person who has made a protected disclosure (or a public authority or investigating authority on behalf of such a person) to apply for an injunction against the making of a reprisal. This amendment will assist persons and authorities to take pro-active action to limit detrimental action occurring during the management of a protected disclosure. A suitable provision for injunctive relief has been recommended by the Ombudsman, the Protected Disclosures Act Implementation Steering Committee, and in

other evidence or submissions. Similar injunctions against reprisals are available under the Queensland Act and the Act of the Australian Capital Territory.<sup>19</sup>

### **Recommendation 13**

The Parliamentary Committee recommends that the Protected Disclosures Act be amended so as to authorise a person who has made a protected disclosure (or a public authority or investigating authority on behalf of such a person) to apply for an injunction against the making of a reprisal. This amendment will assist persons and authorities to limit detrimental action occurring during the management of a protected disclosure. The inclusion in the Act of a suitable provision for injunctive relief has been recommended by the Ombudsman, the Protected Disclosures Act Implementation Steering Committee and in other evidence or submissions. Similar injunctions against reprisals are available in Queensland and in the Australian Capital Territory.

### **Nomination of a prosecuting authority**

3.80 In its submission, the Protected Disclosures Act Implementation Steering Committee states that the Protected Disclosures Act 1994 does not give any authority the responsibility to prosecute offences under section 20(1) (Protection against reprisals) or section 28 (False or misleading disclosures). The Steering Committee is of the view that more effective prosecutions for these offences may be possible if a prosecuting authority is specified.

3.81 The report of the first review of the Protected Disclosures Act 1994 noted that no prosecutions had been initiated and said it could not be sure that this uncertainty had not contributed to the situation. It concluded that one way of enhancing the effectiveness of the offence provisions would be to impose a requirement on investigating authorities to report to the Director of Public Prosecutions (DPP) any evidence that tends to suggest that an offence may have been committed. The Director of Public Prosecutions would then have the carriage of the matter as the Office responsible for the prosecution of criminal offences.

3.82 The Cabinet Office responded to this approach by saying that the matter was best dealt with administratively and that the Independent Commission Against Corruption Act 1988, Police Integrity Commission Act 1996, and Ombudsman Act 1974 had similar provisions but none require the relevant investigating authority to refer matters to the Director of Public Prosecutions.<sup>20</sup> This appears incorrect, as section 14 of the Independent Commission Against Corruption Act requires the Commission to assemble evidence that may be admissible in the prosecution of a person for a criminal offence and to furnish such evidence to the Director of Public Prosecutions. This would seem an appropriate precedent to follow. Even if no provision of this type is adopted the inclusion of some statement in sections 20 and 28 recognising the role of the Director of Public Prosecutions would be extremely beneficial from the point of view of clarification and reassurance to whistleblowers.

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<sup>19</sup> Section 47 of the Whistleblowers Protection Act 1994 (Qld) and section 30 of the Public Interest Disclosure Act 1994, ACT.

<sup>20</sup> Letter from Premier Carr dated 13 October 2004



3.83 The Parliamentary Committee recommends that sections 20 and 28 of the Protected Disclosures Act 1994 be amended to include a statement specifying the Director of Public Prosecutions as the prosecuting authority for the purposes of those provisions. The change recommended should not preclude a criminal action by an individual.

#### **Recommendation 14**

The Parliamentary Committee recommends that sections 20 and 28 of the Protected Disclosures Act 1994 be amended to include a statement specifying the Director of Public Prosecutions (DPP) as the prosecuting authority for the purposes of those provisions, in order to remove the uncertainty that currently exists as to the prosecuting authority in relation to these provisions. The change recommended should not preclude a criminal action by an individual.

### **Other issues raised in submissions**

3.84 Other issues raised in both public and confidential submissions are addressed in the following sections.

#### **'Serial' disclosures**

3.85 The submission by the Minister for Transport and State Development suggested a provision dealing with "serial" disclosures. The Minister recommended that a mechanism be available to allow for a conclusive "close out" where multiple disclosures are made about the same or similar issues. This suggestion could be examined when the Protected Disclosures Unit is preparing procedural guidelines.

#### **Enforcement of Protected Disclosures Act 1994**

3.86 The submission by the Medical Consumers Association argues that the Protected Disclosures Act 1994 is not sufficiently enforced and does not provide adequate protection for informers. The recommendations in this report will strengthen the capacity of authorities to enforce the Act and to provide protection for persons making disclosures. The Association also argues for the establishment of a register of protected disclosures to keep track of what happens to those persons who have lodged a protected disclosure. It is evident from the submissions supporting the establishment of a Protected Disclosures Unit that the monitoring of the handling of disclosures is seen as an important function of the unit. The terms of the Committee's recommendation also places great importance on the monitoring role of the proposed unit.

#### **Investigation of history of person making an accusation**

3.87 The submission by Dr G. Wagener makes several recommendations. The first is to allow a preliminary investigation, before the commencement of a full investigation, of the 'history' of the person making the accusation – such as the past performance of duties or relevant mental history. The submission argues there should be consequences in the case of false accusations. It says that within the Protected Disclosures Act 1994 there is no

requirement that due process be followed or that the respondent be informed of specific allegations.

3.88 Part 2 of the Protected Disclosures Act 1994 is intended to set out the criteria for protected disclosures, the focus being on the subject matter of the disclosure rather than on the history of the person making it. False or misleading disclosures are an offence under section 28 carrying a possible penalty of 50 penalty units or imprisonment for 12 months. Additionally, frivolous or vexatious disclosures can lose protection under section 16. The Act also contains provisions for the disclosure of information if that is essential, having regard to natural justice or the need to investigate the matter effectively (s.22). The submission asserts that the respondent to a protected disclosure is treated like a criminal who can be removed and barred from his place of work pending an investigation. It argues such a person should be allowed to maintain normal duties until a decision is made. The Committee in its report stresses the need for procedures to be developed to ensure procedural fairness applies in cases such as this.

#### **Support base for Protected Disclosures Act 1994**

3.89 The objective of the submission by Dr Peter Bowden is to suggest measures to strengthen the Act and its administrative procedures. The submission argues that it is unclear which agency a whistleblower should approach and that there should be one agency to provide the support base in the office of the Ombudsman. The Parliamentary Committee's report recommends the setting up of such a unit. Dr Wagener's submission also states that the NSW Ombudsman should have an active, not passive role. The Ombudsman should develop procedures for obtaining information and be aware of what is happening to the complaint and be interactive. The Ombudsman should be given the task of providing support, consultation and training to people involved in all aspects of whistleblowing. He also suggests that the Ombudsman should be required to publish an annual report with statistics and cases that are in the public domain. The Committee's recommendations cover all these matters.

3.90 Dr Wagener's submission also supports coverage by the Protected Disclosures Act 1994 of health, safety and environmental protection. The Parliamentary Committee has recommended this course for further examination by the Steering Committee.

#### **Absence of detailed, enforceable regulations and procedures**

3.91 Ms Penhall-Jones made a submission to the inquiry and also gave evidence in the course of the public hearing on 4 August 2006. Ms Penhall-Jones claims the Protected Disclosures Act 1994 is deficient in most respects, due to a failure to provide adequate regulatory requirements for management, Ministers, and investigating agencies to pursue corrupt conduct reports. Her submission further claims that there is a systemic failure to honour the intentions of the legislation by all agencies and a lack of protection for informers. She favours the creation of either a new agency or one within the NSW Audit Office. The Parliamentary Committee has recommended the setting up of a Protected Disclosures Unit and the making of regulations so that effective strategies can be developed for managing protected disclosures.

**Need for a 'friendlier' Act**

3.92 The submission by Mr Gerard Dempsey says the Protected Disclosures Act 1994 should be made friendlier to the person making the disclosure and that investigations of complaints frequently take up to 6 months to finalise leading to a loss of evidence as people move on or forget. Implementation of the Committee's recommendations will produce a more supportive administrative climate and an accent on the fair and expeditious handling of disclosures.

**Abolition of the Protected Disclosure Act 1994**

3.93 The submission by Mr Joseph Palmer advocates the abolition of the Protected Disclosures Act 1994 because it gives the misleading impression that whistleblowers are protected. He states his views are derived from personal experience, and that anyone who makes a disclosure is blacklisted. The Parliamentary Committee accepts the need for greater publicity through training and guidelines to give the public a realistic picture of the limits to which the Act can preserve the confidentiality of the whistleblower. The development of procedures by the Protected Disclosures Unit that accord with procedural fairness and natural justice should add to whistleblower protection.

**Need for a more efficient administration of the Protected Disclosures Act 1994**

3.94 A confidential submission states that the Protected Disclosures Act 1994 is not the problem, but the administration of it. The contributor argues the Department of Education and Training did not have in place proper procedures to investigate and deal with complaints. The contributor also says that knowledge of the purpose and details of the Act are lacking and maintains the Act should not be used by investigators to protect themselves from accountability and scrutiny.

3.95 The focus of the Parliamentary Committee's recommendations in this report is on improving the administration of the Act.

3.96 The contributor sought statistical details on the number of disclosures rejected on the basis of being frivolous, vexatious, false or misleading by the Department of Education and Training. Currently, there are no general statistics available and no powers to require agencies to provide them. This is one of the matters the Parliamentary Committee's recommendations will address. Those recommendations also cover monitoring of the handling by agencies of disclosures.



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## CHAPTER 4— CONCLUDING COMMENTS

4.1 There remain several general matters to be addressed as concluding comments to this report of a review of the Protected Disclosures Act 1994.

### Review period for Protected Disclosures Act 1994

4.2 In its submission the Protected Disclosures Act Implementation Steering Committee recommends that the review period for the Act should be changed from the current two-year review cycle to a more realistic and practicable period of five years. In theory the Act should have been reviewed five times to date in accordance with section 32 - one year after the date of assent and two yearly thereafter. This suggestion has been previously put forward by the Steering Committee to the Government, which has advised it should appropriately be considered as part of this parliamentary review.

4.3 The matter was discussed with Mr Colagiuri, Parliamentary Counsel, who advised that current Government policy requires one review after a period of five years in respect of principal legislation. No further reviews are required thereafter. The recommendations of this report, if implemented, will result in important practical changes to the protected disclosures scheme, which would benefit from a further review after 5 years. The Parliamentary Committee accordingly recommends that section 32 be amended to require one further final review at the expiration of five years. Section 32 should sunset after that review. If circumstances warrant a further review after that time this can be initiated by the Minister, be the subject of a resolution of Parliament to a relevant Parliamentary committee (e.g., the ICAC Committee, or the Committee on the Office of the Ombudsman and Police Integrity Commission), or, if the relevant administrative function is established as a Protected Disclosures Unit under the Ombudsman, as part of the routine review functions of the Committee on the Office of the Ombudsman and Police Integrity Commission.

#### **Recommendation 15**

In its submission the Protected Disclosures Act Implementation Steering Committee recommends that the review period for the Act should be changed from the current two-year review cycle to a more realistic and practicable period of five years. Current Government policy requires one review after five years in respect of principal legislation. No further reviews are required thereafter. The recommendations of this report, if implemented, will result in important practical changes to the protected disclosures scheme, which would benefit from a further review after five years. The Parliamentary Committee accordingly recommends that section 32 be amended to require one further review at the expiration of five years. Section 32 should sunset after that review.

## **Protected Disclosures Act statutory advisory committee**

4.5 The Parliamentary Committee notes that the Protected Disclosures Act Implementation Steering Committee is an ad hoc body established by the various New South Wales investigating authorities as a means of co-ordinating and sharing concerns and experiences with the practical implementation of the Protected Disclosures Act 1994. The Parliamentary Committee recommends that consideration be given to establishing this function under the Act, as a statutory advisory committee. If agreed to, the statutory advisory committee would provide a formal mechanism for the investigating authorities under the Act to interact first hand with the NSW Ombudsman on matters concerning the Act.

### **Recommendation 16**

The Parliamentary Committee notes that the Protected Disclosures Act Implementation Steering Committee is an ad hoc body established by the various New South Wales investigating authorities as a means of co-ordinating and sharing concerns and experiences with the practical implementation of the Protected Disclosures Act 1994. The Parliamentary Committee recommends that consideration be given to establishing this function under the Act, as a statutory advisory committee.

## **A national approach to identify what is essential for effective whistleblowing legislation**

4.6 Dr Brown, in his Issues Paper, argues that the time has been reached for a second generation of Australian whistleblower laws and that there are strong arguments supporting the need for greater uniformity, the principal of which is that the key issues are fundamentally common. He concludes that time would be well spent in a discussion to reach clear consensus on the fundamental principles for whistleblower legislation. The meeting, or symposium, would build on the issues identified for discussion in the course of the collaborative national research project 'Whistling While They Work', with a general aim to see if a clear consensus position can be developed. The Parliamentary Committee has been advised that planning is underway to present the findings of the 'Whistling While They Work' in a conference scheduled for late 2007.

4.7 It would be appropriate, therefore, for a meeting to examine the fundamental principles for whistleblower legislation to be scheduled for some period after the results of the 'Whistling While They Work' project have been released. Discussions have been held with the Ombudsman and the Commissioner of the Independent Commission Against Corruption, both of whom support a national meeting of representatives of key integrity bodies and relevant government representatives from each Australasian jurisdiction to discuss the fundamental principles that should underlie whistleblowing legislation, with a suggested date of mid to late 2008. Such a meeting could be organised on the basis that participants pay their own travel and accommodation expenses, with the convening organisation providing the venue, refreshments and lunches, settling an agreed agenda, chairing the meeting, and preparing minutes setting out what was agreed. Organised on this basis, such a meeting

should not involve a significant financial impost on the convening agency. The Parliamentary Committee understands that the Office of the Ombudsman would welcome the opportunity to organise this meeting, subject to a supplementation in funding.

4.8 The Parliamentary Committee notes that such a discussion would be extremely useful for the purpose of any subsequent review of the Protected Disclosures Act 1994.

### **Recommendation 17**

The Parliamentary Committee recommends that a national conference of representatives of key integrity bodies and relevant government representatives from each Australasian jurisdiction be convened under the auspices of the Office of the Ombudsman to discuss, with a view to reaching consensus on the fundamental principles for whistleblowing legislation. The conference would build on the issues identified for discussion in the course of the collaborative national research project 'Whistling While They Work'. The conference should be organised on the basis that participants pay their own travel and accommodation expenses, with the convening organisation providing the venue, refreshments and lunches, settling an agreed agenda, chairing the conference and preparing minutes setting out what was agreed. Organised on this basis, the conference should not involve a significant financial impost on the convening agency. The conference should be supported by a suitable supplementation of funds.

## **Conclusion**

4.9 The Parliamentary Committee believes that its findings and recommendations in this report, unlike the earlier reviews, will go some way to successfully addressing the concerns expressed by the Ombudsman and others about the Protected Disclosures Act 1994, and lead to the development and implementation of a more effective process for public officials of New South Wales to make disclosures about corrupt conduct, maladministration, or serious and substantial waste of public resources.





# ANNEXURE 1

## LIST OF SUBMISSIONS

- 1 NSW Branch, Whistleblowers Association
- 2 NSW Ombudsman, Office of the Ombudsman
- 3 Confidential submission
- 4 Confidential submission
- 5 Confidential submission
- 6 Confidential submission
- 7 Dr Grahame Wagener
- 8 Mr Joseph Palmer
- 9 Mr Gerard Dempsey
- 10 Auditor-General, NSW Audit Office
- 11 Ms Barbara Newrick
- 12 Dr Peter Bowden, University of Sydney
- 13 Confidential submission
- 14 Confidential submission
- 15 Mr David Sheen
- 16 Confidential submission
- 17 The Hon. Tony Kelly MLC, Minister for Local Government
- 18 The Hon. Michael Costa MLC, Treasurer
- 19 The Hon. Tony Kelly, Minister for Lands
- 20 The Hon. David Campbell MP, Minister for Regional Development,  
Minister for Small Business
- 21 The Hon. Morris Ireland QC, Inspector of the Police Integrity  
Commission
- 22 The Hon. Dianne Beamer MP, Minister for Regional Development,  
Minister for Western Sydney,
- 23 Director-General, NSW Department of Community Services
- 24 Confidential submission
- 25 The Hon. John Hatzistergos MLC, Minister for Health
- 26 Director-General, Department of Education and Training
- 27 Chief Executive, Sydney Catchment Authority
- 28 Confidential submission
- 29 Confidential submission
- 30 Mr Michael Robert Cranny
- 31 The Hon. John Watkins MP, Deputy Premier, Minister for  
Transport, Minister for State Development
- 32 Director-General, NSW Department of Housing
- 33 Director-General, NSW Department of Environment and  
Conservation
- 34 Confidential submission
- 35 Confidential submission
- 36 Mr Tony Kelly MLC, Minister for Justice
- 37 Ms Margaret Penhall-Jones
- 38 Mr Chris Wheeler, Chairman of the Protected Disclosures Act  
Implementation Steering Committee

- 39 Mr Michael McGuirk
- 40 Confidential submission
- 41 Confidential submission
- 42 Secretary, Medical Consumers Association
- 43 The Hon. Frank Sartor MP, Acting Minister for Police
- 44 The Hon. Frank Sartor MP, Minister for Planning, Minister for Redfern Waterloo, Minister for Science and Medical Research, Minister Assisting the Minister for Health
- 45 Mr Ian MacDonald MLC, Minister for Natural Resources, Minister for Primary Industries, Minister for Mineral Resources
- 46 Mr Matt Brown MP, Chairman, Public Accounts Committee

## ANNEXURE 2

## EXTRACT FROM OMBUDSMAN'S ISSUES PAPER: ADEQUACY OF THE PROTECTED DISCLOSURES ACT TO ACHIEVE ITS OBJECTIVES

Recommendations arising out of reviews of the Protected Disclosures Act that have not been implemented or have been partly implemented

Recommendation		Source
1	Protected Disclosures Unit (PDU) Establish a Protected Disclosures Unit within the Office of the Ombudsman to perform various monitoring and advisory functions, including to: <ul style="list-style-type: none"> <li>• Monitor the response of public sector agencies to the Act, including investigations</li> <li>• Provide advice and guidance, and</li> <li>• Coordinate the collection of statistics on protected disclosures and training programs.</li> </ul>	1 <sup>st</sup> review (rec. 1) and 2 <sup>nd</sup> review (rec. 3)
2	To enable the PDU to monitor trends in the operation of the protected disclosures scheme by requiring public sector agencies to regularly provide it with certain information.	1 <sup>st</sup> (rec. 2) & 2 <sup>nd</sup> review (rec.4)
3	Statutorily require public sector agencies to provide the PDU statistics on protected disclosures received.	1 <sup>st</sup> review (rec.17)
4	Include in the Act a statement of the Legislature's intent that public authorities and officials should act in a manner consistent with, and supportive of, the objects of the Act and that they should ensure that persons who make protected disclosures are not subject to detrimental action.	1 <sup>st</sup> review (rec. 7)
5	Provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.	1 <sup>st</sup> review (rec 8)
6	Require each investigating authority to refer any evidence of an offence under section 20 to the Director of Public Prosecutions.	1 <sup>st</sup> review (rec.10)
7	Extend protection against detrimental action to any person/body engaged in a contractual arrangement with a public sector agency who makes a protected disclosure,	1 <sup>st</sup> review (rec.11)
8	Extend protection against detrimental action to any person who makes a protected disclosure to the Internal Audit Bureau.	1 <sup>st</sup> review (rec.12)
9	Clarify that the protections do not apply to Members of Parliament and local government councillors.	1 <sup>st</sup> review (rec.15)
10	Statutorily require public sector agencies to adopt uniform standards and formats for statistical reporting.	1 <sup>st</sup> review (rec.16)
11	Require investigating authorities to develop uniform standards and formats.	1 <sup>st</sup> review (rec.18)

12	Require all public sector agencies to periodically report to the Parliamentary Joint Committee on protected disclosures.	1 <sup>st</sup> review (rec.20)
13	Require all investigating authorities to periodically report to the Parliamentary Joint Committee on protected disclosures.	1 <sup>st</sup> review (rec.21)
14	Have the Premier comprehensively evaluate the priority areas for reform of the protected disclosure scheme.	2 <sup>nd</sup> review (rec. 1)
15	Provide for the Ombudsman to make disclosures to the Director of Public Prosecutions or the police for the purpose of conducting prosecutions.	2 <sup>nd</sup> review (rec. 5)
16	To require public sector agencies to tell staff about internal reporting systems and require the Ombudsman to monitor compliance with this.	2 <sup>nd</sup> review (rec. 7)
17	Provide explicitly for courts to make orders suppressing the publication of material, which would tend to disclose the identity of a whistleblower.	2 <sup>nd</sup> review (rec. 8)
18	Provide that detrimental action includes payback complaints made in retribution for a protected disclosure.	2 <sup>nd</sup> review (rec. 9)
19	Have the PDU examine the merits of a false claims statutory scheme for NSW,	2 <sup>nd</sup> review (rec. 11)
20	Require all investigating authorities to provide reasons to a whistleblower for not proceeding with an investigation into their protected disclosure. *	2 <sup>nd</sup> review (rec. 2)
21	Require public sector agencies to include certain statements relating to protected disclosures in their codes of conduct. *	2 <sup>nd</sup> review (rec. 4)
22	Have the Steering Committee continue to play a central role in determining the strategic direction of the development of the protected disclosures scheme. *	2 <sup>nd</sup> review (rec. 2)

\*Recommendation partly implemented.

The following recommendations have been implemented:

1st review – recommendation 5, 6, 9, 14, 19, 22 and 23

2nd review – recommendations 6 and 12

## ANNEXURE 3

# FURTHER CORRESPONDENCE FROM THE OMBUDSMAN

5 April 2006

Mr Ian Faulks  
The Committee Manager  
Committee on the Independent Commission Against  
Corruption Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Faulks

### Review of the Protected Disclosures Act 1994

Please accept this as additional correspondence to my submission dated 30 September 2005 to the Parliamentary Inquiry Review of the *Protected Disclosures Act 1994*.

In that submission, I recommended consideration be given to establishing a protected disclosures unit within my office to:

- improve awareness of the Act in the public sector
- provide advice and guidance to agencies and their staff
- coordinate the collection of statistics on protected disclosures
- monitor trends in the operation of the scheme
- provide advice to the government or relevant agencies on Bills relating to matters concerning whistleblowing issues
- periodically report on it's work to the government and legislature.

We have undertaken some research into the cost of the creation of such a unit within this office. We contacted relevant bodies in other jurisdictions to request advice about the resources they used to perform such functions.

We received responses from the Commonwealth Ombudsman, Ombudsman Victoria, South Australia Ombudsman, Queensland Ombudsman, New Zealand office of the Ombudsmen and the Western Australian Public Sector Standards Commissioner (W A PSSC).

Of these bodies, the W A PSSC has the most equivalent role to the one I have proposed. Tasmania and Victoria are the only other states with specific responsibilities in relation to whistleblowers, however the scope of their role is significantly narrower than the one I have proposed. In addition, because of their high threshold tests, they receive relatively few disclosures a year.

Under the *Public Interest Disclosure Act 2003 (WA)* (the Pill Act) the Commissioner is responsible for the following functions:

- receiving disclosures where the information relates to a public officer
- establishing a Code setting out the minimum standards of conduct and integrity to be complied with by Pill officers
- monitoring compliance with the Pill Act and PID Code
- assisting public authorities and public officers to comply with the Pill Act and Code
- preparing guidelines on internal procedures relating to the functions of a proper authority under the PID Act
- ensuring that all proper authorities have copies of the guidelines
- reporting annually to each House of Parliament on the performance of the Commissioner's obligations under the Pill Act, and compliance or noncompliance with the Pill Act and Pill Code.

The WA PSSC currently receives \$183,000 in funding to perform these functions. Two staff members work full-time (one senior and one researcher) in the area, and other staff are allocated tasks as needed.

We have been advised the W A PSSC has recently applied for an additional \$200,000 plus, as their current funding is not sufficient to perform all functions effectively. For example, a recent climate survey indicated that knowledge of the Pill Act across the WA public sector was very low.

While we have at no stage received any funding or resources to perform equivalent functions to the W A PSSC, we do undertake some work in the area. We have calculated that a very conservative estimation of the resources currently directed to this work is \$45,000 a year. This includes our provision of telephone advice, limited training for agencies, attendance at Protected Disclosures Act Implementation Steering Committee meetings and publishing fact sheets and guidelines. With such limited resources our work in the area is greatly restricted, and we cannot achieve the objectives listed above and in point 3 of our submission.

Based on the resources used by the W A PSSC and on our own estimations, we envisage 3 - 5 full time staff (grades 9/10, 7/8 and 5/6) would be needed to carry out the functions we have proposed. We have calculated the total costs for three additional staff at these grades would be in the order of \$300,000 for 2006-2007.

Should you require any further information, please contact my Deputy, Chris Wheeler on (02) 92861036 or [cwheeler@ombo.nsw.gov.au](mailto:cwheeler@ombo.nsw.gov.au).

Yours sincerely

Bruce Barbour  
**Ombudsman**

## ANNEXURE 4

# NOTES FOR THE HEARING BEFORE THE ICAC COMMITTEE IN ITS REVIEW OF THE PROTECTED DISCLOSURES ACT, FRIDAY, 4 AUGUST 2006

### *Background to the establishment, membership of the PDAISC*

#### **Establishment and charter**

The Committee was established by the Premier in July 1996 in the year following the commencement of the Protected Disclosures Act. Its charter was to implement strategies to meet the information needs of agencies to improve implementation of the Act.

These information needs had been identified in ICAC research conducted soon after the introduction of the Act, including the need for guidance and information on such things as the conduct of investigations, implementing internal reporting systems, changing organisational culture and staff training, amongst other things.

#### **Membership**

The initial membership of the Committee comprised senior representatives from the Premier's Department, The Cabinet Office, the then Public Employment Office, the Department of Local Government, the Police Integrity Commission, NSW Police Service Internal Witness Support Unit, the Audit Office, the ICAC and the NSW Ombudsman.

Since its establishment, the organisations represented on the Committee have changed very little, other than in relation to the central government agencies which now have only one representative from the Premier's Department. The Committee was initially chaired by the representative of the ICAC and since 2000 has been chaired by the representative of the NSW Ombudsman.

#### **Operations**

In the 10 years that the Committee has been in operation, its primary roles have been to:

- to organise training for public sector agencies and officials in relation to the provisions of the Protected Disclosures Act
- to produce certain fact sheets to assist whistleblowers and those in agencies responsible for implementing the Act

- to facilitate information exchange between the organisations with significant responsibilities for the implementation of the Act and dealing with protected disclosures, and
- to facilitate the coordination of the activities of those organisations that are directed towards the implementation of the Act.

On occasion the Committee has also made recommendations to government for necessary amendments to the Protected Disclosures Act.

The number of meetings of the Committee each year has depended on the activities being undertaken by the Committee at any point in time, for example preparing for and undertaking training or preparing submissions to either government, or to Parliament Committees reviewing the *Protected Disclosures Act*.

### *Proposal to establish a Protected Disclosures Unit in the Ombudsman's Office*

#### **The need for an agency to be responsible for implementation of the Act**

One of the problems that the Ombudsman's Office identified early on in the operation of the Act was that there was no agency that had primary responsibility to ensure the effective implementation of the Act – no body owned the Act; it was an orphan.

The protection of whistleblowers, and the need to properly deal with their disclosures, are concepts that are largely alien to public sectors generally, and in particular to Australian public sectors where the culture has long been that it is unacceptable to 'dob' on colleagues.

While the objects of the Protected Disclosures Act are sound, and clearly set out Parliament's intention that whistleblowers should be protected and the disclosures properly dealt with, this alone is not enough to change the culture of the NSW public sector or to ensure that whistleblowers were protected and their disclosures properly dealt with.

In my view there were two primary problems:

1. the Act itself did not go far enough to ensure that its objects would be achieved, for example in relation to at least one of the three objects the Act contains no relevant provisions, and
2. no agency was charged with responsibility to ensure that the Act was effective and was properly implemented across the public sector.

In the absence of such an agency, the only step that was taken in an attempt to facilitate implementation of the Act was to set up the PDAISC. While I believe the Committee has been reasonably effective in providing training across the public sector and in facilitating information exchange and coordination between the main players, its role does not and cannot go far enough.



Whistleblowing in the public sector is in the public interest because it brings to light matters which would otherwise not be identified and addressed. Two of the primary prerequisites for people to make disclosures of wrong-doing in the public sector are that they have a reasonable belief they will be protected if they do so, and that the matters they disclose will be properly dealt with. If whistleblower legislation is not properly implemented, and if agencies do not take adequate steps to protect whistleblowers and deal with their disclosures, this sends a particularly negative message to anyone contemplating making a disclosure and significantly reduces the chances that they will do so.

While the objects of the Protected Disclosures Act indicate a good intent, if whistleblowers are not properly protected and their disclosures are not adequately dealt with, then the Act will not be effective. Where whistleblowers are not properly protected and their disclosures are not properly dealt with, this often has a particularly detrimental impact on the whistleblower in terms of their mental health and career, which in turn can have a very detrimental impact on their colleagues and the operations of the agency.

If the Protected Disclosures Act is not effective to achieve its objects, or it is not implemented appropriately to achieve its objects, then the existence of the Act is counterproductive to those objects – it misleads people into making disclosures in the mistaken belief that they would be protected and their disclosures would be properly dealt with. The backlash that occurs from the knowledge that whistleblowers had not been protected, and the disclosures have not been properly dealt with will in fact reduce the chances of people coming forward to disclose wrong-doing within agencies.

It is therefore vitally important that there be adequate provisions in the Act to achieve its three objects, and that mechanisms be put in place to ensure that the Act is properly implemented by agencies. An essential mechanism to achieve this would be the establishment of a Protected Disclosures Unit.

### **Recommendations to establish a Unit**

In the first review of the Act, the Ombudsman Parliamentary Committee identified the need for a Protected Disclosures Unit with the following monitoring and advisory functions:

1. to provide advice to persons who intend to make, or have made, a protected disclosure
2. to provide advice to public authorities on matters such as the conduct of investigations, protections of the staff, legal interpretations and definitions
3. to monitor the conduct of investigations by public authorities, and if necessary, provide advice or guidance on the investigation process
4. to provide advice and assistance to public authorities on the development or improvement of internal reporting systems
5. to audit the internal reporting procedures of public authorities

6. to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities
7. to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities
8. to publish an annual report containing statistics on protected disclosures for the public sector in NSW and identifying any systemic issues and other problems with the operation of the Act
9. to coordinate education and training programs in consultation with the investigating authorities and provide advice to public authorities seeking assistance in developing internal education programs, and
10. to public guidelines on the *Protected Disclosures Act* in consultation with the investigating authorities (Recommendation 1).

Of the functions set out above:

- (1), (2) and (10) are currently undertaken by the NSW Ombudsman
- in relation to (4) and (5), some years ago the NSW Ombudsman audited the internal reporting procedures of a large number of State government agencies and provided advice and assistance to them on improving those systems [the DLG used a self assessment checklist for an audit of council internal reporting procedures]
- in relation to (6), the ICAC has conducted some research in relation to the implementation of the Act, but has not, as far as I am aware, specifically focused on a survey of persons who have made disclosures, and
- in relation to (9), the PDAISC has undertaken this function since its establishment.

Functions (3), (7) and (8) are not undertaken by any agency in NSW.

The need for a Protected Disclosures Unit was also identified in the second review of the Act, which identified a further two functions, being:

- “(k) to develop proposals for the reform of the Act, in consultation with the investigating authorities and the Protected Disclosures Act Implementation Steering Committee, and
- (l) to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.”

In relation to the third review of the Act currently being undertaken by your Committee, the PDAISC has recommended in its submission that a Protected Disclosures Unit be established in the Ombudsman’s Office.

The main issue addressed by the PDAISC in its submission in support of this recommendation is that simply placing statutory obligations on agencies will not necessarily be effective without providing for some kind of monitoring and review mechanism. The Committee submitted that a more proactive compliance mechanism was needed to ensure proper implementation of the Act and the mechanism that could be considered is one of mandatory notification to a PD Unit. This would apply to all public sector agencies except investigating authorities as defined in the Act, and NSW Police which already subject to oversight by both the Ombudsman. The Committee suggests that two levels of intervention could be considered:

- case-by-case – requiring every agency to report every protected disclosure they have received to the Protected Disclosures Unit and how they handled them, or
- periodic reporting – requiring every agency to report to the Unit periodically (eg, twice a year) on all the Protected Disclosures they have received and how they handled them.

As mentioned previously, such a monitoring role is currently not performed by any agency in NSW but could be similar to the role performed by the Ombudsman in relation to child protection related allegations (see Part 3A of the *Ombudsman Act*), or police complaints (Part 8A, *Police Act*).

The Committee was of the view that two major benefits would arise from having some kind of mandatory notification scheme, in conjunction with the other functions recommended by the Committee for the Unit, being:

- firstly, it would give further incentives to agencies to comply with the Act, and give them formal guidance on how to do so, and
- secondly, statistics collected would be more accurate than if they were provided only voluntarily, so those who are responsible for implementing the Act and the Legislature would be provided with accurate information about how well the scheme is working.

The Committee was of the view that the results of a recent survey of state agencies where the majority indicated they have had very little experience with handling PDs, illustrates a need for a formal, properly resourced, advisory body to help agencies through an unfamiliar situation, as and when the need arises.

In his submission to this review of the Act, the Ombudsman has also recommended that consideration be given to establishing a PD Unit.

### **Funding of a PD Unit**

In both our submissions to the 1996 review of the Act and in a letter to your Committee of April 2006 in relation to this review of the Act, we have estimated that we would need between 3-5 full time staff to properly perform the recommended functions of such a Unit – we have calculated the total costs for three additional staff at appropriate grades would be in the order of \$300,000 for 2006-07.

## Previous response to proposals for a PD Unit

The establishment of a Protected Disclosures Unit has been recommended by both of the previous reviews of the Act, by the PDAISC, by the Ombudsman, by the Auditor General and by various others.

In my view the reasons why no such Unit has yet been established include:

- up until recently there was no uniformity of view by all investigating authorities as to the appropriate functions for such a Unit [see for example the letter to the Ombudsman from the former Premier of May 2001 where he states:  

“I am also aware of the concerns raised by the other investigative authorities with the Parliamentary Committee that any proposed Unit should not duplicate the functions performed by those investigating authorities.”]
- there was confusion on the part of government as to the respective roles of the PDAISC and the proposed Unit [see for example the comments by the former Premier in his letter to the Chairperson of the Ombudsman Parliamentary Committee of September 2001 where he stated:  

“...I consider that most of the functions of the proposed statutory ‘unit’ are already being undertaken by the Protected Disclosures Act Implementation Steering Committee and its individual member agencies. I consider that the Committee, which includes representatives of each of the investigative authorities as well as the Department of Local Government, the Police Service and my administration, is a suitable administrative body to perform the functions that your Committee has proposed for a statutory Protected Disclosures Unit.”]
- the proposed costs associated with establishing such a Unit [these estimated costs should be looked at in the context of the costs to agencies that arise where whistleblowers are not properly protected and their disclosures are not properly dealt with, for example: arising out of legal proceedings by whistleblowers or persons the subject of investigation; the costs associated with investigations undertaken by this Office, the ICAC of the Audit Office; the costs associated with the morale and stress problems that can arise in the workplace; etc.]

The problems that occur in the absence of a body with statutory powers and responsibilities for the implementation of the Act are illustrated by the audit of internal reporting policies carried out by the Ombudsman several years ago. This audit of agency internal reporting policies was carried out over a period of approximately three years. It required extensive efforts to obtain copies of internal reporting policies from agencies, and the review of the adequacy of each of those policies was particularly labour intensive. The process commenced via a Premier’s Memorandum to all agencies listed in Schedules 1 and 3 of the Public Sector Management Act requiring them to adopt procedures for the purposes of the Act and to forward copies of the adopted procedures to the Premier’s Department.

Copies of all responses received by the Premier's Department were then forwarded to our Office for assessment. Of the approximately 130 agencies that were initially sent the Premier's Memorandum, only 85 agencies (ie, 63%) responded over the next six months. On 7 July, the Director General of the Premier's Department wrote to the agencies that had not responded reminding them of the requirements of the Premier's Memorandum 96/24. In response to this letter, a further 28 agencies (ie, 21%) responded. To obtain responses from the remaining 15 agencies, it was necessary for this Office to write to them individually informing them that they may be the subject of criticism in the Ombudsman's 1997-98 Annual Report that they had not forwarded copies of their adopted internal reporting documentation within a specified time. Only seven of the 15 agencies responded within the set time. We reported in the results of this audit to the Ombudsman Parliamentary Committee and in our Annual Reports. This example demonstrates the need for there to be statutory requirements for agencies to adopt internal reporting policies and to provide copies of those policies to a PD Unit.

### *Major concerns about the adequacy of the Act*

Laying down the rules of the road that apply to whistleblowers

One way of looking at the objectives or purpose of whistleblower legislation, particularly from a government's perspective, is to lay down the rules of the road that apply to whistleblowing – the rules that all the parties to a disclosure must play by. In an area as sensitive, if not potentially explosive, as whistleblowing, the importance of clear ground rules that each party is required to comply with cannot be over estimated.

Such legislation should be designed to protect the legitimate rights and interests of all parties to a disclosure and to set out the ground rules for disclosures to be made and dealt with.

From a practical perspective this can be seen as the fourth objective of whistleblower legislation.

Whistleblowing can be a painful experience for all concerned – for the whistleblower, for the agency concerned, and for any person the subject of disclosure. However, the level of pain experienced by all three parties can be exponentially greater where appropriate rules are not followed.

There are two issues that need to be addressed:

- firstly, setting out fair and reasonable rules that must be followed by each party to a disclosure, and
- secondly, ensuring that each party to the disclosure complies with those rules.

Looking at the first issue, whistleblower legislation needs to set out fair and reasonable rules to be complied with by the whistleblower, by the public official or agency receiving the disclosure, and by persons who may be the subject of the disclosure.

The public interest is served by disclosures being facilitated and properly addressed. The public interest is not served by collateral damage to an agency or its personnel, or to the government of the day, over and above that caused by the problem being properly addressed.

It is therefore in the public interest to maximise the former (ie, disclosures being facilitated and properly addressed) while minimising the latter (ie, collateral damage). This can best be achieved through the adoption and implementation of fair and effective rules to be followed by whistleblowers if they want to rely on the protection provided through whistleblower legislation.

These rules should be designed to encourage whistleblowers to initially take their disclosures to the lowest practical level. Further, the objective should be to ensure that a whistleblower does not go public with their disclosure unless they have first taken their concerns to senior management or an appropriate external watchdog body, their concerns have not been properly addressed, and the whistleblower is in a position to be able to demonstrate substantial grounds for believing that their disclosures are substantially true.

Whistleblowing may be in the public interest, provided whistleblowers play by the rules, but the chances of collateral outcomes that are not in the public interest increase significantly if whistleblowers do not play by the rules, eg, the damage that can be caused by selective leaking to achieve a desired politically partisan outcome.

The rules for whistleblowers that should also be addressed in the PD Act therefore include:

- whether disclosures can be made anonymously, and
- an obligation to cooperate with any agency investigation.

It is also important that agencies play by the rules, and are seen to do so. Few people will blow the whistle if agencies that receive disclosures are not perceived to play by the rules. The rules for the recipients of disclosures that need to be addressed in the PD Act should therefore include:

- an obligation to set up appropriate policies and procedures for the receipt and handling of disclosures and for the protection of whistleblowers
- an obligation to protect whistleblowers (which would include ensuring confidentiality where this is both practical and appropriate)
- an obligation to appropriately deal with disclosures (which may include investigations), and
- an obligation to provide feedback to the whistleblower.

The rules for any persons the subject of disclosure that should be addressed in the PD Act include an obligation to cooperate with any agency investigation.

Looking at the second issue - ensuring that each party complies with the rules – this can be problematic, particularly in relation to the protection of whistleblowers. For example:

- it is relatively easy to ensure that whistleblowers comply with appropriate rules, for example by providing that their disclosures are only protected under the Act if certain reasonable steps are taken or requirements are complied with, along with an offence clause for the provision of false or misleading information
- ensuring agency compliance issues can be best dealt with by placing appropriate obligations in the legislation, provided implementation is closely oversighted by an impartial external body, however
- the compliance issue in relation to the subjects of disclosure is probably the most problematic, requiring both strong legislative provisions and direct management intervention.

### **Issues paper – adequacy of the Protected Disclosures Act to achieve its objectives**

As noted in our issues paper on the adequacy of the Act to achieve its objectives, in our view the PD Act is inadequate to achieve two of its three core objectives. We concluded that while the two previous reviews of the Act had identified a range of largely operational issues that needed to be addressed (with mixed success), it is now time for the Act to be comprehensively reviewed.

Looking at the three core objectives of the Act:

- protections for whistleblowers:
  - NSW is the only jurisdiction in Australia in which a whistleblower who has been the subject of detrimental/reprisal action has no rights in the Act to seek damages
  - there is no statutory obligation on senior managers and/or CEOs to protect whistleblowers, or even to establish procedures to protect whistleblowers (obligations imposed in five of the other seven Australasian jurisdictions), and
  - only NSW and two other jurisdictions make no provision for injunctions or orders to remedy or restrain breaches of the Act.
- ensuring disclosures are properly dealt with:
  - the Act almost completely fails to address the core objective of ensuring disclosures are properly dealt with, and
  - matters that should be considered for inclusion in the Act including obligations to appropriately deal with disclosures including to adopt and implement procedures for assessing and investigating, or otherwise appropriately dealing with disclosures, to appropriately investigate or otherwise handle disclosures; to appoint investigators (to ensure an impartial or an independent investigation); to provide procedural fairness in the conduct of any investigations

- to notify whistleblowers about progress in the outcome of investigations
- to notify a central agency of disclosures received each year and the outcomes of investigations, etc, and
- to make and retain adequate records of disclosures made in annual reports on the implementation of the Act. [As noted in our issues paper, at present no information is available as to how many protected disclosures are being made to any particular agencies or agencies generally, or whether such disclosures and the people who made them are being dealt with properly by those agencies.]
- facilitating the making of disclosures - as the Act fails to properly address the core objective of facilitating disclosures by public authorities, the issues that need to be considered include:
  - whether the scope of the conduct covered by the Act is wide enough (eg, should it be expanded to include public health and safety issues and environmental damage as in most other Australian jurisdictions)
  - whether avenues for the making of a disclosure should be expanded to include any person or body with jurisdiction to deal with the subject matter of the disclosures
  - whether private citizens should be protected if they make disclosures about conduct covered by the Act (as is the case in the five of the other seven jurisdictions)
  - whether specific provision should be included in the Act for anonymous disclosures, and
  - whether agencies should be required to adopt and implement an internal reporting system for the purposes of the Act
- other issues to be considered, as noted in the issues paper, included:
  - whether disclosures should not be protected where the whistleblower fails to assist any investigation or the whistleblower makes any further unauthorised disclosure, and
  - obligations on whistleblowers such as to maintain confidentiality and to assist/cooperate with investigators.

### **PDAISC's submission to the review of the Act**

The submission made by the PDAISC primarily focuses on three major structural changes, being:



- redress the whistleblowers
- statutory obligations on agencies
- establishing a Protected Disclosures Unit to provide agencies with advice and support.

The Committee also made submissions in relation to:

- legal responsibility for ensuring an agency complies with its obligations
- nomination of a prosecuting authority
- proactive management of whistleblowers/confidentiality
- the Director General of the Department of Local Government
- waste
- review provisions of the Act
- other legislative schemes applying outside the public sector
- the name of the Act.

### **Ombudsman's submission to review of Act**

The Ombudsman made submissions in relation to most of the issues addressed by the PDAISC.

#### *Are concerns enough to warrant repeal and replacement*

As mentioned in our issues paper, while the two previous reviews of the Act have identified a range of largely operational issues that need to be addressed, in our view it is now time for the Act to be comprehensively reviewed.

I believe there would be benefits in the Committee conducting a comprehensive review of the Act and its implementation to determine whether the Act as it is currently drafted is an adequate vehicle to achieve its objects. As mentioned in our issues paper, in our view it clearly is not. It is a matter for the Committee, the government and the Parliament to determine whether any problems identified with the Act can be addressed through amendment, or whether the Act should be set aside and replaced with a completely new Act.

In my view, the basic concepts underlying the Act are appropriate, for example the three provisions in the objects clause, and the scheme of the Act which requires the recipient of a disclosure to make a decision, based on objective criteria, as to whether a disclosure is

covered by the Act (as opposed to the scheme in certain other jurisdictions whereby the decision is made by the Ombudsman).

My problem is with the detail in the Act, or in some cases, the absence of detail, for example:

- the title of the Act should be amended to better reflect the fact that it is designed to facilitate the making of disclosures in the public interest – one way of achieving this is to provide the protection for people who make such disclosures – the end to be achieved is the making of disclosures, one of the means to this end is providing protection for people who make disclosures
- a number of the key terms and concepts of the Act need greater definition, including “*serious and substantial waste*”, “*government policy*”, etc
- the number of external agencies that can receive disclosures should be expanded to include any person or body with jurisdiction to properly deal with a disclosure
- provisions which require receiving agencies to identify the motivation of the whistleblower should be removed or modified
- obligations should be placed on agencies to prepare, adopt and implement adequate internal reporting policies and policies to ensure the protection of whistleblowers
- the section dealing with the provision of information to people who have made a disclosure should be expanded to require the provision of progress reports and details of the outcome of the matter
- the protection provisions of the Act should be expanded to allow whistleblowers to seek damages and to provide for the seeking of injunctions, and
- the Act should be amended to provide for the establishment powers and functions of a Protected Disclosures Unit.

#### *Principal changes most beneficial to the PD Act*

As indicated in the Ombudsman’s submission to the review, the major structural changes that should be made to the PD Act concern:

- (1) redress for whistleblowers
- (2) statutory obligations on agencies, and
- (3) establishment of a Protected Disclosures Unit to provide agencies with advice and support.

*Should the Act protect private individuals*

For a range of reasons I believe the Act should not be extended generally to cover disclosures made by private individuals, with the possible exception of disclosures concerning public health and safety issues and environmental damage. These reasons include:

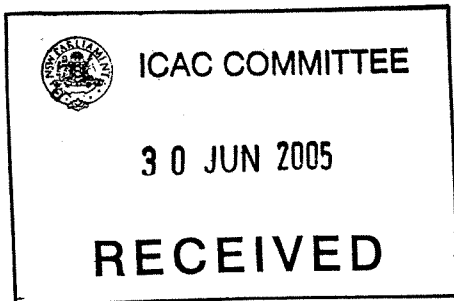
- the complexity of the Act makes it difficult enough for implementation by public sector agencies who have more experience at implementing this type of legislation, including developing and implementing necessary policies
- legislation of this type is designed to encourage and facilitate disclosures in the public interest, ie, matters that go beyond the personal interests of the person making the disclosure (the subject matter of most complaints made by members of the public)
- the aim of such legislation is to promote and facilitate disclosures by employees of government agencies about conduct of their fellow employees or the agency in which they are employed – employees being far more likely to be aware of misconduct within their agency than general members of the public.



## ANNEXURE 5

### SELECTED SUBMISSIONS RECEIVED FROM PUBLIC AUTHORITIES AND INVESTIGATING AUTHORITIES

RPDA OIO ICC166  
COS/2164



THE AUDIT OFFICE  
OF NEW SOUTH WALES

CONTACT NAME  
TELEPHONE A920  
OUR REFERENCE  
YOUR REFERENCE

The Hon K Yeadon MP  
Chairman  
Committee on the Independent Commission Against Corruption  
Parliament House, Macquarie Street  
SYDNEY NSW 2000

28 June 2005

Dear Chairman

Thank you for your letter of 25 May 2005 inviting the Audit Office to provide a submission to your Committee's review of the *Protected Disclosures Act 1994*.

I have taken this opportunity to revisit our submissions to previous reviews of the Act. In the main I am satisfied that matters previously raised have either been satisfactorily resolved or are not of sufficient current significance to refresh. There is, however, one exception.

In my 1999 submission to the review of the Act by the Committee on the Office of the Ombudsman, I raised the issue of the funding of protected disclosure investigations by this Office. I wish to make a repeat submission on this issue.

My submission of 14 December 1999 stated that:

The Audit Office is largely a self-funding body, charging for its financial audit services.

In general, the financial audit activities result in a small surplus which is used to supplement the allocation from Treasury for performance audits.

The Office receives no allocation for protected disclosures. Hence any costs incurred on protected disclosures reduce the limited amount available for the Office's performance audit activities.

Topics selected for performance audit review are generally selected on the basis that the review's findings will result in improved use of public monies. It is unfortunate if the Office is placed in the position of having to curtail planned performance audits to carry out its responsibilities under the Protected Disclosures Act. It is also inappropriate that such a disincentive to a proper investigation of a protected disclosure complaint is seen to exist.

The Audit Office considers that it would be more appropriate if the protected disclosure investigation were funded separately by Parliament through a special appropriation. In that way the question of any cross-subsidisation by the Audit Office clients could be avoided.

As to new matters for consideration by your review, I have one issue to raise.

Looking back over our experience to date with protected disclosures, we can observe that it is very common for complainants to send their disclosure to all three of the designated "watchdog" agencies. This highlights a process issue that does not appear to have been anticipated by the original legislation.

In practice, the secrecy and process obligations of each watchdog body have at times tended to impede the efficient exchange of information relating to protected disclosure matters. Attempts to address these aspects have been partly effective, and have included the development of Memoranda of Understanding and Information Sharing Agreements between the watchdogs. However, I believe that efficient coordination of complaints between the three watchdogs ought to be an objective in the legislation. This may be a worthwhile issue for the Committee to consider.

Yours sincerely

A handwritten signature in black ink, appearing to read "Bob Sendt". The signature is written in a cursive, slightly slanted style.

R J Sendt  
Auditor-General



New South Wales

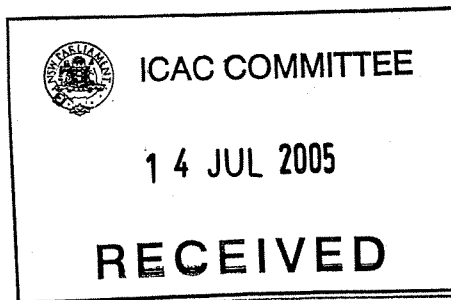
RPDA 017

The Hon Tony Kelly MLC  
Minister for Rural Affairs,  
Minister for Local Government,  
Minister for Emergency Services, and  
Minister for Lands

ICC166  
C05/2313

MIN: 05/3239  
Doc ID: A18884

The Hon Kim Yeadon MP  
Chairman  
Committee on the Independent  
Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000



Dear Mr Yeadon *Kim*

12 JUL 2005

I refer to your letter of 25 May 2005 inviting submissions on a review being conducted into whether the policy objectives of the *Protected Disclosures Act 1994* remain valid and whether the terms of the Act remain appropriate for securing those objectives.

There is one aspect of the current legislation on which I seek to make comment.

The Director General of the Department of Local Government is presently an authorised investigating authority in relation to protected disclosures relating to serious and substantial waste of local government monies.

The Director General is also authorised under Part 3 of Chapter 14 of the *Local Government Act 1993* to receive and investigate complaints that a person has, or may have, contravened Part 2 of Chapter 14 (pecuniary interest matters) of the Act. Further, the Director General has recently been authorised under Part 1 of Chapter 14 of the Act to investigate or authorise an investigation into a request or report concerning possible misbehaviour on the part of a councillor. The Director General also retains a general power to investigate any aspect of a council, its works and activities under section 430 of the *Local Government Act 1993*.

The Director General has previously noted to the Protected Disclosures Act Implementation Steering Committee that should a public official make allegations of pecuniary interest breach directly to the Director General, that public official currently will not have the protections of the *Protected Disclosures Act 1994*.

These matters can be and are referred to the Director General's attention by the NSW Ombudsman or the Independent Commission Against Corruption. Nevertheless, it is more appropriate that public officials can make such complaints directly to the Director General.



This is an important issue, not least because senior council staff and councillors face the real risk of detrimental action in making pecuniary interest or misbehaviour complaints and allegations. Therefore, I ask that your Committee consider supporting amendments of this nature.

To address this issue, the Director General could be made an investigation authority for all matters within the Director General's jurisdiction to investigate. This would involve conferring on the following matters the protections of the Act:

*"A complaint made by a public official to the Director General of the Department of Local Government will be protected if it is a disclosure of information concerning a council, a councillor, a council delegate or a member of council staff; that shows or tends to show:*

- *maladministration or a serious or substantial waste of local government money; or*
- *a contravention of Part 2 of Chapter 14 of the Local Government Act 1993 (pecuniary interest); or*
- *misbehaviour of a councillor (as defined in section 440F of the Local Government Act 1993)."*

I trust this submission is helpful to the Committee's deliberations.

Yours sincerely



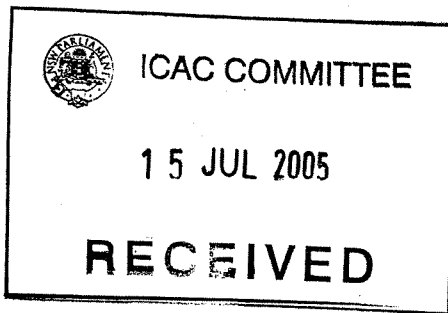
Hon David Campbell MP  
**Acting Minister for Local Government**

RPDA 018

ICC166  
COS/2345



*Minister for Roads*  
*Minister for Economic Reform*  
*Minister for Ports*  
*Minister for the Hunter*



M05/6155

The Hon Kim Yeadon MP  
Chairman  
Committee on the Independent Commission  
Against Corruption  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

12 JUL 2005

Dear Mr Yeadon

Thank you for your letter concerning the Committee on the Independent Commission against Corruption to act as a joint committee of members of Parliament under s.32 of the Protected Disclosures Act 1994 to review the Act.

I support the aims of the Act and have no comment to make regarding the Committee's inquiry.

If you require any further information, please contact Rob McCarthy, General Manager, Control Management Services, on 9218-6399.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Costa".

**MICHAEL COSTA**



New South Wales

KPLA 019

The Hon Tony Kelly MLC  
Minister for Rural Affairs  
Minister for Local Government  
Minister for Emergency Services  
Minister for Lands  
Minister Assisting the Minister for Natural Resources

ICC166  
COS/2411

MIN 05/3245

The Hon Kim Yeadon MP  
Chair  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie St  
SYDNEY NSW 2000



ICAC COMMITTEE

19 JUL 2005

RECEIVED

*Kim*  
Dear Mr Yeadon,

I refer to your letter inviting submissions with regard to the review of the Protected Disclosures Act 1994.

The Director General of the Department of Lands has requested that two issues be put to the Committee for consideration during the review.

Firstly, while section 16 of the Act provides that a disclosure is not protected if it is made frivolously or vexatiously, it is submitted that this alone is not a sufficient deterrent. The Department has had a number of instances of people repeatedly making allegations which upon investigation have proved to be unfounded. It is suggested that section 16 of the Act be strengthened to provide greater deterrence against frivolous or vexatious disclosures.

Secondly, it is possible that a department could investigate a disclosure and find that there is no evidence to support the complaint, only to have the complainant refer the matter to ICAC without informing ICAC that the matter had already been investigated. This can waste time and resources. It is submitted that there should be a requirement that any person who makes a disclosure should also reveal whether the disclosure has previously been investigated, by whom and the outcome of that investigation.

Subject to those two matters, I support the continued operation of the Act.

Yours sincerely

David Campbell MP  
Acting Minister for Lands



**David Campbell**  
Minister for Regional Development  
Minister for the Illawarra  
Minister for Small Business

M02368

The Hon Kim Yeadon MP  
Chairman  
Committee on the Independent  
Commission Against Corruption  
Parliament of NSW  
Macquarie Street  
SYDNEY NSW 2000



Dear Mr Yeadon *Kim*

Thank you for your letter inviting submissions for the purpose of the Committee's review of the Protected Disclosures Act 1994.

I have no issues to raise in a submission to the Committee.

Thank you again for the opportunity to comment. If you require further information in relation to this issue, please contact Ms Patricia Armstrong, Advisor, in my office, on (02) 9228 3777.

Yours sincerely

**David Campbell**  
Minister for Regional Development  
Minister for the Illawarra  
Minister for Small Business

25 JUL 2005

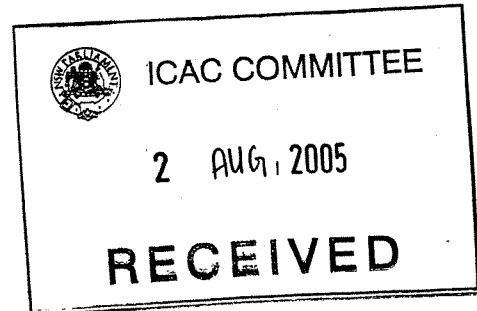


NEW SOUTH WALES

**Inspector  
of the  
Police Integrity Commission**

Our ref: 06-04AC

1 August 2005



Mr Ian Faulks  
Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament of NSW  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Faulks

**RE: REVIEW OF THE PROTECTED DISCLOSURES ACT 1994**

Thank you for affording me the opportunity to make a submission with regard to the Review above referred to.

During my three year tenure of office of Inspector of the Police Integrity Commission I have not been upon to have reference to the Protected Disclosures Act 1994 and accordingly regret to advise that I am unable to offer any submission of assistance to your committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morris Ireland'.

The Honourable Morris Ireland QC  
Inspector of the Police Integrity Commission



Minister for Juvenile Justice  
Minister for Western Sydney  
Minister Assisting the Minister for  
Infrastructure and Planning (Planning Administration)

RML 05-0162

The Hon Kim Yeadon MP  
Chairman  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

- 2 AUG 2005

Dear Mr Yeadon

I refer to your letter of 25 May 2005 inviting submissions regarding the review of the *Protected Disclosures Act 1994*.

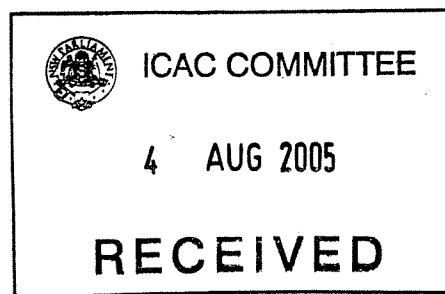
The Act, in its present form, has adequately facilitated the reporting and investigating of alleged corrupt conduct, maladministration and serious and substantial waste. It is considered that the Act currently serves the department in promoting ethical and efficient conduct by its staff.

I do not propose to make a submission as part of the review of the Act.

Thank you for your letter.

Yours sincerely

The Hon Diane Beamer MP

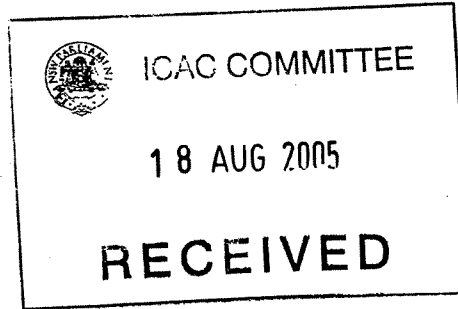




KYDA 023 ICC 166  
COS/2878

# NSW DEPARTMENT OF COMMUNITY SERVICES

Head Office 4-6 Cavill Avenue, Ashfield NSW 2131 • Locked Bag 28, Ashfield NSW 1800  
DX 21212 Ashfield • Tel (02) 9716 2222 • Fax (02) 9716 2999



R 05/01035  
Min 05/2522

16 AUG 2005

Mr I Faulks  
Committee Manager  
Committee on the Independent Commission  
Against Corruption  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Faulks

I refer to your correspondence to the Hon Reba Meagher, MP, Minister for Community Services concerning the review being undertaken by your Committee into the *Protected Disclosures Act 1994*. The Minister has requested that I reply on her behalf.

Thank you for providing the NSW Department of Community Services with the opportunity to make a submission to the Committee on the Independent Commission Against Corruption's review into the *Protected Disclosures Act 1994*.

The Department has had minimal involvement with this legislation and accordingly will not be providing a submission.

Yours sincerely

Neil Shepherd  
Director-General



NEW SOUTH WALES

MINISTER FOR HEALTH

RPDA 025 Ice 165  
COS/2930

M05/3778

~~22 AUG 2005~~



ICAC COMMITTEE

23 AUG 2005

RECEIVED

Mr Ian Faulks  
Committee Manager  
Committee on the Independent  
Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Faulks

I am responding to an invitation extended by The Hon Kim Yeadon MP to make a submission for the consideration of the Committee reviewing the Protected Disclosures Act 1994.

The NSW Department of Health consulted with relevant staff across the Department and attached for your consideration is a response based on these consultations.

Thank you for the opportunity to provide input into the review.

Yours sincerely

  
(John Hatzistergos)



## NSW Health Submission – Review of Protected Disclosures Act 1994

### 1. General Observations

The Act has been in place for over ten years and has provided some incentive for the reporting of maladministration and corrupt conduct within the public sector. This may have contributed to some culture change around the issue of “whistle blowing”. The requirement to reply to the discloser within a set time frame about action taken gives some confidence to all parties.

That said there remains significant confusion about the nature and extent of the protection provided by the Act. A common misconception is that the Act invariably prevents disclosure of the identity of a complainant, a much broader “protection” than that which the Act actually provides.

People have come forward with complaints on the premise that in making a protected disclosure, regardless of the particular circumstances of the case, their identity will not be revealed to the person the subject of the complaint. Some complainants have quite properly been advised that, as set out in section 22 of the Act, in their case a fair investigation does in fact require the complainant’s identity to be disclosed to the person or persons the subject of the complaint. Upon receiving this advice a number of complainants are reluctant to proceed with their complaint.

Additionally NSW Health has noticed that anonymous complaints have become more prevalent, the ultimate means of a complainant protecting their identity.

While tightening section 22 of the Act to guarantee anonymity might provide a greater incentive for complainants to come forward, such an approach is contrary to principles of fairness and justice and would increase the risk of frivolous, vexatious or malicious complaints. Procedural fairness and effective investigative techniques necessarily prevent complainants’ identities being suppressed in conducting many investigations, particularly where the conduct of another person or persons are the subject of the complaint. Any protective legislative scheme must recognise this, as the current Act does in section 22.

Accordingly NSW Health supports the current balance struck by section 22 but considers further education is required to remove the misconception that the Act guarantees anonymity.

Another common misconception is that the Act regulates the way in which investigations of maladministration or corruption are to be investigated. One of the objectives of the Act is to encourage and facilitate disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste by “*providing for those disclosures to be properly investigated and dealt with*”. However the substantive provisions of the Act do not regulate or provide for investigation of protected disclosures at all.

This misconception appears, in part, to arise from confusion between the provisions of the Act itself and the broader Ombudsman’s Guidelines. It appears these Guidelines have been treated as equivalent to the statutory prescription itself and that a failure to adhere to the Guidelines is somehow equivalent to breaching the actual Act.

## **2. Specific Issues**

### **2.1 Anonymous Disclosures**

It is noted that the Ombudsman's Guidelines suggest that where an organisation is certain the anonymous disclosure is from a public official or where the identity of the discloser becomes known the disclosures should be protected. However the Act does not expressly provide for anonymous complaints and this aspect should be clarified.

### **2.2 Definitions of Protected Disclosures**

The broadness of the current definitions of what constitutes protected disclosures (particularly maladministration) has resulted in the use of the Act for matters that may be more effectively dealt with by an organisation's grievance policies.

The experience across NSW Health is that a significant number of protected disclosures tend on review to be grievances 'dressed up' as allegations, which have very little if any substance in relation to identifying public sector corruption and maladministration.

Compounding this issue is the current drafting of section 27 (Notification to person making disclosure), which states that the discloser should be notified of any action taken or proposed to be taken. This form of word presupposes there will be action and raises an expectation in complainants that investigation or other action will proceed in all cases. Clearly in some cases a reasonable assessment of the complaint will indicate that no action is warranted and accordingly section 27 should expressly recognise this possibility.

### **2.3 Definition of Public Official**

While NSW Health has applied the Act throughout public health organisations, it is unclear if the majority of staff employed in public health organisations strictly fall within the definition of 'public official' in the Act.

The Act defines public official as:

'A person employed under the Public Sector Management Act 1988, an employee of a state owned corporation, a subsidiary of a State owned corporation or a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority...'

NSW Health Service staff are not public servants, nor employees of State owned corporations. While the Chief Executive of a public health organisation could properly be considered a public official it is arguable whether for example a doctor or nurse, or clerk or storeman working somewhere in the public health system could be said to have public official functions or be acting in a public official capacity in the course of their employment.

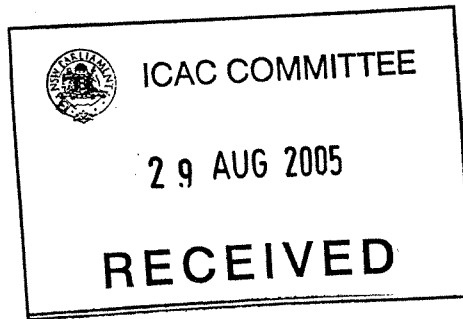
## **2.4 Relevant Investigation Act**

The Act appears to be drafted on the basis that investigations which may flow from protected disclosures will be conducted under a "relevant investigation Act", for example section 16 (3). In the case of investigations within the public health system, they are frequently conducted on an administrative basis, noting that the Health Services Act 1997 does not codify the way in which public health organisations conduct disciplinary and other investigations. The PD Act should better reflect that investigations may proceed on an administrative as well as statutory basis.

RPLH 828

ILL 100  
COS/3024

DIRECTOR-GENERAL OF EDUCATION AND TRAINING  
MANAGING DIRECTOR OF TAFE NSW



Early Childhood and Primary Education  
Secondary Education  
Technical and Further Education  
Vocational Education and Training  
Higher Education  
Adult and Community Education

The Committee Manager  
Parliament House  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

RML 05/2751  
RML 05/3273  
RML 05/3866

Dear Sir/Madam

I refer to your letter dated 29 July 2005 to the Minister for Education and Training, the Hon Carmel Tebbutt MLC, regarding the proposed review by the Committee of the Protected Disclosures Act 1994. I have been asked to respond to you.

The Department of Education and Training has a policy titled *Protected Disclosures – Internal Reporting Policy* dated 30 April 2004 that describes an internal reporting system for disclosing suspected corruption, maladministration or serious waste. In addition to the Director-General/Managing Director and the Director of Audit (Disclosures Co-ordinator), persons who are authorised to receive a protected disclosure are known as Nominated Disclosure Officers. These people are generally SES and senior officers, totalling about 150.

During 2004, 39 per cent (41 cases) of complaints registered by the Department's Audit Directorate were accepted as protected disclosures. The Employee Performance and Conduct Directorate also receive a small number of protected disclosures relating to child protection issues each year.

The Department has also established a Complainant and Witness Support Program for staff who make disclosures under the *Protected Disclosures Act 1994*.

The Department's Protected Disclosures Co-ordinator (Director of Audit) has advised that the following observations have been made in relation to whether the objectives of the Act are being met:

- Many complaints and allegations lodged as protected disclosures are workplace grievances. Following departmental investigations, some have been seen as having personal reasons for disclosure rather than a disclosure of a serious matter in the public interest. It is believed that the Act should be revised to include a public interest test for a complaint or allegation to be accepted as a protected disclosure. That is not to say that the complaint itself would not be dealt with.

- The Department noted that the NSW Ombudsman stated in the current Protected Disclosures Guidelines, 4th edition that "...we have significantly revised our advice about expectations of confidentiality for whistleblowers, noting that confidentiality is in practice often not a realistic option". The Department would support any further clarification that can be made in the Act in this respect.
- From time to time disclosures of alleged corrupt conduct, serious waste and maladministration are submitted by SES and senior officers, school principals and workplace managers as protected disclosures. Acceptance of such protected disclosures necessarily imposes an additional administrative burden on agencies. It is the Department's view that such disclosures are part of the duties of management and should be reported as a matter of course without the need of protection under the Act, an objective of which is to protect "whistleblowers" from reprisals from those in authority or power.
- The Act provides for penalties to be imposed on people who take detrimental action against a whistleblower substantially in reprisal for their protected disclosure. The Department's experience indicates that this aspect of the Act is ambiguous and it is very difficult to prove that detrimental action taken against a whistleblower is substantially a reprisal for having made a protected disclosure. The Act needs clarification in this regard.
- The NSW Ombudsman has advised agencies to interpret the Act broadly – to assume the disclosure is a protected disclosure when in doubt and act accordingly. This approach has tended to encourage acceptance of less serious matters and workplace grievances as protected disclosures. The Act needs to clarify the "seriousness test" for acceptance of protected disclosures.

For further information in relation to this matter, please contact Mr Bill Middleton, Director of Audit and Disclosures Co-ordinator on telephone number 9561 8913.

Yours sincerely



Andrew Cappie-Wood  
**DIRECTOR-GENERAL OF EDUCATION AND TRAINING**  
**MANAGING DIRECTOR OF TAFE NSW**

22 August 2005

RPDA 027

ICC 166  
COS/3077



PO Box 323 Penrith NSW 2751  
Level 2, 311 High Street  
Penrith NSW 2750  
Tel 1300 722 468 Fax 02 4732 3666  
Email [Info@sca.nsw.gov.au](mailto:Info@sca.nsw.gov.au)  
Website [www.sca.nsw.gov.au](http://www.sca.nsw.gov.au)

Ref: M2005/00300  
Your Ref: ICC 165

Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

- 1 SEP 2005

Dear Mr Faulks

Thank you for your letter seeking the Sydney Catchment Authority's (SCA) submission to the ICAC Committee's review into the *Protected Disclosures Act 1994*.

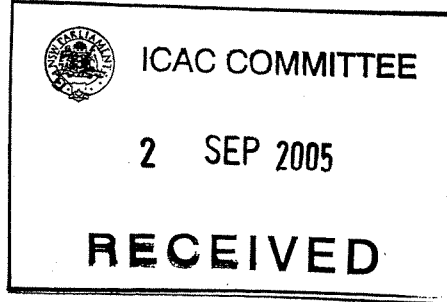
The SCA was created in 1999 to manage and protect Sydney's drinking water catchments and supply bulk water to its customers. There are currently some 295 staff working at the SCA.

Since the establishment of the SCA, only one disclosure has been made to the principal officer of the SCA under the *Protected Disclosures Act 1994*. The disclosure was properly investigated and the person making the disclosure was afforded the full protection of the Act.

Yours sincerely

**LISA CORBYN**  
**Chief Executive**

**FAXED**  
11/9/2005



PO Box 323 Penrith NSW 2751  
Level 2, 311 High Street  
Penrith NSW 2750  
Tel 1300 722 468 Fax 02 4732 3666  
Email [info@sca.nsw.gov.au](mailto:info@sca.nsw.gov.au)  
Website [www.sca.nsw.gov.au](http://www.sca.nsw.gov.au)

Ref: M2005/00300  
Your Ref: ICC 165

Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

- 1 SEP 2005

Dear Mr Faulks

Thank you for your letter seeking the Sydney Catchment Authority's (SCA) submission to the ICAC Committee's review into the *Protected Disclosures Act 1994*.

The SCA was created in 1999 to manage and protect Sydney's drinking water catchments and supply bulk water to its customers. There are currently some 295 staff working at the SCA.

Since the establishment of the SCA, only one disclosure has been made to the principal officer of the SCA under the *Protected Disclosures Act 1994*. The disclosure was properly investigated and the person making the disclosure was afforded the full protection of the Act.

Yours sincerely

**LISA CORBYN**  
**Chief Executive**

RPDA 030

ICC166  
COS/316A**Internet Mailbox ICAC Committee - PDA review**

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**From:** "Michael Cranny" <Michael.Cranny@blacktown.nsw.gov.au>  
**To:** <icac@parliament.nsw.gov.au>  
**Date:** 8/09/2005 10:20 AM  
**Subject:** PDA review

---

The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
Sydney NSW 2000

This is my individual submission and represents my own views and not those of my organisation.

The Protected Disclosures Act 1994 (PDA) is intended to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters, and
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and
- (c) providing for those disclosures to be properly investigated and dealt with.

The Department of Local Government requires all Councils to have procedures for complaint handling. These procedures are generally the 'established procedures' referred to in (a). These procedures are often found wanting in their implementation and design.

Accordingly many Councils have impressive policies and procedures for handling complaints originating from without and or within the organisation. Of course the way in which these policies are publicised and crucially implemented distinguishes Councils.

There are those councils that conduct the investigation process professionally according to 'best practice guidelines' and seek outcomes that not only improve operational practices over time but leave the parties involved impressed with the complainants handling process.

I believe that there are Councils that set the investigation up in a way that intimidates complainants to either withdraw a complaint or, if this fails, to conduct a biased and prejudiced investigation with an apparent outcome predetermined by a senior officer. These councils play mere lip service to their publicised good complaints handling practices.

It is my view that my organisation has both types of investigation processes. It is the General manager who determines who shall conduct the investigation. Professional quality investigations are conducted by the Probity Unit that meet all the objectives of the PDA for both protected and non-protected disclosures. On the other hand, it is my personal experience that an intimidatory type of investigation has been conducted by Employee Relations in relation to non-protected disclosures relating to an ethical issue I raised involving changing publicised authorship of my report without reference to me. I was asked not to make the written complaint against the former director (such action being considered to be 'extreme') and I was subsequently threatened with a job transfer for doing so unless I made a contrite apology for making the complaint against the former director.

Council's complaints policy requires the reporting of complaints to be reported to Council every six months but no such report has been made to my knowledge in over two years since the policy was adopted. I believe that our organisation is extremely averse to adverse publicity and this is the reason such report has



not been made and also why fraud is often not reported to the police in breach of the Crimes Act. We have a culture of cover-up and the use of fear and threats to ensure reputations are protected. The organisation is slow to innovate and rated poorly in the areas of risk management and corporate values in a recent Governance Health Check.

Nevertheless there are many things we do well as an organisation, as evidenced in our winning the 2004 Bluett Award for excellence in Local Government. It is my hope that this weakness in our organisation can be remedied by a change in the law that would set a mandatory standard for internal council investigations and sanctions under the code of conduct for improper influence.

It is my personal submission, that the PDA be broadened to provide that all disclosures made for breaches of NSW Councils Code of Conduct be treated in law as protected disclosures unless such protection is waived in writing by the complainant or the circumstances given under the Act.

Yours Faithfully

Michael Cranny  
GOVERNANCE OFFICER  
Governance Services Section  
Blacktown City Council  
Phone 9839-6422  
Email - [michael.cranny@blacktown.nsw.gov.au](mailto:michael.cranny@blacktown.nsw.gov.au)

\*\*\*\*\*

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RPDA 031

ICC166  
005/3193



ICAC COMMITTEE

9 SEP 2005

RECEIVED

**Deputy Premier**  
**Minister for Transport**  
**Minister for State Development**

The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Sir,

I refer to your letter requesting a submission for the Review into the Protected Disclosures Act 1994. I apologise for the delay in responding.

I have sought input from the Ministry of Transport, RailCorp, State Transit and the Transport Infrastructure Development Corporation in response to your request.

I attach for your information a summary of comments from transport portfolio agencies.

Please be aware that State Transit has advised that it does not have any comment or concerns with the Protected Disclosures Act 1994, and is not included in the summary of information.

Yours sincerely,

John Watkins MP  
Deputy Premier  
Minister for Transport  
Minister for State Development

08 SEP 2005

BN05/00690

**Transport Portfolio Response to the  
Committee on the Independent Commission Against Corruption  
review into the Protected Disclosures Act 1994**

**5 September 2005**

**Ministry of Transport**

Since approximately April 2003 the Ministry of Transport has dealt with the following disclosures (a general outline only of which is set in compliance with s22 of the Act) as protected disclosures for the purposes of the Act;

1. 28 April 2003 – disclosure concerning management of staff in State Rail Authority – disclosure made to the Minister for Transport Services,
2. 14 October 2003 – disclosure concerning Rail Infrastructure Corporation – disclosure made to the Minister for Transport Services,
3. 4 May 2004 – disclosure concerning staff conduct within the Ministry of Transport – disclosure made to Ministry of Transport Officer.

Commonly, protected disclosures dealt with by the Ministry of Transport have been made to the Minister and forwarded to the Ministry of Transport for advice and attention. Disclosures have usually concerned operational agencies within the Transport Portfolio.

*Ministry of Transport Arrangements*

- The Ministry of Transport has in place a comprehensive policy in respect of the making of a protected disclosure. The policy is published on the Ministry's internal website and is therefore widely available.
- Other than the Director General the person nominated as responsible for receiving protected disclosures within the Ministry of Transport is the Executive Director, Finance and Corporate Services.
- Responsibility for receiving and dealing with protected disclosures is referred to in the position description of the Executive Director Finance and Corporate Services.

The provisions of s26 of the Act have been of particular utility to the Ministry of Transport when dealing with matters pertaining to portfolio agencies.

The only issue raised for further consideration is the possibility of a provision dealing with 'serial' disclosures about essentially the same issue. It is suggested that it would be useful if a mechanism were available to allow for a conclusive 'close out' where multiple disclosures are made about the same or essentially the same issues.

The Ministry of Transport only receives a relatively small number of protected disclosures and is generally satisfied with the operation of the Act. The Ministry of Transport makes no particular recommendation for amendment to the Act.

## **RailCorp**

RailCorp's experience has shown the Act to be a very useful mechanism for encouraging, promoting and facilitating the reporting of matters concerning corrupt conduct maladministration and serious and substantial waste.

In many cases RailCorp believes that the individuals making reports may not otherwise have been inclined to come forward. As agencies cannot address matters of which they are unaware, RailCorp strongly encourages individuals to report matters of concern. The Act is one avenue for achieving that aim.

In the last 18 months alone RailCorp has received 22 protected disclosures.

Most of these cases have been reported by individuals who claim they fear retribution for report and therefore seeking protection under the Act. In a small number of cases, once the circumstances of the case were revealed it was recommended to the person making the report that the matter be classified as a Protected Disclosure and treated as such.

For example, in order to protect the identity of an employee who made a report, an audit of several employees was conducted in order to isolate the records of the subject of the investigation without alerting him as to who had made the report. RailCorp believes it is unlikely this employee would have reported the matter had the Act not existed and been promoted.

The ability of employees to use the provisions of the Act has, in RailCorp's view, assuaged employees' fears of reappraisal and has the added impact of alerting managers and persons handling such matters of the need to handle such matters with extreme caution.

Information about the Protected Disclosures Act is included in RailCorp's Code of Workplace Conduct and the Ethics @ Work induction training sessions. At these sessions an issue that often arises is concern employees might be harassed or victimised for reporting a matter. The existence of the Act and its protections provides a good defence to the argument that it is better and easier to just keep quiet and let the corrupt or other inappropriate conduct continue.

## **Transport Infrastructure Development Corporation (TIDC)**

TIDC acknowledges the objectives and purpose of the Act and supports the principle of protected disclosures.

The matter of protected disclosures is included in TIDC's New Employee Induction process and in the TIDC Staff Code of Conduct. Further, as a

general reminder to all staff, an independent specialist undertook a presentation on protected disclosures and probity at a TIDC staff meeting in August 2005.

TIDC is currently developing a Protected Disclosures Policy in line with the Act, to provide a defined framework for the Corporation.

Should the ICAC review result in amendments to the Act, TIDC will amend its policies and procedures accordingly.



M05/02490  
M05/03269

Mr Ian Faulks  
Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Faulks

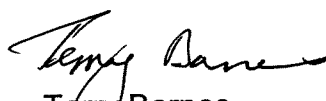
I refer to your letter of 29 July 2005 to the previous Minister for Housing, the Hon J G Tripodi MP, your file reference ICC 165. The current Minister for Housing and Minister Assisting the Minister for Health (Mental Health), the Hon Cherie Burton MP, has requested that I respond on her behalf.

In your letters, you requested that the previous Minister assist in arranging for agencies under his administration to make submissions to the ICAC Committee concerning its review into the *Protected Disclosures Act* 1994 (the Act). Following receipt of your letter, the previous Minister forwarded the request to the Department of Housing. My office then forwarded the request to the Department's Business Assurance Unit, which is responsible for investigating allegations of corruption, protected disclosure procedures and similar matters.

The Business Assurance Unit reviewed the Department's recent history and treatment of protected disclosures. It was found that the Department has had very limited operational exposure to protected disclosures and equally limited experience in relation to the Act's interpretation and application. As such, the Department of Housing will not be able to provide an appropriate or meaningful submission to the ICAC Committee.

If you require any further information, please feel free to contact Ms Susan Trudgett, Manager, Business Assurance, on (02) 8753 8583.

Yours sincerely

  
Terry Barnes  
Director-General

- 8 SEP 2005

RPDA:033

ICC 166  
05/3457



Department of  
Environment and Conservation (NSW)

FAXED  
26/9/2005

Your reference : ICC 165  
Our reference : DOC05/16657  
Contact : Jonathan Charles ph 9995 6165

STAYSAFE  
26 SEP 2005  
RECEIVED

Mr Ian Faulks  
The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

26 SEP 2005

Dear Mr Faulks

I am writing in response to your letter, dated 29 July 2005, inviting submissions to the ICAC Committee's Parliamentary inquiry regarding the *Protected Disclosures Act 1994*. I note that the date for submissions from agencies was extended to 30 September 2005.

I understand that the purpose of the review is to determine whether the policy objectives of the *Protected Disclosures Act 1994* (the Act) remain valid and whether the terms of the Act remain appropriate for securing those objectives.

The Department of Environment and Conservation (DEC) has developed and promoted specific guidelines and procedures to facilitate disclosures and ensure that the necessary safeguards are in place. These procedures are publicly available on DEC's website.

However DEC has received few approaches to disclose information in accordance with the terms of the Act. For example, we received one disclosure in the past twelve months. In light of this, DEC has not experienced problems in regard to the practical working application of the Act.

In DEC's view, the policy objectives of the Act are still valid and the Act remains a viable mechanism for encouraging staff to report suspected incidences of corrupt conduct and serious and substantial waste. The existence of the Act, and the accessibility for staff to the safeguards it provides, is a key component of DEC's Fraud and Corruption Control Strategy.

If you require any additional information please contact Jonathan Charles, Manager Corporate Audit and Review, on ph 9995 6165.

Yours sincerely

**LISA CORBYN**  
**Director General**

RPDA: 036

ICC 166  
C05/3618



New South Wales

Minister for Justice



ICAC COMMITTEE

07 OCT 2005

RECEIVED

The Committee Manager  
Committee on the  
Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

RML: 05/0728

30 SEP 2005

Dear Mr Faulks,

I refer to a letter dated 25 May 2005 from the Hon K Yeadon MP to my predecessor the Hon J Hatzistergos MLC seeking a submission for the purpose of the Committee's review of the *Protected Disclosures Act 1994*, and your subsequent letter to my predecessor dated 29 July 2005 seeking his assistance in arranging for departments and agencies under his administration to make appropriate submissions to the ICAC Committee.

A submission from the Department of Corrective Services is attached.

Yours sincerely,

A handwritten signature in black ink that reads 'Tony Kelly'.

Tony Kelly MLC  
Minister for Justice



# DEPARTMENT OF CORRECTIVE SERVICES

## SUBMISSION

### REVIEW OF *PROTECTED DISCLOSURES ACT 1994*

The Department has had considerable experience in processing disclosures made under the Act.

The Department is of the view that the Act effectively provides protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector.

The Department has not identified any urgent need for legislative amendment.

The Department has noted, however, that some confusion remains among people wanting to make a protected disclosure as to what constitutes a protected disclosure, and who can make such a disclosure.

The definitions of "corrupt conduct" and "public official" in section 4 of the Act may contribute to the confusion.

Under the Act, "corrupt conduct" has the same meaning given to it by the *Independent Commission Against Corruption Act 1988*. This definition of "corrupt conduct" is open to broad interpretation. It is likely that different agencies interpret "corrupt conduct" differently.

The same can be said of the definition of "public official". It is not absolutely clear as to what constitutes a "public official". It is arguable for instance, as to whether employees of the company employed by the Department of Corrective Services to manage Junee Correctional Centre are public officials, and whether such employees can make a protected disclosure.

Perhaps the definitions of "corrupt conduct" and "public official" could be reviewed with a view to lessening the scope for variations of interpretation.

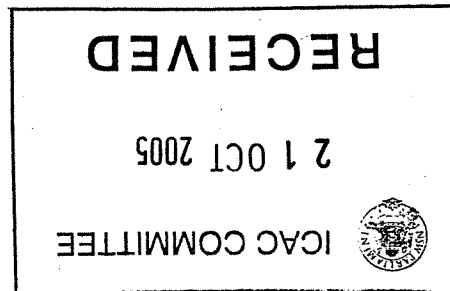
September 2005

RPDA: 038

ICC 166  
COS/3740

**PROTECTED DISCLOSURES STEERING COMMITTEE**

*Acknowledged  
in Year 21/10/05* Level 24  
580 George Street  
SYDNEY NSW 2000  
Tel: 9286 1000  
Fax: 9283 2911



19 October 2005

Mr Ian Faulks  
The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Dear Mr Faulks

**Review of the Protected Disclosures Act 1994**

I write in my capacity as Chair of the Protected Disclosures Act Implementation Steering Committee.

Please find enclosed the submission of the Steering Committee, which has been endorsed by all Committee members except for NSW Police, which, regrettably, has not been able to consider the submission in the timeframe required. However, we hope that they will be able to provide formal endorsement by 1 December 2005 (the date that submissions close).

Yours sincerely

Chris Wheeler

**Deputy Ombudsman**

## **Protected Disclosures Act Implementation Steering Committee**

### ***Submission to the Parliamentary Inquiry Review of the Protected Disclosures Act 1994***

#### **Background**

The Protected Disclosures Act Implementation Steering Committee (PDAISC) was formed in July 1996 to provide practical advice and information to help state agencies and local councils deal with protected disclosures, including:

- investigating disclosures
- implementing internal reporting systems
- protecting staff
- changing organisational culture
- developing training materials
- interpreting the Act.

The PDAISC is chaired by the Deputy Ombudsman and includes representatives from the NSW Ombudsman, Independent Commission Against Corruption, Audit Office, Police Integrity Commission, NSW Police (Internal Witness Support Unit), Department of Local Government and the Premier's Department.

The costs of the activities of the PDAISC are met by the individual member agencies.

## **Underlying purpose of the Act**

With the benefit of involvement over a number of years in the implementation of the *Protected Disclosures Act 1994* (the PD Act), the PDAISC is strongly of the view that the Act requires significant amendment to facilitate achievement of its underlying purpose of exposing serious problems in the public sector by encouraging and facilitating the reporting of those problems by public sector staff. The essential reason for this is that in practice the PD Act makes little or no provision for practical 'protection' or other forms of redress for whistleblowers. The PDAISC is of the view that major structural changes to the PD Act in three different areas could help to change this situation:

- redress for whistleblowers
- statutory obligations on agencies
- establishing a protected disclosures unit to provide agencies with advice and support..

To some extent the changes discussed are alternative solutions to practical problems with the current Act, but could also be considered as different components of a comprehensive set of reforms. One category of redress for whistleblowers, for example, could be to give them the right to take legal action to compel the agency concerned to comply with statutory obligations. An alternative or additional mechanism by which those obligations could be enforced is the creation of a scheme involving the notification of individual protected disclosure matters to a protected disclosures unit established within an oversight body such as the Ombudsman's office.

In this submission the PDAISC will discuss those three major areas of structural reform and a number of other specific issues. The following points will be covered:

1. Redress for whistleblowers
2. Statutory obligations on agencies
3. Protected disclosures unit.
4. Legal responsibility for ensuring an agency complies with its obligations
5. Nomination of a prosecuting authority
6. Proactive management of whistleblower/confidentiality
7. Director General of the Department of Local Government
8. Waste
9. Review provision of the Act
10. Other legislative schemes applying outside the public sector
11. The name of the Act

## 1. Redress for whistleblowers

Under the current system, a whistleblower who has been treated poorly as a result of making a disclosure has no options for redress under the PD Act except to start a private prosecution (under section 20) against a person who has taken detrimental action against them.

Since the commencement of the Act no such private prosecutions have been successful. There have been two (*Pelechowski v Department of Housing*; *McGuirk* cases). There have also been two prosecutions by NSW Police under s. 206 of the *Police Act 1990*, which is equivalent to s. 20 of the PD Act, neither of which has been successful.

Currently a whistleblower has no options under the PD Act to seek compensation for any damages they have suffered. There is also no provision in the PD Act for a whistleblower to take action to require the agency concerned to take reasonable steps to protect them from detrimental action, to deal with the protected disclosure appropriately or to give them support. The PD Act also does not provide a whistleblower with any options if the agency fails to take any of these actions.

Agencies have a common law duty of care towards their employees, and legal obligations under the *Occupational Health and Safety Act 2000* and industrial relations laws. Whistleblowers have some redress through these mechanisms, and there is at least one case where a whistleblower successfully sued his employer for breaching their common law duty of care (see *Wheadon v State of NSW*, NSW District Court, No. 7322 of 1998).

The PDAISC is of the view that for the PD Act to be effective, the system it establishes must, in and of itself, provide adequate statutory remedies for a whistleblower. An employee who has suffered as a result of making a protected disclosure should not be required to resort to trying to find a breach of another Act or a common law duty.

Importantly, employers should not be able to avoid legal liability because individual employees do not have the capacity or resources to seek legal advice about their common law options. The PD Act could be amended to simply codify the common law duties of employers. This would not burden agencies with additional legal responsibilities, but it would make it more practical for whistleblowers to become aware of and enforce their legitimate legal rights. It would also send a clear message to agencies that they must comply fully with their legal responsibilities.

Comparable legislation in other States and Territories provides a number of different specific remedies for whistleblowers. The PDAISC is of the view that consideration should be given to the inclusion of the following specific options for redress for a whistleblower in NSW:

- to start a private prosecution against any individual who takes detrimental action against them
- to take civil action against any individual who takes detrimental action against them (this would require the PD Act to establish the taking of detrimental action as a statutory tort) — the remedies would be the standard remedies available under tort law such as injunction and damages

- to take civil action to obtain a legal remedy to compel the agency to comply with its statutory obligations or to pay damages for breaching its statutory obligations (see section 2)— Some consideration would need to be given to how to define the party that bears this obligation. See section 4.

The PDAISC notes that an in-depth comparison of the differences between the NSW PD Act and other Australian and New Zealand legislation was recently conducted by the NSW Ombudsman and published in their issues paper, *The Adequacy of the Protected Disclosures Act to Achieve its Objectives* (April 2004).

## **2. Statutory obligations on agencies**

As with other systems intended to prevent people from hurting others, the PD Act should aim to not only provide whistleblowers with redress when they have suffered retribution, but should aim to prevent retribution from occurring in the first place.

The PDAISC has been active over the years in trying to educate agencies in the benefits of taking whistleblowers seriously and handling their disclosures sensitively and professionally. We have recently published a fact sheet for agencies outlining some of the critical aspects of handling these matters effectively (attached). It has also been important to point out to agencies the risk that they take if they do not handle these matters properly. Some of the worst cases have resulted in large-scale litigation, workplace disharmony and very little systemic improvement in response to the original complaints of the whistleblowers. Currently the PD Act requires an agency to do only three things when they receive a protected disclosure:

- to maintain confidentiality if possible (s. 22)
- to tell the whistleblower within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure (s. 27)
- to assess and decide what action should be taken in respect of the disclosure (by implication flowing from s. 27).

While section 14 contemplates a situation where an agency has established a procedure for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste, it does not require agencies to set up any such procedure. The PDAISC recently asked over 100 State agencies for a copy of their internal reporting policy. While the vast majority of agencies complied with this request, a number responded that they did not have one.

The PDAISC is of the view that consideration should be given to requiring agencies to establish a number of systems and to play an active role in protecting whistleblowers from retribution.

Because of the way certain public sector agencies have been established (see discussion in section 4), the PDAISC submits that placing these obligations on an individual office holder — an agency's 'CEO' — rather than on a 'public sector agency' may be preferable.

The PDAISC submits that the following obligations be included:

- to have in place an internal reporting system (that conforms to prescribed minimum standards) to facilitate the making of protected disclosures, to keep it up-to-date and to educate all staff and management about this system
- to have in place systems to protect whistleblowers once a protected disclosure has been made internally, or once they become aware that a protected disclosure has been made externally
- to investigate or deal with protected disclosures in accordance with the agency's internal reporting policy or with external guidelines to be prepared by a protected disclosures unit or an agency such as the Ombudsman
- to take reasonable steps to stop detrimental action from continuing once they become aware of it.

The PDAISC also submits that the obligation to keep a disclosure confidential should be amended to provide that if the CEO decides that the disclosure cannot practically be dealt with in a confidential way, then the CEO is under an obligation to take specific proactive management action to protect the whistleblower (see discussion in section 6).

The PDAISC observes that in some other jurisdictions agencies are under an ill-defined obligation to 'provide protection from detrimental action' (for example, see *Public Interest Disclosure Act 2003 (WA)*). This would mean that, no matter what reasonable measures an agency put in place to try to protect the whistleblower, the agency would still be in breach of their statutory obligation if someone nevertheless took detrimental action against the whistleblower. We are of the view that such a general obligation would be difficult to fulfil in practice, and is therefore unreasonable.

Instead, the PDAISC submits that some consideration should be given to comparable legislation in Tasmania and Victoria which links the obligations outlined above to an obligation to follow specific guidelines prepared and published by the State's Ombudsman's office (see s. 38 of the *Tasmania Public Interest Disclosures Act 2002* and ss. 68-69 of the *Victoria Whistleblowers Protection Act 2001*).

### **3. Protected disclosures unit.**

The PDAISC submits that simply placing statutory obligations on agencies will not necessarily be effective without providing for some kind of monitoring and review mechanism.

The PDAISC observes that in practice some agencies comply with their statutory obligations only after they have been sued for non-compliance. Others may comply to avoid the risk of being sued for non-compliance. This appears to be the case with the enforcement of federal discrimination law and industrial relations law, for example.

Similarly, agencies may comply with their statutory obligations under environmental protection laws or workplace safety legislation to avoid the risk of being fined for non-compliance by an enforcement agency such as the Environment Protection Authority or WorkCover.

The PDAISC submits that a more proactive compliance mechanism that could be considered is one of mandatory notification to a protected disclosures unit established in an oversight body such as the Ombudsman's office. This would apply to all public sector agencies except investigating authorities as defined in the Act, and NSW Police, which is already subject to oversight by both the Ombudsman and the PIC.

Two levels of intervention could be considered:

- case-by-case— requiring every agency to report every protected disclosure they received to the protected disclosures unit and how they handled them
- periodic reporting — requiring every agency to report to the protected disclosures unit periodically (eg twice a year) on all the protected disclosures they had received, and how they handled them.

The PDAISC observes that the Ombudsman has broad investigative powers which could be invoked in implementing such a scheme, whether it required case-by-case or periodic reporting.

The PDAISC also submits that consideration be given to giving the protected disclosures unit responsibility to:

- improve awareness of the Act in the public sector
- provide advice and guidance to agencies and their staff
- provide or coordinate training for agency staff who are responsible for dealing with disclosures
- coordinate the collection of statistics on protected disclosures
- monitor trends in the operation of the scheme
- provide advice to the Government or relevant agencies on Bills relating to matters concerning whistleblowing issues
- periodically report on its work to the Government and Legislature.

The PDAISC is of the view that two major benefits would arise from having some kind of mandatory notification scheme in conjunction with these other functions:

- firstly, it would give further incentive to agencies to comply with the PD Act, and give them formal guidance on how to do so
- secondly, the statistics collected would be more accurate than if they were provided only voluntarily, so those who are responsible for implementing the Act and the legislature would be provided with accurate information about how well the scheme is working.

In a recent survey of over 100 State agencies, agencies were asked about their experiences with protected disclosures. The majority of agencies wrote that they had had very little experience with handling these kinds of matters. The PDAISC is of the view that this illustrates a need for a formal, properly resourced, advisory body to help agencies through an unfamiliar situation, as and when the need arises. There was also a high demand for training in this area — much higher than the individual agencies of the PDAISC are able to service. Having a dedicated and funded protected disclosures unit would allow this training to be provided.



The PDAISC notes that the reports of the last two Parliamentary reviews of the PD Act recommended the establishment of such a unit in the Ombudsman's office.

#### **4. Legal responsibility for ensuring an agency complies with its obligations**

The public service is made up of a number of different organisational structures and legal entities. The PDAISC is aware of several entities that consist of an individual holding a statutory appointment, performing his/her functions with resources provided by another government agency. In legal terms, no separate 'agency' exists; just an office-holder and staff employed by another government agency (eg the Privacy Commissioner and the Valuer-General).

Another structural phenomenon is that of the 'mega-department', where agencies performing separate functions under separate pieces of legislation have merged into larger corporate entities, but still operate to a large extent as separate functioning units.

The PDAISC submits that some consideration be given to the different structures within the public service, including Boards and State-owned corporations, when determining exactly on whom statutory obligations (as discussed in section 2) should be placed. This is necessary for the purpose of enabling a whistleblower to determine which parties s/he can take legal action against (see section 1).

One option would be to place the obligation on the 'CEO' of an agency and then define it in a way which would make it clear that any person with responsibility for making sure an agency functioned effectively would be obliged to comply with the obligations under the PD Act. Certain responsibilities flowing from this obligation could be delegated by the 'CEO' to other staff in the agency (for example, see section 23 of the Western Australian *Public Interest Disclosure Act 2003*).

#### **5. Nomination of a prosecuting authority**

There are currently two offence provisions in the Act — see sections 20(1) and 28. However, there is no prosecuting authority given the responsibility of conducting prosecutions for these offences. The PDAISC is of the view that more effective prosecutions for these offences may be possible if a prosecuting authority is specified. We observe that a number of agencies in the State, including the Office of the Director of Public Prosecutions, NSW Police and/or the Crown Solicitor, do have certain prosecutorial functions.

#### **6. Proactive management of whistleblowers/confidentiality**

The PDAISC submits that the confidentiality provision in the PD Act should be amended to oblige agencies to proactively protect a whistleblower if they determine that the matter cannot be handled confidentially.

One way to give agencies practical guidance on this could be to include in the Act a list of proactive measures that agencies must comply with. However, as each case is different, it may be more practical to link this obligation to an obligation to follow guidelines to be prepared and published by a protected disclosures unit or the Ombudsman's office.

Please find attached a copy of *Protection of Whistleblowers: Practical Alternatives to Confidentiality* (2005) NSW Ombudsman, for information about some of the options that agencies may have to proactively protect a whistleblower from retribution.

The PDAISC observes that in some other jurisdictions agencies are placed under an obligation to assist a whistleblower to transfer to another government department if the whistleblower asks for it and this is the only practical means of protecting the whistleblower (see ss. 27-28 of the ACT *Public Interest Disclosure Act 1994* and s.46 of the Queensland *Whistleblowers Protection Act 1994*). Such an obligation may be of use when the culture within the agency is such that protecting someone from detrimental action is almost impossible or the person's reputation (once the disclosure is known by other members of staff) would be such that career advancement would be difficult.

### **7. Director General of the Department of Local Government**

Section 12B of the PD Act provides that to be protected by the Act, a disclosure by a public official to the Director General of the Department of Local Government must be a disclosure of information that shows or tends to show serious and substantial waste of local government money. A disclosure about any other subject matter will not be protected.

This has caused an anomaly about which the Director General has written to the PDAISC. A copy of his letter dated 30 June 2003 is attached. We have previously raised this issue with the Government. They responded that this was an issue that could be appropriately considered as part of this Parliamentary review.

As the Director General explained, he is authorised under Part 3 of Chapter 14 of the *Local Government Act 1993* to receive and investigate complaints that a person has or may have contravened Part 2 of Chapter 14. Part 2 imposes specific duties on councillors and other people associated with councils (such as general managers) to disclose any pecuniary interest they may have in matters.

Part 3 provides that:

- the Director General is responsible for notifying the Pecuniary Interest Tribunal of a decision to investigate a complaint or to refer a complaint for investigation to an authority (which is defined as the Ombudsman, ICAC, the Commissioner of Police or the Director of Public Prosecutions)
- the Director General must present a report to the Tribunal at the conclusion of any such investigation
- if an authority receives a complaint directly, it is authorised to refer the complaint to the Director General if the complaint involves a possible contravention of Part 2.

We share the Director General's concerns that a public official who complains directly to him under Part 3 of Chapter 14 will not be protected under the PD Act. Breaches of pecuniary interest disclosure requirements are serious matters and public officials should be encouraged to come forward if they suspect there has been a breach, without fear of reprisals.

In considering this matter, we would also draw your attention to Part 5 of Chapter 13 of the Local Government Act, which authorises the Director General to receive and investigate complaints about *any* conduct of a council, a delegate of a council, a councillor or a council staff member. A public official who complains to the Director General under this Part will also not be protected under the PD Act.

The PDAISC acknowledges that not all complaints made under Part 5 of Chapter 13 should attract the protection of the PD Act, as they may be about trivial matters, for example. The PDAISC also acknowledges that the Director General may not be an appropriate person to handle complaints involving allegations of corrupt conduct. However, we are of the view that if a complaint is about serious maladministration or misbehaviour, it should be treated the same whether it is made to the Director General under this Part or under the PD Act to the Ombudsman, ICAC, a general manager of a council or otherwise in accordance with a council's internal reporting procedure.

We therefore submit that consideration be given to amending section 12B of the PD Act to provide that a disclosure made by a public official to the Director General of the Department of Local Government will be protected if:

1. it is a disclosure of information concerning a council, a councillor, a council delegate or a member of council staff, and
2. the information shows or tends to show:
  - maladministration or a serious and substantial waste of local government money
  - a contravention of Part 2 of Chapter 14 of the *Local Government Act* (the pecuniary interest disclosure requirements)
  - misbehaviour of a councillor (as defined in section 440F of the *Local Government Act*).

## **8. Waste**

There is no definition of the terms 'waste' or 'serious and substantial waste' in the Act. It is our experience that this leads to confusion about the application of the Act to disclosures that relate to waste issues.

## **9. Review provision of the Act**

The Act was assented to on 12 December 1994 and commenced in March 1995, more than ten years ago. Section 32 requires that the Act be reviewed one year after the date of assent, and then every two years thereafter. In theory the Act should so far have been reviewed five times. In practice, it has only been reviewed twice, in 1996 and in 2000.

The PDAISC is of the view that section 32 should be amended to require the Act to be reviewed every five years instead, as this would provide Parliament with a more realistic and practical timetable. We have previously raised this issue with the Government. They responded that this was an issue that could be appropriately considered as part of this Parliamentary review.

### **10. Other legislative schemes applying outside the public sector**

Earlier in 2005 the government introduced a bill to amend the *Registered Clubs Act 1976*. One of the amendments proposed was to insert sections 43B and 43C into the Act. We were concerned that:

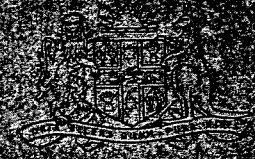
- none of our members had been consulted in the development of this policy, and
- the proposals attempted to replicate some of the provisions in the PD Act without addressing the weaknesses in that Act.

We wrote to The Cabinet Office with our concerns by letter dated 11 February 2005. A copy of that letter and the response from The Cabinet Office (dated 28 April 2005) is attached.

### **11. The name of the Act**

The PDAISC submits that some consideration be given to changing the name of the Act to the Public Interest Disclosures Act, to make it abundantly clear that the focus of the Act is on disclosures of public interest issues and facilitating actions taken in the public interest.

# Protected disclosures fact sheet



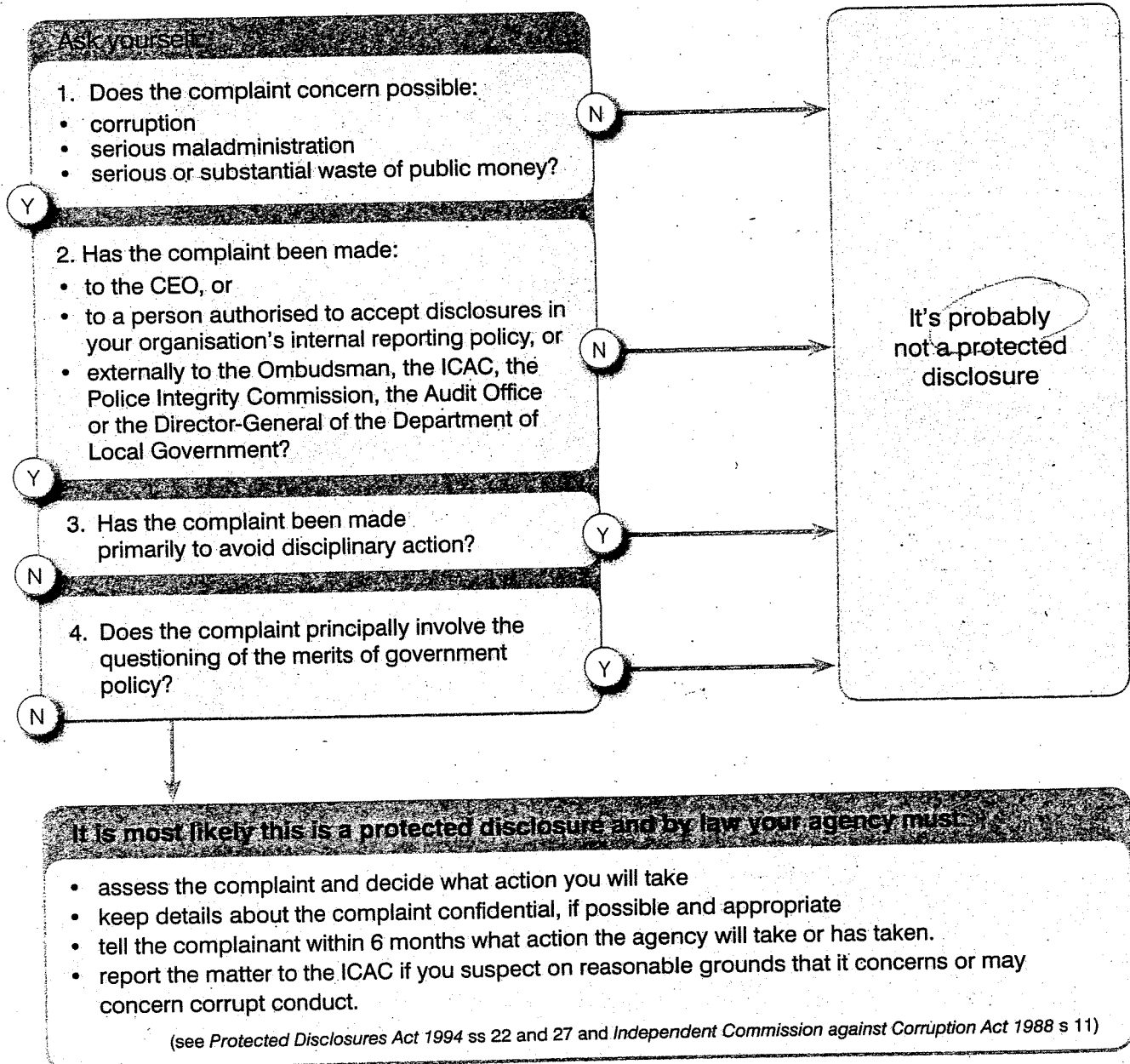
Department of Local Government

This fact sheet sets out a simple step-by-step guide to deciding if the Protected Disclosures Act 1994 applies to a complaint and gives some practical tips on how to manage protected disclosures. It is designed to be used by CEOs, General Managers, senior managers and protected disclosures coordinators in public sector agencies.

## AM I DEALING WITH A PROTECTED DISCLOSURE?

### THE SCENARIO:

**A member of staff complains to you about something to do with your organisation or your staff.**



## HOW DO I MANAGE THIS SITUATION?

**WHETHER OR NOT THE COMPLAINT IS A 'PROTECTED DISCLOSURE' UNDER THE PD ACT, YOU SHOULD:**

### 1. SUPPORT THE COMPLAINANT

If the complainant genuinely believes there is something seriously amiss with your organisation and is sufficiently concerned to bring this to your attention, the agency has a responsibility to:

- take the person seriously and treat them with respect
- give the person support in what is commonly a stressful situation (this includes keeping them informed of what is being done with their complaint)
- protect the person from suffering repercussions for coming forward (this includes dealing with the matter discreetly if not confidentially, and responding swiftly and fairly to any allegations that the person has in fact suffered retribution).

### 2. BE FAIR TO ANY PERSON WHO HAS BEEN ACCUSED OF WRONGDOING

The process of finding out the truth of allegations should be impartial. This means you do not take sides and do not have a preconceived outcome in mind.

Any person who has been accused of wrongdoing must be given an opportunity to put forward their response to any allegations made against them. However, he or she does not have a right to have any information about who has made the allegations (except where the matter results in disciplinary or criminal proceedings).

### 3. REMEMBER THE PEOPLE INVOLVED ARE EMPLOYEES

Be mindful of your obligations under occupational health and safety legislation, your common law duty of care, and your obligations to comply with principles of good conduct and administrative practice.

### 4. DON'T FORGET INNOCENT BYSTANDERS

If a matter cannot be dealt with confidentially, be vigilant in preventing gossip, innuendo and paranoia amongst staff who find out that something is going on. Explain to potential witnesses why they are being interviewed or give them some information about the process to contain suspicion and fear. Remember that retribution is sometimes taken against a person suspected of causing trouble, who may not be the person who made the disclosure.

### 5. USE THE COMPLAINT AS CONSTRUCTIVE FEEDBACK

Complaints from staff, just like those from outsiders, often contain valuable information that can be used to fix problems or improve the way your organisation operates.

Try to find out the truth of the allegations. Do not be tempted to dismiss a complaint from a disgruntled staff member who is perceived as a troublemaker. Often it is only the agitators who will speak out. Others may also see problems but have an interest in keeping the peace.

Deal with any problems that are identified as a result of the complaint or its investigation.

Keep good and comprehensive records of the making of the disclosure, how it was handled and the result.

### 6. LEARN FROM THIS EXPERIENCE

Do you need to implement or improve your policies or procedures to make these complaints easier to handle in the future?

Do you need to educate staff and management to prepare them for the challenges that these situations present and to deter people from taking retribution against people who report suspected problems?

Read the *Protected Disclosures Guidelines*, NSW Ombudsman.

Ask for help and support.

For advice and training for senior managers, contact the Ombudsman.

If you require assistance in developing in-house training programs for staff or managers on protected disclosures, contact the ICAC.

### CONTACT

#### NSW Ombudsman

Tel: 9286 1000 or 1800 451 524 (toll free)

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

#### Independent Commission Against Corruption

Tel: 8281 5999 or 1800 463 909 (toll free)

Email: [icac@icac.nsw.gov.au](mailto:icac@icac.nsw.gov.au)

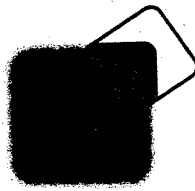
Web: [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

#### Department of Local Government

Tel: 4428 4100

Email: [dlg@dlg.nsw.gov.au](mailto:dlg@dlg.nsw.gov.au)

Web: [www.dlg.nsw.gov.au](http://www.dlg.nsw.gov.au)



## PROTECTION OF WHISTLEBLOWERS

### PRACTICAL ALTERNATIVES TO CONFIDENTIALITY

#### Confidentiality: good in theory

The long held and widespread view has been that the best protection that can be provided for a whistleblower is confidentiality. This is often the first thing whistleblowers themselves will ask for. The reason is obvious. If no one knows you 'dobbed', you cannot suffer reprisals.

The *Protected Disclosures Act* provides that investigators, agencies and staff to whom a protected disclosure is referred should not disclose information that might identify or tend to identify the person who made the disclosure, other than in certain specified circumstances (s. 22).

Where a member of staff has 'blown the whistle', if practical and appropriate, it is certainly best practice that confidentiality be maintained by the agency, all responsible staff and the whistleblower. There are three main things to keep confidential:

- the fact of the disclosure
- the identity of the whistleblower, and
- the allegations themselves (including individuals' names).

In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. Certainly this would provide the most effective protection for a whistleblower.

The likelihood of the identity of the whistleblower being disclosed or remaining confidential often determines the appropriate approach that should be adopted by CEOs and relevant managers to protect whistleblowers.

#### Confidentiality: problems in practice

The issue of confidentiality for whistleblowers is a particularly vexed question. In practice two main problems arise with expecting confidentiality to protect a whistleblower from retribution. Firstly, an organisation may not be able to realistically guarantee confidentiality. It is often difficult to make even preliminary enquiries into allegations without alerting someone in the organisation to the fact that allegations have been made. Further, to ensure procedural fairness, anyone who is the subject of allegations should be given an opportunity to answer them.

Once it is known that an internal disclosure has been made, it is often not difficult to surmise who has blown the whistle. Sometimes the whistleblower has made confidentiality even more difficult by previously voicing their concerns about an issue, or their intention to complain, before making a formal disclosure.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can be certain those measures have succeeded. Human error and indiscretion cannot be discounted. The agency may not be aware or be able to predict that certain information they think can be revealed (eg allegations that certain systems are failing) is sufficient to identify the whistleblower. Someone may have simply seen the whistleblower approaching management to report his/her concerns.

In these circumstances, if the whistleblower subsequently suffers detrimental action from the person who was the subject of their allegations, it would be open to suspect this was a result of the person finding out and taking retribution. However, this may be difficult to prove. Indeed, in NSW we have seen a case where a person accused of taking 'detrimental action' against a whistleblower has been able to use the agency's attempts to guarantee confidentiality to argue that he/she could not have known about the disclosure, and therefore, could not have taken that action in reprisal for the disclosure.

A further complication arises in those cases where people find out that a disclosure has been made and take retribution against the wrong person; a person who did not actually make the disclosure. A system for protecting whistleblowers should also aim to prevent this kind of behaviour taking place.

## Practical alternatives to confidentiality

The likelihood of the identity of the whistleblower being disclosed or remaining confidential often determines the appropriate approach that should be adopted by CEOs and relevant managers to protect whistleblowers. Experience indicates that pro-active management action is often the only practical option available to protect whistleblowers.

As in practice an expectation of confidentiality for a whistleblower is often not realistic, it is important that agencies determine at the outset whether or not:

- the whistleblower has telegraphed an intention to make the disclosure or has already complained to colleagues about the issue
- the information contained, or issues raised, in the disclosure can readily be sourced to the whistleblower
- the issues raised in the disclosure can be investigated without disclosing information that would or would tend to identify the whistleblower
- there is a high risk of any subject of a disclosure surmising who made the disclosure and taking detrimental action and, if so, whether publicly disclosing the whistleblower's identity would:
  - a) not expose them to any more harm than they were already at risk of, and
  - b) prevent any person who subsequently took retribution from sustaining an argument that they did not know the identity of the whistleblower.

If confidentiality is not a realistic and appropriate option, then consideration must be given by agencies to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.

While certain minimum steps should be taken by management and persons responsible for dealing with disclosures in all cases when a person makes an initial disclosure, additional approaches must be adopted depending on whether:

- the identity of the whistleblower is and is likely to **remain confidential**, or
- the identity of the whistleblower is known or is likely to **become known** as the disclosure is dealt with.

These approaches can be grouped under the following three headings.

**If confidentiality is not a realistic and appropriate option, then consideration must be given by agencies to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.**

### A. *The minimum steps to be taken in all cases, whether or not the identity of the whistleblower has or will become known:*

#### 1. **Supporting the whistleblower**

Agencies and their senior management should provide active support to the whistleblower, including:

- an assurance that he or she has done the right thing
- an assurance that management will take all reasonable steps necessary to protect him or her
- giving the whistleblower advice about counselling or support services that are or can be made available to assist him or her, and
- appointment of a senior officer as a mentor (in consultation with the whistleblower) to provide moral support and positive reinforcement to the whistleblower, and to respond appropriately to any concerns the whistleblower might raise.

*[Note: The mentor should not be any person appointed to investigate the disclosure or who will make decisions for the agency based on the outcome of any such investigation.]*

#### 2. **Guidance**

Guidance should be given to the whistleblower as to what is expected of him or her (eg, not to 'blow their own cover', not to draw attention to themselves or their disclosure, not to alert any subjects of the disclosure that a disclosure has been made about them, to assist any person appointed to investigate their allegations, etc).

#### 3. **Information**

Information should be given to the whistleblower about how the disclosure is to be dealt with, the likely time periods involved, and the nature of any ongoing involvement of the whistleblower in the process (ie, provision of further information to investigators, provision of progress reports and information as to the outcome of any investigation to the whistleblower, etc).

#### 4. **Responsibility**

An appropriate senior member of staff of the agency should be given responsibility for ensuring that the disclosure is dealt with appropriately and expeditiously.

#### 5. **Prompt investigation**

All reasonable steps should be taken by agencies to ensure that the disclosure and related matters can be dealt with expeditiously including, where there is to be an investigation:

- approval of terms of reference and realistic deadlines for investigation
- appointment of one or more investigators
- provision of necessary resources
- provision of necessary powers/authority to investigators, and
- assessment of the report and recommendations arising out of the investigation.

*[Note: This includes properly and adequately dealing with allegations made by the whistleblower as well as any allegations made against the whistleblower.]*



## 6. Enforcement

Agencies should ensure that they appropriately respond to any actual or alleged detrimental action taken against the whistleblower, for example by:

- investigating allegations of detrimental action
- warning or counselling staff
- taking disciplinary action, or
- initiating criminal proceedings or referring a matter to the DPP.

### B. The approaches available where the identity of the whistleblower is and is likely to remain confidential:

#### 1. Secrecy

All reasonable steps should be taken by agencies and staff responsible for dealing with disclosures to limit the number of people who are aware of the identity of the whistleblower or of information that could tend to identify the whistleblower.

Consideration should be given to the capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the whistleblower or to take actions detrimental to the success of any investigation (such as tampering with evidence or improperly influencing witnesses). The strict legal requirement to maintain confidentiality should be impressed on anyone who needs to be told about the disclosure.

#### 2. Procedures for maintaining secrecy

The importance of being discreet and the possible consequences if they are not, should be emphasized to the whistleblower (eg, not to 'blow their own cover', not to draw attention to themselves or their disclosure, not to alert any subjects of disclosure that a disclosure has been made about them, etc).

Procedures should be put in place to make sure the whistleblower can communicate with investigators without alerting others to the investigation. For example, the whistleblower should be told how and by whom he or she will be contacted should further information be required and how and who to contact if he or she wishes to obtain further advice or information about how the disclosure is being dealt with.

#### 3. Appropriate investigation techniques

Consideration should be given to which approaches to dealing with the allegations are least likely to result in the whistleblower being identified, while still being effective, eg:

- arranging for a 'routine' internal audit of an area, program or activity that covers, but is not focused solely on, the issues disclosed
- not identifying any 'trigger' or reasons for an audit or investigation
- alluding to a range of possible 'triggers' or reasons for an audit or investigation, without confirming any particular one or acknowledging that a protected disclosure has been made, and/or

- where it might be expected that everyone in a workplace would be interviewed, ensuring that the whistleblower is also called for an interview (even though they have already provided their information) and, where appropriate, directing him/her to provide certain information.

An investigation, or a line of investigation, might need to be avoided or discontinued where there is potential for the identity of the whistleblower to become known, and the risk of serious detrimental action being taken far outweighs any likely benefit from continuing.

### C. The approaches available where the identity of the whistleblower is known or is likely to become known as the issues are dealt with:

[Note: The approaches set out below should be adopted either at the outset if the identity of the whistleblower is known, or at the appropriate stage in any investigation where the identity of the whistleblower is likely to become known, will need to be disclosed, or actually becomes known for whatever reason.]

#### 1. Proactive management intervention

The work colleagues of the whistleblower and any subject(s) of the disclosure should be informed:

- that a disclosure has been made
- of the substance of the allegations identified in the disclosure (preferably without identifying any subject(s) of the disclosure)
- of the identity of the whistleblower
- that management of the agency, from the CEO down, welcomes the disclosure, will support the whistleblower and will not tolerate any harassment or victimisation of the whistleblower
- if the disclosure appears to be a protected disclosure, that protections in the *Protected Disclosures Act* would be expected to apply
- of the likely criminal, disciplinary or other management related repercussions should anyone take or threaten detrimental action against the whistleblower, and
- how the disclosure is likely to be dealt with (in general terms only).

[Note: Preferably the prior agreement of the whistleblower should be obtained before this is done, but where this is not possible the whistleblower should at least be given prior warning].

#### 2. Responsibility for supporting and protecting the whistleblower

The direct supervisor and line managers of the whistleblower should be made responsible for:

- providing on-going support for the whistleblower (including after any investigation is over), and
- protecting the whistleblower from harassment, victimisation or any other form of reprisal by the subject(s) of disclosure or any other employees.

### 3. Advice and training

Relevant staff (in particular the colleagues of the whistleblower and any subject(s) of disclosure) should be given appropriate advice and/or training in relation to the importance of whistleblowing, the relevant provisions of the agency's internal reporting policy and the *Protected Disclosures Act*, and the reasons why it is in the interests of staff, management and the agency to protect whistleblowers.

### 4. Relocation or transfer

At the whistleblower's request (for example if the whistleblower fears for their personal safety) consideration may need to be given to whether it is necessary and practicable to relocate the whistleblower within the agency, transfer the whistleblower to an equivalent position in another agency, or to assist the whistleblower to obtain appropriate alternative employment. If such action is taken, it should be made clear to other staff that this was at the whistleblower's request and he or she is not being punished.

Note: The material in this brochure expands on the relevant material in *Protected Disclosures Guidelines* (5<sup>th</sup> edition), NSW Ombudsman, 2004 (at A.4.6.3, C.1.5.3 & C.1.5.4).

## Further information

- *Protected Disclosures Guidelines* (5<sup>th</sup> edition), NSW Ombudsman, May 2004
- *Thinking of Blowing the Whistle?* NSW government (brochures for State agencies and councils)
- *Protected disclosures fact sheet*, NSW government (for use by agencies dealing with protected disclosures)

## Contact us for more information

Level 24 580 George Street  
Sydney NSW 2000

Inquiries 9–4 Monday to Friday  
or at other times by appointment

General inquires: 02 9286 1000

Toll free (outside Sydney metro): 1800 451 524

Tel. typewriter (TTY): 02 9264 8050

Facsimile: 02 9283 2911

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

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Department of Local Government  
5 O'Keefe Avenue NOWRA NSW 2541  
Locked Bag 3015 NOWRA NSW 2541


OUR REFERENCE  
YOUR REFERENCE  
CONTACT

AF: 96/0414

Mr D Riordan  
4428 4190

Mr Chris Wheeler  
Chair  
Protected Disclosures Act Steering  
Committee  
C/-NSW Ombudsman  
580 George Street  
Sydney NSW 2000

30 JUN 2003

  
Dear Mr Wheeler

I am writing to you following informal discussions at the Protected Disclosures Act Steering Committee meeting held on 15 May 2003 about possible amendments to the Protected Disclosures Act 1994.

As you know, as Director General, I am an authorised investigating authority in relation to protected disclosures relating to serious and substantial waste of local government monies. You will also be aware that under Part 3 of Chapter 14 of the Local Government Act 1993, I am authorised to receive and investigate complaints that a person has or may have contravened Part 2 of Chapter 14.

It is somewhat anomalous, however, that should a public official make such a complaint directly to me, that public official currently will not have the protections of the Protected Disclosures Act 1994. It also seems somewhat inefficient that in order to do so, the public official would need to complain of the matter to the NSW Ombudsman or the Independent Commission Against Corruption or to a public official under section 14 of the Protected Disclosures Act 1994. I appreciate that such matters would routinely be referred to my attention. Nevertheless, it is more appropriate that public officials were able to make such complaints directly to me.

This is an important issue, not least because you will be aware that senior council staff and councillors face the real risk of detrimental action in making pecuniary interest complaints. Therefore, I ask that your Committee consider this request and advise the Department of its views.

I look forward to your reply.

Yours sincerely

  
Garry Payne  
Director General

# PROTECTED DISCLOSURES STEERING COMMITTEE

Contact: Chris Wheeler  
Telephone ☎: 9286-1004  
Our reference: ADM/442P06

Level 24  
580 George Street  
SYDNEY NSW 2000  
Tel: 9286 1000  
Fax: 9283 2911

11 February 2005

Mr R B Wilkins  
Director-General  
The Cabinet Office  
Level 39, Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000

Dear Mr Wilkins

## **Registered Clubs Legislation Amendment Bill 2004 - provisions about detrimental action**

I write in my capacity as Chair of the Protected Disclosures Act Implementation Steering Committee.

Currently there is before the Legislative Council a bill to amend the *Registered Clubs Act 1976*. One of the amendments proposed is to insert sections 43B and 43C into the Act, which read as follows:

### **43B Protection of employees and members of governing body who disclose information to Director**

- (1) A person or a registered club that takes detrimental action against an employee of a registered club, or a member of the governing body of a registered club, that is substantially in reprisal for the employee or member disclosing information to the Director concerning conduct of the club or of a person that is or may be the subject of an investigation, inquiry or complaint under this Act is guilty of an offence.

Maximum penalty: 100 penalty units.

- (2) It is a defence to an offence under subsection (1) if the defendant proves that the disclosure was frivolous or vexatious
- (3) An employee or a member of a governing body is not subject to any liability for disclosing information referred to in subsection (1) to the Director and no action, claim or demand may be taken or made of or against the employee or member of the governing body for making the disclosure.

- (4) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the employee or member concerned.
- (5) In this section, *detrimental action* means action causing, comprising or involving any of the following:
  - (a) injury, damage or loss,
  - (b) intimidation or harassment,
  - (c) discrimination, disadvantage or adverse treatment in relation to employment,
  - (d) dismissal from, or prejudice in, employment,
  - (e) loss of office as a member of the governing body of a registered club (other than at a general meeting of the club),
  - (f) disciplinary proceedings.

#### **43C False or misleading disclosures**

An employee of a registered club, or a member of the governing body of a registered club, must not disclose information to the Director concerning conduct of the club or of a person that the employee or member knows is false or misleading in a material respect.

Maximum penalty: 100 penalty units.

In the second reading speech of the Minister for Gaming and Racing, he stated that these amendments were based on provisions in the *Protected Disclosures Act 1994*.

The amendments represent a significant policy expansion, from a focus on the public sector to supporting the insider reporting of wrong conduct by private sector organisations to their government regulators.

The members of the Committee have considerable expertise in protected disclosures and experience in the practical implementation of the scheme, however none of our agencies was consulted or asked to contribute to the debate over this new policy. We would like to raise some of the concerns we have about this new policy for your attention.

The first consideration is consistency. Most private organisations are regulated by various government departments such as Workcover, the Environment Protection Authority and the Department of Fair Trading. It would seem reasonable that a policy to provide protections to whistleblowers within registered clubs would be developed more generally in the context of whistleblowing to any government regulator.

Our second concern is that sections 43B and 43C have been proposed without any provision for whistleblowers who approach someone other than the Director of the Department of Gaming and Racing. You would be aware that under the Protected Disclosures Act, a whistleblower will be protected if they make their disclosure to a number of alternative recipients, including the various watchdog bodies and the CEO of their agency.

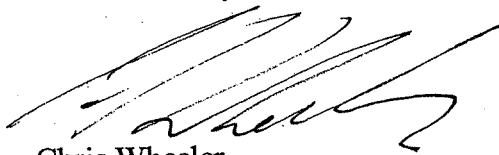
This aims to ensure that those loyal employees who place their trust in management to fix the problems they allege, will be protected. In our experience, in many cases employees who report their concerns to management suffer retribution rather than praise.

The Committee feels it would be important for this new scheme to provide protection for a whistleblower who reports their concerns to the governing body of their registered club or to staff of the Department of Gaming and Racing, including enforcement officers, investigators and staff who handle telephone inquiries. It appears to be unnecessarily restrictive to provide that *only* those disclosures to the Director of the Department, but not to any other staff, will be protected.

Finally, we are concerned that there is no provision proposed to require registered clubs or the Department of Gaming and Racing to set up systems to protect and support whistleblowers after they have disclosed information to the Director. In the Committee's experience, one of the failings of the Protected Disclosures Act is that there is no legislative requirement for public sector agencies or their CEOs to protect whistleblowers in a practical way. Many whistleblowers therefore suffer for their actions in circumstances which could have been avoided, which in turn further discourages genuine whistleblowers from coming forward. It is possible that the same thing will happen to whistleblowers in the registered clubs industry if the amendments remain as they are currently drafted.

We would recommend that some consideration be given to the matters we have raised. Should you wish to discuss these matters I can be contacted directly on 9286-1004.

Yours sincerely

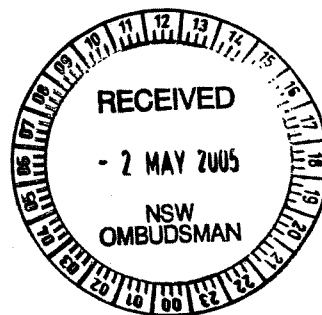


Chris Wheeler

**Deputy Ombudsman**



THE CABINET OFFICE  
NEW SOUTH WALES



Mr Chris Wheeler  
Deputy Ombudsman and  
Chair, Protected Disclosures Steering Committee  
Level 24, 580 George Street  
SYDNEY NSW 2000

28 APR 2005

Dear Mr Wheeler

I refer to your letter regarding the *Registered Clubs Legislation Amendment Bill 2004*.

Please be advised that the NSW Government now intends to withdraw this Bill. As some of its provisions may be carried forward into future legislation, however, I have forwarded your letter to the Minister for Gaming and Racing for information.

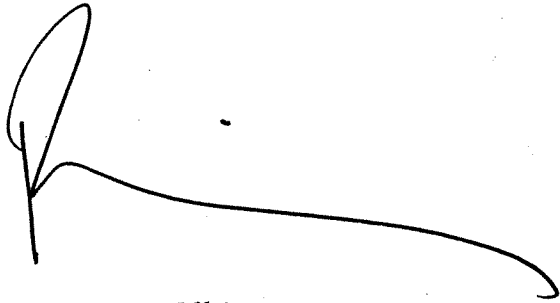
While your Committee's comments are appreciated and have been noted, it is important to recognise that the detrimental action provisions in the *Registered Clubs Legislation Bill 2004* were designed to deal with specific corruption concerns within a particular industry of the private sector. Given the specific nature of the concerns, the introduction of a broader regime applying to all private sector organisations in respect of government regulators is not supported at the current time.

Further, the difference in approach in the Bill from the public sector model reflects the different circumstances that these provisions are designed to address.

The issue you raise about the absence of a legislative requirement for a system to support whistleblowers should be raised in the context of the review of the *Protected Disclosures Act 1994*. It is anticipated that this review will be undertaken shortly by the Committee on the Independent Commission Against Corruption. Inclusion of the changes you have suggested would pre-empt that review.

Thank you for bringing your Committee's comments to my attention.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a long, sweeping horizontal line that ends in a small hook.

Roger B Wilkins  
Director-General



RPDA 043

ICC 166  
C06/191

Acknowledged  
AP  
20/1/2006



NEW SOUTH WALES

Minister for Police  
Leader of the House



ICAC COMMITTEE

20 JAN 2006

RECEIVED  
MT 3706

Mr Ian Faulks  
The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

17 JAN 2006

Dear Mr Faulks,

I refer to the review into the *Protected Disclosures Act 1994*.

NSW Police supports proposals 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the submission made by the Protected Disclosures Act Implementation Steering Committee (PDAISC).

However, NSW Police does not support proposal number 1 (Redress for whistleblowers) for the following reasons:

- **The *Police Act 1990* contains existing protections for internal whistleblowers in addition to those provided under the *Protected Disclosures Act*.**

NSW Police has an Internal Witness Support Unit which provides support for internal witnesses and those who make protected disclosures. Section 169A of this Act provides protection to complainants by stating that a member of NSW Police must not disclose the identity of a complainant unless the disclosure fits certain exemptions. In addition, under section 206 of the *Police Act*, it is an offence for a police officer to take detrimental action against another police officer who has made a protected allegation under the *Police Act* or any other Act, including the *Protected Disclosures Act*.

- **Opportunities for redress for whistleblowers already exist under the *Occupational Health and Safety Act 2000*.**

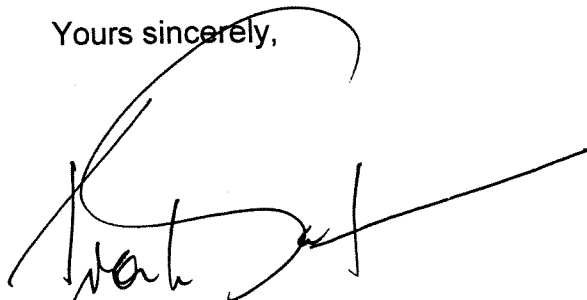
Under this Act, agencies have a common law duty of care towards their employees, and it provides for a whistleblower the opportunity for redress by suing an employer for breach of care.

- **There are no specific details (jurisdiction of claims/monetary limits of compensation) in regards to the proposed codified protection.**

Please contact Ms Cathy Chang, Policy Assistant, on telephone 8263 6289 or [chan1cat@police.nsw.gov.au](mailto:chan1cat@police.nsw.gov.au) should you have any further questions.

I thank you for the opportunity to comment.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Frank Sartor', with a long horizontal stroke extending to the right.

**FRANK SARTOR MP**  
**Acting Minister for Police**

Acknowledged 15/2/06  
AP

RPDA 044



NEW SOUTH WALES

The Hon Frank Sartor MP  
Minister for Planning  
Minister for Redfern Waterloo  
Minister for Science and Medical Research  
Minister Assisting the Minister for Health (Cancer)



ICAC COMMITTEE

10 FEB 2006

RECEIVED

D05/3113

ICC 166  
C06/354

7 FEB 2006

The Committee Manager  
Committee on the Independent Commission  
Against Corruption  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Dear Sir

I refer to correspondence from the Hon. Kim Yeadon MP, dated 25 May 2005, addressed to the former Minister for Infrastructure and Planning, the Hon Craig Knowles MP a copy of which is enclosed for you convenience, and note that a review is being undertaken of the Protected Disclosures Act 1994 (the PDAct). I note that the Minister was invited to make a submission for the purpose of the review on behalf of the Department of Infrastructure, Planning and Natural Resources (the Department of Planning). I am pleased to advise that the Department of Planning has undertaken a review of the PDAct and the implementation of its policy objectives. I wish to make the following comments:

The PDAct commenced in 1994. The object of the PDAct is "to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and serious waste in the public sector".

The issues which require comment are as follows:

1. *Is the Department aware of the Protected Disclosures Act;*
2. *At what stage of implementation are the systems for reporting protected disclosures;*
3. *What training or information strategies have been put in place to publicise the Protected Disclosures Act;*
4. *What problems has the Department encountered in responding to the Protected Disclosures Act;*
5. *Are there any resources or assistance that the Department considers would be helpful in responding to the Protected Disclosures Act.*
6. *Does the size of the Department and structure ie. centralised or regionalised affect the way that the Department has responded to the Protected Disclosures Act.*

## Issues

### **Issue 1 Is the Department aware of the Protected Disclosures Act?**

The Department is aware of the PDAAct, as were the Department's predecessors. It has endeavoured to raise awareness of the legislation and of the protection offered. The Department has articulated its commitment to the aims and objectives of the PDAAct in two important documents, the *Fraud and Corruption Prevention Plan – Strategic Approach* (the FCPP) and the *Internal Reporting Policy* (the IRP)

### **Issue 2 At what stage of implementation are the systems for reporting protected disclosures?**

The Department has implemented a fraud and corruption prevention strategy and a reporting framework which deals with the PDAAct.

The FCPP deals with the issue of fraud and corruption generally, and has as its objective, the limitation of the Department's exposure to fraud and other corrupt conduct by encouraging a fraud and corruption resistant culture. The FCPP articulates the Department's stance in relation to such conduct and the expectations regarding behaviour of those within the Department. Section 7 of the FCPP deals specifically with protected disclosures and advises that it must be read in conjunction with the IRP.

The IRP deals exclusively with matters arising under the PDAAct. It sets out in plain English the purpose and object of the PDAAct, the sorts of disclosures that can be made under the PDAAct and the framework to implement the policy. The IRP lists officers who may handle protected disclosures and other alternative avenues for making protected disclosures. The IRP provides for the rights and protections of the person making the protected disclosure and those of the person whom is the subject of the protected disclosure. Finally, the IRP deals with matters relating to confidentiality, an exemption from release under the *Freedom of Information Act*, and notification procedures as a result of a protected disclosure.

### **Issue 3 What training or information strategies have been put in place to publicise the Protected Disclosures Act?**

The Department considers that the strategy is fully implemented, both the FCPP and IRP are available on the Department's intranet for staff to access. All information is available to those who wish to make a protected disclosure or who wish to find out more about it. In relation to training and information strategies, the Department has issued circulars and memoranda to staff when the legislation commenced and whenever the IRP has been updated. The *Code of Ethics and Conduct* specifically refers to the PDAAct in a section headed "Reporting Corrupt Conduct, Maladministration and Waste". In May and June of 2005, governance workshops informed staff of the IRP, and it is proposed as a component of the Department's new induction program. A number of corruption prevention seminars have been conducted in the regions by the Internal Audit Branch.

### **Issue 4 What problems has the Department encountered in responding to the Protected Disclosures Act?**

A problem that has been identified by the Department is the intentional or mistaken misuse of the PDAAct, in relation to allegations of harassment or as a means to air

internal grievances for conduct that falls short of that envisaged by the PDAct. This may be done by those who wish to gain the protections from reprisal that the PDAct offers. The Department has found some difficulty in convincing such persons wishing to claim the protections that they may not have made the sort of disclosure afforded protection under the PDAct. This creates a drain in time and resources used to investigate these other claims. Whilst the PDAct is not the appropriate avenue for investigating an harassment claim or personal grievance, these matters are recognised as important to the Department which has established separate procedures which specifically deal with them. This problem however is noted to be a problem that may be faced by any public sector organisation and it is not considered to be something particular to the Department.

**Issue 5 Are there any resources or assistance that the Department considers would be helpful in responding to the Protected Disclosures Act?**

It is suggested that the name of the PDAct is misleading and that if it were called the *Disclosures in the Public Interest Act*, as is the case in a number of other states and the United Kingdom, it would be clearer to those seeking protection that it was not to be used for personal grievances or harassment claims. Further, a lodgement form may assist in the screening of claims that fall outside of the PDAct and prompt the provision of all relevant information at the outset of the investigation. This would also allow the Department to identify any potential harassment claims or personal grievances that can be directed to the appropriate channels. This is the procedure that is used in Tasmania and Western Australia. A penalty for providing false or misleading disclosures as per section 28 of the PDAct should be noted on the form. This penalty could be widened to include a failure to assist with the provision of pertinent information for the investigation once the protected disclosure had been made.

**Issue 6 Does the size of the Department and structure ie. centralised or regionalised affect the way that the Department has responded to the Protected Disclosures Act?**

There are nominated protected disclosure officers representing the regions as well as Head Office, so the structure and location of the Department has had no significant impact on the operation of the PDAct or the Department's ability to respond. The Department has established an Internal Investigations Committee to assist in the investigation of allegations arising under the PDAct.

**Comment**

The *Protected Disclosures Act* provides our departmental officers with protection when making disclosures in relation to corrupt conduct, maladministration and serious and substantial waste in the public sector. The Fraud and Corruption Prevention Plan—Strategic Approach and the Internal Reporting Policy, adopted by the Department articulate the procedures to go about making a protected disclosure and articulate the Department's commitment to the prevention of such conduct.

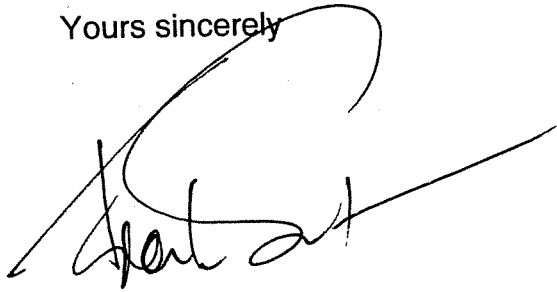
Consideration should be given as to how best to prevent any potential abuse of the system by people wishing to air grievances that are of a lesser nature. This may be achieved by the renaming the PDAct to *Disclosures in the Public Interest Act*, or

something similar to raise awareness of the "public interest" element of the protected disclosures, and introducing a lodgement form and tougher penalties.

In summary, the PDAct is fully implemented by the Department with the FCPP and the IRP. Investigations within the Department indicate that there is an issue of intentional or mistaken misuse of the legislation for matters that fall short of the conduct envisaged by the Act, and that would be better dealt with through normal grievance handling procedures.

Should you have any further enquiries about this matter, I have arranged for Ms Natasha Highman, Senior Legal Officer, Legal Services, to assist you. She can be contacted on telephone number (02) 9228 6237.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Frank Sartor', with a large, sweeping flourish above the name.

**Frank Sartor**

KFDN: 043

MINISTER FOR NATURAL RESOURCES  
MINISTER FOR PRIMARY INDUSTRIES  
MINISTER FOR MINERAL RESOURCES



NEW SOUTH WALES

ICC 166  
C06/1168

Level 33 Governor Macquarie Tower  
1 Farrer Place SYDNEY NSW 2000 AUSTRALIA  
Telephone: (02) 9228 3344  
Facsimile: (02) 9228 3452  
e-mail: macdonald.office@macdonald.minister.nsw.gov.au

Acknowledged  
M. Yeoh 27/4/2006

19 APR 2006



MPI05/3149

Mr Ian Faulks  
Committee Manager  
Committee on the Independent  
Commission Against Corruption  
Parliament of New South Wales  
Macquarie St  
SYDNEY NSW 2000

Dear Mr Faulks

Thank you for your letter concerning the Review into the *Protected Disclosures Act 1994*.

NSW Department of Primary Industries (NSW DPI) has dealt with a number of disclosures raised under the *Protected Disclosures Act 1994* in recent times. The Department has found the Legislation to be clear in its intent and easily understood by officers making disclosures. NSW DPI therefore supports the *Protected Disclosures Act 1994* in its present form.

Yours sincerely

  
IAN MACDONALD MLC



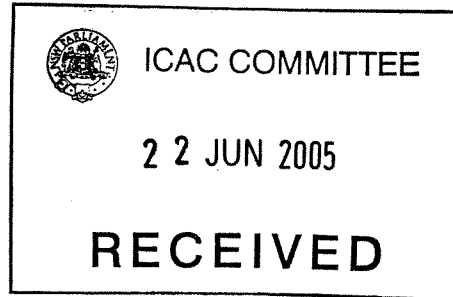
COMMENTS  
RADA: 046

ICC 166  
COS/2060

21 June 2005

File ref: PAC271  
Your ref: ICC 165

The Hon Kim Yeadon MP  
Chairman  
Committee on the Independent Commission  
Against Corruption  
Parliament House  
Macquarie St  
SYDNEY NSW 2000



Dear Mr Yeadon

Thank you for your letter of 25 May 2005 requesting comments from the Public Accounts Committee as part of your review of the *Protected Disclosures Act 1994*.

My comments relate to the powers of the Auditor-General to investigate allegations made by public officials into serious and substantial wastage of public money.

As you would be aware, the Public Accounts Committee reviews the effectiveness and efficiency of government activities on behalf of the Parliament. It has a close working relationship with the Auditor-General whose reports provide one of the main sources of information for the Committee's investigations.

The *Protected Disclosures Act* protects officials if they disclose information to the Auditor-General. He and his staff are empowered to investigate such complaints in accordance with complementary provisions in Division 7 of the *Public Finance and Audit 1983*.

These powers are important to the operation of accountability arrangements because they can help in identifying areas of inefficiency which may not have been apparent through the normal auditing process.

The Committee notes that the current provisions enable the Audit Office to use considerable flexibility in determining the appropriate response in dealing with issues raised in protected disclosures. If warranted, the Auditor-General can report on particular issues to Parliament such as the report on allegations of mismanagement at the University of New South Wales Education Testing Centre in 2001. This investigation led to significant enhancements to governance and accountability arrangements at the Centre. The Committee notes that the Auditor-General has not chosen to report on these issues since 2003.

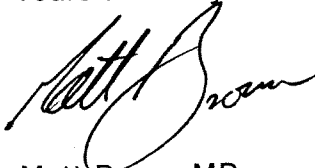


Protected disclosures can also be indicators of systemic problems that could be addressed by performance audits and subsequent follow-up inquiries by the Public Accounts Committee. Recent examples of topics that originally arose as protected disclosures to the Auditor-General are the Committee's reports on academics' paid outside work and ambulance response times from 2004.

We believe the current provisions meet the policy objectives of the legislation and these objectives continue to be important to the effective administration of New South Wales.

I look forward to the outcome of your review.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Matt Brown', written in a cursive style.

Matt Brown MP  
Chairman

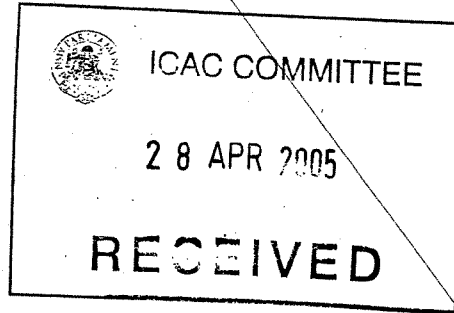
LCC 166  
C05/1255  
RPDA 002



NSW Ombudsman

26 April 2005

Mr Kim Yeadon, MP  
Chairman  
Committee on the Independent Commission  
Against Crime  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000



Level 24 580 George Street  
Sydney NSW 2000  
Phone 02 9286 1000  
Fax 02 9283 2911  
Tollfree 1800 451 524  
TTY 02 9264 8050  
Web www.ombo.nsw.gov.au  
ABN 76 325 886 267

Acknowledged  
M Yeadon 29/4/2005

Dear Mr Yeadon

**Re: Review of the *Protected Disclosures Act 1994***

I note that Parliament has resolved that the review under s.32 of the *Protected Disclosures Act* be referred to your Committee, to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

To assist the Committee's deliberations I enclose certain background material, including copies of:

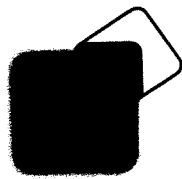
- *Protected Disclosures Guidelines* (5<sup>th</sup> edition), 2004, NSW Ombudsman
- *Issues Paper: The adequacy of the Protected Disclosures Act to achieve its objectives*, April 2004, NSW Ombudsman
- relevant sections of recent annual reports of this Office
- brochures entitled *Thinking about blowing the whistle?* - one for State agencies and the other for local councils
- a document which briefly describes a major national research project that is about to commence into the management and protection of whistleblowers, and
- the survey form sent to over 100 State agencies in December 2004 and repeated in February 2005 seeking information relevant to the implementation of the *Protected Disclosures Act* (interestingly, out of 80 responses received so far, 10% of State agencies still do not have an internal reporting policy a decade after the commencement of the Act).

Should you require any further information or assistance, please contact my Deputy, Chris Wheeler on 9286-1004.

Yours sincerely

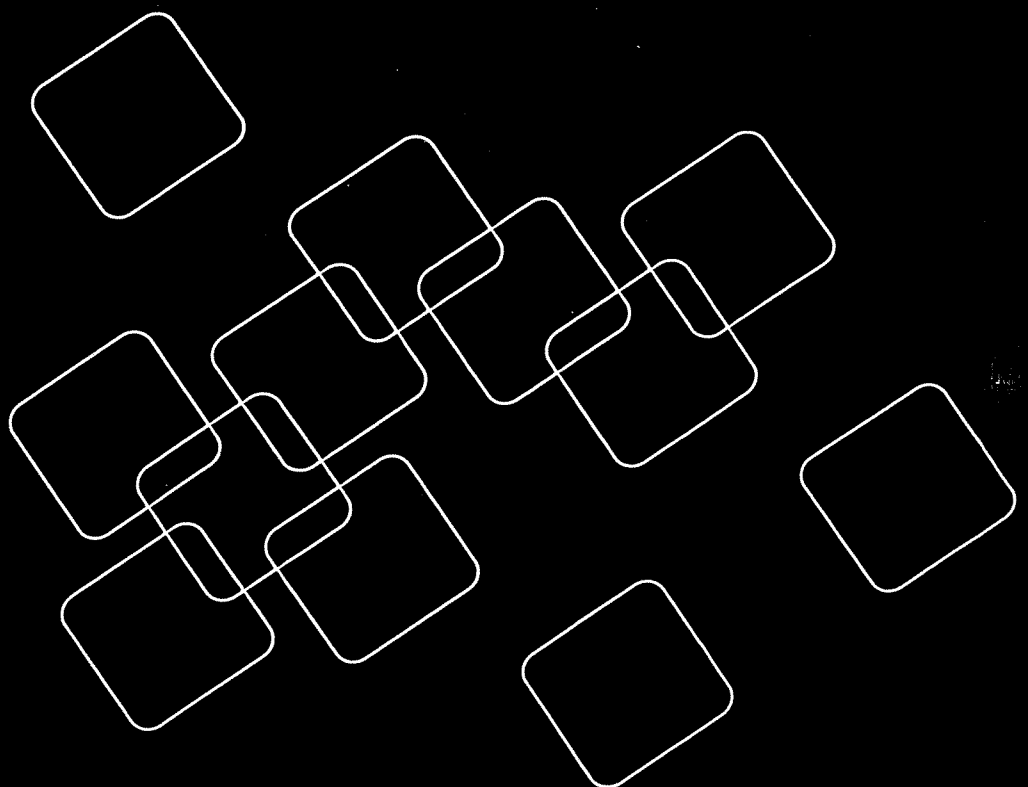
Bruce Barbour  
Ombudsman

Encs

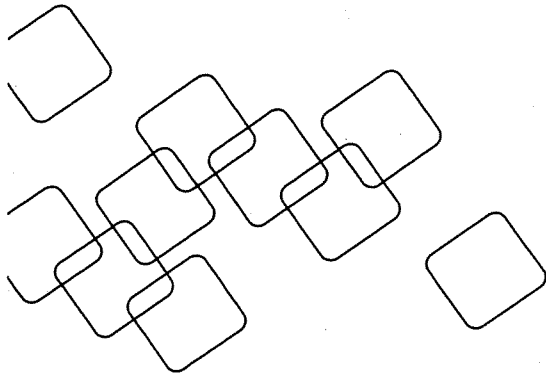


NSW Ombudsman

annual report  
2003–2004



## 05: general team



# protected disclosures

This year was the tenth anniversary of the *Protected Disclosures Act 1994*. For almost a decade, public sector whistleblowers in NSW have had statutory protection if they come forward to complain about the state of affairs inside their own workplaces.

Whistleblowers are important to workplaces. They are often best placed to see what is going wrong inside an organisation and, by bringing these problems to light, they give organisations the opportunity to fix things and improve their service to the public.

Whistleblowers should be encouraged to come forward. These kinds of actions are part of being a responsible and effective employee. Indeed, many employees draw attention to organisational problems as part of their day-to-day responsibilities – they are called supervisors. However if people make criticisms about a colleague, or skip a link in the chain of command to make a complaint, they are often called 'dobbers' or troublemakers. Many people do not speak up for fear of being labelled or suffering reprisals.

In 1994, the NSW Parliament attempted to change the culture inside the public sector by introducing a scheme through which people could report corruption, mismanagement and waste - and not suffer reprisals. Our experience with the scheme established by the Protected Disclosures Act is that it has not achieved its original objectives.

In April 2004 we published an issues paper called *The Adequacy of the Protected Disclosures Act to Achieve its Objectives* (discussed later in this section). We hope that this paper will generate discussion about this important issue and prompt a review of the Act that leads to improvements to the scheme.

Our work with protected disclosures includes:

- investigating and resolving complaints by whistleblowers
- providing agencies with advice, guidance and training in how to deal with these kinds of complaints themselves
- working with the steering committee to monitor the implementation of the Act
- making suggestions to the government about ways the scheme might be improved.

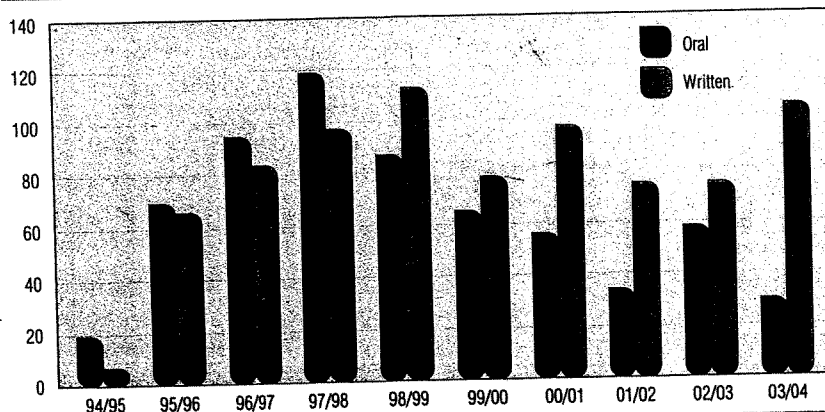
## handling complaints

Since the Act came into operation on 1 March 1995, we have received a total of 1430 complaints - 633 oral complaints and 797 written complaints. Figure 41 shows how the number of complaints has fluctuated over that time, with a peak in the two years 1997-98 and 1998-99. This year we received 105 written complaints, 30 more than last year.

We handle complaints made by public sector staff about maladministration, but a large part of our work is investigating or trying to resolve complaints about the way that agencies have handled protected disclosures. For example, see case study 93. One problem that we have encountered is agencies who have not treated complaints as protected disclosures where it appears they should have. Case study 94 is an example of how a situation can escalate if a complainant is not kept informed and their concerns are not treated seriously. Handling complaints at least in the spirit of the Act can help avoid this kind of situation. Also see our discussion of an investigation into the University of NSW under 'universities' and case study 40.

Figure 41 Protected disclosures received - ten year comparison

	94/95	95/96	96/97	97/98	98/99	99/00	00/01	01/02	02/03	03/04	Total
Oral	19	70	95	119	87	65	56	34	58	30	633
Written	7	66	84	97	113	78	97	75	75	105	797
<b>Total</b>	<b>26</b>	<b>136</b>	<b>179</b>	<b>216</b>	<b>200</b>	<b>143</b>	<b>153</b>	<b>109</b>	<b>133</b>	<b>135</b>	<b>1430</b>



Note: The Act commenced on 1 March 1995 so for the year 94/95 the figure shows the numbers of complaints received during the 4 month period 1 March 1995 - 30 June 1995.

### case study 93

An employee of a government agency internally reported an allegation of corrupt conduct against colleagues. The report constituted a protected disclosure under the Protected Disclosures Act but the agency did not identify this.

We made inquiries and found that the agency had an internal reporting policy, but did not have adequate systems in place to ensure that the policy was complied with. There was also limited awareness of the policy among staff.

We conducted an information session with key staff from the agency. We explained the benefits to the agency, staff, clients and the public of protected disclosures being encouraged, identified and promptly investigated. We provided advice as to how to best manage and investigate protected disclosures, and are providing ongoing advice to the agency about their investigation of the protected disclosure in question.

The agency has more readily identified subsequent protected disclosures and investigated them more promptly and efficiently. We are satisfied that the agency appreciates the objectives of the Act, but we consider that they still need to educate staff about their internal reporting policy and actively encourage them to make protected disclosures where appropriate.

### providing training

We are encouraged by requests from agencies this year for us to train their managers on how to best manage protected disclosures. In 2003-2004, we provided training to staff from the Department of Juvenile Justice, State Rail / RailCorp and the Attorney General's Department.

We also gave several presentations on the topic of whistleblowing to, for example, a visiting delegation from the Legislative Bureau of the House of Councillors of the Japanese Parliament, the Institute of Internal Auditors, and the 4th Regional Anti Corruption Conference for Asia-Pacific in Kuala Lumpur.

### confidentiality

Over the past ten years we have significantly altered our views on the best way for agencies to protect whistleblowers. The long held and widespread view has been that confidentiality is the best protection. If no one knows you have come forward, you cannot suffer reprisals. The requirement to keep a whistleblower's identity confidential is one of the core provisions of most whistleblower legislation - it is also often the first thing that whistleblowers themselves ask for.

There are three main things that may be kept secret. These are the fact of the disclosure, the identity of the whistleblower and the allegations themselves, including the names of the individuals concerned. In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. This certainly provides the best protection for the whistleblower.

### case study 94

A teacher at a TAFE college made allegations to a TAFE director about his supervisor. He alleged corruption, maladministration and bullying. In particular he alleged that the daughter of the college director had been employed in a position which had not been advertised, for which others were better qualified and for which she was paid at an inappropriate rate.

The allegations were investigated by the Department of Education and Training (DET) but the matter was not treated as a protected disclosure. The department found that although the employment of the daughter of the college director could have been managed better, there was no evidence of corruption or serious maladministration. They took some action to pay the daughter at the appropriate rate.

The teacher complained to us that after he made these allegations he was forced to transfer to another TAFE college against his wishes. He believed that this decision constituted detrimental action for making a protected disclosure.

Although he successfully appealed the decision and was transferred back to the original college, we were nevertheless concerned about the way DET had handled the teacher's complaint. During our inquiries we found no documentation indicating why DET had decided not to treat the matter as a protected disclosure or to show that the teacher had been given reasons for this decision. We also found he had not been consulted or given clear reasons for his transfer. This has caused the teacher some distress and he continues to have concerns about his work environment.

We felt that the matter could have been much better managed and told DET that:

- we disagreed with their assessment that the allegation should not be treated as a protected disclosure, since it raised an issue of potential corruption
- at the very least they should have recorded the reasons for their decision.

Importantly, the teacher should have been given clear reasons why his complaint was not being treated as a protected disclosure and why he was being transferred.

We advised DET that, given the history of this matter, they should take steps to make sure that the teacher was not subjected to victimisation, harassment or detrimental action on his return to work at the original TAFE college.

## 05: general team

In practice, however, there are two main problems with expecting confidentiality to protect a whistleblower from retribution.

- Firstly, an agency may not be able to realistically guarantee confidentiality. The choice may be between doing nothing and ensuring confidentiality, or doing something and breaching confidentiality. It is sometimes difficult to even make preliminary inquiries without alerting other staff to the fact that allegations have been made. This alone is often enough for the identity of the whistleblower to be disclosed or guessed. Also, to ensure procedural fairness, anyone who is the subject of allegations should be given an opportunity to answer them. This will of course reveal both the fact of the disclosure and the allegations themselves. It may also be difficult if the whistleblower has previously raised their concerns publicly.
- Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way they can know for sure if those measures have succeeded. They may not be aware that revealing some information may be enough to identify the whistleblower to others.

Our new approach is to suggest different ways of handling protected disclosures depending on whether the agency thinks confidentiality is likely to be maintained. We discuss these issues in detail in the 5th edition of our *Protected Disclosures Guidelines* published this year. In the guidelines we outline:

- the minimum steps agencies should take in relation to all protected disclosures
- the approach to take where confidentiality is a reasonable and practical option
- the options available if maintaining confidentiality is not realistic.

If confidentiality is not a realistic option, we recommend proactive intervention. This is where the disclosure and its author are acknowledged and management takes adequate steps to actively support and protect the whistleblower [see paragraph 1.5.3 in Part C of our guidelines].

The guidelines are available from our office or on our website at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).

## a review of the Act

The Protected Disclosures Act was assented to on 12 December 1994 and was required to be reviewed within 12 months and then every two years after that (s. 32). Only two of the six reviews that should have been conducted have been undertaken. Of the 33 recommendations made in the reports of those two reviews, only nine have been fully implemented and three partially implemented.

In anticipation of the next review, we undertook a project to compare and contrast all whistleblower legislation currently in force in Australasia. Our review included:

- comparing the various types of provisions in the legislation
- identifying alternative approaches to common issues
- ranking the scope of each Act on the basis of a range of measures
- surveying the experience in each jurisdiction.

We looked at all the information available to assess the adequacy of the Protected Disclosures Act to achieve its objectives and found several deficiencies. In an issues paper called *The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, we discussed our findings and provided options to address the deficiencies identified. This paper was distributed widely to government agencies and other interested parties and is available on our website at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).

We believe that whistleblower legislation will only be effective if it can:

- protect whistleblowers
- ensure their disclosures are properly dealt with
- facilitate the making of disclosures.

Some of the deficiencies we found with the Protected Disclosures Act are:

- there is no obligation on senior management to protect whistleblowers or establish procedures to protect whistleblowers
- there is no central agency responsible for monitoring how well the scheme is working - this includes collecting data on how many protected disclosures are being made to particular agencies, how many have been made since the Act commenced, and how those disclosures are being handled
- it is the only Australasian whistleblower legislation in which the whistleblowers themselves have no direct right to seek damages for detrimental action.

The government has since called for the Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission to conduct a further review of the Act. We hope that the concerns we raised in our issues paper will be considered in that review.

## working with the steering committee

Our Deputy Ombudsman, Chris Wheeler, is the chair of the Protected Disclosures Act Implementation Steering Committee. This committee was set up in 1996 to encourage and facilitate the disclosure of corrupt conduct and other forms of misconduct by strengthening the scheme established by the Act. The other members of the committee are representatives from the Independent Commission Against Corruption, the Audit Office of NSW, the Police Integrity Commission, the Department of Local Government, NSW Police (Internal Witness Support Unit) and the Premier's Department.

In November 2003 the committee provided a report on its activities for the period 2000-2003 to the Premier. These activities include providing advice, guidelines and training to agencies and successfully lobbying the government to improve the scheme via legislative amendments.

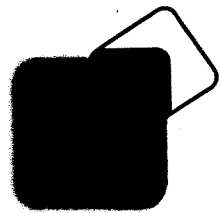
In April 2004 the committee also wrote to The Cabinet Office requesting the following amendments to the Act.

- An amendment to s.12B to provide that complaints made to the Director General of the Department of Local Government will be protected if they are made in accordance with the Local Government Act 1993 and if they disclose information that show or tends to show corrupt conduct, maladministration, a serious and substantial waste of local government money or a contravention of the pecuniary interest disclosure requirements of the Local Government Act.
- An amendment to s.32 to require the Act to be reviewed every five years, instead of every two, to provide Parliament with a more realistic and practical timetable.

The Cabinet Office has suggested that we raise these proposals during the review of the Act.

## a research project

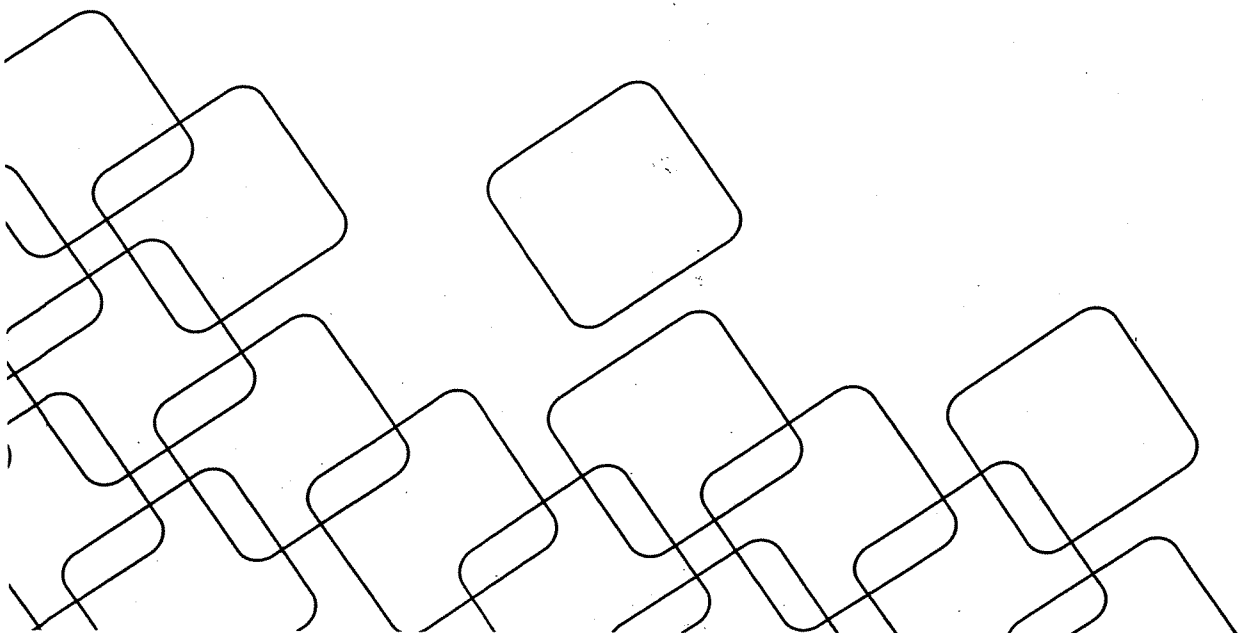
In February 2004 we became involved in a cooperative national research project called Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations. This project is being conducted by Griffith University with participation from other universities and public sector agencies around Australia. The aim of the project is to identify and expand 'current best practice' systems for the management of professional reporting, public interest disclosures and internal integrity witnesses in the Australian public sector. The researchers plan to study the experiences of organisations operating under different public interest disclosure regimes across the Australian public sector. We have contributed \$25,000 to this project and our Deputy Ombudsman, Chris Wheeler, will be involved in conducting some of the research.



NSW Ombudsman

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Annual Report 2002–2003





## Training and review

During the year, we presented six training sessions for senior managers at agencies including the Motor Accidents Authority, State Rail Authority and Transgrid.

Our advice was also in demand across the country. For example, the Deputy Ombudsman was invited to Western Australia to brief senior bureaucrats (including the WA Ombudsman) on the practical implementation of the *Public Interest Disclosure Act 2002*, their equivalent to our PD Act.

We also offered an internship to a postgraduate student who will review all Australian and New Zealand Acts offering whistleblower protection. We will then make recommendations to the Joint Parliamentary Committee on the Ombudsman and the PIC about potential amendments to the NSW Act.

## Working with the steering committee

The Protected Disclosures Act Implementation Steering Committee (the steering committee), chaired by the Deputy Ombudsman, met four times during 2002-2003. The Strategic Plan 2002-2005 and Work Plan 2003-2004 were both approved. The steering committee conducted training and produced and distributed fact sheets on protected disclosures for state and local government agencies. They also recommended legislative change so that the PD Act is reviewed every five years instead of every two years.

Following recommendations made by the steering committee, the *Local Government Act* and *Protected Disclosures Act* were amended to clarify the definition of an 'officer of a council'. The definition now explicitly includes disclosures about the conduct of a council, a delegate of a council, a councillor, and a staff member of a council. The PD Act was also amended to extend protection to public sector staff making allegations about staff from another agency.

Examples where public sector staff may observe the behaviour of those employed by another agency during their day-to-day work include Joint Investigation Response Teams (involving both police and DoCS staff), Business Link, the Department of Public Works and Services, and the Central Corporate Services Unit. This unit looks after human services, financial services, IT, facilities and records management, procurement, and research and development needs for government departments.

The steering committee made a submission to Standards Australia on their draft Australian Standard, *Whistle blowing systems for organisations*, published in June 2003. The standard is for both public and private organisations which creates potential difficulties because the corporate governance and accountability frameworks for the public and private sectors are very different.

The committee congratulated Standards Australia for taking this step and asked that the standard explicitly state that it did not replace or override the PD Act or any other standards of greater scope that apply to public sector agencies.

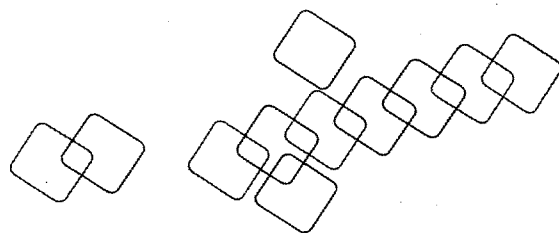


Kim Swan, legal officer and Galina Laurie, project officer.

## A change of name

In last year's Annual Report, we mentioned a possible name change for the PD Act. The suggestion was to rename it the 'Public Interest Disclosures Act' to better reflect the Act's intent that protected disclosures are in the public interest and to reduce the tendency for staff to confuse personal grievances with protected disclosures.

We asked state and local government agencies for their views on the name change but, despite lively debate, a poor return rate provided inconclusive results. The issue is therefore currently on hold.



## Protected disclosures

Protected disclosures encourage public sector staff to blow the whistle on agency misconduct and mismanagement. The intention of the *Protected Disclosures Act 1994* (the PD Act) is that complainants making allegations about serious issues are protected against detrimental action or reprisals resulting from making the disclosure. Insiders are best placed to notice misconduct and mismanagement by colleagues or their employer, so whistleblower protection is an important means of ensuring complaints can be made without fear of retaliation.

The NSW Ombudsman is one of five watchdog bodies to whom protected disclosures can be made. The others are the Independent Commission against Corruption, the Auditor-General, the Police Integrity Commission (and the PIC Inspector), and the Director General of the Department of Local Government. Representatives of most of these agencies, plus the Premier's Department and NSW Police, sit on the Protected Disclosures Act Implementation Steering Committee to monitor how agencies are implementing the PD Act.

The Ombudsman's main roles in relation to protected disclosures are:

- Complaint handling - we deal with disclosures about maladministration, allegations about reprisals being made against whistleblowers for making a protected disclosure, and problems agencies may have with implementing the PD Act.
- Advice - we provide advice to public sector staff thinking of making a disclosure or to staff who are responsible for implementing the PD Act.
- Training - we offer training to agencies about their responsibilities under the PD Act.
- Monitoring and improvement - we work with other watchdog bodies to develop guidelines on interpreting and implementing the PD Act.

Our 2001-2002 Annual Report included a detailed outline of our role as well as information on how to make complaints. Please see pp. 66-71 of that report.

### Complaint handling

In 2002-2003, we received 133 protected disclosures - 58 oral disclosures and 75 written disclosures. This is an increase on last year's figures (see Figure 28 for five year comparison). A large number of these were complaints about universities and several protected disclosures by university staff were investigated during the year.

We conducted three formal investigations in 2002-2003, all of which resulted in findings of wrong conduct and the Ombudsman making recommendations about changes to policy or procedure. For more details, please see case studies 1 and 3 in 'General complaint work'. We have also conducted several informal investigations - please see case studies 34, 35 and 36 in this section.

Conflicts of interests have been at the forefront of issues raised in protected disclosures this year. For example, our investigation into allegations made against the President of the Anti-Discrimination Board and the Privacy Commissioner showed that he had a poor grasp of the concept of a conflict of interests and had repeatedly failed to recognise or manage both actual and perceived conflicts arising from his various professional roles and friendships. He had also therefore ignored the requirements of the codes of conduct of these agencies. For more details, please see case study 3 in 'General complaint work'.

Protected disclosures, like other complaints, can bring about much-needed changes in government services. For example in case study 34 on the closure of Gullama, the Department of Community Service's Aboriginal service centre in Redfern, our investigation resulted in work being done to preserve the integrity of child protection information handled by the centre.

In addition, DoCS has made considerable improvements to its recruitment processes and support for Aboriginal staff. In case study 36, our inquiries led to the Department of Ageing, Disability and Home Care implementing better

asset management systems and a new policy governing computer usage.

There is the potential for the PD Act to be used illegitimately to, for example, make a disclosure to avoid disciplinary action. We want to encourage genuine whistleblowers but, at the same time, ensure that agencies have clear guidelines in place to reduce the possibility that protected disclosures could be misused. Guidelines in themselves, however, are not enough – it is vital that agencies also provide induction and refresher training on protected disclosures to all their staff.

We have begun an investigation into how complaints made by police officers with a genuine grievance against other officers are handled internally by NSW Police.

The project is considering various aspects of the complaint handling process including:

- how these complaints are assessed and allocated
- the appropriateness of investigation strategies used and outcomes reached
- the timeliness of investigations
- the tools used to measure complainant satisfaction.

Figure 28: Protected disclosures received – five year comparison

	98/99	99/00	00/01	01/02	02/03
Oral	87	65	56	34	58
Written	113	78	97	75	75
Total	200	143	153	109	133

### Prerequisites for a disclosure to be protected

During the year we became aware of a number of agencies that were confused about the prerequisites for a disclosure to be protected under the PD Act. Representatives of some agencies believed it was important that complainants nominate that they had made a protected disclosure.

It is, in fact, irrelevant whether the complainant or the person they inform is aware that the complaint is a protected disclosure. If the disclosure meets the requirements of the PD Act – that is, it is not made frivolously or vexatiously or in an attempt to avoid disciplinary action, does not question the merits of government policy, has been made to the appropriate authority or person, and shows or tends to show conduct specified in the PD Act – then the protections and obligations of the Act will apply.

In case study 36, the department's focus on the issue of confidentiality occurred at the expense of protecting the complainant.

### Case study 34

We received a protected disclosure about the closure of Gullama, an Aboriginal service centre in Redfern. The Department of Community Services established the unit in 1976 to provide advocacy as well as advice and support for staff working on child protection matters involving Aboriginal families. In 1994, staff of the unit began to take a primary role in child protection casework. There were ongoing difficulties at the centre with casework practices, administration and workers' time management. Some of these difficulties were due to workload and/or inadequate supervision.

In April 2000, after the stabbing of a young child whose parents were clients of Gullama, the department's former Director General decided to remove the unit's child protection function, integrate the staff into the Eastern Sydney Community Service Centre (CSC) and redefine the role of Gullama. The complaint we received was about how the closure had been managed. The issues raised included what steps had been taken to ensure that case files were complete and reallocated, what training was provided to staff being reintegrated into the Eastern Suburbs CSC, how culturally appropriate casework practices were to be maintained and the future of Gullama.

Initially we did not disclose the complainant's identity when we wrote to DoCS. When DoCS was unable to find documentation relating to one of the complainant's main concerns, we asked the complainant if we could identify her as we could not make further inquiries without doing so.

In particular, we could not give the department copies of a review the complainant had conducted of the now missing documentation. She agreed to this disclosure and we were then able to conduct an audit aimed at cross checking information provided by the complainant with electronic records and Gullama files relocated to Eastern Suburbs CSC. As a result of our inquiries the DoCS Client Information Service database (CIS) was updated, files were completed and reallocated, and all cases still marked as belonging to Gullama were reviewed and brought up to date.

DoCS has replaced Gullama with an Aboriginal family preservation service. This will be a home based program for Indigenous families in crisis whose children are at risk of being taken away for protective reasons. DoCS is also working on improving the recruitment, training, support and mentoring of Aboriginal staff and has established an Aboriginal Services Branch.

The branch will help Aboriginal and non-Aboriginal staff to improve service delivery to Indigenous clients. They will also work directly with other agencies and DoCS staff to address child protection and early intervention issues for Aboriginal families.

We acknowledged the complainant's contribution to the important and necessary work that had been done as a result of her protected disclosure.

### Case study 35

We received a protected disclosure about management practices in a Department of Housing branch office. The whistleblower alleged some staff were using other staff members' computer usernames and passwords to make payments to contractors. There was no allegation of corrupt conduct but, had there been, this practice would have made it very difficult to identify those responsible.

The department responded promptly to our inquiries. They acted to ensure that staff who did not have sufficient delegation to approve payments to contractors could not do so, and staff who could make these payments had the necessary access.

## Confidentiality

The PD Act contains important confidentiality requirements. When a complaint is classified as a protected disclosure, the complainant's identity must be kept confidential unless:

- the complainant allows their identity to be made public
- procedural fairness requires the information to be revealed
- proceeding with the investigation depends on the complainant being identified
- it is in the public interest to reveal the information.

In the Gullama case, for example, we did not identify the complainant when we initially wrote to DoCS. However later on, the investigation could not progress without her identity being revealed. Luckily she agreed to this disclosure. In another case involving allegations that a police officer had corrupt motives in extending the date of his medical retirement, we were able to refer the protected disclosure to NSW Police for investigation without any need to identify the complainant.

The requirement of confidentiality can, however, be a double-edged sword. On the one hand, it may offer the best protection for complainants against reprisals. On the other hand, a defendant in proceedings for detrimental action, victimisation or tort can use it as a defence. For example, in a case involving the prosecution of a police officer for alleged detrimental action, the defendant was able to show that the whistleblower's identity had not been disclosed to the police or its investigators. As a result, there was no way to prove that detrimental action taken by the defendant against the whistleblower was in reprisal for the complaint he made.

The requirement that confidentiality be maintained does not address the fact that people within an agency often know exactly who made the disclosure. For example, the whistleblower may have somehow communicated their intention to complain before making the disclosure or have previously raised the issue in the workplace. They may be the most likely person to have made the disclosure given the nature of their work or their knowledge of or involvement in the matter or related issues.

Another problem is that people who are aware that a disclosure has been made can wrongly guess the identity of a whistleblower and then mistakenly harass a person who has had no involvement in the matter.

We have found one remedy for cases in which it is impractical to maintain confidentiality. After gaining the complainant's permission to disclose their identity, we have on occasion approached the agency's CEO early in the process. We have told the CEO that a disclosure has been made and who the complainant is. We then inform the CEO that we will hold him or her responsible for ensuring that no detrimental action is taken against the whistleblower. From our experience, this approach has resulted in senior management making sure that appropriate protections are in place.

## Case study 36

An employee of the Department of Ageing, Disability and Home Care complained to us about how the department handled a protected disclosure she'd made about staff at a group home accessing pornography via one of the home's computers.

The department believed that because the computer was privately owned it was not covered by the department's internal computer use policy. The complainant insisted that the department had purchased the computer and provided a copy of the receipt.

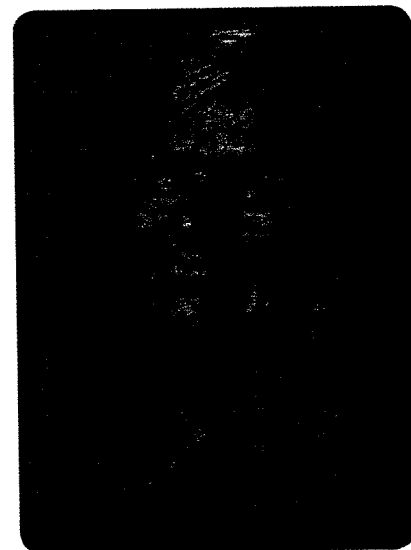
The department maintained that the receipt she provided did not refer to the computer in question and, despite considerable time spent tracking down a receipt that would prove ownership, no definitive proof was found.

The department used its view that the computer was privately owned to argue that the complaint was not a protected disclosure. They also asserted that as the incident had been investigated as a management issue before the complainant approached the Ombudsman and the department's Professional Conduct Unit and was therefore considered to be public knowledge, there was nothing further to be gained by treating the complaint as a protected disclosure.

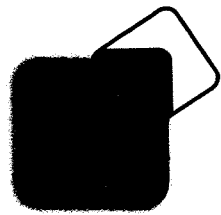
We pointed out to the department that the PD Act is not simply intended to protect the complainant's identity – it also protects the complainant from any victimisation, harassment or other reprisals stemming from making a complaint. Because the department had refused to accept the complaint as a protected disclosure, the complainant's rights under the Act had in effect been denied.

As a result of our inquiries, the department agreed that the complaint should have been accepted as a protected disclosure and apologised to the complainant. In addition, they assured us that new accounting measures were now in place for group homes to ensure proper future tracking of all assets.

The department has also put in place a policy covering the use of all computers on departmental property.



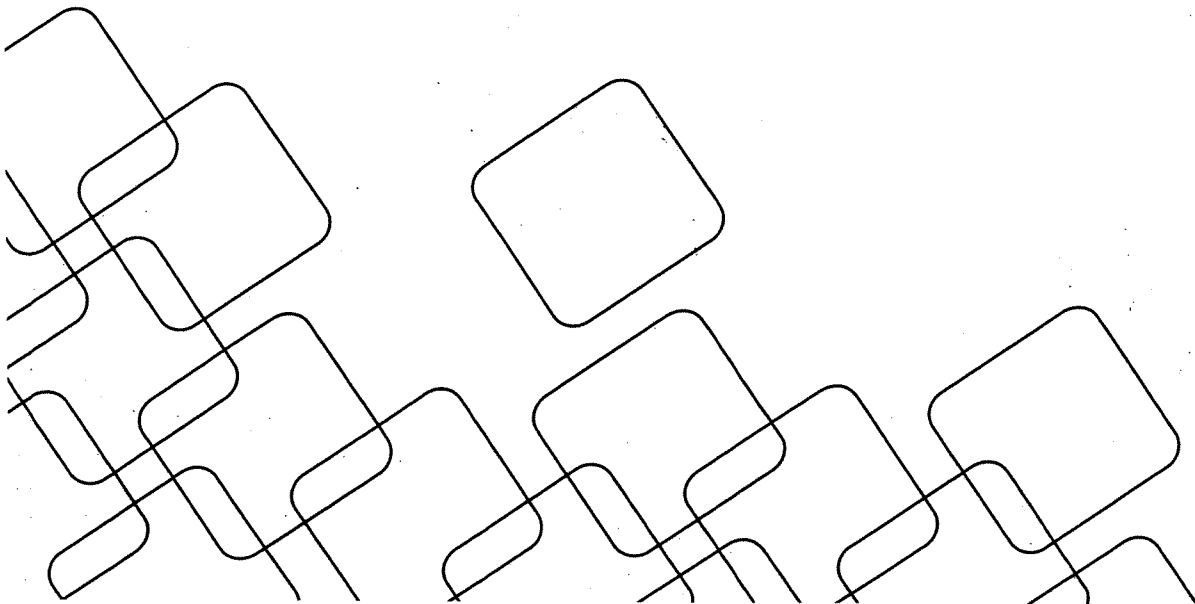
*Lindy Annakin, a senior investigation officer in our general team and editor of this year's Annual Report.*



NSW Ombudsman

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Annual Report 2001–2002





## Protected disclosures

Our office plays a leading role in making sure that public sector agencies respond effectively to internal reports of serious misconduct or mismanagement. It is not in the public interest if staff who report a genuine belief that serious misconduct is occurring within their agency suffer for speaking out. Experience has shown that staff are in the best position to know how well their agency is performing its functions and whether there is anything or anyone inhibiting that performance. By actively using this information and addressing the deficiencies exposed, agencies can become fairer, more accountable and more responsive in the way they operate.

In NSW, the *Protected Disclosures Act 1994* (the PD Act) gives certain types of reports (called protected disclosures) statutory protection. Police officers can make protected disclosures and they are also protected, in most cases, under a separate scheme established under the *Police Act 1990*. These statutory schemes make it an offence to take detrimental action against a person for reporting misconduct. They also require agencies to advise the person who makes the disclosure, within six months of receiving the disclosure, how the agency proposes to respond.

These schemes aim to encourage public sector agencies to treat reports of misconduct seriously. The PD Act scheme specifically aims to encourage staff to come forward with information about corruption, serious maladministration and the serious and substantial waste of public money. Disclosures made in bad faith are not protected. If a disclosure is made in good faith but is not later substantiated, it will still be protected as long as the original allegations showed or tended to show specific kinds of misconduct.

Regrettably, many agencies still operate within a culture that discourages the exposure of corruption, misconduct and serious inefficiencies. Bearers of bad news are often considered to be traitors, malcontents or troublemakers. The risk of this attitude is that agencies may miss out on discovering information that may help them

improve their operations or avoid future problems or even a disaster. More significantly, they face the long-term risk of effectively silencing those who might be able to bring attention to future problems.

Our work in the area of protected disclosures is very broad. We resolve and investigate individual complaints, provide advice and information, help agencies improve their handling of internal complaints, and work with the Protected Disclosures Act Implementation Steering Committee to monitor and improve the scheme.

### Resolving and investigating individual complaints

Complaints about maladministration can be made directly to our office. When they are made by public sector staff about serious matters, we usually treat them as protected disclosures. We deal with each complaint impartially and, if possible, confidentially.

People can also complain to us if they have suffered reprisals from speaking out. Under the *Ombudsman Act*, we have the power to investigate any conduct that may be unreasonable, unjust or based on improper motives — such as punishing someone for criticising the agency. This means that we can investigate a complaint from someone who has suffered reprisals even if their original complaint was not technically a protected disclosure.

This year we received 75 complaints that we classified as protected disclosures (see fig 26). We completed one formal investigation and resolved 17 matters after making preliminary inquiries. The allegations were about a range of issues including inappropriate ministerial influence, improper use of resources and nepotism. See case studies 40 and 41. Case study 40 is a good example of a situation where, although the suspicions of the complainant may not have been confirmed, the department

was able to identify and improve deficiencies in its practices by listening to the complainant's concerns and handling the complaint fairly and professionally.

The number of protected disclosures we receive has decreased over the past five years. We hope this is because agencies have improved the way they handle staff concerns and more people feel confident that their concerns will be addressed directly and effectively if they raise them internally, rather than needing to turn to an external agency such as the Ombudsman.

However it is also possible that we are receiving fewer disclosures because people are not aware that they can make them to us. Research from the ICAC shows that knowledge of the PD Act has increased over the past five years among both staff and management. However in 2001–2002 still only 47% of staff surveyed said that they had heard about the PD Act before the survey.

## Providing advice and information

We are happy to give practical verbal advice to anyone contemplating making a protected disclosure, even if they wish to remain anonymous. We also provide advice to people on how a particular report of misconduct should be dealt with by their agency. Sometimes we hear about the same matter from different sources — the complainant and the person dealing with the matter. Case study 42 shows the different perspectives that these parties can have. Our role is to impartially provide practical information and confidential advice on how each party should proceed.

We also educate agencies about their obligations towards staff who make reports of misconduct and best practice in handling these matters. We have information about the PD scheme on our web site and we regularly distribute information through our email information line.

**Figure 26:**  
Protected disclosures received – five year comparison

	97/98	98/99	99/00	00/01	01/02
Oral	119	87	65	56	34
Written	97	113	78	97	75
Total	216	200	143	153	109

### Case study 40

An employee of the Department of Ageing, Disability and Home Care complained of concerns they had about funding for a person with a disability being allocated to a service that was not on the department's approved list of service providers. The employee also believed they had detected irregularities in the handling of expressions of interest from agencies interested in providing advocacy services for people with disabilities leaving large residential facilities.

At the complainant's request, we sent the complaint to the department for their assessment and response. We asked them for details of the steps they would take to investigate the complaint and their investigation findings, as well how they were going

to make sure there was no detrimental action taken against the complainant.

Although the department took eight months to investigate the allegations, we were satisfied with their response. They found that the allegations did not show or tend to show that the department had engaged in conduct that amounted to maladministration. This meant that technically the provisions of the PD Act did not apply. Nevertheless the complaint was dealt with in accordance with the department's PD policy and the complainant's identity was protected at all times.

However the investigation did find several administrative and managerial issues that needed to be addressed, including:

- poor record management — key documents were missing or inadequate
- poor contract management — there were inconsistencies in documented policies and reliance on verbal advice
- poor staff management — staff were not fully briefed on assigned tasks.

As a result of this complaint the department made several improvements including:

- centralising contract management
- revising their policy on contractors and consultants
- training more than 100 staff in contract management skills
- restructuring the Community Living and Development Unit.

### Case study 41

Last year we reported on our investigation of a complaint concerning the Educational Testing Centre (ETC) at the University of New South Wales. The complainant, then a senior manager at the ETC, alleged that nepotism and cronyism were rife at the ETC and the university had failed to protect her from bullying and harassment when her confidentiality was breached.

The complainant also made disclosures about serious financial mismanagement by the ETC, inappropriate contractual agreements for a major IT development and failure to follow tendering procedures. The Audit Office examined these allegations and issued a performance audit report in November 2001.

We focused our investigation on the allegations of nepotism, how the university handled the complaint and how it dealt with the complainant in terms of its obligations under the PD Act.

The university's initial internal audit found the allegation that 25% of the staff of the ETC were related to be sustained. It did not however examine in closer detail the nature of those relationships. Our investigation largely confirmed the internal audit finding but noted that most of the people covered were casual. The ETC regularly reacted to heavy workloads or urgent deadlines by recruiting relatives of staff for short periods of time. Despite the cyclical nature of the ETC's work, little or no evidence was found of a systematic approach to recruiting.

Of some concern was the evidence that there were significant family

relationships in relation to senior managers. Our investigation showed that at least six members of the immediate family of the then director were or had been employed at the ETC. This included his wife, a daughter and two sons, one of whom was employed on a permanent basis. In addition, his father-in-law and seven members of his family had been given casual employment for short periods of time.

It seemed to be common practice at the ETC to nominate people into vacant or newly created positions for considerable periods of time without advertising the position. It also appeared that a number of the people nominated were close friends or relatives of senior staff at the ETC.

Our investigation also found that the university did not follow its own guidelines for dealing with serious disclosures and the provisions of those guidelines were not sufficiently clear. A number of discussions do not appear to have been recorded in sufficient detail to provide adequate guidance to the officers dealing with the complaint.

The senior members of staff expressed confusion and lack of knowledge about the university's guidelines and their own obligations under them. Even when we gave the Chief Financial Officer (CFO) a copy of our provisional findings and recommendations, he indicated that he had never been informed that he had a role to play under the university's guidelines for handling protected disclosures.

The CFO was at the time the direct supervisor of the ETC. As he was unaware of the need to restrict his lines of inquiries to avoid identifying the complainant, he asked the ETC director about the allegations of

nepotism. He may have unwittingly given the director information that identified the complainant as the likely source of the allegations.

The university did take some action to address concerns about the ongoing treatment of the complainant by ETC staff. However this action was mostly in response to concerns raised by the complainant, rather than any active management of the protected disclosure.

We made several recommendations on how the university should improve its practices. These included:

- the need to amend and clarify its guidelines for handling complainants raising serious disclosures
- the need to implement a training program for senior staff on their responsibilities under these guidelines
- the need for the internal investigation of such matters to be more structured and, whenever possible, as independent as possible of the organisational structure under scrutiny
- the need to implement a training program to reinforce its code of conduct in relation to dealing with conflicts of interest and ethical issues, including the recruitment and supervision of staff and the allocation of work to those staff members.

The university has advised us that the recommendations in our final report have now been implemented.



### Case study 42

A secretary working at an area health service (AHS) contacted us for confidential advice. She alleged that there was a 'rampant' practice of specialists who ran both private and public practices using secretaries employed by the area health service to do administrative tasks for their private practices. She was concerned that none of the secretaries appeared to have been paid to do this private work. Her doctor had paid her a monthly sum to do the work but stopped after she voiced her concerns. She stated that although she had raised her concerns with the internal auditors, her doctor had not been disciplined. We advised her to ask the internal auditors for further information about what action they had taken or were planning to take, and if she was still dissatisfied, she could write to us with her complaint.

On the same day, the internal auditor of the AHS contacted us for advice. He told us that he was handling a complaint from a doctor's secretary who had alleged that there was a widespread practice of doctors using secretaries to do their private work. He advised us that staff specialists are employed under a contract that allows them 'reasonable' administrative support for their private practices. However he recognised that this had the potential to be abused and was planning to audit hospitals in the area health service to see how secretarial services were being used. He told us that he had explained the contractual situation to the secretary, but she had communicated to him her dissatisfaction with this response. We advised him that his planned actions appeared to be appropriate

and emphasised the need to treat the matter confidentially and to keep the complainant informed. He reassured us that he would do so. We did not hear from the secretary again.

### Case study 43

We were contacted by a government department that had been asked by a Ministerial office for advice. The matter concerned a state owned corporation (SOC) within the Minister's portfolio. An employee had gone directly to the Minister alleging mismanagement at a high level of the SOC. The Minister was understandably concerned and asked the CEO to investigate and provide a response to the allegations. The Minister told the CEO the name of the employee who had made the allegations. The CEO subsequently wrote to the Minister reporting that the matter had been investigated, the allegations were unsubstantiated and that they wished to take disciplinary action against the employee. Disciplinary action in the form of counselling was later taken.

The government department sought advice about how the Minister should respond. We confirmed that the employee had not technically made a 'protected disclosure' under the PD Act as the complaint had been made directly to the Minister. However as we were advised that the employee had made the allegations in good faith, we believed that disciplinary action was highly inappropriate. The purpose of the Act is to encourage employees who have genuine concerns about the way their agencies are functioning to feel safe to air those concerns with the appropriate parties. Although the Act does not currently provide protection for those who make a complaint to

the responsible Minister, we felt that there is clearly a public interest in Ministers having access to this kind of information.

Our advice was that the Minister should communicate to the CEO that he disapproved strongly of any disciplinary action against the employee. We also suggested that the Minister should ask for an undertaking that not only would this not happen again, but the CEO would make it clear to all staff that if they had any serious concerns about the way the SOC was functioning they should feel safe to contact the Minister directly.

### Case study 44

A constable at a metropolitan police station received a telephone call from someone who claimed to be a police officer. The caller warned the constable to 'watch out' for an officer who was soon to be transferred to that station. The caller stated, 'she put some of our blokes on paper and has caused nothing but trouble for them'.

The female officer named by the caller was attached to a regional station and had been an internal witness in proceedings against two officers who had allegedly asked her to sign a false statement to cover up an assault on a young person.

An investigation identified the caller as a senior constable at the regional station concerned. He attempted to justify his comments by stating that he was merely giving his opinion as a supervisor. He has now been charged with an offence under the *Protected Disclosures Act* for taking detrimental action against a whistleblower.

## Helping agencies handle internal complaints

### New guidelines

When an internal report of misconduct is made, agencies must consider the person who made the disclosure and anyone else who may be affected by the disclosure, particularly the person who is the subject of the allegation. The agency also needs to tailor its approach to the matter depending on the nature of the complaint.

We understand how difficult it is to juggle the need to be fair to those who allege misconduct and those who are accused. We are also aware of the risks involved when deciding whether to treat a matter as a disclosure about the operations of the agency or as a workplace grievance. Sometimes the line between a protected disclosure and a grievance is very grey.

This year we released the 4th edition of our Protected Disclosures Guidelines. These guidelines give agencies practical help on how to handle internal reports of misconduct in a consistent, fair and professional manner. They also include a model internal reporting policy.

### Internal reporting policies

An effective internal reporting policy is crucial to an agency's ability to properly handle internal complaints. The policy should outline who is responsible for what, what a person should expect when they report misconduct, what the difference between a 'protected disclosure' and a 'grievance' is, and what other options the person may have to deal with their concerns.

This year we have made significant progress with establishing and improving the internal reporting systems in universities in NSW. At the time of writing, it appears that all of them, except for Southern Cross University, had an internal reporting system for protected disclosures. We have given most of them feedback about the quality of their systems, but unfortunately some of them have been slow or have failed to respond to our advice. This is disappointing because deficient systems may make it difficult for universities to protect themselves from criticisms that they have not dealt fairly and properly with complaints from staff.

## Working with the steering committee

The Deputy Ombudsman chairs the Protected Disclosures Act Implementation Steering Committee (Steering Committee). It has representatives from the Independent

Commission Against Corruption, the Audit Office, the Department of Local Government, the Police Integrity Commission, the Internal Witness Support Unit of NSW Police and the Premier's Department. This year the Cabinet Office advised that it would no longer be represented on the Committee.

The Steering Committee aims to encourage the disclosure of corrupt conduct, maladministration and serious and substantial waste in the public sector by monitoring the implementation of the scheme and improving procedures for making disclosures. It met five times this year and successfully lobbied the government for various changes to the PD Act. One important change was that people who make disclosures to the Director-General of the Department of Local Government about serious and substantial waste of public money in local government will be protected.

Changes were also made to the *Public Finance and Audit Act 1983* to allow the Auditor-General to determine how protected disclosures are to be handled.

This year the Steering Committee developed a brochure called 'Thinking about blowing the whistle? How to make a protected disclosure' which provides step-by-step guidance for public sector staff contemplating reporting misconduct. We sent about 25,000 copies of this brochure to over 200 agencies and were encouraged by the number of agencies that asked for copies to distribute to their staff.

## Protecting whistleblowers

### Who can I make a report to?

When a person sees what they perceive to be misconduct in their workplace they may tell their friends, their family, their supervisor, their boss — or they may keep the information to themselves. The statutory schemes do not protect everyone. They aim only to protect people from reprisals in the workplace where there is a real risk, for example, if a person tells their CEO. The schemes only protect those who are trying officially to bring the agency's attention to the perceived problem.

The schemes also protect people from reprisals if they report misconduct to the relevant external watchdog agency — maladministration to the NSW Ombudsman, corruption to the Independent Commission Against Corruption, and serious and substantial waste of public money to the Audit Office (for State agencies) or to the Director-General of the Department of Local Government (for local councils).

Sometimes a complaint or a request for advice exposes a weakness in the current legislative schemes. For example, this year we provided advice about a matter where an employee reported his concerns to the Minister responsible for the public sector agency. He was then threatened with disciplinary action by the agency's CEO after the Minister asked the CEO to look into the matter. Because of the way the Act works, this threat was not considered to be action prohibited under the Act. Please see case study 43.

The responsible Minister has a duty and a right to know how the agency is functioning. If employees have serious concerns, particularly about senior management, they should not be discouraged from informing the Minister. The Steering Committee has written to the government requesting an amendment to the Act to extend protection to those who report their concerns to their responsible Minister. At the time of writing, the Committee had been advised that the government's view was that public sector employees should be encouraged to take up their concerns with the various external agencies if they are uncomfortable reporting matters internally. Those agencies will be in a better position to evaluate whether it is a matter that needs to be taken up at the Ministerial level, or addressed by the agency itself.

### Who can I make a report about?

This year the Committee became aware of a case where a police officer reported misconduct by a correctional officer that he was working with through the NSW Police internal reporting system. The police officer was only protected from reprisals for making a disclosure about another police officer. When the correctional officer found out that his alleged misconduct had been reported, he took reprisals against the police officer who had no legislative protection to rely on.

The way the public sector works is changing and staff from different agencies often work closely together. For example, police officers and staff from the Department of Community Services work in Joint Investigative Teams to investigate allegations of child abuse. People should be protected if they make bona fide disclosures about the misconduct of any public sector employee, not just those who work for the same agency.

The Steering Committee has written to the government asking for the protections of the PD Act to be extended to those who make disclosures about people in other agencies. We also suggested that all such disclosures should be referred to the CEO of the agency where the

subject of the allegations works. We expect these amendments to be made next year.

### What if I suffer reprisals?

People can complain to our office if they have suffered reprisals as result of having made an internal report of misconduct. The reprisals themselves may constitute improper conduct which we can investigate, but they may also be an offence under the PD Act.

The offence is that of taking 'detrimental action' against a person 'substantially in reprisal' for that person having made a protected disclosure in accordance with the Act. The Director of Public Prosecutions or NSW Police may prosecute a person for this offence which carries a penalty of 12 months imprisonment or 50 penalty units or both. In our experience, it has been extremely difficult to establish that this offence has been committed.

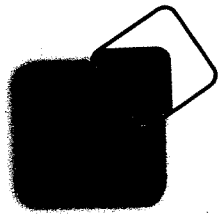
During the year, the Steering Committee lobbied the government to make:

- changes to the *Police Service Act 1990* (now the *Police Act*) to reverse the onus of proof in relation to proceedings for the offence of taking detrimental action against a whistleblower — so that the defendant must prove that the action was not taken 'substantially in reprisal' for the whistleblower making a disclosure
- changes to the PD Act and the *Police Service Act* to extend the statute of limitations for bringing proceedings for detrimental action to two years.

We were pleased that Parliament approved the legislation making these changes. This year the police prosecuted two officers for this offence. Although both prosecutions failed through lack of evidence, we hope that the changes to the legislation will help to deter people from taking reprisals against whistleblowers. Please see case study 44.

### A new name for the Act

One of the issues the Steering Committee will be looking at next year is the name of the Protected Disclosures Act. Similar Acts in some other jurisdictions have used the term 'public interest disclosure' to emphasise that the aim is to encourage public sector staff to come forward with information about problems with their agencies, for the good of the public. Our experience has shown that people often confuse personal grievances with protected disclosures.



NSW Ombudsman

Agencies need to recognise that whistleblowing can result in stress and that they have an obligation to provide ongoing support, reassurance and protection for the whistleblower



## Protected disclosures

Protected disclosures are made by 'whistleblowers' —people 'on the inside' speaking out to expose wrongdoing. In NSW, the *Protected Disclosures Act 1994* (the PD Act) sets out a scheme which gives certain types of disclosures statutory protection. The PD Act protects whistleblowers by making it an offence to take detrimental action against them because of their disclosure.

A person can only be considered to be a whistleblower if they are working in the state public sector or for a local council and the information relates to an agency in the state public sector or a local council. They have to make their disclosure to the head of the agency about which they have concerns or to the Audit Office, the Independent Commission Against Corruption (ICAC), the Police Integrity Commission or the Ombudsman, depending on the nature of the information.

### Encouraging protected disclosures

Our office wants to encourage people to make protected disclosures. We believe that the staff of an organisation are in the best position to know how well it is performing its functions and whether there is anything or anyone inhibiting that performance. By actively using this information and addressing the deficiencies that protected disclosures highlight, agencies can become fairer, more accountable and more responsive in the way they operate.

Agencies need to provide a supportive environment that encourages their staff to make protected disclosures. People will not come forward if they think they will not be taken seriously, that nothing positive will be done or that they will be punished for speaking up.

To develop a supportive environment for whistleblowers within the NSW public sector, we have tried to make sure people feel comfortable contacting our office and also helped agencies create a supportive environment for their own staff.

### Contacting our office

We are happy to provide practical verbal advice to people contemplating making a protected disclosure, even if they wish to remain anonymous. We also have information about how to make a protected disclosure on our web site and in our brochures.

If someone makes a protected disclosure to us about maladministration, we will deal with it impartially and, if possible, confidentially. If it is not something we can deal with, we will give the person relevant advice and refer them to another agency if appropriate.

If someone claims that they have suffered detrimental action as a result of having made a protected disclosure, we will take these issues up with the agency concerned, if warranted (see case study 58).

This year we received 97 complaints that were classified as protected disclosures (see fig 5). Of these, we undertook formal investigations in relation to the more serious matters and resolved many issues informally with the agency concerned. See case studies 59 and 60 in this section and case studies 63, 64, 65 and the discussion of the University of Sydney in the section on universities for examples of our work in this area.

**Figure 5: Protected disclosures received  
—five year comparison**

	96/97	97/98	98/99	99/00	00/01
Written	84	97	113	78	97
Oral	95	119	87	65	56
Total	179	216	200	143	153

**Complaining to the whistleblower’s own agency**

We have helped agencies to create a supportive environment for not only whistleblowers, but also those who are the subject of a disclosure and other staff members who may be affected.

We provide advice to agencies that contact us for assistance and this year we set up a pilot email information line to share resources with over 100 Protected Disclosures Coordinators in councils and public sector agencies. For example, we circulated a research study conducted by the police service into the effects of being a police whistleblower. In December 2000 we ran a workshop in Coffs Harbour with other members of the Protected Disclosures Act Implementation Steering Committee (the ‘Steering Committee’). The workshop was for people responsible for administering the PD Act and the feedback was very positive. We will also be releasing the fourth edition of our guidelines for agencies on how to interpret and implement the PD Act soon.

**Agency obligations**

Whistleblowers are not only protected by the PD Act. If a person suffers as a result of having ‘blown the whistle’, they may also be able to take legal action against their employer for breaching their common law duty of care towards their staff. This year, *Wheadon v State of New South Wales*, a case decided in the District Court of NSW, highlighted how essential it is that public sector agencies handle disclosures made by whistleblowers properly.

In March 1987, a police officer (the whistleblower) made a statement to the Internal Affairs section of the police service alleging corruption on the part of a senior officer. This year the whistleblower was awarded over \$600,000 in damages after the court found that the police service had breached its duty of care by failing to provide proper care and support and failing to prevent him from being victimised and harassed.

This case has several consequences for agencies. Agencies need to recognise that whistleblowing can result in stress and that they have an obligation to provide ongoing support, reassurance and protection for the whistleblower. In particular, the onus is on the agency to provide counselling (even if the employee does not ask for it) and to actively protect an employee from reprisals.

This year we dealt with a case that raised another interesting issue. The PD Act protects public officials from detrimental action if they speak out about the inappropriate conduct of another public official. It does not provide the same protections to people who speak out but are not public officials. Interestingly, in South Australia non-public officials are afforded those protections.

In the case we dealt with, a councillor was criticised by a member of the community who happened to be employed in another part of the public sector. The council initially treated the critic like any other member of the public. However, the effect of the PD Act was that the person’s criticism could be considered to be a protected disclosure. Any threats of legal action by the councillor against the critic might therefore be ‘detrimental action’ under the PD Act and carry criminal sanctions (see case study 61).

## Reforming the system

The system for protecting whistleblowers is only six years old. As a member of the Steering Committee established to develop strategies for more effectively implementing the PD Act, we continue to play a role in improving this system. The Steering Committee met five times this year and has representatives from the ICAC, Audit Office, Department of Local Government, Premier's Department, The Cabinet Office, PIC and the Internal Witness Support Unit of the police service.

In August 2000, the Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission (JPC) produced a report on its second review of the PD Act and made several recommendations. This year the Steering Committee has continued to lobby for the adoption of these recommendations, some of which are discussed below.



**I started work as an inquiry officer in March this year. I answer inquires about a broad range of issues from lots of different people.**

**In this position I have developed skills in effective complaint handling and now have a thorough working knowledge of the Ombudsman's role. My job is a challenging one, with a varied workload that has expanded even within the short time I have been here. David Wright-Smith**

### Correctional officers

Correctional officers have a statutory obligation to report misconduct, but to be protected under the PD Act, a disclosure must be voluntary. That is, the disclosure must not be made because a person had a duty to make it. Following a recent amendment to the PD Act, correctional officers making an obligatory disclosure may still be protected under the Act.

### Protected disclosures unit

This year we wrote to the Premier strongly supporting the JPC's recommendation to create a dedicated Protected Disclosures Unit. This unit would be a centralised expert service which would:

- provide advice, education and training
- systematically scrutinise and monitor the way public sector agencies handle disclosures
- use qualitative and quantitative information about the overall scheme to provide strategic direction and recommend reform.

The Premier rejected the proposal on the basis that many of these functions are already being performed by the Steering Committee and its members, although not in any systematic way.

### Other issues

Other legislative reforms that we strongly support include:

- extending to two years the statute of limitations in relation to bringing charges against a person for taking detrimental action against a police officer who makes a protected disclosure,
- making the Department of Local Government another external body to which protected disclosures can be made,
- reversing the onus of proof in relation to allegations made under the *Police Service Act 1990* which would be categorised as protected disclosures if made under the PD Act,
- requiring public sector agencies to inform staff of internal reporting systems setting out how to make a protected disclosure, and allowing our office to monitor compliance with this requirement,
- providing for the courts to be able to make orders suppressing the publication of material which would tend to disclose the identity of someone who has made a protected disclosure.

## Case studies

### **Case study 58**

A member of a unit of the State Emergency Service (SES) voiced some concerns about the use and accountability of funds by the unit. He alleged that, in response, the unit controller responsible for controlling and coordinating the activities of the unit advised him that his position as president of the auxiliary was no longer required.

He then tried to raise his concerns at the divisional level. They dismissed the issues without apparently making any inquiries. It was only when he raised his concerns with State Headquarters that an internal audit was conducted.

The complainant offered to step aside from the unit until the audit was complete to prevent any disharmony. He asked that his name not be mentioned to anyone except the Director General. Contrary to this request, a letter was read out at a meeting of members of the unit that implied that he had stepped down because he was under investigation.

He complained to our office that his confidentiality had been breached. He also claimed that although the final audit report had made some recommendations about the issues he had raised, those recommendations had not been followed.

We decided to make some inquiries as we were concerned about the way the SES appeared to have handled this protected disclosure. We were particularly concerned that the complainant may have suffered detrimental action as a result of coming forward.

We found that there appeared to be serious flaws in both the way the SES handled this particular matter and in their general systems for dealing with protected disclosures. A complicating factor was that there was a degree of animosity between the complainant and his unit controller.

When we raised our concerns with the SES they, to their credit, conducted a further investigation and produced a report which recommended:

- counselling the officers who had failed to deal with the original protected disclosure appropriately,
- developing and circulating relevant policies and procedures for reporting and handling protected disclosures, and
- engaging a professional mediator to address the ongoing conflict in the unit.

Following this report, we were advised that the unit controller had written the complainant a letter revoking his appointment as Deputy Rescue Officer and asking him to show cause why he should remain a member of the unit. The letter failed to advise the complainant of any rights of appeal or review that may have been available to him. We were concerned about the unit controller's conduct and obtained an agreement from the SES that:

- the 'show cause' proceedings would be stopped,
- the complainant would be given a copy of the second audit report, and
- the validity of the complainant's concerns would be formally acknowledged.

We also met with senior members of the SES to discuss some systemic issues. We reinforced the need for the SES to implement an effective internal complaint handling and reporting policy and offered to help them with this. We also clarified with them that it is not the complainant's responsibility to ask that a complaint is dealt with under the PD Act—it is the agency's responsibility to deal with it appropriately.

### **Case study 59**

The day after a senior ICAC officer was offered a job with another public sector agency, a fax was sent anonymously to that agency's Director-General warning that the officer would bring trouble to the agency. The fax made several allegations about the officer's management practices and the way the officer treated staff. It also contained statements that a court of law would be likely to find defamatory.

The fax header indicated that it had been sent from an ICAC fax machine.

After receiving a protected disclosure about this matter, we decided to initiate an investigation on the basis that if the fax had been sent by an ICAC officer, such conduct could constitute corrupt conduct under section 8 of the ICAC Act. Under section 8, corrupt conduct includes conduct that involves the misuse of information or material that the person has acquired in the course of his or her official functions. It also includes conduct that involves a breach of public trust.

Further, the public expects that employees of ICAC will adhere to very high ethical standards. We were satisfied that the public would consider the sending of the fax and its nature unacceptable for an ICAC employee. The conduct also appeared to breach certain provisions of the ICAC Code of Conduct.



The evidence showed that the fax header had been tampered with and had not been sent from an ICAC machine. Instead, it was most likely that the fax had been sent by a former employee of ICAC from a residential fax machine. We found that the former employee had probably been told about the senior officer's job offer by a friend still working at ICAC. There was nothing inappropriate about this as the information was not confidential.

The former employee was summonsed to give evidence about his knowledge of the matter. He objected to giving particular evidence pursuant to section 21 of the *Ombudsman Act* on the ground that it may tend to prove he was liable to a civil penalty. If he had been a public official at the time the fax was sent, he would not have been able to claim privilege and could have been directed to answer all relevant questions.

In the evidence that the former employee did give, he admitted he had ill feeling for the senior officer and that he wanted to avoid having any further association with that person. Ironically, he had applied, and was being considered, for a position in the same agency that the person had been appointed to, which we believe may have motivated him to send the fax.

As the person responsible was not a public official at the time the fax was sent, the investigation was concluded with no recommendations made.

### **Case study 60**

Last year we reported that we had conducted a preliminary investigation into allegations that senior officers at the ICAC had covered up a sexual liaison between an investigator (A) and a suspect's solicitor (B). This year we received further allegations that a senior officer (C) had given misleading evidence during that preliminary investigation in an attempt to cover up the way the ICAC had managed the situation. Our preliminary investigation found no evidence of a cover up, although we had certain concerns about the way the situation had been managed.

The more recent allegations were made in three documents, at least two of which were protected disclosures. An investigation was commenced. We held a hearing and took evidence from a number of ICAC staff.

We concluded that C had not provided a fully accurate picture of the nature of the ICAC's interest in B during our previous preliminary inquiries. Although C's view appeared to be based on an honestly held belief, it had the effect of

understating the seriousness of the situation and mitigating its mismanagement. We also found that C withheld details that were relevant to our initial inquiries. However, we were satisfied that C had not deliberately sought to mislead our office.

Another one of the allegations was that C had failed to keep proper documents, enabling C to cover up the poor management of the liaison. We found that a number of ICAC officers had poor standards of record-keeping, but this seemed to be more a deficiency of practice rather than a deliberate ploy to cover up the relationship and management's response to it.

We found the specific allegations not sustained. However, because much of the evidence obtained related to management and administrative issues within the ICAC, we prepared a report for the ICAC Commissioner to inform future improvements to the operations and practices of the ICAC.

### **Case study 61**

A person wrote to her local council complaining that a councillor's behaviour in a council meeting was sexist. In dealing with the complaint, the mayor of the council gave a copy of the complainant's letter to the councillor and asked him to comment. Shortly afterwards, the complainant received a letter from the councillor's solicitors threatening defamation action unless she signed a statement withdrawing and apologising for remarks made in her letter.

We told the general manager we were concerned at such conduct and asked him to speak to the councillor. The councillor's solicitors later wrote to the complainant withdrawing their earlier threat.

It later emerged that the complainant worked at the local public school and was therefore a 'public official' under the PD Act. Her allegations of sexist behaviour could be construed as being allegations of maladministration, which includes conduct that is 'improperly discriminatory.' The threat of legal action against her could therefore have been classed as detrimental action under the PD Act.



# Protected disclosures

Table 1: Complaints about protected disclosures in the year 2000/01

Category	Number of complaints
Public authorities	136
Officials	179
Whistleblowers	216
Witnesses	200
Other	143

total
136
179
216
200
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## Overview

The Ombudsman has three key roles in relation to protected disclosures.

### Dealing with complaints

Our first role is dealing with:

- disclosures concerning maladministration by public authorities or officials
- complaints about the implementation of the *Protected Disclosures Act*
- concerns raised or complaints made by whistleblowers and witnesses about detrimental action taken against them after making a protected disclosure.

### Providing advice

Our second role is providing advice on the *Protected Disclosures Act*. This is achieved primarily by giving telephone advice to public officials contemplating making a protected disclosure or to officials with responsibility for implementing the Act. Officers of the Ombudsman also conduct briefings for agencies on the Act and its requirements.

### Preparing guidelines

Our third role is preparing guidelines on the interpretation and implementation of the Act.



## Protected disclosures and the public interest

The object of the *Protected Disclosures Act* is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector.

The public interest element is a critical aspect of the protected disclosures scheme but is sometimes overlooked. In some jurisdictions the public interest aspect is more clearly emphasised, with protected disclosures explicitly referred to as 'public interest' disclosures.

A public official wishing to make a protected disclosure, and a principal officer or nominated disclosure officer assessing a disclosure, must consider the public interest of the disclosure. One of the biggest difficulties in evaluating the public interest of a disclosure is the absence of a definition.

### *The public interest*

The absence of a definition of 'public interest' in the *Protected Disclosures Act* is not an omission. The concept of 'public interest' is inherently incapable of precise definition as there is no single immutable public interest. There will be occasions where certain public interests will be in conflict with other public interests.

Although there is no set definition, there are guidelines to help public officials. As the term suggests, the public interest is different from

private interest because it extends beyond the interest of an individual or possibly even a group of individuals.

In 1979, the Senate Standing Committee on Constitutional and Legal Affairs referred to the 'public interest' as 'an ill-defined or amorphous concept that eludes definition by jurists'. According to the committee, the term can be regarded as 'a convenient and useful concept for aggregating any number of interests that bear upon a disputed question that is of a general (rather than merely private) concern'.

### *Determining an agency's public interest*

Each public authority must determine the public interest as it applies to that agency. They should refer to the purposes for which the agency has been established or the functions it is required or permitted to perform. These are expressed in the enabling legislation or the objectives set out by Parliament or government policy.

Matters that affect the efficiency or effectiveness of an organisation will generally be matters in the public interest.

## Protected disclosures and grievances

Protected disclosures and grievances are two quite distinct forms of complaint. The public interest element of a protected disclosure is the feature that distinguishes the two.

Conduct which affects a person in his or her individual capacity may be serious to that individual, but this does not necessarily make it a matter of public interest.

The protected disclosures legislation was not designed as a mechanism for dealing with complaints that raise issues primarily of concern to the complainant alone. These complaints are more appropriately dealt with by the agency's grievance procedure.

Each year we receive a number of inquiries from public officials seeking advice on making a protected disclosure about matters that are more appropriately characterised as grievances. In these cases we usually advise the complainant to use their agency's grievance handling procedure.

### *Some important consequences arising from the public interest nature of a protected disclosure*

There are several important consequences that flow from a complaint being characterised as a protected disclosure rather than a grievance. While a grievance may raise concerns that have a broader application, a grievance predominantly relates to that individual. Because of the strong stake that an individual has in relation to his or her grievance, an aggrieved public official is commonly said to 'own' their grievance.

By contrast, because protected disclosures are in the public

interest, disclosures cease to belong to a whistleblower as soon as they are made. It is very important that whistleblowers are advised at the outset that once a disclosure has been made they lose 'ownership' of it. The most significant practical ramifications of this are:

**A protected disclosure, once made, may not always be withdrawn**

A whistleblower cannot demand that his or her protected disclosure be withdrawn once it has been made. The public interest may require that the issues raised in the disclosure be addressed. The principal officer, protected disclosure coordinator or nominated disclosure officer who is confronted by a whistleblower seeking to withdraw the allegations must carefully consider the whistleblower's reasons, including any concerns the whistleblower may have about reprisal action. The expressed wishes of a whistleblower that his or her allegations be withdrawn must be carefully weighed against the public interest in dealing with the allegations that have been aired.

**A whistleblower cannot direct an investigation of the protected disclosure**

The *Protected Disclosures Act* provides a range of protections for whistleblowers. These are outlined in the third edition of the *NSW Ombudsman Protected Disclosures Guidelines*. Administrative protections established by the Act entitle a whistleblower to expect:

- proper assessment and investigation of disclosures

- confidentiality, subject to the exceptions outlined in s. 22
- support
- information about their rights and of the action taken or proposed to be taken in respect of the disclosure within six months of the disclosure being made.

Within this general framework, a whistleblower does not have any say in who conducts the investigation or any specific right to direct the manner in which an investigation is conducted. Of course, as part of a proper investigation, any concerns that a whistleblower has about the investigator or the quality of the investigation must be dealt with.

**Resolving the matters raised in a protected disclosure**

Care must be exercised in adopting methods used for dealing with grievances, such as mediation, to resolve protected disclosures. There is a strong risk that mediation, or other grievance handling processes, will only deal with the issues raised in the protected disclosure as they affect the whistleblower and leave the wider public interest in the issues unaddressed.

Some of the complexities involved in resolving protected disclosures are considered in more detail below.

**Settlement of protected disclosures**

The legislative context and the public interest aspect of protected disclosures introduces certain unique considerations that potentially complicate the resolution of a protected disclosure.

Two of these considerations are illustrated in case study 1.

**Dealing with complaints**

Our most well known role in relation to the Protected Disclosures legislation is dealing with disclosures about maladministration. The sorts of matters raised in protected disclosures are wide ranging. This year we have noted an increase in the number of protected disclosures relating to the administration of universities. This follows observations made in last year's annual report about the increasing readiness of students to complain about problems with university services.

**Issues in university administration highlighted in protected disclosures**

If current or past staff members complain to us about serious problems in their university it is likely their complaint will be considered as a protected disclosure. A major current investigation has highlighted a number of issues that may require substantial policy and procedural adjustments in at least several, if not all, of the ten universities within our jurisdiction. Without prejudging the evidence of the current investigation, it is appropriate to outline issues of concern about universities that have arisen from not only that investigation, but also from other relevant complaints and protected disclosures. These issues include:

- staff responsibilities arising from complaints about, or knowledge of, misconduct by other staff

- procedures for dealing with complaints of misconduct against staff — especially the wisdom of handling them in the industrial arena and the current inability to use similar fact evidence
- prompt and fair procedures for dealing with complaints by students against staff and other students
- intra-faculty/school equity in terms of honours degree assessments
- handling of special consideration applications and lateness penalties in student assessments
- avoiding or otherwise appropriately handling conflicts of interest
- competence in a university's legal services
- proper record keeping and preservation to facilitate accountability
- staff plagiarism of junior and departed staff's teaching materials.

There is no mystique or uniqueness about these problems. With the possible exception of the industrial problem, all can be eliminated by the sensible application of the guidelines set out in the *Ombudsman's Good Conduct and Administrative Practice Guidelines for Public Authorities and Officials*.

### Protected disclosures about the ICAC

Over the year four protected disclosures about ICAC were received from staff of the ICAC and one from a Member of Parliament. These protected disclosures resulted in one informal investigation and two formal investigations by this office.

### Case study 1

A professor made a protected disclosure to the Ombudsman in relation to the university's administration. His wide ranging allegations covered matters of staff salaries and allowances, the relocation of the office and department, release of information, inadequate external teaching, refusal to publish the results of a disciplinary hearing that had exonerated him, provision of false information to him about an audit of his activities and a refusal to reimburse him for legitimate expenses.

Although it seemed there could be elements of a personal grievance between the professor and his employer, it also appeared that the professor had raised matters of legitimate concern and there had been attempts to publish him for doing so. In the university's position, the professor was in the staff's position and it is not unusual for the university to reimburse for all expenses claimed.

We referred one of the technical issues to the Audit Office which rank them in the order of related inquiries. We also made extensive written preliminary inquiries to the university.

Ultimately the dispute was referred for mediation. The mediation raised two very difficult issues. The first was the temptation for a regulatory authority to attempt to impose a form of settlement that would effectively withdraw all complaints and the second was of such attempts achieving a solution that would satisfy the windfallower does not relieve a public authority of their obligation to deal with the broader public and pressure caused by a disclosure.

If the second issue was resolved, the Ombudsman's authority could have been used to provide a settlement to the professor and the university which would ensure that the professor would not be treated as a beneficiary of a settlement.

The second issue was whether the substantial settlement sum that the university undertook to pay the professor might be seen as breaching s 32(b) of the *Protected Disclosures Act*. This section states that:

beneficial treatment is not to be given in favour of a person if the purpose or one of the purposes for doing so is to influence the person or make a transaction from which the person has a substantial interest.

In our view there is a genuine dispute between parties, one or more of whom has made a protected disclosure. A settlement is only likely to be seen as beneficial treatment if the benefits or other terms of the settlement do not bear some identifiable relation to loss, damage, injury or expense incurred by the person receiving the payment or benefit. In such circumstances there may be a benefit that could be seen as being an inducement in relation to future action by the person concerning their protected disclosure. Obviously it is a matter of subjective judgment to assess the generosity of a particular settlement. If a settlement in terms of providing redress in all the circumstances not unreasonable it should not be regarded as beneficial treatment.

While the settlement in this case could be seen as generous we did not see it being unreasonable because the professor had incurred significant financial expense and suffered in terms of his

Both of the formal investigations included hearings conducted under s.19 of the *Ombudsman Act* involving the exercise of Royal Commission powers. In carrying out these investigations we needed to take evidence from a large number of staff of the ICAC.

Both investigations have yet to be concluded. In one case an injunction was taken out preventing this office from concluding the matter until a challenge to our jurisdiction had been heard and determined by the courts. In the other case the results of the investigation are currently being written up.

The conduct investigated in both matters raised significant issues, particularly since they arose out of protected disclosures made by staff of the peak corruption fighting body in NSW. It is hoped that the outcomes of both investigations will be of practical use to the new Commissioner.

**Limitations in our jurisdiction to deal with protected disclosures**

For us to be able to deal with a protected disclosure concerning maladministration, the disclosure must be made in accordance with the *Ombudsman Act*. This means that we are not able to deal with protected disclosures about matters that would otherwise fall outside our jurisdiction.

We commonly receive inquiries from public officials wanting to make a protected disclosure about employment matters, such as alleged irregularities in an agency's selection processes or in the allocation of work. While such issues could in theory be

sufficiently serious to constitute a protected disclosure if made to the agency itself, they will seldom be within our jurisdiction.

We are precluded, by statute, from dealing with complaints about the conduct of a public authority that relates to the appointment or employment of a person or matters affecting a person as an officer or employee. One of the specific circumstance where we are able to deal with complaints about employment matters is where the conduct arises from the making of a protected disclosure. This exception allows us to deal with complaints about detrimental action.

**Implementation by public authorities of the Protected Disclosures Act**

An area that we are constantly monitoring is agency implementation of the *Protected Disclosures Act*. In this role we are less concerned with the substance of a protected disclosure than the manner in which an agency has handled it.

We find that a number of complaints we receive are two-tiered. There is an initial protected disclosure about the conduct of an authority. This complaint has not been dealt with to the satisfaction of the whistleblower and

additional concerns are raised about the manner in which the protected disclosure was dealt with by the agency.

The government has made a clear commitment to supporting and protecting whistleblowers. There are legislative, contractual and administrative obligations on public sector agencies and senior management under the *Protected Disclosures Act*, the model senior executive service contract of employment, and code of conduct for members of the chief executive service and senior executive service.

In our annual reports we have detailed the results of our audit of internal reporting policies and outlined our concerns about the number of agencies that do not have an adequate internal reporting policy. A number of complaints and inquiries received over the past year suggest that some agencies are failing to conduct a proper investigation and abide by the confidentiality guideline set out in the Act.

Failure by an agency to implement the legislation within that agency is in itself maladministration. For this reason we will be maintaining a strong interest in ensuring effective implementation of the *Protected Disclosures Act* by agencies.

See case studies 2 & 3.

**Table 2: Results of audit of the standard of internal reporting procedures**

Review period	Very good	Adequate	Inadequate
1999/2000	56 (42%)	21 (16%)	55 (42%)
1998/1999	51 (39%)	16 (12%)	65 (49%)
1997/1998	37 (28%)	15 (11%)	81 (61%)

## Update on review of internal reporting policies

Premier's Memorandum 96/24 required all agencies to adopt internal reporting procedures for the *Protected Disclosures Act* and send copies to the Premier's Department.

We audited each internal reporting policy received by the Premier's Department. In August and September 1997 we wrote to over 90 agencies setting out brief comments on the general adequacy of, and any deficiencies and inaccuracies in, their internal reporting policy.

So that we could complete our audit and maintain a database of up to date internal reporting policies, we wrote to 69 agencies in 1999 requesting them to send us a copy of their current policy. Over the course of the past year we continued to pursue agencies who had not adequately complied with the Premier's Memorandum. Our assessment of the responses found:

- twenty one responding agencies had either not addressed the problems previously brought to their attention, or had made changes but still had an inadequate policy
- twenty eight responding agencies had improved their documentation to an adequate standard. Nine had

adopted the model policy and a further seven had based their revised procedures on the model

- several agencies had been amalgamated or had ceased to exist

As Table 2 shows, the current results are a significant improvement on the first review carried out in 1997/98.

During its most recent review of the *Protected Disclosures Act*, the Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission asked for and was supplied with a list of agencies that had not responded to our letters of early 1999. That list included the names of 18 agencies.

## Case study 2



## Legislative changes

The *Statute Law (Miscellaneous Provisions) Act 2000* clarifies that employees of a state-owned corporation or a subsidiary of a state-owned corporation are public officials for the purposes of the *Protected Disclosures Act*.

## Second review of the Protected Disclosures Act

The *Protected Disclosures Act* makes provision for the review of the Act by a joint committee of members of Parliament at two yearly intervals.

In 2000, the Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission (the PJC) was referred this statutory review. We made a formal submission to the review and gave evidence at a

public hearing held as part of the review.

At the time of writing the PJC had brought down its report. The report contains a number of worthwhile recommendations, in particular a recommendation that the *Protected Disclosures Act* be amended to enable the establishment of a Protected Disclosures Unit (PDU) within the Office of the Ombudsman. The PDU would perform a range of monitoring and advisory functions in relation to protected disclosures, and be funded by an appropriate additional budgetary allocation (recommendations 3 and 4).

In making this recommendation the PJC specifically endorsed the view of this office that it is in the public interest to have a single dedicated unit with appropriate expertise performing the nominated monitoring and

advisory functions. The PJC also stated that:

Given the obvious problem areas which exist in relation to the protected disclosures scheme, it is the view of this Committee that the establishment of a funded PDU, with specified functions, would significantly enhance the operation of the Protected Disclosures Act within the public sector and assist in the realisation of its objectives.

## Protected Disclosures Act Implementation Steering Committee

We are a member of the Protected Disclosures Act Implementation Steering Committee. This committee also has representatives from the ICAC, Audit Office of NSW, Department of Local Government, Premier's Department, The Cabinet Office,

### Case study 3

Police Integrity Commission and the Internal Witness Support Unit of the NSW Police Service. It was established by the Premier in 1996 to develop strategies for more effectively implementing the *Protected Disclosures Act*.

### **Better management of protected disclosures workshops**

In recent years the committee has conducted over 29 *Better Management of Protected Disclosures* workshops for local councils and state agencies. A survey of protected disclosure coordinators last year showed that demand for this popular workshop remains strong.

Four workshops were held in 1999/2000. In December 1999, two workshops were conducted in the Sydney metropolitan area. In April 2000 the committee travelled to Armidale and Orange to hold workshops for councils in the surrounding areas. These workshops were kindly hosted by Armidale Dumaresq Council and Orange City Council respectively. We would like to publicly acknowledge the assistance provided to the committee by both councils in the organisation of these workshops.

The workshop has been specifically developed for nominated protected disclosures coordinators, all staff receiving and managing complaints and senior management. It is interactive and provides a forum for participants to discuss the

impact of protected disclosures on the organisation, to develop skills for managing staff throughout the reporting and investigation process, and to gain information and skills for conducting internal investigations. The workshops are presented by officers and investigators from the Ombudsman, ICAC, Audit Office (at workshops for state agencies), Department of Local Government (at workshops for councils) and the NSW Police Service. Participants at the workshop are encouraged to take advantage of the presence of these practitioners to obtain practical advice and answers to specific questions relating to their organisation. The workshops conducted during this reporting period were facilitated by Julie McCrossin, whose involvement ensured that the sessions were lively and interactive.

On average, over 90 per cent of participants rated the workshop as being 'very relevant' to their organisation. At the end of the workshop, the majority of participants reported increased levels of understanding of internal reporting systems, protections for staff making disclosures, benefits for the organisation from protected disclosures, investigation techniques and the role of the protected disclosure coordinator.

It is proposed that further workshops will be conducted in the coming year.

### **Assistance in conducting investigations**

In the past we have received substantial feedback from protected disclosure coordinators indicating that there is a need for advice, information and training on conducting an investigation.

Two of our recent publications should help to fill this void. *Investigating complaints: A manual for investigators* provides guidance on the key matters that need to be considered when preparing for and conducting an investigation. The manual is designed to assist in the conduct of an investigation into any complaint of an administrative or disciplinary nature. There are also specific references to the special considerations that apply to the investigation of a protected disclosure.

This publication has been reproduced as chapter 3 in the more comprehensive *The Complaint Handler's Tool Kit*, which provides definitive guidance on the major aspects of complaint handling.

**PROTECTED DISCLOSURES ACT INFORMATION – DECEMBER 2004**

*Please return the completed form to Selena Choo, NSW Ombudsman, by Monday 14 February 2004*

**Fax: (02) 9283 9827 or Mail: Level 24, 580 George St, Sydney 2000**

<b>AGENCY DETAILS</b>	Name of agency:				
	We have a person who is responsible for handling protected disclosures Yes <input type="checkbox"/> No <input type="checkbox"/>				
	If yes, please list their name:				
	and position title:				
	Phone:		Email:		
Is the responsibility for receiving and handling protected disclosures included in this person's official position description? Yes <input type="checkbox"/> No <input type="checkbox"/>					
<b>TRAINING</b>	We would like to send our <b>trainer</b> to a train-the-trainer course. Yes <input type="checkbox"/> No <input type="checkbox"/>				
	Trainer's name:				
	Position title of trainer:				
	Phone:		Email:		
	We do not have a trainer <input type="checkbox"/>		We would like our <b>staff</b> to receive training. Yes <input type="checkbox"/> No <input type="checkbox"/>		
Number of staff to be trained.					
<b>INTERNAL REPORTING SYSTEM</b>	My agency has an internal reporting system. Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, please attach a copy of your policy.				
	When was the policy last revised?				
<b>PROTECTED DISCLOSURES EXPERIENCE</b>	Approximately how many protected disclosures has your agency dealt with each year since 1995?				
	Has your agency encountered any problems or have any issues arisen from the handling of protected disclosures by your agency? Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, please provide details				
	Has your agency ever contacted the ICAC or the NSW Ombudsman, or some other watchdog body for advice about protected disclosures? Yes <input type="checkbox"/> No <input type="checkbox"/>				
Generally, do you feel you have access to sufficient information and assistance when you are handling protected disclosures? Yes <input type="checkbox"/> No <input type="checkbox"/>					
<b>BROCHURES FOR STAFF</b>	I would like to order _____ brochures for distribution to staff. Send them to:				
	Postcode:				
	<i>Please note:</i> Brochures are free of charge for the first 100 and \$25 for every additional 50. You can also download a copy of the brochure from the NSW Ombudsman's website at <a href="http://www.ombo.nsw.gov.au">www.ombo.nsw.gov.au</a>				

Thank you for providing this information.

## **'Whistling While They Work': Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations**

*Australian Research Council  
Linkage Project – 2005-2007*

### **What Is The 'Whistling While They Work' Project?**

The 'Whistling While They Work' project is a three-year collaborative national research project into the management and protection of internal witnesses, including whistleblowers, in the Australian public sector.

The project is being led by Griffith University and is jointly funded by:

- the Australian Research Council
- the five participating universities, and
- 12 industry partners including some of Australia's most important integrity and public sector management agencies.

The protection of whistleblowers and other internal witnesses to corruption, misconduct and maladministration is a great unsolved problem of public sector governance.

This first national study of internal witness management is setting out to describe and compare organisational experience under varying public interest disclosure regimes across the Australian public sector.

By identifying and promoting current best practice in workplace responses to public interest whistleblowing, the project will use the experience and perceptions of internal witnesses and first- and second-level managers to identify more routine strategies for preventing, reducing and addressing reprisals and other whistleblowing-related conflicts.

### **1<sup>st</sup> Public Symposium**

**Researching Whistleblowing:  
Ethics, Methods and the Lessons of  
International Experience**

**Professor Janet Near**

*University of Indiana*

*Co-author of Blowing the whistle: the  
organizational and legal implications for  
companies and employees, 1992*

**Canberra, Tuesday 12 July 2005**  
*See contacts below for further details*

### **Industry Partners**

#### **Commonwealth Government**

- Commonwealth Ombudsman
- Australian Public Service Commission

#### **Queensland Government**

- Qld Crime & Misconduct Commission
- Queensland Ombudsman

#### **New South Wales Government**

- Independent Commission Against Corruption
- NSW Ombudsman

#### **Western Australian Government**

- WA Corruption & Crime Commission
- Public Sector Standards Commissioner
- WA Ombudsman

#### **Northern Territory Commissioner for Public Employment**

#### **ACT Chief Minister's Department**

#### **Transparency International Australia**

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## Funding

Australian Research Council grant	\$585,000
Industry Partners (direct support)	\$210,000
Industry Partners (in-kind support)	<u>\$498,000</u>
Total (not inc. university contributions)	<u>\$1,293,000</u>

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## Research Team

**Dr A J Brown** - Senior Lecturer, Griffith Law School & Socio-Legal Research Centre, Griffith University, Queensland.

**Associate Professor Richard Wortley** - School of Criminology & Criminal Justice and Key Centre for Ethics Law Justice & Governance, Griffith University.

**Dr Paul Mazerolle** - Director of Research & Prevention, Crime & Misconduct Commission, Queensland.

**Dr Rodney Smith** - Senior Lecturer, Discipline of Government and International Relations, University of Sydney.

**Chris Wheeler** - Deputy Ombudsman, NSW.

**Dr Joy Hocking** - Senior Lecturer, School of Management, Edith Cowan University WA.

**Glenn Ross** - Manager, Corruption Prevention, Corruption & Crime Commission WA.

**Peter Roberts** - Senior Lecturer, Centre for Investigative Studies & Crime Reduction, Australian Graduate School of Policing, Charles Sturt University, Canberra.

**Associate Professor Paul Latimer** - School of Business & Economics, Monash University, VIC.

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## Research Plan

Credible strategies for managing internal disclosures are crucial to effective integrity systems, early detection of corruption and maladministration, and the maintenance of positive, healthy workplaces. They are critical to law enforcement, sound financial management, public accountability and the careers and well-being of individual staff.

This project aims to contribute to early detection of workplace misbehaviour and reduce the political, organisational and human costs associated with whistleblowing, by providing managers and integrity agencies with more effective strategies for managing key conflicts. Its findings will inform reviews of existing legislation and identify the regulatory reforms needed to support good workplace practice.

The researchers will:

- Repeat and expand previous confidential, random surveys of a wide range of public employees on their knowledge, attitudes and practices regarding the making and management of public interest disclosures;
  - Establish a more representative picture of the incidence and significance of whistleblowing activity in major public sector organisations;
  - Conduct in-depth surveys of internal witnesses, managers and other employees on current strengths and weaknesses in systems for managing public interest disclosures;
  - Conduct comparative analysis of the lessons of different whistleblower protection systems across Australia and overseas;
  - Help the participating governments and agencies to devise better internal disclosure procedures (IDPs) at operational levels; and
  - Assist in the evaluation of the legislative regimes for 'whistleblower protection' across Australia, particularly those serving the Queensland, NSW, Western Australia and the Commonwealth Governments.
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## Contact

For further information contact the project leader:

**Dr A J Brown**  
 Senior Lecturer  
 Socio-Legal Research Centre  
 Griffith Law School  
 PMB 50 Gold Coast Mail Centre QLD 9726  
 Ph +61 (0)7 5552 8785 Fax 5552 8667  
 Mobile +61 (0)414 782 331  
 Email [A.J.Brown@griffith.edu.au](mailto:A.J.Brown@griffith.edu.au)

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# Thinking about blowing the whistle?

Department of Local Government

## How to make a protected disclosure

If you become aware that something is seriously wrong in the way a public official has acted or is acting, or a public sector agency has acted or is functioning, it is in the public interest and the agency's interest that you tell someone who can do something about it. In NSW, an Act called the *Protected Disclosures Act* sets up a scheme by which people who work in the NSW public sector, for example, in a department or a local council, can come forward with important information. This brochure provides guidance on how to do this.

## BEFORE YOU MAKE A DISCLOSURE

### ASK YOURSELF

### Is the disclosure covered by the Act?

The *Protected Disclosures Act* is designed to deal with disclosures about serious matters about public administration, in particular:

- corruption**, or
- maladministration** (which must be conduct of a serious nature), or
- serious and substantial waste** of public money.

Your council's internal reporting policy should contain information to explain what these terms mean. You could also look under 'protected disclosures' on the NSW Ombudsman's web site:

[www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

A disclosure is **not** covered by the Act if:

- it was made frivolously or vexatiously,
- it was made primarily to avoid dismissal or disciplinary action,
- it contains intentionally false statements or is intended to mislead or attempt to mislead the recipient (these are offences under the Act),
- it questions the merits of government policy.

Making your disclosure in accordance with the scheme in the *Protected Disclosures Act* gives you the best chance of helping the council concerned to remedy the situation.

The scheme encourages all those involved to focus on the issues (not the people) involved.

In the spirit of the Act, the council should take reasonable action to protect you from reprisals.

### REMEMBER

### The best protection is confidentiality—discretion is essential

- Seek advice** from the NSW Ombudsman or from the person responsible for dealing with protected disclosures in your council. **Be discreet** when you are doing so. You may also wish to seek legal advice from a lawyer or approach an appropriate support group.
- Be careful** in deciding who you make your disclosure to and how you make it. To be protected under the *Protected Disclosures Act* your disclosure must be made to specific people (see 'How to make a protected disclosure').
- Don't** telegraph your intentions. For example, threatening to make a disclosure may backfire. If you provide your information discreetly, the council will be better able to focus on the issues rather than on you.
- Don't** tell anyone you are thinking about making a protected disclosure.

### ASK YOURSELF

### Do I have evidence to back up my allegations?

It is important that the information you provide is clear, accurate and factual. If you have documents to support your allegations, try to make them available. This will help the council focus on the real issues and fix real problems.

Avoid speculation or emotive language: it is likely to divert attention from the real issues.

## HOW TO MAKE A PROTECTED DISCLOSURE

### *I want to report something about the council where I work:*

- Your council should have an internal reporting policy. The policy will tell you **how** you should report these matters—for example, whether you can make a disclosure orally or do you have to put it in writing—and the **person** you can report these matters to. The policy should also tell you how the disclosure will be handled.
- If you cannot find a copy of the internal reporting policy, or you are reluctant to ask for it, you can make a disclosure to the General Manager or, if the matter concerns the General Manager, to the Mayor.

### *I want to report something about another agency:*

You can make a disclosure:

- to the head of that agency or your General Manager, or
- to a person in that agency or your council who is responsible for dealing with protected disclosures, or
- to the watchdog bodies below.

### *If you don't want to report something internally, you can report it to:*

- if it's about **CORRUPTION**

#### **Independent Commission Against Corruption**

Tel: 8281 5999 or 1800 463 909 (toll free)  
Fax: 9264 5364  
GPO Box 500  
Sydney NSW 2001  
Email: [icac@icac.nsw.gov.au](mailto:icac@icac.nsw.gov.au)

- if it's about **MALADMINISTRATION**

#### **NSW Ombudsman**

Tel: 9286 1000 or 1800 451 524 (toll free)  
Fax: 9283 2911  
Level 24, 580 George Street  
Sydney NSW 2000  
Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

- if it's about **SERIOUS AND SUBSTANTIAL WASTE** of public money

#### **Director-General of the Department of Local Government**

Tel: 9793 0793  
Fax: 9793 0799  
Locked Bag 1500  
Bankstown NSW 2200  
Email: [dlg@dlg.nsw.gov.au](mailto:dlg@dlg.nsw.gov.au)

- if it's about corruption or serious misconduct by A **POLICE OFFICER**

#### **Police Integrity Commission**

Tel: 9321 6700 or 1800 657 079 (toll free)  
Fax: 9321 6799  
GPO Box 3880  
Sydney NSW 2000  
Email: [contactus@pic.nsw.gov.au](mailto:contactus@pic.nsw.gov.au)

## **What if my allegations cannot be investigated without my identity being guessed or revealed?**

The person or agency to whom you make the disclosure:

- should alert you before your identity, or information that may tend to identify you, is revealed as part of the investigation,
- should take all reasonable steps to protect you against any reprisals in the workplace.

## **What does the Act do for me?**



### **PROTECTION FROM DETRIMENTAL ACTION**

The Act makes it an offence to take detrimental action against you substantially in reprisal for you making a protected disclosure. It is not in the public interest for whistleblowers to suffer as a result of coming forward.

Detrimental action is action such as dismissing you or taking disciplinary action against you and also includes any action:

- that causes you injury, damage or loss,
- that intimidates or harasses you, or
- that discriminates against or disadvantages you in your employment.

The agency about which you make a protected disclosure should take reasonable action to protect you against detrimental action. The government and watchdog bodies expect this.

The agency also has obligations under the common law and occupational health and safety legislation to make sure that you do not suffer as a result of coming forward.

### **What if someone takes detrimental action against me?**

- **Complain** to the person to whom you made the disclosure or to the person who is responsible for dealing with protected disclosures in your council.
- If they do not help you or do not take your complaint seriously, complain to the Department of Local Government, NSW Ombudsman or the Independent Commission Against Corruption. However, be aware that these bodies cannot *prosecute* anyone for taking detrimental action against you. As with other criminal prosecutions, this is a matter for the police, although you may be able to bring a private prosecution yourself.



### **CONFIDENTIALITY**

A person to whom you make a protected disclosure should keep information that might identify you confidential unless:

- you allow them to reveal the information, or
- fairness to other people requires the information to be revealed, or
- it is necessary to disclose information identifying you in order to investigate the matter, or
- it is in the public interest to reveal the information.



## AFTER YOU MAKE THE DISCLOSURE



### OTHER PROTECTIONS

The Act provides that you do not incur any liability for making a protected disclosure.

The Act provides a legal defence to any action taken against you for defamation or breach of confidence.

However, the Act will **not** protect you if you break the law in other ways, for example, if you break into someone's office to obtain evidence to support your allegations.

### ***When will I be told what's happened to my disclosure?***

- The person or agency to whom you made the disclosure **must** tell you within **six months** what action they have taken or propose to take.
- If you don't hear from them within six months, contact them and ask them what is happening. If you do not get a response you can complain to the NSW Ombudsman.

### ***What if I'm not happy with the response?***

- You can complain to the NSW Ombudsman or the Independent Commission Against Corruption about the way your protected disclosure was handled.
- If:
  - it has been decided that your allegations will not be investigated, or
  - the investigation was not completed within six months, or
  - no recommendations were made for action to be taken despite an investigation, or
  - you were not notified within six months of whether or not the matter was to be investigated,**you can** make a disclosure to a member of Parliament or a journalist.

**Caution: Make sure** you seek advice before you do this. To obtain protection for a disclosure to a member of Parliament or a journalist, you must be able to prove that the disclosure is **substantially true**.

### ***Where do I go for further information?***



#### **WITHIN YOUR COUNCIL**

If there is a person in your council who is responsible for dealing with protected disclosures, you should talk to them first.



#### **NSW OMBUDSMAN**

You can also contact the Ombudsman on:

Tel: 9286 1000 or 1800 451 524 (toll free)

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

# Thinking about blowing the whistle?

## How to make a protected disclosure

If you become aware that something is seriously wrong in the way a public official or employee of the public sector agency has acted or is functioning, it is in the public interest and the best interests of the community to tell someone who can do something about it. In NSW, an Act called the *Protected Disclosures Act 2010* sets out a scheme by which people who work in the NSW public sector, for example, in a department or a local government council, can come forward with important information. This brochure provides guidance on how to do this.

### BEFORE YOU MAKE A DISCLOSURE

#### ASK YOURSELF

#### *Is the disclosure covered by the Act?*

The *Protected Disclosures Act* is designed to deal with disclosures about serious matters about public administration, in particular:

- corruption**, or
- maladministration** (which must be conduct of a serious nature), or
- serious and substantial waste** of public money.

Your agency's internal reporting policy should contain information to explain what these terms mean. You could also look under 'protected disclosures' on the NSW Ombudsman's web site:

[www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

A disclosure is **not** covered by the Act if:

- it was made frivolously or vexatiously,
- it was made primarily to avoid dismissal or disciplinary action,
- it contains intentionally false statements or is intended to mislead or attempt to mislead the recipient (these are offences under the Act),
- it questions the merits of government policy.

Making your disclosure in accordance with the scheme in the *Protected Disclosures Act* gives you the best chance of helping the agency concerned to remedy the situation.

The scheme encourages all those involved to focus on the issues (not the people) involved.

In the spirit of the Act, the agency should take reasonable action to protect you from reprisals.

#### REMEMBER

#### *The best protection is confidentiality—discretion is essential*

- Seek advice** from the NSW Ombudsman or from the person responsible for dealing with protected disclosures in your agency. **Be discreet** when you are doing so. You may also wish to seek legal advice from a lawyer or approach an appropriate support group.
- Be careful** in deciding who you make your disclosure to and how you make it. To be protected under the *Protected Disclosures Act* your disclosure must be made to specific people (see 'How to make a protected disclosure').
- Don't** telegraph your intentions. For example, threatening to make a disclosure may backfire. If you provide your information discreetly, the agency will be better able to focus on the issues rather than on you.
- Don't** tell anyone you are thinking about making a protected disclosure.

#### ASK YOURSELF

#### *Do I have evidence to back up my allegations?*

It is important that the information you provide is clear, accurate and factual. If you have documents to support your allegations, try to make them available. This will help the agency focus on the real issues and fix real problems.

Avoid speculation or emotive language: it is likely to divert attention from the real issues.

## HOW TO MAKE A PROTECTED DISCLOSURE

### ***I want to report something about the agency where I work:***

- Your agency should have an internal reporting policy. The policy will tell you **how** you should report these matters—for example, whether you can make a disclosure orally or do you have to put it in writing—and the **person** you can report these matters to. The policy should also tell you how the disclosure will be handled.
- If you cannot find a copy of the internal reporting policy, or you are reluctant to ask for it, you can make a disclosure to the head of your agency (i.e. your CEO or Director-General).

### ***I want to report something about another agency:***

You can **only** make a disclosure to the head of that agency or to the watchdog bodies below.

### ***If you don't want to report something internally, you can report it to:***

- if it's about **CORRUPTION**

**Independent Commission Against Corruption**

Tel: 8281 5999 or 1800 463 909 (toll free)  
Fax: 9264 5364  
GPO Box 500  
Sydney NSW 2001  
Email: [icac@icac.nsw.gov.au](mailto:icac@icac.nsw.gov.au)

- if it's about **MALADMINISTRATION**

**NSW Ombudsman**

Tel: 9286 1000 or 1800 451 524 (toll free)  
Fax: 9283 2911  
Level 24, 580 George Street  
Sydney NSW 2000  
Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

- if it's about **SERIOUS AND SUBSTANTIAL WASTE** of public money

**Auditor-General**

Tel: 9285 0155  
Fax: 9285 0100  
GPO Box 12  
Sydney NSW 2001  
Email: [mail@audit.nsw.gov.au](mailto:mail@audit.nsw.gov.au)

- if it's about corruption or serious misconduct by **A POLICE OFFICER**

**Police Integrity Commission**

Tel: 9321 6700 or 1800 657 079 (toll free)  
Fax: 9321 6799  
111 Elizabeth Street  
Sydney NSW 2000

## **What if my allegations cannot be investigated without my identity being guessed or revealed?**

The person or agency to whom you make the disclosure:

- should alert you before your identity, or information that may tend to identify you, is revealed as part of the investigation,
- should take all reasonable steps to protect you against any reprisals in the workplace.

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Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

RPDA 002.1

ICC 166  
COS/2193

**From:** "Selena Choo" <schoo@ombo.nsw.gov.au>  
**To:** <icac@parliament.nsw.gov.au>  
**Date:** Fri, Jul 1, 2005 11:19 am  
**Subject:** review of Protected Disclosures Act

Dear Ian

As discussed earlier I attach an amended version of the NSW Ombudsman's Issues Paper - The Adequacy of the Protected Disclosures Act to Achieve its Objectives (April 2004). Please replace any previous copies that you have of this paper, as tables 5-9 of Appendix C are missing from those copies.

I would also like to request an extension of time for the submission of the Protected Disclosures Act Implementation Steering Committee to the review of the Act. A number of our key committee members, including Chris Wheeler the Deputy Ombudsman, are having leave over the next few weeks (school holidays) and will not be returning until the week beginning 18 July. Given we need cooperation from seven agencies in developing our submission, it is unlikely that we will be able to provide our submission to you before Friday 22 July. As the Ombudsman's submission will depend on what is covered in the Steering Committee's submission, our office's submission will also be provided on that date.

I apologise for any inconvenience that this may cause. Would you mind letting me know by return email if this is OK.

Regards,  
Selena

<<Adequacy of the Protected Disclosure.pdf>>

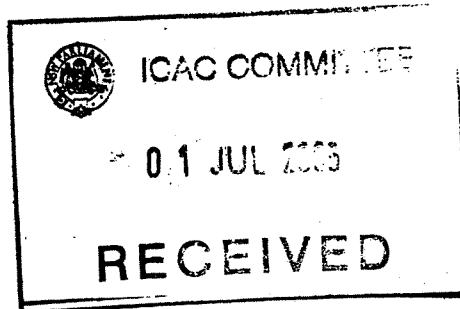
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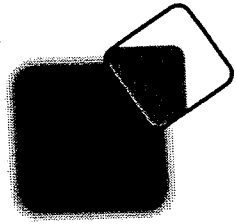
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# NSW Ombudsman

Issues Paper:

The Adequacy of the  
Protected Disclosures Act  
to Achieve its Objectives

April 2004  
(Amended June 2005)



CELEBRATING 30 YEARS OF SERVICE 1975 - 2005



Issues Paper:

The Adequacy of the  
Protected Disclosures Act to  
Achieve its Objectives

April 2004  
(Amended June 2005)



NSW Ombudsman  
Level 24, 580 George Street  
Sydney NSW 2000

General enquiries: (02) 9286 1000  
Toll free (outside Sydney Metro Area): 1800 451 524  
Facsimile: (02) 9283 2911  
Telephone typewriter: (02) 9264 8050  
Website: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

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## Contents

1. Introduction .....	5
2. Purpose of paper .....	6
3. Australasian whistleblower legislation .....	6
4. Comparison of provisions of whistleblower legislation.....	7
5. Ranking the scope of legislative schemes.....	7
6. Core objectives of whistleblower legislation .....	8
7. Key elements of whistleblower legislation.....	9
8. Achieving the core objectives of whistleblower legislation .....	9
9. Adequacy of the Protected Disclosures Act .....	12
10. Conclusions .....	15
11. Appendix	
A Recommendations arising out of the Protected Disclosures Act that have not been implemented or have been partly implemented .....	16
B Australasian whistleblower legislation .....	18
C Comparison of legislative schemes* .....	19
D Comparison of the provisions of Australasian whistleblower legislation .....	26
E Ranking of scope of legislative schemes.....	29
F Summary of whistleblower legislation.....	30
G Key Elements of whistleblower legislation .....	37
H Comparison of whistleblower legislation options to equivalent provisions in Protected Disclosures Act.....	43
I Whistleblowing - Survey of Australasian Ombudsman .....	47

\*Please note that Appendix C was amended in 2005 to include tables 5–9.



## 1. Introduction

Whistleblowers perform an essential service in our society. They can bring to light serious problems with the management or operations of an organisation. This includes matters relating to systems, competence and resources, as well as the integrity of an organisation. In many respects disclosures by whistleblowers provide an invaluable early system for management about problems that, if unaddressed, can sometimes reach catastrophic proportions.

It would be reasonable to think that whistleblowers would be rewarded for performing this service. Instead, we know that, at least in our society, someone who reports these problems is considered to have done something special, something beyond the ordinary. It is even implicit in the very language that we use to discuss this issue – to 'blow the whistle'.

Ideally, reporting these kinds of concerns would be considered to be part of doing a good job; being a responsible and effective employee. It can be noted that many employees do draw attention to organisational problems as part of their day-to-day responsibilities – they are called supervisors.

The critical difference is a cultural one. It is widely accepted that there continues to be a deep-seated culture within Australian workplaces that disapproves of people who criticise their colleagues or superiors. These people are considered to be 'dobbers', a derogatory term implying personal disloyalty. Interestingly, there does not appear to be as much disapproval of people who criticise *systems*, as opposed to individuals, although our experience shows that sometimes even they are considered to be 'troublemakers' if they go outside established reporting channels.

Our experience has shown that this attitude often leads to mishandling of a situation when someone comes forward with genuine concerns. The whistleblower often suffers retribution. The organisation as a whole often also suffers.

This issue has been the subject of much discussion and over the last 10 years each Australian State has introduced legislation to try to prevent the mishandling of such situations. Our experience has shown that internal reporting systems do help management avoid some of the pitfalls associated with handling reports by whistleblowers. We believe that statutorily requiring such systems to be in place is still the most effective way of supporting the whole public sector to handle these matters properly. The systems found throughout Australia and New Zealand differ in many respects. This paper outlines some of the differences and looks critically at whether the NSW *Protected Disclosures Act 1994* achieves its purported aims.

## 2. Purpose of paper

The *Protected Disclosures Act 1994* (NSW) (PD Act) is required to be reviewed every two years (s.32). Only two reviews of the Act have been conducted so far, and these were carried out by the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission. The review required in 2002 has not yet commenced.

A number of the recommendations made by the two reviews have been implemented by the government. **Appendix A** indicates those recommendations that have not been implemented.

To help inform the next review of the Act we undertook a project to compare and contrast all whistleblowing legislation currently in force in Australia and New Zealand. This review included:

- identification and tabulation of the various types of provisions contained in the whistleblower legislation the subject of the review;
- comparison of the provisions in the whistleblower legislation to identify alternative approaches to common issues;
- ranking the scope of each Act on the basis of a range of measures;
- a survey of Australasian Ombudsman seeking information about the experience of each jurisdiction in the implementation of its legislation;
- assessment of the adequacy of the PD Act to achieve its objects; and
- identification of options to address any identified deficiencies in the PD Act.

## 3. Australasian whistleblower legislation

Specific whistleblower legislation has been enacted in the six Australian States, the Australian Capital Territory (ACT) and New Zealand. There is no specific whistleblower legislation enacted in the Northern Territory or the Commonwealth, although a draft *Public Interest Disclosure Bill 2000* [2002] is currently the subject of consideration by the Finance and Public Administration Legislation Committee of the Australian Senate and there is a limited whistleblowing scheme under the *Public Service Act 1999* (Cth) (see **Appendix B**).

The first whistleblower protection legislation was enacted in South Australia in 1993, followed in 1994 by legislation in Queensland, the ACT and NSW. There was then a gap of six years before the enactment of the New Zealand legislation followed by Victoria in 2001, Tasmania in 2002 and Western Australia in 2003.

There is little uniformity in the titles given to whistleblower legislation in the various jurisdictions with three using *Public Interest Disclosure(s) Act* (four if and when the Commonwealth Bill is enacted), three using *Whistleblowers Protection Act* and two using *Protected Disclosure(s) Act*.

For the purposes of this project it is relevant to note that the Western Australian Act only commenced on 1 July 2003 and the Tasmanian Act commenced by proclamation on 1 January 2004.

## 4. Comparison of provisions of whistleblower legislation

Apart from Victoria and Tasmania, each jurisdiction has adopted often dramatically different approaches to the encouragement of disclosures, the protection of whistleblowers and the obligations on agencies receiving disclosures.

In this regard, while some legislation only applies to protect disclosures made by public officials, others apply to disclosures to be made by any person. In some legislation the conduct that can be the subject of a disclosure (for that disclosure to be protected) is very broad in scope while in others it is particularly narrow. The scope of available reporting options varies widely as does the criminal and non-criminal protections that are available. The obligations on agencies to protect whistleblowers and to investigate disclosures, as well as the legal of coordination and oversight of each scheme, also vary widely.

The various legislative schemes are tabulated in **Appendix C** and compared in **Appendix D**.

## 5. Ranking the scope of legislative schemes

We have ranked the various legislative schemes on the basis of the scope of five key aspects (see **Appendix E**). These five key aspects are the:

- 1) scope of persons protected
- 2) scope of conduct the subject of a disclosure
- 3) scope of reporting options
- 4) scope of criminal protections, and
- 5) scope of non-criminal protections.

As can be seen from **Appendix E**, the ranking of each legislative scheme in terms of the five key aspects indicates that, over all, the Queensland Act has the broadest in scope, followed by NSW, then the ACT, New Zealand, WA, Victoria and Tasmania, with South Australia having the narrowest scope, particularly in terms of the protections that are available.

On the other side of the coin, the level of detail and complexity in the legislation is greatest in Queensland, followed by Victoria and Tasmania. The SA legislation has the least level of detail and complexity. While the ACT, NSW, New Zealand and WA occupy the middle ground, the ACT, NSW and WA legislation, at least, are quite complex. In this regard the Commonwealth Ombudsman has described the ACT Act as "*unexpectedly complex*", the former NSW Solicitor General has referred to the "*generous opacity*" of the NSW PD Act and the WA Ombudsman has raised significant concerns about the interpretation of various provisions of that Act.

A summary description of the provisions of each Act is set out in **Appendix F**.

## 6. Core objectives of whistleblower legislation

### Objectives

There are three almost universal pre-requisites for the vast majority of employees to make a disclosure when they become aware of serious problems within the management or operations of their organisation:

- first and foremost they must be confident that they will be protected from suffering reprisals or from being punished if they do so
- secondly they must believe that making a disclosure will serve some good purpose, ie, that appropriate action will be taken by the recipient of the disclosure, and
- thirdly they must be aware that they can make a disclosure and how they should go about doing so, ie, to whom, how, what information should be provided, etc.

These pre-requisites are reflected in the PD Act, which sets out its object in the following terms:

*"The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:*

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters, and*
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and*
- (c) providing for those disclosures to be properly investigated and dealt with." (s.3(1)).*

The three pre-requisites can be translated into the three core objectives that need to be addressed if whistleblower legislation is to be effective:

- 1) ensuring the protection of whistleblowers
- 2) ensuring their disclosures are properly dealt with, and
- 3) facilitating the making of disclosures.

## 7. Key elements of whistleblower legislation

Based on the various approaches adopted in Australasian whistleblower legislation (see **Appendix G**), and our experience implementing the PD Act since 1995, the key elements that need to be addressed to achieve the core objectives appear to be:

- 1) the scope of conduct covered by the Act
- 2) potential whistleblowers
- 3) reporting options
- 4) internal reporting systems
- 5) threshold tests for protection
- 6) circumstances when disclosures are not protected
- 7) obligations on whistleblowers
- 8) obligations on persons/organisations that receive disclosures
- 9) coordinating/monitoring body or role
- 10) determinative function as to whether a disclosure is protected under the legislation
- 11) protections for whistleblowers
- 12) criminal offence for detrimental reprisal action
- 13) beneficial treatment of whistleblowers
- 14) referral of disclosures, and
- 15) records of disclosures (ie, statistics to assist identifying systemic problems and serial offenders).

## 8. Achieving the core objectives of whistleblower legislation

### *Protections for whistleblowers*

Looking at the first objective for effective whistleblower legislation, the long held and widespread view has been that the best protection that can be provided for a whistleblower is confidentiality. This is often the first thing that whistleblowers themselves will ask for. The reason is obvious. If no one knows you 'dobbed', you cannot suffer reprisals.

There are three main things that may be kept secret: the fact of the disclosure, the identity of the whistleblower and the allegations themselves (including individuals' names). In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. Certainly this would provide the most effective protection for a whistleblower.



In practice, however, two main problems arise with expecting confidentiality to protect a whistleblower from retribution. Firstly, an organisation may not be able to realistically guarantee confidentiality. It is often difficult to make even preliminary inquiries into allegations without alerting someone in the organisation to the fact that allegations have been made. Further, to ensure procedural fairness, anyone who is the subject of an allegation should be given an opportunity to answer them. Once it is known that a disclosure has been made, it is often not difficult to surmise who has blown the whistle. Sometimes the whistleblower has made confidentiality even more difficult by previously telegraphing his or her concerns about an issue, or even his or her intention to complain, before making a formal disclosure.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can know for sure if those measures have succeeded. Human error and indiscretion cannot be discounted. The agency and its relevant staff may not be aware or be able to predict that certain information they think can be revealed (eg allegations that certain systems are failing) is sufficient to identify the whistleblower. Someone may have simply seen the whistleblower approaching management to report his/her concerns.

In these circumstances, if the whistleblower subsequently suffers detrimental action from the person who was the subject of their allegations, it would be open to *suspect* that this was a result of the person finding out and taking retribution. However, this may be difficult to prove. Indeed, in NSW we have seen cases where a person accused of taking 'detrimental action' against a whistleblower has been able to use the agency's measures to guarantee confidentiality to argue that s/he could not have known about the disclosure, and therefore, could not have taken that action *because of* the disclosure.

This happened in a recent case involving a NSW police officer. On the basis that the identity of the whistleblower had not been disclosed by the NSW Police or its investigators (as required by s.169A of the *Police Act 1990*), the prosecution could not prove that any detrimental action taken against the whistleblower was 'substantially in reprisal' for the making of a disclosure.

A further complication arises in those cases where people find out that a disclosure has been made and take retributive action against the wrong person; a person who did not actually make the disclosure. A system for protecting whistleblowers should also aim to prevent this kind of behaviour taking place.

Given these difficulties, it is clear that the promise of confidentiality, of itself, is often not sufficient protection for a whistleblower. Whistleblowers need to be provided with appropriate support, to be reassured that they have done the right thing and to be given legal rights against anyone who does not support them or takes retribution.

To achieve adequate protection for whistleblowers, effective whistleblower legislation might include:

- 1) protection from exposure of identity, ie, confidentiality and secrecy
- 2) protection from detrimental/reprisal action, eg:
  - obligations on employers/CEOs to protect whistleblowers
  - the right to complain to an independent external body
  - criminal and disciplinary sanctions for detrimental action/reprisal
  - the right to seek injunction or order to restrain or require action
  - relocation of whistleblowers (at least within or between state government agencies, although this may be difficult for local councils), and/or
  - witness protection (in exceptional circumstances)
- 3) protection from liability, eg, from any criminal or civil liability arising out of a disclosure, including in defamation, and
- 4) redress for detriment, eg, damages in tort and/or compensation (see **Appendix G** at point 11).

Criminal sanctions aim to act as a deterrent and as a punishment. Although it is impossible to know how much retribution has been prevented by the existence of the statutory offence, we could surmise that one reason criminal sanctions have rarely been used is that retributive action has been prevented. What our experience *has* shown is that the sanctions have not been very effective as a punishment. To date the only criminal actions for detrimental/reprisal action in Australasia have been taken in NSW. Each was unsuccessful.

Further, the results of a survey of Australasian Ombudsman (see **Appendix I**) have found that the criminal and disciplinary sanctions for detrimental reprisal/action are seldom if ever used/imposed. Reasons for this include the absence in all jurisdictions of any official person or body with responsibility to implement such sanctions, leaving it up to the whistleblower to take personal action; evidentiary problems in some jurisdictions (eg, where criminal sanctions require a 'but for' test).

#### *Ensuring disclosures are properly dealt with*

Looking at the second core objective for effective whistleblower legislation, provisions that could be included in whistleblower legislation to ensure that disclosures are properly dealt with include:

- 1) obligations on whistleblowers to maintain confidentiality and assist/cooperate with investigators
- 2) obligations to properly investigate/deal with disclosures (eg, to adopt and implement procedures for the investigation of disclosures, to investigate disclosures, to provide/ensure procedural fairness in the conduct of investigations)
- 3) powers to investigate disclosures (either generally or for particular organisations/ persons who otherwise have insufficient powers to do so effectively)
- 4) time lines for action (in relation to both the investigation or disclosures and the information to be provided to whistleblowers)
- 5) obligations to notify whistleblowers and any relevant central agency as to action taken or proposed
- 6) referral of disclosures to more appropriate agencies/persons where the original recipient does not have the jurisdiction or power to appropriately deal with it in (**Appendix G** at points 7,8,14 &15)
- 7) obligations to provide ongoing support for whistleblowers, and
- 8) obligations to periodically review/audit how organisations are handling protected disclosures.

#### *Facilitating the making of disclosures*

In relation to the third core objective for effective whistleblowing legislation, provisions that could be included in whistleblower legislation to facilitate the making of disclosures include:

- 1) identification of the scope of the conduct about which disclosures made will be protected
- 2) identification of the persons to whom and the circumstances where disclosures made will be protected
- 3) provision for disclosures to be made anonymously
- 4) identification of the reporting options for disclosures (both internal and external),
- 5) obligations on agencies to adopt and implement internal reporting systems (**Appendix G** at points 2,3 & 4)
- 6) obligations on agencies to keep staff informed of the existence of an internal reporting system and how to use it.

## 9. Adequacy of the Protected Disclosures Act

We have assessed the provisions of the PD Act to see whether they are adequate to achieve the core objectives for effective whistleblower legislation. To this end we considered the major provisions of the PD Act (other than machinery provisions and those designed to ensure that the legislation is not misused) to identify whether:

- they facilitate the achievement of one or more of the core objectives, and
- the Act as a whole incorporates adequate mechanisms to achieve each of the core objectives.

Appendix H indicates which of the whistleblower legislation options set out in Appendix G are currently addressed in the PD Act. As can be seen, there are a number of important options that are not currently addressed in the PD Act.

### *Protections for whistleblowers*

While the PD Act contains significant statutory protections for whistleblowers (including a reversed onus of proof in criminal proceedings for detrimental action), NSW is the only jurisdiction in which a whistleblower who has been the subject of detrimental/reprisal action has no rights in the Act to seek damages. Another key failing in the Act is that there is no statutory obligation on senior managers and/or CEOs to protect whistleblowers, or even to establish procedures to protect whistleblowers (obligations imposed in five of the other seven Australasian jurisdictions). Further, only NSW and two other jurisdictions do not make provision for injunctions or orders to remedy or restrain breaches of the Act.

To address these and other significant issues, matters that should be considered in the next review for inclusion in the PD Act include:

- 1) specific provision for disclosures to be made anonymously (currently implied)
- 2) obligations on employers/senior managers/CEOs to protect whistleblowers
- 3) obligations on employers/senior managers/CEOs to investigate disclosures
- 4) availability of injunctions or orders to remedy or restrain a breach of the Act
- 5) damages for detrimental/reprisal action
- 6) compensation for detrimental/reprisal action from employer or government
- 7) nomination of a person or body responsible for prosecuting breaches, and
- 8) relocation of whistleblowers within or between agencies.

Consideration should also be given to discussing what purpose is served by several provisions in the Act that limit the circumstances where the protections of the Act apply, for example:

- 1) disclosures made "*frivolously or vexatiously*" (s.16), which relates to the motive of the whistleblower and not to the content of the disclosure – often invaluable information can be brought to light by people motivated by malice or disaffection – what is crucial is the content of the disclosure not the motive of the whistleblower (although it may be more appropriate to limit a malicious whistleblower from accessing any private rights the Act might confer)
- 2) disclosures concerning the "*merits of government policy*" (s.17) – a term not defined in the Act - the NSW Act is the only Australasian legislation which contains such a provision

- 3) disclosures motivated by the object of avoiding disciplinary action (s.18), which relates to the motive of the whistleblower and not to the content of the disclosure - the NSW Act is the only Australasian legislation which contains such a provision, and
- 4) that disclosures to members of Parliament or journalists "*must be substantially true*" (s.19(5)) - in practical terms a requirement that could seldom if ever be met by a whistleblower where the preconditions in s.19(3) apply.

*Ensuring disclosures are properly dealt with*

The PD Act almost completely fails to address the core objective of ensuring disclosures are properly dealt with.

To remedy this serious defect, matters that should be considered for inclusion in the PD Act include obligations:

- 1) to appropriately deal with disclosures, including:
  - a) to adopt and implement procedures for assessing and investigating, or otherwise appropriately dealing with disclosures
  - b) to appropriately investigate or otherwise handle disclosures (including investigation powers for organisations/ persons who otherwise have insufficient powers to do so effectively)
  - c) to appoint investigators (to ensure an impartial or independent investigation)
  - d) to provide procedural fairness in the conduct any of investigations (where this is not already dealt with in relevant legislation),
- 2) to notify whistleblowers:
  - a) of progress
  - b) of the outcome of investigations,
- 3) to notify a central monitoring/coordinating agency:
  - a) of disclosures received each year
  - b) of outcomes of investigations,
- 4) to make and retain adequate records of disclosures made to receiving organisations, and to report in receiving organisation annual reports and in any monitoring/coordinating body's annual report on the implementation of the Act.

[Note: The nature of the investigation required in each particular case will depend on the nature and content of the disclosure.]

At present no information is available as to how many protected disclosures are being made to any particular agencies or agencies generally, or whether such disclosures and the people who made them are being dealt with properly by those agencies. The NSW Ombudsman is only aware of disclosures made directly to the Office, and disclosures made to agencies where the whistleblower or agency has sought advice from the Office.

Given the complexity of issues arising in relation to the PD Act and whistleblowing generally, and the need for a close eye to be kept on how agencies deal with disclosures and whistleblowers, consideration should be given to the establishment of a coordinating/monitoring role as recommended by the Parliamentary Committee in its reports arising out of the two reviews of the PD Act. This would include identifying appropriate functions and powers, determining whether the agency carrying out this role would need to coordinate/monitor investigating authorities, considering obligations on agencies to report on the operation of the legislation.

### *Facilitating the making of disclosures*

The PD Act fails to adequately address the core objective of facilitating disclosures by public officials.

There are a number of issues that need to be considered for the Act to better address this objective, for example:

- 1) whether the avenues for making a disclosure should be expanded to include any person or body with jurisdiction to deal with the subject matter of the disclosure (the current provision as to the avenues for the making of disclosures is one of the main sources of complexity in the Act)
- 2) whether the scope of the conduct covered by the Act is wide enough (eg, should it be expanded to include public health and safety issues and environmental damage as in most other Australasian jurisdictions)
- 3) whether private citizens should be protected if they make disclosures about conduct covered by the Act (as is the case in five of the other seven jurisdictions)
- 4) whether specific provision should be included in the Act for anonymous disclosures (the present position is that we have read the Act to imply that disclosures can be made anonymously), and
- 5) whether agencies should be required to adopt and implement an internal reporting system for the purposes of the Act (currently a discretionary issue).

A further, and far more contentious, issue relates to beneficial treatment of whistleblowers. Some countries have legislation which makes provision for the payment of rewards to whistleblowers, or payment of a share of the moneys recovered as a result of their disclosure. The PD Act prohibits beneficial treatment in favour of a person if the purpose (or one of the purposes) for doing so is to influence the person to make, to refrain from making or to withdraw a disclosure (s.3(2)(b)).

It is important to ensure that no inducements (either financial or preferential treatment) to make or withdraw disclosures are offered or given, particularly where the evidence of the whistleblower, and therefore his or her credibility, will be crucial to the case. For the same reason prohibition should extend to the automatic payment or provision of any rewards or benefits on the making of a disclosure.

The payment of rewards, or a share of any recovered moneys, at the conclusion of any investigation where a disclosure is substantiated, or on conviction or imposition of a penalty, may, however, be an option to consider. This approach has been found to be effective in the USA in relation to fraud in Federal government contracting and in Korea in relation to disclosures about corruption. But before adopting any such approach, serious consideration would have to be given to the fundamental intention of any whistleblowing scheme, which presumably is to facilitate and encourage a change of culture within public sector agencies so that it is part of a public official's public duty and employee responsibilities to report serious problems with their agency's management or operations.

### *Other issues to be considered*

Other issues that need to be considered in a review of the PD Act, include:

- 1) circumstances when disclosures should not be protected, eg, where:
  - a) the whistleblower knows the disclosure to be false or it is made in bad faith
  - b) the whistleblower fails to assist any investigation
  - c) the whistleblower makes further unauthorised disclosure
- 2) obligations on whistleblowers:
  - a) to maintain confidentiality
  - b) to assist/cooperate with investigators
- 3) confidentiality in relation to the subject(s) of disclosures (where possible, practical, and appropriate).

## 10. Conclusions

The PD Act, as it is currently drafted, is inadequate to achieve two of its three core objectives.

While the two previous reviews of the PD Act have identified a range of largely operational issues that need to be addressed (with mixed success), it is now time for the Act to be comprehensively reviewed.

The required review of the Act (s.32) should be commenced as a matter of urgency. This review should include consideration of the issues raised at 9 above.



**Bruce Barbour**  
*NSW Ombudsman*

## Appendix A

### Recommendations arising out of reviews of the Protected Disclosures Act that have not been implemented or have been partly implemented

Recommendation	Source
<p>1. Protected Disclosures Unit (PDU)</p> <p>Establish a Protected Disclosures Unit within the Office of the Ombudsman to perform various monitoring and advisory functions, including to:</p> <ul style="list-style-type: none"> <li>• monitor the response of public sector agencies to the Act, including investigations</li> <li>• provide advice and guidance, and</li> <li>• coordinate the collection of statistics on protected disclosures and training programs.</li> </ul>	<p>1<sup>st</sup> review (rec. 1) and 2<sup>nd</sup> review (rec.3)</p>
<p>2. To enable the PDU to monitor trends in the operation of the protected disclosures scheme by requiring public sector agencies to regularly provide it with certain information.</p>	<p>1<sup>st</sup> (rec. 2) &amp; 2<sup>nd</sup> review (rec. 4)</p>
<p>3. Statutorily require public sector agencies to provide to the PDU statistics on protected disclosures received.</p>	<p>1<sup>st</sup> review (rec. 17)</p>
<p>4. Include in the Act a statement of the Legislature's intent that public authorities and officials should act in a manner consistent with, and supportive of, the objects of the Act and that they should ensure that persons who make protected disclosures are not subject to detrimental action.</p>	<p>1<sup>st</sup> review (rec. 7)</p>
<p>5. Provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.</p>	<p>1<sup>st</sup> review (rec.8)</p>
<p>6. Require each investigating authority to refer any evidence of an offence under section 20 to the Director of Public Prosecutions.</p>	<p>1<sup>st</sup> review (rec. 10)</p>
<p>7. Extend protection against detrimental action to any person/body engaged in a contractual arrangement with a public sector agency who makes a protected disclosure.</p>	<p>1<sup>st</sup> review (rec. 11)</p>
<p>8. Extend protection against detrimental action to any person who makes a protected disclosure to the Internal Audit Bureau.</p>	<p>1<sup>st</sup> review (rec. 12)</p>
<p>9. Clarify that the protections do not apply to Members of Parliament and local government councillors.</p>	<p>1<sup>st</sup> review (rec. 15)</p>
<p>10. Statutorily require public sector agencies to adopt uniform standards and formats for statistical reporting.</p>	<p>1<sup>st</sup> review (rec. 16)</p>
<p>11. Require investigating authorities to develop uniform reporting categories, standards and formats.</p>	<p>1<sup>st</sup> review (rec. 18)</p>
<p>12. Require all public sector agencies to periodically report to the Parliamentary Joint Committee on protected disclosures.</p>	<p>1<sup>st</sup> review (rec. 20)</p>
<p>13. Require all investigating authorities to periodically report to the Parliamentary Joint Committee on protected disclosures.</p>	<p>1<sup>st</sup> review (rec. 21)</p>

Recommendation		Source
14.	Have the Premier comprehensively evaluate the priority areas for reform of the protected disclosures scheme.	2 <sup>nd</sup> review (rec. 1)
15.	Provide for the Ombudsman to make disclosures to the Director of Public Prosecutions or the police for the purpose of conducting prosecutions.	2 <sup>nd</sup> review (rec. 5)
16.	To require public sector agencies to tell staff about internal reporting systems and require the Ombudsman to monitor compliance with this.	2 <sup>nd</sup> review (rec. 7)
17.	Provide explicitly for courts to make orders suppressing the publication of material which would tend to disclose the identity of a whistleblower.	2 <sup>nd</sup> review (rec. 8)
18.	Provide that detrimental action includes payback complaints made in retribution for a protected disclosure.	2 <sup>nd</sup> review (rec. 9)
19.	Have the PDU examine the merits of a false claims statutory scheme for NSW.	2 <sup>nd</sup> review (rec. 11)
20.	Require all investigating authorities to provide reasons to a whistleblower for not proceeding with an investigation into their protected disclosure.*	1 <sup>st</sup> review (rec. 2)
21.	Require public sector agencies to include certain statements relating to protected disclosures in their codes of conduct.*	1 <sup>st</sup> review (rec. 4)
22.	Have the Steering Committee continue to play a central role in determining the strategic direction of the development of the protected disclosures scheme.*	2 <sup>nd</sup> review (rec. 2)

\* Recommendation partly implemented.

The following recommendations have been implemented:

1<sup>st</sup> review - recommendations 5, 6, 9, 14, 19, 22 and 23.

2<sup>nd</sup> review - recommendations 6 and 12.



## Appendix B

### Australasian whistleblower legislation

South Australia	1993	<i>Whistleblowers Protection Act</i>
Queensland	1994	<i>Whistleblowers Protection Act</i>
Australian Capital Territory	1994	<i>Public Interest Disclosure Act</i>
New South Wales	1994	<i>Protected Disclosures Act</i>
New Zealand	2000	<i>Protected Disclosure Act</i>
Victoria	2001	<i>Whistleblowers Protection Act</i>
Tasmania	2002	<i>Public Interest Disclosures Act</i>
Western Australia	2003	<i>Public Interest Disclosure Act</i>

## Appendix C

### Comparison of legislative schemes

<b>Table 1: Scope of Act</b>										
<b>Scope of conduct covered by Act</b>										
	ACT	NSW	NZ	QLD	SA	TAS	VIC	WA		
Improper conduct, maladministration or matters of administration	ss.3, 4	s.11	s.3	s.16	s.4	s.3	s.3	s.3		
Waste of public money/ mismanagement of public resources	s.3	ss.12, 12B	s.3	s.17	s.4	s.3	s.3	s.3		
police misconduct, illegal activity or corrupt conduct	s.3	ss.10, 12A	s.3	ss.15,16	s.4	s.3	s.3	s.3		
public health and safety	ss.3, 4	-	s.3	ss.18	s.4	s.3	s.3	s.3		
environmental damage	-	-	s.3	ss.18, 19	s.4	s.3	s.3	s.3		
private sector	s.4(2)	-	s.6	s.19	s.4	-	s.3	-		
<b>Threshold test</b>										
disciplinary action	s.4(1)*	-	-	-	-	-	-	-		
dismissal	s.4(1)*	-	-	-	-	s.3	s.3	-		
criminality	s.4(1)*	-	-	-	-	s.3	s.3	-		
<b>Persons and bodies that can be the subject of a disclosure</b>										
state public officials	s.3	s.4	s.3	Pt 3	s.4	s.6	s.3	s.3		
state agencies	s.3	s.4	s.3	Pt 3	s.4	s.6	s.3	s.3		
bodies performing public official functions	s.3	s.4	-	Pt 3	s.4	-	s.3	s.3		
MPs	?	s.4	-	Pt 3	s.4	ss.3, 7(4)	s.3	s.3		
local council staff	NA	s.4	s.3	Pt 3	s.4	s.3	s.3	s.3		
local councils	NA	s.4	s.3	Pt 3	s.4	s.3	s.3	s.3		
Councillors	NA	s.4	s.3	Pt 3	s.4	s.3	s.3	s.3		
private individuals or organizations	s.4(2)	-	s.6	s.4	-	-	s.3	-		

**Internet Mailbox ICAC Committee - Extension approved - Review of the Protected Disclosures Act 1994 - ICAC Committee**

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**From:** Internet Mailbox ICAC Committee  
**To:** schoo@ombo.nsw.gov.au  
**Date:** 1/07/2005 4:29 PM  
**Subject:** Extension approved - Review of the Protected Disclosures Act 1994 - ICAC Committee

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File ref: ICC 165

Ms Selena Choo  
New South Wales Ombudsman  
of schoo@ombo.nsw.gov.au

Dear Ms Choo,

I refer to your recent email correspondence regarding the Committee on the Independent Commission Against Corruption inquiry into review of the Protected Disclosures Act 1994.

Your request for an extension has been agreed to. The Committee would be grateful in receiving a quality late submission by mid-July or later if needed.

I look forward in receiving your submission.

Yours sincerely,

Ian Faulks  
Committee Manager

1CC166  
COS/3506

RPDA 002.2



NSW Ombudsman

Level 24 580 George Street  
Sydney NSW 2000

Phone 02 9286 1000

Fax 02 9283 2911

Tollfree 1800 451 524

TTY 02 9264 8050

Web [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

ABN 76 325 886 267

30 September 2005

Mr Ian Faulks  
The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Dear Mr Faulks

**Review of the Protected Disclosures Act 1994**

I understand that some materials of our office have already been considered to form a submission from the NSW Ombudsman. Please find enclosed additional information to supplement that submission.

Yours sincerely

Bruce Barbour  
Ombudsman



## **NSW Ombudsman**

### **Submission to the Parliamentary Inquiry Review of the Protected Disclosures Act 1994**

#### **Underlying purpose of the Act**

With the benefit of involvement over a number of years in the implementation of the *Protected Disclosures Act 1994*, the Ombudsman is strongly of the view that the Act requires significant amendment to facilitate achievement of its underlying purpose of exposing serious problems in the public sector by encouraging and facilitating the reporting of those problems by public sector staff. The essential reason for this is that in practice the PD Act makes little or no provision for practical 'protection' or other forms of redress for whistleblowers. The Ombudsman is of the view that major structural changes to the PD Act in three different areas could help to change this situation:

- redress for whistleblowers
- statutory obligations on agencies
- establishing a protected disclosures unit to provide agencies with advice and support.

In this submission we will discuss those three major areas of structural reform and a number of other specific issues. The following points will be covered:

1. Redress for whistleblowers
2. Statutory obligations on agencies
3. Protected disclosures unit
4. Legal responsibility for ensuring an agency complies with its obligations
5. Nomination of a prosecuting authority
6. Proactive management of whistleblower/confidentiality
7. Waste
8. Review provision of the Act
9. The name of the Act

## 1. Redress for whistleblowers

Under the current system, a whistleblower who has been treated poorly as a result of making a disclosure has no options for redress under the PD Act except to start a private prosecution (under section 20) against a person who has taken detrimental action against them.

Since the commencement of the Act no such private prosecutions have been successful. There have been two (*Pelechowski v Department of Housing*; *McGuirk* cases). There have also been two prosecutions by NSW Police under s. 206 of the *Police Act 1990*, which is equivalent to s. 20 of the PD Act, neither of which has been successful.

Currently a whistleblower has no options under the PD Act to seek compensation for any damages they have suffered. There is also no provision in the PD Act for a whistleblower to take action to require the agency concerned to take reasonable steps to protect them from detrimental action, to deal with the protected disclosure appropriately or to give them support. The PD Act also does not provide a whistleblower with any options if the agency fails to take any of these actions.

Agencies have a common law duty of care towards their employees, and legal obligations under the *Occupational Health and Safety Act 2000* and industrial relations laws. Whistleblowers have some redress through these mechanisms, and there is at least one case where a whistleblower successfully sued his employer for breaching their common law duty of care (see *Wheadon v State of NSW*, No. 7322 of 1998).

The Ombudsman is of the view that for the PD Act to be effective, the system it establishes must, in and of itself, provide adequate statutory remedies for a whistleblower. An employee who has suffered as a result of making a protected disclosure should not be required to resort to trying to find a breach of another Act or a common law duty.

Importantly, employers should not be able to avoid legal liability because individual employees do not have the capacity or resources to seek legal advice about their common law options. The PD Act could be amended to simply codify the common law duties of employers. This would not burden agencies with additional legal responsibilities, but it would make it more practical for whistleblowers to become aware of and enforce their legitimate legal rights. It would also send a clear message to agencies that they must comply fully with their legal responsibilities.

Comparable legislation in other States and Territories provides a number of different specific remedies for whistleblowers. The Ombudsman is of the view that consideration should be given to the inclusion of the following specific options for redress for a whistleblower in NSW:

- to start a private prosecution against any individual who takes detrimental action against them
- to take civil action against any individual who takes detrimental action against them (this would require the PD Act to establish the taking of detrimental action as a statutory tort) — the remedies would be the standard remedies available under tort law such as injunction and damages

- to take civil action to obtain a legal remedy to compel the agency to comply with its statutory obligations or to pay damages for breaching its statutory obligations (see section 2) — Some consideration would need to be given to how to define the party that bears this obligation. See section 4.

In our April 2004 issues paper, *The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, we set out an in-depth comparison of the differences between the NSW PD Act and other Australian and New Zealand legislation.

## **2. Statutory obligations on agencies**

As with other systems intended to prevent people from hurting others, the PD Act should aim to not only provide whistleblowers with redress when they have suffered retribution, but should aim to prevent retribution from occurring in the first place.

The Ombudsman and other members of the Protected Disclosures Act Implementation Steering Committee (PDAISC) have been active over the years in trying to educate agencies in the benefits of taking whistleblowers seriously and handling their disclosures sensitively and professionally. The PDAISC recently published a fact sheet for agencies outlining some of the critical aspects of handling these matters effectively (attached). It has also been important to point out to agencies the risk that they take if they do not handle these matters properly. Some of the worst cases have resulted in large-scale litigation, workplace disharmony and very little systemic improvement in response to the original complaints of the whistleblowers. Please see the attached case study, published in the annual report of the NSW Ombudsman for 2000-2001.

Currently the PD Act requires an agency to do only three things when they receive a protected disclosure:

- to maintain confidentiality if possible (s. 22)
- to tell the whistleblower within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure (s. 27)
- to assess and decide what action should be taken in respect of the disclosure (by implication flowing from s. 27).

While section 14 contemplates a situation where an agency has established a procedure for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste, it does not require agencies to set up any such procedure. Over 100 State agencies were recently asked to provide a copy of their internal reporting policy. While the vast majority of agencies complied with this request, a number responded that they did not have one.

The Ombudsman is of the view that consideration should be given to requiring agencies to establish a number of systems and to play an active role in protecting whistleblowers from retribution.

Because of the way certain public sector agencies have been established (see discussion in section 4), the Ombudsman submits that placing these obligations on an individual office holder — an agency's 'CEO' — rather than on a 'public sector agency' may be preferable.

The Ombudsman submits that the following obligations be included:

- to have in place an internal reporting system (that conforms to prescribed minimum standards) to facilitate the making of protected disclosures, to keep it up-to-date and to educate all staff and management about this system
- to have in place systems to protect whistleblowers once a protected disclosure has been made internally, or once they become aware that a protected disclosure has been made externally
- to investigate or deal with protected disclosures in accordance with the agency's internal reporting policy or with external guidelines to be prepared by an agency such as the Ombudsman
- to stop detrimental action from continuing once they become aware of it
- to cooperate with any of the external investigating authorities nominated in the Act in their investigation of any protected disclosure involving the agency.

Currently the PD Act makes it an offence for an individual to take detrimental action against a whistleblower. This does not cover a situation where the whistleblower is of the view that detrimental action has been taken against them substantially in reprisal for them having made a protected disclosure, but cannot establish exactly who the individuals are or can only establish that a number of individuals acted in concert to take the reprisal action (for example, senior management). The Ombudsman submits that some consideration be given to creating a specific obligation on the *agency* to not take detrimental action against a whistleblower. Some attention would need to be given to where the onus of proof should lie if a whistleblower took legal action for the breach of such an obligation.

The Ombudsman also submits that the obligation to keep a disclosure confidential should be amended to provide that if the CEO decides that the disclosure cannot practically be dealt with in a confidential way, then the CEO is under an obligation to take specific proactive management action to protect the whistleblower (see discussion in section 6).

We observe that in some other jurisdictions agencies are under an ill-defined obligation to 'provide protection from detrimental action' (for example, see *Public Interest Disclosure Act 2003* (WA)). This would mean that, no matter what reasonable measures an agency put in place to try to protect the whistleblower, the agency would still be in breach of their statutory obligation if someone nevertheless took detrimental action against the whistleblower. We are of the view that such a general obligation would be difficult to fulfil in practice, and is therefore unreasonable.

Instead, we submit that some consideration should be given to comparable legislation in Tasmania and Victoria which links the obligations outlined above to an obligation to follow specific guidelines prepared and published by the State's Ombudsman's office (see s. 38 of the *Tasmania Public Interest Disclosures Act 2002* and ss. 68-69 of the *Victoria Whistleblowers Protection Act 2001*).

In addition, the Ombudsman submits that simply placing statutory obligations on agencies may not necessarily be effective without providing for some kind of monitoring and review mechanism.

We have observed that in practice some agencies comply with their statutory obligations only after they have been sued for non-compliance. Others may comply to



avoid the risk of being sued for non-compliance. This appears to be the case with the enforcement of federal discrimination law and industrial relations law, for example.

Similarly, agencies may comply with their statutory obligations under environmental protection laws or workplace safety legislation to avoid the risk of being fined for non-compliance by an enforcement agency such as the Environment Protection Authority or WorkCover.

We submit that the Committee may wish to consider a more proactive compliance mechanism to apply to all public sector agencies except investigating authorities as defined in the Act, and NSW Police, which is already subject to oversight by both the Ombudsman and the PIC. Some examples are the different models adopted in Western Australia, Tasmania and Victoria.

### **3. Protected disclosures unit**

The Ombudsman submits that consideration be given to establishing a protected disclosures unit to:

- to improve awareness of the Act in the public sector
- to provide advice and guidance to agencies and their staff
- to provide or coordinate training for agency staff who are responsible for dealing with disclosures
- coordinate the collection of statistics on protected disclosures
- monitor trends in the operation of the scheme
- provide advice to the Government or relevant agencies on Bills relating to matters concerning whistleblowing issues
- periodically report on its work to the Government and Legislature.

We draw the Committee's attention to the fact that the reports of the last two Parliamentary reviews of the PD Act recommended the establishment of such a unit in the Ombudsman's office.

In a recent survey of over 100 State agencies, agencies were asked about their experiences with protected disclosures. The majority of agencies wrote that they had had very little experience with handling these kinds of matters. The Ombudsman is of the view that this illustrates a need for a formal, properly resourced, advisory body to help agencies through an unfamiliar situation, as and when the need arises. There was also a high demand for training in this area — much higher than the individual agencies of the PDAISC are able to service. Having a dedicated and funded protected disclosures unit would allow this training to be provided, giving agencies the skills to properly fulfil their statutory obligations.

### **4. Legal responsibility for ensuring an agency complies with its obligations**

The public service is made up of a number of different organisational structures and legal entities. The Ombudsman is aware of several entities that consist of an individual holding a statutory appointment, performing his/her functions with resources provided by another government agency. In legal terms, no separate

'agency' exists; just an office-holder and staff employed by another government agency (eg the Privacy Commissioner and the Valuer-General).

Another structural phenomenon is that of the 'mega-department', where agencies performing separate functions under separate pieces of legislation have merged into larger corporate entities, but still operate to a large extent as separate functioning units.

The Ombudsman submits that some consideration be given to the different structures within the public service, including Boards and State-owned corporations, when determining exactly on whom statutory obligations (as discussed in section 2) should be placed. This is necessary for the purpose of enabling a whistleblower to determine which parties s/he can take legal action against (see section 1).

One option would be to place the obligation on the 'CEO' of an agency and then define it in a way which would make it clear that any person with responsibility for making sure an agency functioned effectively would be obliged to comply with the obligations under the PD Act. Certain responsibilities flowing from this obligation could be delegated by the 'CEO' to other staff in the agency (for example, see section 23 of the Western Australian *Public Interest Disclosure Act 2003*).

### **5. Nomination of a prosecuting authority**

There are currently two offence provisions in the Act — see sections 20(1) and 28. However, there is no prosecuting authority given the responsibility of conducting prosecutions for these offences. The Ombudsman is of the view that more effective prosecutions for these offences may be possible if a prosecuting authority is specified. We observe that a number of agencies in the State, including the Office of the Director of Public Prosecutions, NSW Police and/or the Crown Solicitor, do have certain prosecutorial functions.

### **6. Proactive management of whistleblowers/confidentiality**

The Ombudsman submits that the confidentiality provision in the PD Act should be amended to oblige agencies to proactively protect a whistleblower if they determine that the matter cannot be handled confidentially.

One way to give agencies practical guidance on this could be to include in the Act a list of proactive measures that agencies must comply with. However, as each case is different, it may be more practical to link this obligation to an obligation to follow guidelines to be prepared and published by a protected disclosures unit (if it were to be established) or by some other body with expertise in protected disclosures.

Please find attached a copy of our publication, *Protection of Whistleblowers: Practical Alternatives to Confidentiality* (2005), for information about some of the options that agencies may have to proactively protect a whistleblower from retribution.

The Ombudsman observes that in some other jurisdictions agencies are placed under an obligation to assist a whistleblower to transfer to another government department if the whistleblower asks for it and this is the only practical means of protecting the whistleblower (see ss. 27-28 of the ACT *Public Interest Disclosure Act 1994* and s.46 of the Queensland *Whistleblowers Protection Act 1994*). Such an obligation may be of use when the culture within the agency is such that protecting someone from detrimental action is almost impossible or the person's reputation (once the disclosure

is known by other members of staff) would be such that career advancement would be difficult.

### **7. Waste**

There is no definition of the terms 'waste' or 'serious and substantial waste' in the Act. It is our experience that this leads to confusion about the application of the Act to disclosures that relate to waste issues.

### **8. Review provision of the Act**

The Act was assented to on 12 December 1994 and commenced in March 1995, more than ten years ago. Section 32 requires that the Act be reviewed one year after the date of assent, and then every two years thereafter. In theory the Act should so far have been reviewed five times. In practice, it has only been reviewed twice, in 1996 and in 2000.

The Ombudsman is of the view that section 32 should be amended to require the Act to be reviewed every five years instead, as this would provide Parliament with a more realistic and practical timetable.

### **9. The name of the Act**

The Ombudsman submits that some consideration be given to changing the name of the Act to the Public Interest Disclosures Act, to make it abundantly clear that the focus of the Act is on disclosures of public interest issues and facilitating actions taken in the public interest.

## **Acknowledgements**

We gratefully acknowledge the contributions of the Police Integrity Commission, the Audit Office, Department of Local Government and the Premier's Department in the drafting of this submission.

## University of Sydney

We received two protected disclosures about the circumstances surrounding the awarding of first class honours to a student enrolled in the School of Biological Sciences at the University of Sydney. The circumstances arose in 1998 and involved allegations of plagiarism, bullying, sexual harassment, serious academic misconduct, conflicts of interest and nepotism.

In our investigation of this highly involved matter we used our Royal Commission powers, including holding hearings to take evidence from 27 witnesses. We discovered substantial deficiencies in the university's complaint handling procedures and record keeping practices and in their administration of academic assessments. The university inappropriately took an adversarial approach to resolve a particular allegation and this meant that all parties, including the student involved, were left dissatisfied.

Because the university did not handle the matter properly, it escalated and both the student and the supervisor took legal action against the university. The matter received substantial media coverage and is estimated to have cost the university more than \$1 million to date.

The series of events started when an honours student alleged that one of her assessment tasks had been plagiarised by another student. The university investigated but found no evidence to substantiate her allegations. We found that this investigation was very competent.

The student then alleged that her thesis supervisor had sexually harassed and bullied her. These claims were made to the Chair of the Honours Examination Committee (the Chair) who already had a hostile relationship with the supervisor.

Our investigation found that the student effectively received four forms of special consideration because of the stress that she claimed to have suffered as a result of the plagiarism allegations and the alleged sexual harassment. As a result of receiving this special consideration, a penalty of 4.4% for late submission was not applied and the student's final assessment was increased by a further 2.4% to 79.6%, which rounded up to 80%. This gave her the minimum mark necessary for first class honours. This special treatment was contrary to the university's special consideration policy, and the actions of the examiners after their meeting with the student were also contrary to the policy governing the marking of theses.

The special consideration took the following forms:

- Firstly, following the initial investigation, the Head of School (the Head) unilaterally granted the student an extension of three days to hand in her thesis.
- Secondly, the Chair appears to have unilaterally granted the student a separate extension of three days after she applied under the policy for special consideration.
- Thirdly, during a meeting between the student and the three examiners marking her thesis, one of whom was the Chair, the student burst into tears and told the examiners about the stress that she had been suffering so they increased her mark out of sympathy. This was despite the fact that the policy states that a student's mark can only be increased if their academic performance at the meeting warrants a higher mark.
- Fourthly, either the Chair or all the examiners at the honours examiners meeting (the evidence of several witnesses was conflicting) decided that no late penalty should apply to the student's mark, even though her thesis was submitted 10 days after the due date. Even assuming that the student had been granted a six-day extension, the thesis was still four days late.

It was difficult to make conclusive findings about what actually took place because many decisions and discussions were not recorded or were recorded poorly. Poor records also made the true position of the student's marks and penalties difficult to determine. Both the examiners' decisions and their subsequent reconsideration of the student's results were seriously flawed. In our report, we highlighted the serious risk of marks being corrupted if proper records were not kept, particularly of reasons why special consideration was granted. The lack of records made it very difficult to scrutinise the Chair's conduct and we made several recommendations about the need for the university to improve its record-keeping practices.

As we were also concerned about the repeated failure of university staff to comply with the special consideration policy, we included model special consideration guidelines in our investigation report. These guidelines set out a stringent process for dealing with applications for special consideration based on stress.

Immediately after the honours examiners meeting, the student's supervisor complained to the Head about the failure to apply a late penalty to the student. The Head then instructed the Chair to apply a penalty to the student's mark. He did not have the power to do this. The Chair stated that she was instructed to reduce the overall mark to 79%, but the Head denies this. The student was therefore to be granted second class honours.

When the student was advised of this news, she lodged a written complaint with the university. She complained about the investigation into her allegations of plagiarism and about the sexual harassment. She had earlier placed a statutory declaration with the Student Representative Council setting out her grievances and she included this with her written complaint. The university investigated the sexual harassment allegations in accordance with rarely used provisions of the industrial award then covering academics.

We found that the university's investigation was seriously deficient. Instead of taking an inquisitorial approach, the university took an adversarial approach and tended to act as prosecutor on the student's behalf. This was the primary cause of the escalation of events over the next nine months.

The supervisor complained that the Chair had fabricated complaints against him and that his confidentiality had been breached. He took three separate Supreme Court actions against the university, its investigators and the people who had complained about him. These were settled on terms not to be disclosed and the supervisor resigned from the university. As a result of the legal proceedings, the investigation into the sexual harassment allegations was not completed.

The university could have avoided this kind of legal action had it investigated the allegations properly. We recommended that the university improve its investigative practices to make sure that they meet the following criteria:

- procedural fairness—for both complainant and staff member
- speed—so that opportunities for misconduct repetition, breaches of confidentiality and the build-up of bitterness are minimised
- confidentiality—for all parties until the investigation process is completed
- meticulous record-keeping—including recording reasons for all significant investigation-related decisions.

The student also continued to be dissatisfied with the way the university had handled her grievances. She complained to the Anti-Discrimination Board (ADB) about the university, her supervisor and the Head. After the ADB rejected her complaint, she took legal action in the Supreme Court and the Court of Appeal is currently considering the matter.

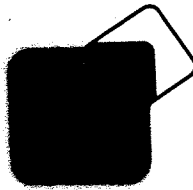
She also complained about the Head to the university. The student told an ADB officer her complaint against the Head was to put pressure on the university. At our hearings, her aunt testified that the complaint was a 'back-up.'

We found that the university's response to the complaints against the Head was also flawed. The Pro Vice-Chancellor was responsible for making inquiries and he had the impression that the Vice-Chancellor wanted the student's honours result upgraded. During our hearings, the Vice-Chancellor denied that this had been his intention. After his inquiries (which we found to be partial), the Pro Vice-Chancellor wrote a memo to the Vice-Chancellor that we found was factually incorrect and otherwise misleading, but supported the result he believed the Vice-Chancellor wanted. The memo ended by suggesting that the Vice-Chancellor destroy it after reading 'since if accessed under freedom of information, it could damage the university's defence of any external actions brought by [the student].' This was a highly inappropriate suggestion which, commendably, the Vice-Chancellor ignored. We recommended the university conduct further training to ensure compliance with the *State Records Act 1998* and other record-keeping policies.

Despite arguments by the Head, the Dean of Science was convinced by misleading information to recommend that the original decision of the examiners' meeting should be restored. So, 16 months after the student was awarded second class honours, her result was upgraded to first class honours.

Throughout this matter, the student was given advice and support by her aunt who was employed by the university as Manager, Industrial Relations. We found that the aunt failed to recognise that she had a perceived conflict of interest, if not an actual conflict, in this matter and should not have become involved. In response to our concerns, the university has agreed to review its code on conflicts of interest to better conform to our 'Good Conduct and Administrative Practice Guidelines.'

Our recommendations to the University of Sydney were circulated to all NSW universities and have already drawn a number of positive responses. Some universities are conducting administrative reviews to change their local procedures to conform to our recommendations. One university advised that its existing procedures are consistent with the principles we promoted.



## PROTECTION OF WHISTLEBLOWERS PRACTICAL ALTERNATIVES TO CONFIDENTIALITY

### Confidentiality: good in theory

The long held and widespread view has been that the best protection that can be provided for a whistleblower is confidentiality. This is often the first thing whistleblowers themselves will ask for. The reason is obvious. If no one knows you 'dobbed', you cannot suffer reprisals.

The *Protected Disclosures Act* provides that investigators, agencies and staff to whom a protected disclosure is referred should not disclose information that might identify or tend to identify the person who made the disclosure, other than in certain specified circumstances (s. 22).

Where a member of staff has 'blown the whistle', if practical and appropriate, it is certainly best practice that confidentiality be maintained by the agency, all responsible staff and the whistleblower. There are three main things to keep confidential:

- the fact of the disclosure
- the identity of the whistleblower, and
- the allegations themselves (including individuals' names).

In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. Certainly this would provide the most effective protection for a whistleblower.

The likelihood of the identity of the whistleblower being disclosed or remaining confidential often determines the appropriate approach that should be adopted by CEOs and relevant managers to protect whistleblowers.

### Confidentiality: problems in practice

The issue of confidentiality for whistleblowers is a particularly vexed question. In practice two main problems arise with expecting confidentiality to protect a whistleblower from retribution. Firstly, an organisation may not be able to realistically guarantee confidentiality. It is often difficult to make even preliminary enquiries into allegations without alerting someone in the organisation to the fact that allegations have been made. Further, to ensure procedural fairness, anyone who is the subject of allegations should be given an opportunity to answer them.

Once it is known that an internal disclosure has been made, it is often not difficult to surmise who has blown the whistle. Sometimes the whistleblower has made confidentiality even more difficult by previously voicing their concerns about an issue, or their intention to complain, before making a formal disclosure.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can be certain those measures have succeeded. Human error and indiscretion cannot be discounted. The agency may not be aware or be able to predict that certain information they think can be revealed (eg allegations that certain systems are failing) is sufficient to identify the whistleblower. Someone may have simply seen the whistleblower approaching management to report his/her concerns.

In these circumstances, if the whistleblower subsequently suffers detrimental action from the person who was the subject of their allegations, it would be open to suspect this was a result of the person finding out and taking retribution. However, this may be difficult to prove. Indeed, in NSW we have seen a case where a person accused of taking 'detrimental action' against a whistleblower has been able to use the agency's attempts to guarantee confidentiality to argue that he/she could not have known about the disclosure, and therefore, could not have taken that action in reprisal for the disclosure.

A further complication arises in those cases where people find out that a disclosure has been made and take retribution against the wrong person; a person who did not actually make the disclosure. A system for protecting whistleblowers should also aim to prevent this kind of behaviour taking place.

## Practical alternatives to confidentiality

The likelihood of the identity of the whistleblower being disclosed or remaining confidential often determines the appropriate approach that should be adopted by CEOs and relevant managers to protect whistleblowers. Experience indicates that pro-active management action is often the only practical option available to protect whistleblowers.

As in practice an expectation of confidentiality for a whistleblower is often not realistic, it is important that agencies determine at the outset whether or not:

- the whistleblower has telegraphed an intention to make the disclosure or has already complained to colleagues about the issue
- the information contained, or issues raised, in the disclosure can readily be sourced to the whistleblower
- the issues raised in the disclosure can be investigated without disclosing information that would or would tend to identify the whistleblower
- there is a high risk of any subject of a disclosure surmising who made the disclosure and taking detrimental action and, if so, whether publicly disclosing the whistleblower's identity would:
  - a) not expose them to any more harm than they were already at risk of, and
  - b) prevent any person who subsequently took retribution from sustaining an argument that they did not know the identity of the whistleblower.

If confidentiality is not a realistic and appropriate option, then consideration must be given by agencies to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.

While certain minimum steps should be taken by management and persons responsible for dealing with disclosures in all cases when a person makes an initial disclosure, additional approaches must be adopted depending on whether:

- the identity of the whistleblower is and is likely to **remain confidential**, or
- the identity of the whistleblower is known or is likely to **become known** as the disclosure is dealt with.

These approaches can be grouped under the following three headings.

**If confidentiality is not a realistic and appropriate option, then consideration must be given by agencies to the steps that should be taken to ensure the whistleblower is adequately protected from detrimental action.**

### A. The minimum steps to be taken in all cases, whether or not the identity of the whistleblower has or will become known:

#### 1. Supporting the whistleblower

Agencies and their senior management should provide active support to the whistleblower, including:

- an assurance that he or she has done the right thing
- an assurance that management will take all reasonable steps necessary to protect him or her
- giving the whistleblower advice about counselling or support services that are or can be made available to assist him or her, and
- appointment of a senior officer as a mentor (in consultation with the whistleblower) to provide moral support and positive reinforcement to the whistleblower, and to respond appropriately to any concerns the whistleblower might raise.

[Note: *The mentor should not be any person appointed to investigate the disclosure or who will make decisions for the agency based on the outcome of any such investigation.*]

#### 2. Guidance

Guidance should be given to the whistleblower as to what is expected of him or her (eg, not to 'blow their own cover', not to draw attention to themselves or their disclosure, not to alert any subjects of the disclosure that a disclosure has been made about them, to assist any person appointed to investigate their allegations, etc).

#### 3. Information

Information should be given to the whistleblower about how the disclosure is to be dealt with, the likely time periods involved, and the nature of any ongoing involvement of the whistleblower in the process (ie, provision of further information to investigators, provision of progress reports and information as to the outcome of any investigation to the whistleblower, etc).

#### 4. Responsibility

An appropriate senior member of staff of the agency should be given responsibility for ensuring that the disclosure is dealt with appropriately and expeditiously.

#### 5. Prompt investigation

All reasonable steps should be taken by agencies to ensure that the disclosure and related matters can be dealt with expeditiously including, where there is to be an investigation:

- approval of terms of reference and realistic deadlines for investigation
- appointment of one or more investigators
- provision of necessary resources
- provision of necessary powers/authority to investigators, and
- assessment of the report and recommendations arising out of the investigation.

[Note: *This includes properly and adequately dealing with allegations made by the whistleblower as well as any allegations made against the whistleblower.*]

## 6. Enforcement

Agencies should ensure that they appropriately respond to any actual or alleged detrimental action taken against the whistleblower, for example by:

- investigating allegations of detrimental action
- warning or counselling staff
- taking disciplinary action, or
- initiating criminal proceedings or referring a matter to the DPP.

### B. The approaches available where the identity of the whistleblower is and is likely to remain confidential:

#### 1. Secrecy

All reasonable steps should be taken by agencies and staff responsible for dealing with disclosures to limit the number of people who are aware of the identity of the whistleblower or of information that could tend to identify the whistleblower.

Consideration should be given to the capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the whistleblower or to take actions detrimental to the success of any investigation (such as tampering with evidence or improperly influencing witnesses). The strict legal requirement to maintain confidentiality should be impressed on anyone who needs to be told about the disclosure.

#### 2. Procedures for maintaining secrecy

The importance of being discreet and the possible consequences if they are not, should be emphasized to the whistleblower (eg, not to 'blow their own cover', not to draw attention to themselves or their disclosure, not to alert any subjects of disclosure that a disclosure has been made about them, etc).

Procedures should be put in place to make sure the whistleblower can communicate with investigators without alerting others to the investigation. For example, the whistleblower should be told how and by whom he or she will be contacted should further information be required and how and who to contact if he or she wishes to obtain further advice or information about how the disclosure is being dealt with.

#### 3. Appropriate investigation techniques

Consideration should be given to which approaches to dealing with the allegations are least likely to result in the whistleblower being identified, while still being effective, eg:

- arranging for a 'routine' internal audit of an area, program or activity that covers, but is not focused solely on, the issues disclosed
- not identifying any 'trigger' or reasons for an audit or investigation
- alluding to a range of possible 'triggers' or reasons for an audit or investigation, without confirming any particular one or acknowledging that a protected disclosure has been made, and/or

- where it might be expected that everyone in a workplace would be interviewed, ensuring that the whistleblower is also called for an interview (even though they have already provided their information) and, where appropriate, directing him/her to provide certain information.

An investigation, or a line of investigation, might need to be avoided or discontinued where there is potential for the identity of the whistleblower to become known, and the risk of serious detrimental action being taken far outweighs any likely benefit from continuing.

### C. The approaches available where the identity of the whistleblower is known or is likely to become known as the issues are dealt with:

[Note: The approaches set out below should be adopted either at the outset if the identity of the whistleblower is known, or at the appropriate stage in any investigation where the identity of the whistleblower is likely to become known, will need to be disclosed, or actually becomes known for whatever reason.]

#### 1. Proactive management intervention

The work colleagues of the whistleblower and any subject(s) of the disclosure should be informed:

- that a disclosure has been made
- of the substance of the allegations identified in the disclosure (preferably without identifying any subject(s) of the disclosure)
- of the identity of the whistleblower
- that management of the agency, from the CEO down, welcomes the disclosure, will support the whistleblower and will not tolerate any harassment or victimisation of the whistleblower
- if the disclosure appears to be a protected disclosure, that protections in the *Protected Disclosures Act* would be expected to apply
- of the likely criminal, disciplinary or other management related repercussions should anyone take or threaten detrimental action against the whistleblower, and
- how the disclosure is likely to be dealt with (in general terms only).

[Note: Preferably the prior agreement of the whistleblower should be obtained before this is done, but where this is not possible the whistleblower should at least be given prior warning].

#### 2. Responsibility for supporting and protecting the whistleblower

The direct supervisor and line managers of the whistleblower should be made responsible for:

- providing on-going support for the whistleblower (including after any investigation is over), and
- protecting the whistleblower from harassment, victimisation or any other form of reprisal by the subject(s) of disclosure or any other employees.



### 3. *Advice and training*

Relevant staff (in particular the colleagues of the whistleblower and any subject(s) of disclosure) should be given appropriate advice and/or training in relation to the importance of whistleblowing, the relevant provisions of the agency's internal reporting policy and the *Protected Disclosures Act*, and the reasons why it is in the interests of staff, management and the agency to protect whistleblowers.

### 4. *Relocation or transfer*

At the whistleblower's request (for example if the whistleblower fears for their personal safety) consideration may need to be given to whether it is necessary and practicable to relocate the whistleblower within the agency, transfer the whistleblower to an equivalent position in another agency, or to assist the whistleblower to obtain appropriate alternative employment. If such action is taken, it should be made clear to other staff that this was at the whistleblower's request and he or she is not being punished.

Note: The material in this brochure expands on the relevant material in *Protected Disclosures Guidelines* (5<sup>th</sup> edition), NSW Ombudsman, 2004 (at A.4.6.3, C.1.5.3 & C.1.5.4).

## Further information

- *Protected Disclosures Guidelines* (5<sup>th</sup> edition), NSW Ombudsman, May 2004
- *Thinking of Blowing the Whistle?* NSW government (brochures for State agencies and councils)
- *Protected disclosures fact sheet*, NSW government (for use by agencies dealing with protected disclosures)

## Contact us for more information

Level 24 580 George Street  
Sydney NSW 2000

Inquiries 9–4 Monday to Friday  
or at other times by appointment

General inquires: 02 9286 1000

Toll free (outside Sydney metro): 1800 451 524

Tel. typewriter (TTY): 02 9264 8050

Facsimile: 02 9283 2911

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

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# Protected disclosures fact sheet



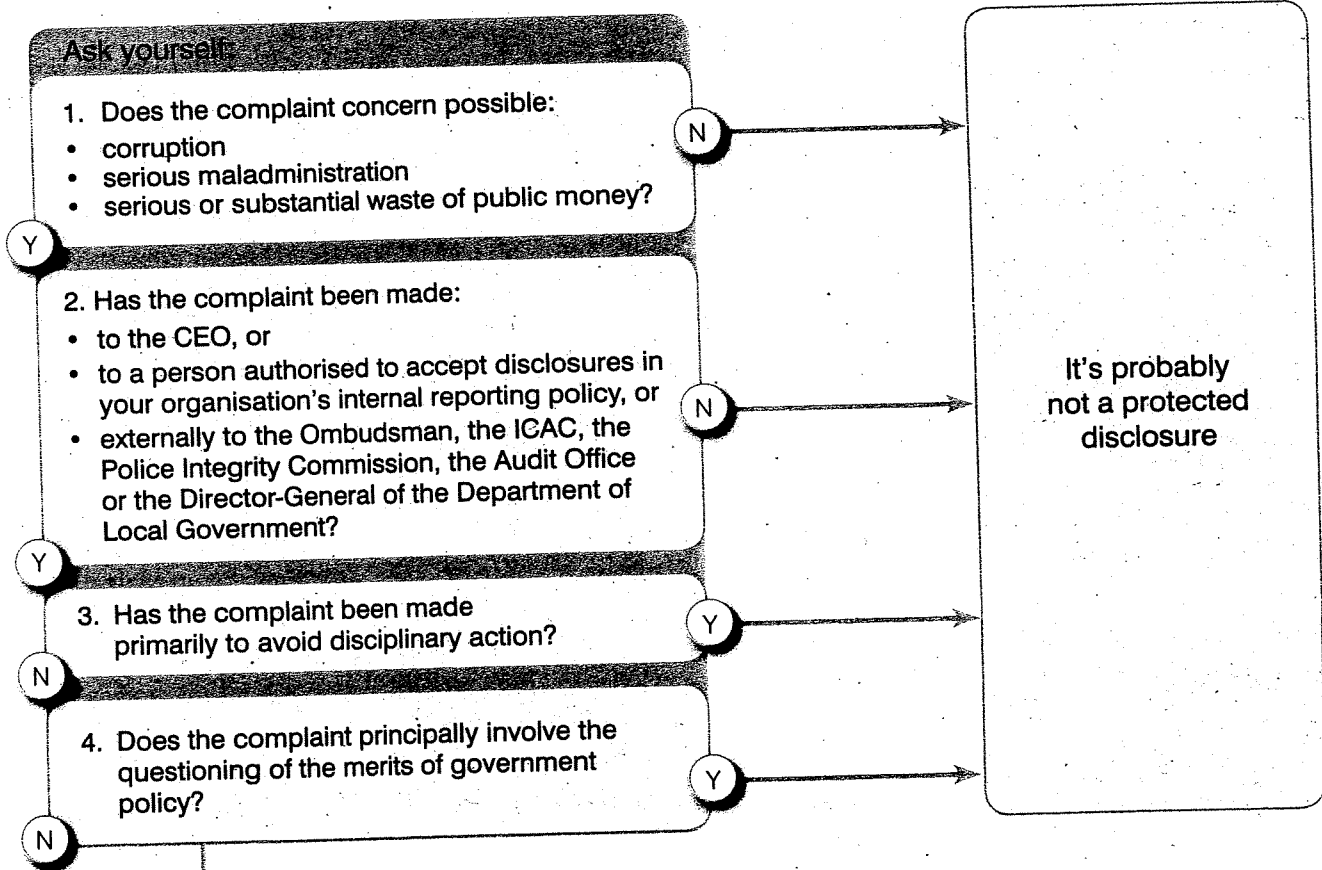
Department of Local Government

This fact sheet sets out a simple step-by-step guide to deciding if the *Protected Disclosures Act 1994* applies to a complaint and gives some practical tips on how to manage protected disclosures. It is designed to be used by CEOs, General Managers, senior managers and protected disclosures coordinators in public sector agencies.

## AM I DEALING WITH A PROTECTED DISCLOSURE?

### THE SCENARIO:

**A member of staff complains to you about something to do with your organisation or your staff.**



### It is most likely this is a protected disclosure and by law your agency must:

- assess the complaint and decide what action you will take
- keep details about the complaint confidential, if possible and appropriate
- tell the complainant within 6 months what action the agency will take or has taken.
- report the matter to the ICAC if you suspect on reasonable grounds that it concerns or may concern corrupt conduct.

(see *Protected Disclosures Act 1994* ss 22 and 27 and *Independent Commission against Corruption Act 1988* s 11)

## HOW DO I MANAGE THIS SITUATION?

**WHETHER OR NOT THE COMPLAINT IS A 'PROTECTED DISCLOSURE' UNDER THE PD ACT, YOU SHOULD:**

### 1. SUPPORT THE COMPLAINANT

If the complainant genuinely believes there is something seriously amiss with your organisation and is sufficiently concerned to bring this to your attention, the agency has a responsibility to:

- take the person seriously and treat them with respect
- give the person support in what is commonly a stressful situation (this includes keeping them informed of what is being done with their complaint)
- protect the person from suffering repercussions for coming forward (this includes dealing with the matter discreetly if not confidentially, and responding swiftly and fairly to any allegations that the person has in fact suffered retribution).

### 2. BE FAIR TO ANY PERSON WHO HAS BEEN ACCUSED OF WRONGDOING

The process of finding out the truth of allegations should be impartial. This means you do not take sides and do not have a preconceived outcome in mind.

Any person who has been accused of wrongdoing must be given an opportunity to put forward their response to any allegations made against them. However, he or she does not have a right to have any information about who has made the allegations (except where the matter results in disciplinary or criminal proceedings).

### 3. REMEMBER THE PEOPLE INVOLVED ARE EMPLOYEES

Be mindful of your obligations under occupational health and safety legislation, your common law duty of care, and your obligations to comply with principles of good conduct and administrative practice.

### 4. DON'T FORGET INNOCENT BYSTANDERS

If a matter cannot be dealt with confidentially, be vigilant in preventing gossip, innuendo and paranoia amongst staff who find out that something is going on. Explain to potential witnesses why they are being interviewed or give them some information about the process to contain suspicion and fear. Remember that retribution is sometimes taken against a person suspected of causing trouble, who may not be the person who made the disclosure.

### 5. USE THE COMPLAINT AS CONSTRUCTIVE FEEDBACK

Complaints from staff, just like those from outsiders, often contain valuable information that can be used to fix problems or improve the way your organisation operates.

Try to find out the truth of the allegations. Do not be tempted to dismiss a complaint from a disgruntled staff member who is perceived as a troublemaker. Often it is only the agitators who will speak out. Others may also see problems but have an interest in keeping the peace.

Deal with any problems that are identified as a result of the complaint or its investigation.

Keep good and comprehensive records of the making of the disclosure, how it was handled and the result.

### 6. LEARN FROM THIS EXPERIENCE

Do you need to implement or improve your policies or procedures to make these complaints easier to handle in the future?

Do you need to educate staff and management to prepare them for the challenges that these situations present and to deter people from taking retribution against people who report suspected problems?

Read the *Protected Disclosures Guidelines*, NSW Ombudsman.

Ask for help and support.

For advice and training for senior managers, contact the Ombudsman.

If you require assistance in developing in-house training programs for staff or managers on protected disclosures, contact the ICAC.

### CONTACT

#### NSW Ombudsman

Tel: 9286 1000 or 1800 451 524 (toll free)

Email: [nswombo@ombo.nsw.gov.au](mailto:nswombo@ombo.nsw.gov.au)

Web: [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

#### Independent Commission Against Corruption

Tel: 8281 5999 or 1800 463 909 (toll free)

Email: [icac@icac.nsw.gov.au](mailto:icac@icac.nsw.gov.au)

Web: [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)

#### Department of Local Government

Tel: 4428 4100

Email: [dlg@dlg.nsw.gov.au](mailto:dlg@dlg.nsw.gov.au)

Web: [www.dlg.nsw.gov.au](http://www.dlg.nsw.gov.au)

RPDA

**From:** "Selena Choo" <choo@ombo.nsw.gov.au>  
**To:** <ian.faulks@parliament.nsw.gov.au>  
**Date:** Friday, 30 September 2005 15:40:32  
**Subject:** Submission to the review of the Protected Disclosures Act

Dear Ian,

Please find attached a supplementary submission of the NSW Ombudsman. I apologise that the attachments are not available in electronic form, however they are attached to the hard copy of our submission, which will be delivered by hand to the Parliament House mail room on Tuesday afternoon. (We are tabling a special report to Parliament then.)

Thanks for taking the time to talk to me yesterday.

Regards,  
Selena

<<submission to Parliamentary Committee by Ombudsman - review of protected disclosures act - September 2005.DOC>>

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## **NSW Ombudsman**

### **Submission to the Parliamentary Inquiry Review of the Protected Disclosures Act 1994**

#### **Underlying purpose of the Act**

With the benefit of involvement over a number of years in the implementation of the *Protected Disclosures Act 1994*, the Ombudsman is strongly of the view that the Act requires significant amendment to facilitate achievement of its underlying purpose of exposing serious problems in the public sector by encouraging and facilitating the reporting of those problems by public sector staff. The essential reason for this is that in practice the PD Act makes little or no provision for practical 'protection' or other forms of redress for whistleblowers. The Ombudsman is of the view that major structural changes to the PD Act in three different areas could help to change this situation:

- redress for whistleblowers
- statutory obligations on agencies
- establishing a protected disclosures unit to provide agencies with advice and support.

In this submission we will discuss those three major areas of structural reform and a number of other specific issues. The following points will be covered:

1. Redress for whistleblowers
2. Statutory obligations on agencies
3. Protected disclosures unit
4. Legal responsibility for ensuring an agency complies with its obligations
5. Nomination of a prosecuting authority
6. Proactive management of whistleblower/confidentiality
7. Waste
8. Review provision of the Act
9. The name of the Act

## 1. Redress for whistleblowers

Under the current system, a whistleblower who has been treated poorly as a result of making a disclosure has no options for redress under the PD Act except to start a private prosecution (under section 20) against a person who has taken detrimental action against them.

Since the commencement of the Act no such private prosecutions have been successful. There have been two (*Pelechowski v Department of Housing*; *McGuirk* cases). There have also been two prosecutions by NSW Police under s. 206 of the *Police Act 1990*, which is equivalent to s. 20 of the PD Act, neither of which has been successful.

Currently a whistleblower has no options under the PD Act to seek compensation for any damages they have suffered. There is also no provision in the PD Act for a whistleblower to take action to require the agency concerned to take reasonable steps to protect them from detrimental action, to deal with the protected disclosure appropriately or to give them support. The PD Act also does not provide a whistleblower with any options if the agency fails to take any of these actions.

Agencies have a common law duty of care towards their employees, and legal obligations under the *Occupational Health and Safety Act 2000* and industrial relations laws. Whistleblowers have some redress through these mechanisms, and there is at least one case where a whistleblower successfully sued his employer for breaching their common law duty of care (see *Wheadon v State of NSW*, No. 7322 of 1998).

The Ombudsman is of the view that for the PD Act to be effective, the system it establishes must, in and of itself, provide adequate statutory remedies for a whistleblower. An employee who has suffered as a result of making a protected disclosure should not be required to resort to trying to find a breach of another Act or a common law duty.

Importantly, employers should not be able to avoid legal liability because individual employees do not have the capacity or resources to seek legal advice about their common law options. The PD Act could be amended to simply codify the common law duties of employers. This would not burden agencies with additional legal responsibilities, but it would make it more practical for whistleblowers to become aware of and enforce their legitimate legal rights. It would also send a clear message to agencies that they must comply fully with their legal responsibilities.

Comparable legislation in other States and Territories provides a number of different specific remedies for whistleblowers. The Ombudsman is of the view that consideration should be given to the inclusion of the following specific options for redress for a whistleblower in NSW:

- to start a private prosecution against any individual who takes detrimental action against them
- to take civil action against any individual who takes detrimental action against them (this would require the PD Act to establish the taking of detrimental action as a statutory tort) — the remedies would be the standard remedies available under tort law such as injunction and damages

- to take civil action to obtain a legal remedy to compel the agency to comply with its statutory obligations or to pay damages for breaching its statutory obligations (see section 2) — Some consideration would need to be given to how to define the party that bears this obligation. See section 4.

In our April 2004 issues paper, *The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, we set out an in-depth comparison of the differences between the NSW PD Act and other Australian and New Zealand legislation.

## **2. Statutory obligations on agencies**

As with other systems intended to prevent people from hurting others, the PD Act should aim to not only provide whistleblowers with redress when they have suffered retribution, but should aim to prevent retribution from occurring in the first place.

The Ombudsman and other members of the Protected Disclosures Act Implementation Steering Committee (PDAISC) have been active over the years in trying to educate agencies in the benefits of taking whistleblowers seriously and handling their disclosures sensitively and professionally. The PDAISC recently published a fact sheet for agencies outlining some of the critical aspects of handling these matters effectively (attached). It has also been important to point out to agencies the risk that they take if they do not handle these matters properly. Some of the worst cases have resulted in large-scale litigation, workplace disharmony and very little systemic improvement in response to the original complaints of the whistleblowers. Please see the attached case study, published in the annual report of the NSW Ombudsman for 2000-2001.

Currently the PD Act requires an agency to do only three things when they receive a protected disclosure:

- to maintain confidentiality if possible (s. 22)
- to tell the whistleblower within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure (s. 27)
- to assess and decide what action should be taken in respect of the disclosure (by implication flowing from s. 27).

While section 14 contemplates a situation where an agency has established a procedure for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste, it does not require agencies to set up any such procedure. Over 100 State agencies were recently asked to provide a copy of their internal reporting policy. While the vast majority of agencies complied with this request, a number responded that they did not have one.

The Ombudsman is of the view that consideration should be given to requiring agencies to establish a number of systems and to play an active role in protecting whistleblowers from retribution.

Because of the way certain public sector agencies have been established (see discussion in section 4), the Ombudsman submits that placing these obligations on an individual office holder — an agency's 'CEO' — rather than on a 'public sector agency' may be preferable.

The Ombudsman submits that the following obligations be included:

- to have in place an internal reporting system (that conforms to prescribed minimum standards) to facilitate the making of protected disclosures, to keep it up-to-date and to educate all staff and management about this system
- to have in place systems to protect whistleblowers once a protected disclosure has been made internally, or once they become aware that a protected disclosure has been made externally
- to investigate or deal with protected disclosures in accordance with the agency's internal reporting policy or with external guidelines to be prepared by an agency such as the Ombudsman
- to stop detrimental action from continuing once they become aware of it
- to cooperate with any of the external investigating authorities nominated in the Act in their investigation of any protected disclosure involving the agency.

Currently the PD Act makes it an offence for an individual to take detrimental action against a whistleblower. This does not cover a situation where the whistleblower is of the view that detrimental action has been taken against them substantially in reprisal for them having made a protected disclosure, but cannot establish exactly who the individuals are or can only establish that a number of individuals acted in concert to take the reprisal action (for example, senior management). The Ombudsman submits that some consideration be given to creating a specific obligation on the *agency* to not take detrimental action against a whistleblower. Some attention would need to be given to where the onus of proof should lie if a whistleblower took legal action for the breach of such an obligation.

The Ombudsman also submits that the obligation to keep a disclosure confidential should be amended to provide that if the CEO decides that the disclosure cannot practically be dealt with in a confidential way, then the CEO is under an obligation to take specific proactive management action to protect the whistleblower (see discussion in section 6).

We observe that in some other jurisdictions agencies are under an ill-defined obligation to 'provide protection from detrimental action' (for example, see *Public Interest Disclosure Act 2003 (WA)*). This would mean that, no matter what reasonable measures an agency put in place to try to protect the whistleblower, the agency would still be in breach of their statutory obligation if someone nevertheless took detrimental action against the whistleblower. We are of the view that such a general obligation would be difficult to fulfil in practice, and is therefore unreasonable.

Instead, we submit that some consideration should be given to comparable legislation in Tasmania and Victoria which links the obligations outlined above to an obligation to follow specific guidelines prepared and published by the State's Ombudsman's office (see s. 38 of the *Tasmania Public Interest Disclosures Act 2002* and ss. 68-69 of the *Victoria Whistleblowers Protection Act 2001*).

In addition, the Ombudsman submits that simply placing statutory obligations on agencies may not necessarily be effective without providing for some kind of monitoring and review mechanism.

We have observed that in practice some agencies comply with their statutory obligations only after they have been sued for non-compliance. Others may comply to



avoid the risk of being sued for non-compliance. This appears to be the case with the enforcement of federal discrimination law and industrial relations law, for example.

Similarly, agencies may comply with their statutory obligations under environmental protection laws or workplace safety legislation to avoid the risk of being fined for non-compliance by an enforcement agency such as the Environment Protection Authority or WorkCover.

We submit that the Committee may wish to consider a more proactive compliance mechanism to apply to all public sector agencies except investigating authorities as defined in the Act, and NSW Police, which is already subject to oversight by both the Ombudsman and the PIC. Some examples are the different models adopted in Western Australia, Tasmania and Victoria.

### **3. Protected disclosures unit**

The Ombudsman submits that consideration be given to establishing a protected disclosures unit to:

- to improve awareness of the Act in the public sector
- to provide advice and guidance to agencies and their staff
- to provide or coordinate training for agency staff who are responsible for dealing with disclosures
- coordinate the collection of statistics on protected disclosures
- monitor trends in the operation of the scheme
- provide advice to the Government or relevant agencies on Bills relating to matters concerning whistleblowing issues
- periodically report on its work to the Government and Legislature.

We draw the Committee's attention to the fact that the reports of the last two Parliamentary reviews of the PD Act recommended the establishment of such a unit in the Ombudsman's office.

In a recent survey of over 100 State agencies, agencies were asked about their experiences with protected disclosures. The majority of agencies wrote that they had had very little experience with handling these kinds of matters. The Ombudsman is of the view that this illustrates a need for a formal, properly resourced, advisory body to help agencies through an unfamiliar situation, as and when the need arises. There was also a high demand for training in this area — much higher than the individual agencies of the PDAISC are able to service. Having a dedicated and funded protected disclosures unit would allow this training to be provided, giving agencies the skills to properly fulfil their statutory obligations.

### **4. Legal responsibility for ensuring an agency complies with its obligations**

The public service is made up of a number of different organisational structures and legal entities. The Ombudsman is aware of several entities that consist of an individual holding a statutory appointment, performing his/her functions with resources provided by another government agency. In legal terms, no separate

'agency' exists; just an office-holder and staff employed by another government agency (eg the Privacy Commissioner and the Valuer-General).

Another structural phenomenon is that of the 'mega-department', where agencies performing separate functions under separate pieces of legislation have merged into larger corporate entities, but still operate to a large extent as separate functioning units.

The Ombudsman submits that some consideration be given to the different structures within the public service, including Boards and State-owned corporations, when determining exactly on whom statutory obligations (as discussed in section 2) should be placed. This is necessary for the purpose of enabling a whistleblower to determine which parties s/he can take legal action against (see section 1).

One option would be to place the obligation on the 'CEO' of an agency and then define it in a way which would make it clear that any person with responsibility for making sure an agency functioned effectively would be obliged to comply with the obligations under the PD Act. Certain responsibilities flowing from this obligation could be delegated by the 'CEO' to other staff in the agency (for example, see section 23 of the Western Australian *Public Interest Disclosure Act 2003*).

### **5. Nomination of a prosecuting authority**

There are currently two offence provisions in the Act — see sections 20(1) and 28. However, there is no prosecuting authority given the responsibility of conducting prosecutions for these offences. The Ombudsman is of the view that more effective prosecutions for these offences may be possible if a prosecuting authority is specified. We observe that a number of agencies in the State, including the Office of the Director of Public Prosecutions, NSW Police and/or the Crown Solicitor, do have certain prosecutorial functions.

### **6. Proactive management of whistleblowers/confidentiality**

The Ombudsman submits that the confidentiality provision in the PD Act should be amended to oblige agencies to proactively protect a whistleblower if they determine that the matter cannot be handled confidentially.

One way to give agencies practical guidance on this could be to include in the Act a list of proactive measures that agencies must comply with. However, as each case is different, it may be more practical to link this obligation to an obligation to follow guidelines to be prepared and published by a protected disclosures unit (if it were to be established) or by some other body with expertise in protected disclosures.

Please find attached a copy of our publication, *Protection of Whistleblowers: Practical Alternatives to Confidentiality* (2005), for information about some of the options that agencies may have to proactively protect a whistleblower from retribution.

The Ombudsman observes that in some other jurisdictions agencies are placed under an obligation to assist a whistleblower to transfer to another government department if the whistleblower asks for it and this is the only practical means of protecting the whistleblower (see ss. 27-28 of the ACT *Public Interest Disclosure Act 1994* and s.46 of the Queensland *Whistleblowers Protection Act 1994*). Such an obligation may be of use when the culture within the agency is such that protecting someone from detrimental action is almost impossible or the person's reputation (once the disclosure

is known by other members of staff) would be such that career advancement would be difficult.

### **7. Waste**

There is no definition of the terms 'waste' or 'serious and substantial waste' in the Act. It is our experience that this leads to confusion about the application of the Act to disclosures that relate to waste issues.

### **8. Review provision of the Act**

The Act was assented to on 12 December 1994 and commenced in March 1995, more than ten years ago. Section 32 requires that the Act be reviewed one year after the date of assent, and then every two years thereafter. In theory the Act should so far have been reviewed five times. In practice, it has only been reviewed twice, in 1996 and in 2000.

The Ombudsman is of the view that section 32 should be amended to require the Act to be reviewed every five years instead, as this would provide Parliament with a more realistic and practical timetable.

### **9. The name of the Act**

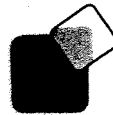
The Ombudsman submits that some consideration be given to changing the name of the Act to the Public Interest Disclosures Act, to make it abundantly clear that the focus of the Act is on disclosures of public interest issues and facilitating actions taken in the public interest.

### **Acknowledgements**

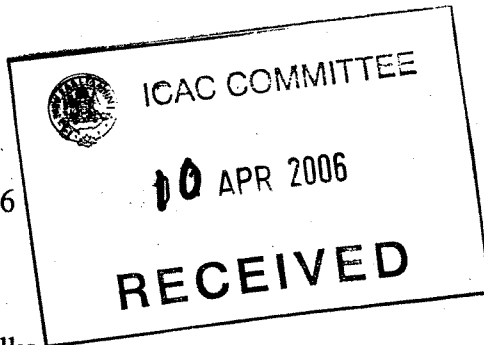
We gratefully acknowledge the contributions of the Police Integrity Commission, the Audit Office, Department of Local Government and the Premier's Department in the drafting of this submission.

RPDA 002.3

ICC 106  
C06/1053



NSW Ombudsman



5 April 2006

Acknowledged  
m/yeoh  
11/4/2006

Level 24 580 George Street  
Sydney NSW 2000  
Phone 02 9286 1000  
Fax 02 9283 2911  
Tollfree 1800 451 524  
TTY 02 9264 8050  
Web [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)  
ABN 76 325 886 267

Mr Ian Faulks  
The Committee Manager  
Committee on the Independent Commission Against Corruption  
Parliament House  
Macquarie Street  
Sydney NSW 2000

Dear Mr Faulks

### Review of the Protected Disclosures Act 1994

Please accept this as additional correspondence to my submission dated 30 September 2005 to the Parliamentary Inquiry Review of the *Protected Disclosures Act 1994*.

In that submission, I recommended consideration be given to establishing a protected disclosures unit within my office to:

- improve awareness of the Act in the public sector
- provide advice and guidance to agencies and their staff
- coordinate the collection of statistics on protected disclosures
- monitor trends in the operation of the scheme
- provide advice to the government or relevant agencies on Bills relating to matters concerning whistleblowing issues
- periodically report on it's work to the government and legislature.

We have undertaken some research into the cost of the creation of such a unit within this office. We contacted relevant bodies in other jurisdictions to request advice about the resources they used to perform such functions.

We received responses from the Commonwealth Ombudsman, Ombudsman Victoria, South Australia Ombudsman, Queensland Ombudsman, New Zealand office of the Ombudsmen and the Western Australian Public Sector Standards Commissioner (WA PSSC).

Of these bodies, the WA PSSC has the most equivalent role to the one I have proposed. Tasmania and Victoria are the only other states with specific responsibilities in relation to whistleblowers, however the scope of their role is significantly narrower than the one I have proposed. In addition, because of their high threshold tests, they receive relatively few disclosures a year.



Under the *Public Interest Disclosure Act 2003 (WA)* (the PID Act) the Commissioner is responsible for the following functions:

- receiving disclosures where the information relates to a public officer
- establishing a Code setting out the minimum standards of conduct and integrity to be complied with by PID officers
- monitoring compliance with the PID Act and PID Code
- assisting public authorities and public officers to comply with the PID Act and Code
- preparing guidelines on internal procedures relating to the functions of a proper authority under the PID Act
- ensuring that all proper authorities have copies of the guidelines
- reporting annually to each House of Parliament on the performance of the Commissioner's obligations under the PID Act, and compliance or non-compliance with the PID Act and PID Code.

The WA PSSC currently receives \$183,000 in funding to perform these functions. Two staff members work full-time (one senior and one researcher) in the area, and other staff are allocated tasks as needed.

We have been advised the WA PSSC has recently applied for an additional \$200,000 plus, as their current funding is not sufficient to perform all functions effectively. For example, a recent climate survey indicated that knowledge of the PID Act across the WA public sector was very low.

While we have at no stage received any funding or resources to perform equivalent functions to the WA PSSC, we do undertake some work in the area. We have calculated that a very conservative estimation of the resources currently directed to this work is \$45,000 a year. This includes our provision of telephone advice, limited training for agencies, attendance at Protected Disclosures Act Implementation Steering Committee meetings and publishing fact sheets and guidelines. With such limited resources our work in the area is greatly restricted, and we cannot achieve the objectives listed above and in point 3 of our submission.

Based on the resources used by the WA PSSC and on our own estimations, we envisage 3 – 5 full time staff (grades 9/10, 7/8 and 5/6) would be needed to carry out the functions we have proposed. We have calculated the total costs for three additional staff at these grades would be in the order of \$300,000 for 2006–2007.

Should you require any further information, please contact my Deputy, Chris Wheeler on (02) 9286 1036 or [cwheeler@ombo.nsw.gov.au](mailto:cwheeler@ombo.nsw.gov.au).

Yours sincerely



Bruce Barbour  
Ombudsman

## ANNEXURE 6

# EXTRACTS FROM THE MINUTES OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION REGARDING THE REVIEW OF THE PROTECTED DISCLOSURES ACT 1994

This appendix contains relevant extracts from the minutes of ICAC Committee meetings of:

- Wednesday 6 April 2005;
- Wednesday 4 May 2005;
- Wednesday 22 June 2005;
- Wednesday 18 March 2006;
- Wednesday 7 June 2006;
- Thursday 3 August 2006;
- Friday 4 August 2006; and
- Wednesday 22 November 2006

regarding the review of the Protected Disclosures Act 1994.

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 6 APRIL 2005  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

### *Legislative Council*

Ms Gardiner  
Rev. Nile

### *Legislative Assembly*

Mr Yeadon (Chairman)  
Ms Keneally  
Mr Mills  
Mr Pearce  
Mr Price  
Mr O'Farrell  
Mr Turner  
Mr Roberts

Also in attendance: Mr Faulks, Manager of the Committee, Mr Jefferis, Senior Committee Officer, and Ms Yeoh and Ms Cyril, Assistant Committee Officers.

The Chairman presiding.

## 1. Apologies

Apologies were received from Mr Primrose.

## 2. Previous minutes

On the motion of Mr Mills, seconded Mr Pearce, the minutes of Tuesday 9 November 2004 was accepted as a true and accurate record.

## 3. Chairman's report

....

### *"Whistling while they work" research project*

The Chairman noted that the Independent Commission Against Corruption is participating in a three-year Australian Research Council (ARC) funded linkage project "Whistling While They Work", which will investigate public interest disclosures (whistleblowing) in the public sector. The project team is led by Griffith University's Dr A.J. Brown, and involves

researchers from five tertiary institutions: Griffith University, Charles Sturt University, Monash University, Edith Cowan University, and the University of Sydney. Research will include extensive surveys into the experience of public sector whistleblowers in the participating jurisdictions, the ways in which managers handle internal disclosures, the institutional supports used by public agencies to manage whistleblowing-related conflicts, and opportunities for law reform. Whistleblowing or protected disclosure laws around Australia are often criticised as window-dressing measures, no two legislative systems are the same, and very little has been done until now to evaluate their implementation. Individual federal, state and territory governments are sensitive that disclosures by their officials will reflect on them politically, but effective management of whistleblowing is a systemic challenge for all organisations, and is not unique to any particular government. Queensland statistics show positive indications that whistle-blowers were more likely to be listened to, and vindicated, than other complainants. But possibly around 1.8 per cent of all public servants find themselves blowing the whistle on suspected wrongdoing, each year – a substantial figure – with very little known about how their welfare and associated internal workplace conflicts are then managed. The project has been established with a three-year grant of \$585,000 from the Australian Research Council, and approximately \$710,000 in direct and in-kind support from 12 industry partners:

*.Commonwealth Government*

- Commonwealth Ombudsman
- Australian Public Service Commission

*Queensland Government*

- Qld Crime & Misconduct Commission
- Queensland Ombudsman

*New South Wales Government*

- Independent Commission Against Corruption
- NSW Ombudsman

*Western Australian Government*

- WA Corruption & Crime Commission
- Public Sector Standards Commissioner
- WA Ombudsman

*Northern Territory*

- Commissioner for Public Employment

*ACT*

- Chief Minister's Department

and

- Transparency International Australia

On the motion of Mr Turner, seconded Mr Mills:

That the Committee invite representatives of the Independent Commission Against Corruption and NSW Ombudsman to brief the ICAC Committee on the “Whistling While They Work” research project.

Passed unanimously.

....



## 5. Review of the Protected Disclosures Act 1994

The Chairman reported that the Premier, the Hon. Bob Carr MP, has requested the ICAC Committee conduct a review of the Protected Disclosures Act 1994. The Protected Disclosures Act 1994 s.32 requires a joint committee of Parliament to review the Act one year after the date of assent and every two years thereafter. Two reviews have been undertaken to date, the most recent in August 2000. Both reviews were conducted by the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission.

In April 2004, the NSW Ombudsman released an issues paper, "The adequacy of the Protected Disclosures Act 1994 to achieve its objectives", which identified that the review required in 2002 had not commenced. The issues paper also summarised the outcomes arising from the two previous reviews.

The Premier has held discussions with the chairman of the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, Mr Paul Lynch MP. Mr Lynch has proposed that another committee conduct the third review as the resources of the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission are apparently fully committed to a current inquiry program. As a consequence, the Premier has requested that the review required under the Protected Disclosures Act 1994 s.32 be undertaken by the ICAC Committee.

....

## 7. General business

....

There being no further business, the Committee adjourned at 6:50 p.m..

Chairman

Committee Manager

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

11:30 A.M., WEDNESDAY 4 MAY 2005  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

### *Legislative Council*

Mr Primrose (Vice Chairman)  
Rev. Nile  
Ms Gardiner

### *Legislative Assembly*

Mr Yeadon (Chairman)  
Ms Keneally  
Mr Mills  
Mr Pearce  
Mr Price  
Mr Tink  
Mr Roberts

Also in attendance: Mr Faulks, Manager of the Committee, Mr Jefferis, Senior Committee Officer, and Ms Yeoh and Ms Cyril, Assistant Committee Officers.

The Chairman presiding.

## 1. Apologies

Apologies were received from Mr Turner.

## 2. Previous minutes

On the motion of Mr Price, seconded Ms Keneally, the minutes of Tuesday 6 April 2005 was accepted as a true and accurate record.

## 3. Membership of the ICAC Committee

The Chairman reported that on Tuesday 3 May 2005 Mr O'Farrell was discharged from the ICAC Committee. Mr Tink has been appointed to serve on the ICAC Committee.

....

## **5. Review of the Protected Disclosures Act 1994**

The Chairman reported that by resolution of the Legislative Assembly and the Legislative Council, the review required under the Protected Disclosures Act 1994 s.32 is to be undertaken by the ICAC Committee.

....

## **8. General business**

There being no further business, the Committee adjourned at 1:05 p.m..

Chairman

Committee Manager

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 22 JUNE 2005  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

### *Legislative Council*

Ms Gardiner  
Rev. Nile

### *Legislative Assembly*

Mr Yeadon  
Mr Mills  
Mr Pearce  
Mr Price  
Mr Tink  
Mr Turner

Also in attendance: Mr Faulks, Manager of the Committee, Mr Jefferis, Senior Committee Officer, and Ms Yeoh and Ms Cyril, Assistant Committee Officers.

The Chairman presiding.

## **1. Apologies**

Apologies were received from Mr Primrose, Mr Roberts and Ms Keneally.

## **2. Previous minutes**

On the motion of Mr Mills, seconded Revd Nile, the minutes of Wednesday 4 May 2005 was accepted as a true and accurate record.

....

## **4. Review of the Protected Disclosures Act 1994**

The Chairman reported that the review of the Protected Disclosures Act 1994 was publicly advertised on Saturday 21 May 2005, with submissions requested by 1 July 2005.

....

The Chairman noted that the Committee Manager attended a workshop regarding the Protected Disclosures Act, held at North Gosford on Tuesday 24 May 2005. The

workshop was conducted by the Independent Commission Against Corruption, as part of the Rural and Regional Outreach Strategy (RAROS) that aims to bring corruption prevention information, resources and services to all communities in New South Wales. The Central Coast workshop was led by Mr Chris Wheeler, Deputy Ombudsman.

....

## **5. General business**

There being no further business, the Committee adjourned at 6:40 p.m..

Chairman

Committee Manager

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 29 MARCH 2006  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

### *Legislative Council*

Ms Gardiner  
Rev. Nile  
Mr Primrose

### *Legislative Assembly*

Mr Yeadon  
Mr Mills  
Mr Pearce  
Mr Turner  
Ms Keneally  
Mr Roberts  
Mr Price  
Mr Kerr

Also in attendance: Mr Faulks, Manager of the Committee, Mr Nordin, Senior Committee Officer, Ms Phelps, Committee Officer, and Ms Yeoh, Assistant Committee Officer.

The Chairman presiding.

## 1. Previous minutes

On the motion of Mr Mills, seconded Rev. Nile, the minutes of Thursday 1 December 2005 and Monday 12 December 2005 were accepted as a true and accurate record.

....

## 3. Membership of the ICAC Committee

The Chairman reported that on Tuesday 28 March 2006 Mr Tink was discharged from the ICAC Committee, and Mr Kerr was appointed. The Chairman noted that Mr Kerr had been the inaugural Chairman of the ICAC Committee, from its inception in April 1989 to March 1995.

....

## **7. Review of the Protected Disclosures Act 1994**

The Chairman reported that a background briefing paper has been prepared on the inquiry to review the Protected Disclosures Act 1994, and is being distributed to ICAC Committee Members.

....

## **11. General business**

....

There being no further business, the Committee adjourned at 7:00 p.m..

Chairman

Committee Manager

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 7 JUNE 2006  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

*Legislative Council*  
Ms Gardiner

*Legislative Assembly*  
Mr Yeadon (Chairman)  
Mr Mills  
Mr Pearce  
Mr Turner  
Ms Keneally  
Mr Price  
Mr Kerr

Also in attendance: Mr Faulks, Manager of the Committee, Mr Nordin, Senior Committee Officer, Ms Phelps, Committee Officer, and Ms Yeoh, Assistant Committee Officer.

The Chairman presiding.

### 1. Apologies

Apologies were received from Mr Primrose, Rev. Nile and Mr Roberts.

### 2. Previous minutes

On the motion of Mr Price, seconded Ms Keneally, the minutes of Wednesday 29 March 2006 were accepted as a true and accurate record.

...

### 7. Review of the Protected Disclosures Act 1994, review of 2004-2005 annual report of the Independent Commission Against Corruption, and the quarterly examination of the Inspector of the Independent Commission Against Corruption for the period April-June 2006

The Committee deliberated on the inquiry to review the Protected Disclosures Act 1994, the review of 2004-2005 annual report of the Independent Commission Against Corruption, and the quarterly examination of the Inspector of the Independent Commission Against Corruption for the period April-June 2006.



It was agreed that hearing days would be set for Thursday 3 August 2006 and Friday 4 August 2006.

## **8. General business**

There being no further business, the Committee adjourned at 5:35 p.m..

Chairman

Committee Manager

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

10:00 A.M., THURSDAY 3 AUGUST 2006  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

### *Legislative Council*

Mr Primrose (Vice Chairman)  
Ms Gardiner  
Revd. Nile

### *Legislative Assembly*

Mr Yeadon (Chairman)  
Mr Mills  
Mr Pearce  
Mr Turner  
Ms Keneally  
Mr Price  
Mr Kerr  
Mr Roberts

Also in attendance: Mr Faulks, Manager of the Committee, Mr Jefferis, Senior Committee Officer, and Ms Phelps, Committee Officer.

The Chairman presiding.

## 1. Review of the Protected Disclosures Act 1994

The public were admitted.

### **Peter Bowden**

was called and sworn.

The Committee examined the witness.

Evidence concluded, the witness withdrew.

### **Robert John Sendt Jane Tebbutt**

were called and sworn.

The Committee examined the witnesses.

Evidence concluded, the witnesses withdrew.

**Jill Lorraine Hennessy  
Frances Mary Waters  
Michelle Karen O'Heffernan**

were called and sworn.

The Committee examined the witnesses.

Evidence concluded, the witnesses withdrew.

**Christopher John Ballantine**

were called and sworn.

The Committee examined the witnesses.

Evidence concluded, the witnesses withdrew.

**Leslie Thomas Tree  
Wendy Anne Upton**

were called and sworn.

The Committee examined the witnesses.

Evidence concluded, the witnesses withdrew.

**Andrew John Allan  
Thomas Benjamin**

were called and sworn.

The Committee examined the witnesses.

Evidence concluded, the witnesses withdrew.

### **3. General business**

There being no further business, the Committee adjourned at 3:20 p.m..

Chairman

Committee Manager

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

**10:00 A.M., FRIDAY 4 AUGUST 2006  
AT PARLIAMENT HOUSE, SYDNEY**

**MEMBERS PRESENT**

*Legislative Council*  
Mr Primrose (Vice Chairman)

*Legislative Assembly*  
Mr Yeadon (Chairman)  
Mr Mills  
Mr Pearce  
Mr Turner  
Mr Roberts

Also in attendance: Mr Faulks, Manager of the Committee, and Mr Jefferis, Senior Committee Officer.

The Chairman presiding.

**1. Apologies**

Apologies were received from Ms Gardiner, Revd. Nile, Mr Kerr, Ms Keneally and Mr Price.

**2. Review of the Protected Disclosures Act 1994**

The public were admitted.

**Christopher Charles Wheeler**

was called and sworn.

The Committee examined the witness.

Evidence concluded, the witness withdrew.

**Margaret Leila Penhall-Jones**

was called and sworn.

The Committee examined the witness.

Evidence concluded, the witness withdrew.

**Grahame William Wagener  
David Richard Michael Sheehan**

were called and sworn.

The Committee examined the witness.

Evidence concluded, the witness withdrew.

**Michael Robert Cranny**

was called and sworn.

The Committee examined the witness.

Evidence concluded, the witness withdrew.

## **5. General business**

There being no further business, the Committee adjourned at 3:50 p.m..

Chairman

Committee Manager

# PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 22 NOVEMBER 2006  
AT PARLIAMENT HOUSE, SYDNEY

## MEMBERS PRESENT

*Legislative Council*  
Ms Gardiner

*Legislative Assembly*  
Mr Yeadon (Chairman)  
Mr Turner  
Mr Pearce  
Ms Keneally  
Mr Roberts  
Mr Kerr  
Mr Mills  
Mr Price

Also in attendance: Mr Faulks, Manager of the Committee; Mr Jefferis, Senior Committee Officer; Ms Jay, Senior Committee Officer; Ms Phelps, Committee Officer; and Ms Yeoh, Assistant Committee Officer.

The Chairman presiding.

### 1. Apologies

Apologies were received from Mr Primrose and Revd. Nile.

### 2. Previous minutes

On the motion of Ms Keneally, seconded Mr Turner, the minutes of Meeting No. 22 of Wednesday 20 September 2006 was accepted as a true and accurate record.

....

### 10. Consideration of draft report: 'Review of the Protected Disclosures Act 1994'

The Chairman presented his draft report: "Review of the Protected Disclosures Act 1994".

The report, have been distributed previously, was accepted as being read.

The Committee proceeded to deliberate on the draft report:

Chapter 1, Paras 1.1 - 1.6: read and agreed to  
Chapter 2, Paras 2.1 - 2.2: read and agreed to  
Chapter 3, Paras. 3.1 - 3.94: read and agreed to  
Chapter 4, Paras 4.1.- 4.9 read and agreed to

Annexure 1: read and agreed to  
Annexure 2: read and agreed to  
Annexure 3: read and agreed to  
Annexure 4: read and agreed to  
Annexure 5: read and agreed to  
Annexure 6: read and agreed to  
Annexure 7: read and agreed to

Recommendation 1: read and agreed to  
Recommendation 2: read and agreed to  
Recommendation 3: read and agreed to  
Recommendation 4: read and agreed to  
Recommendation 5: read and agreed to  
Recommendation 6: read and agreed to  
Recommendation 7: read and agreed to  
Recommendation 8: read and agreed to  
Recommendation 9: read and agreed to  
Recommendation 10: read and agreed to  
Recommendation 11: read and agreed to  
Recommendation 12: read and agreed to  
Recommendation 13: read and agreed to  
Recommendation 14: read and agreed to  
Recommendation 15: read and agreed to  
Recommendation 16: read and agreed to

The Committee deliberated.

It was agreed that the following text and recommendation be included:

**" Members of Parliament**

3.60 Under section 19 of the Protected Disclosures Act 1994, a public official may, under certain circumstances, make a disclosure to a member of Parliament, or to a journalist, and that disclosure is protected by the Act. To attract protection:

- the public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of the Act;
- the investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred (a) must have decided not to investigate the matter, or (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or (c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or (d) must have failed to



notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated;

- the public official must have reasonable grounds for believing that the disclosure is substantially true; and
- the disclosure must be substantially true.

3.61 The Parliamentary Committee noted that there was a lack of training and supportive documentation available to members of Parliament regarding the receipt of a disclosure from a public official under section 19 of the Protected Disclosures Act 1994, and accordingly recommends that the Clerk of the Legislative Assembly and the Clerk of the Parliaments ensure that appropriate training and supportive documentation is made available.

**Recommendation 10**

**The Clerk of the Legislative Assembly and the Clerk of the Parliaments ensure that appropriate training and supportive documentation is made available to members of Parliament regarding the receipt of a disclosure from a public official under section 19 of the Protected Disclosures Act 1994.**

3.62 In doing so, the Clerk of the Legislative Assembly and the Clerk of the Parliaments should consult with the Protected Disclosures Unit regarding the development of appropriate education and training materials about protected disclosures—see Recommendation 9 (h)."

The proposed text and recommendation was read and agreed to.

On the motion of Mr Pearce, seconded Mr Turner:

That the draft report: "Review of the Protected Disclosures Act 1994", as amended, be read and agreed to.

Passed unanimously.

On the motion of Mr Pearce, seconded Mr Turner:

That the draft report: "Review of the Protected Disclosures Act 1994", as amended, be accepted as a report of the ICAC Committee, and that it be signed by the Chairman and presented to the House.

Passed unanimously.

*On the motion of Mr Pearce, seconded Mr Turner:*

That the Chairman and Committee Manager be permitted to correct any stylistic, typographical and grammatical errors in the report.

Passed unanimously.

## 11. General business

This being the last scheduled meeting of the ICAC Committee of the 53rd Parliament, the Chairman thanked the Members for their contribution and commitment over the period 2003-2006.

The Chairman also thanked, on behalf of the Committee, the staff of the ICAC Committee secretariat: Mr Faulks, Manager of the Committee; Mr Jefferis, Senior Committee Officer; Ms

Jay, Senior Committee Officer; Ms Phelps, Committee Officer; and Ms Yeoh, Assistant Committee Officer; for their efforts in supporting the Committee's work.

There being no further business, the Committee adjourned at 5:20 p.m..

Chairman

Committee Manager

## ANNEXURE 7

# REPORTS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

ICAC Committee (2006).	Review of the Protected Disclosures Act 1994
ICAC Committee (2006).	Examination of the 2003-2004 annual report of the Independent Commission Against Corruption
ICAC Committee (2006).	Quarterly examination of the Inspector of the Independent Commission Against Corruption, July-September 2006
ICAC Committee (2006).	Quarterly examination of the Inspector of the Independent Commission Against Corruption, April-June 2006
ICAC Committee (2006).	Quarterly examination of the Inspector of the Independent Commission Against Corruption, January-March 2006
ICAC Committee (2006).	Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006
ICAC Committee (2006).	Quarterly examination of the Inspector of the Independent Commission Against Corruption, October-December 2005.
ICAC Committee (2005).	Examination of the 2003-2004 annual report of the Independent Commission Against Corruption
ICAC Committee (2004).	Examination of the report of the Independent Commission Against Corruption profiling the NSW public sector
ICAC Committee (2004).	Report on examination of the 2002-2003 annual report of the Independent Commission Against Corruption
ICAC Committee (2004).	Report on examination of the 2001-2002 annual report of the Independent Commission Against Corruption
ICAC Committee (2004).	The prevention and investigation of misconduct and criminal wrongdoing involving public officials
ICAC Committee (2002).	Report on matters arising from the general meeting with the Commissioner of the ICAC, 27 November 2000
ICAC Committee (2002).	Stage III, Review of the ICAC: Conduct of hearings
ICAC Committee (2001).	Stage III, Review of the ICAC: Issues paper
ICAC Committee (2001).	General meeting with the Commissioner of the ICAC , 30th November 2001
ICAC Committee (2001).	Stage II, Review of the ICAC: Jurisdictional issues
ICAC Committee (2001).	Report on alleged contempt in relation to the draft report of Bron McKillop on inquisitorial systems
ICAC Committee (2001).	General meeting with the Commissioner of the ICAC , 27th November 2000
ICAC Committee (2000).	Consideration of proposed powers
ICAC Committee (2000).	Review II, Jurisdictional issues, Issues paper
ICAC Committee (2000).	The ICAC: Accounting for extraordinary powers
ICAC Committee (1999).	General meeting with the Commissioner of the ICAC, 1st December 1999
ICAC Committee (1999).	Review of the ICAC, Issues paper

ICAC Committee (1999).	Comparative study of the Hong Kong ICAC: Delegation's report to the Committee
ICAC Committee (1998).	Inquiry into Section 13A of the Constitution Act 1902
ICAC Committee (1998).	Collation of evidence of the Commissioner of the ICAC, the Hon B.S.J. O'Keefe AM QC, on general aspects of the Commission's operations, July 1998
ICAC Committee (1997).	Study tour of organisations and oversight bodies comparable to the ICAC, London, Berlin, New York, Washington, February 1997
ICAC Committee (1997).	Collation of evidence of the Commissioner of the ICAC, the Hon B.S.J. O'Keefe AM QC, on general aspects of the Commission's operations, November 1997
ICAC Committee (1997).	Review of the Role and Functions of the Independent Commission Against Corruption, Issues Paper, October 1997
ICAC Committee (1997).	Collation of Evidence of the Commissioner of the ICAC, the Hon B.S.J. O'Keefe AM QC, on general aspects of the Commission's operations, July 1997
ICAC Committee (1996).	Collation of Evidence of the Commissioner of the ICAC, the Hon B.S.J. O'Keefe AM QC, on general aspects of the Commission's operations, October/December 1996
ICAC Committee (1996).	Public hearing with the Hon B.S.J. O'Keefe AM QC, Questions upon notice, 25th October 1996
ICAC Committee (1996).	Collation of evidence of the Commissioner of the ICAC, the Hon B.S.J. O'Keefe AM QC, on general aspects of the Commission's operations, 27th May 1996
ICAC Committee (1995).	Study Tour to USA, Canada, United Kingdom and Ireland 30th June –16th July 1995
ICAC Committee (1995).	Visit to Brisbane, 22nd-23rd June 1995
ICAC Committee (1995).	Collation of Evidence of the Commissioner of the ICAC, the Hon B S J O'Keefe AM QC, on General Aspects of the Commission's Operations, 15 September 1995
ICAC Committee (1994).	Inquiry into Pecuniary Interest Provisions for Members of Parliament and Senior Executives and A Code of Conduct for Members of Parliament
ICAC Committee (1994).	Report in response to the motion passed by the Legislative Assembly on 15th September 1994 and the Legislative Council on 20th September 1994 re: Justice O'Keefe's appointment
ICAC Committee (1994).	Collation of evidence of the Acting Commissioner of the ICAC, Mr John Mant, on general aspects of the Commission's operations, 3rd August 1994
ICAC Committee (1994).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission's operations, 4th March 1994
ICAC Committee (1994).	Collation of material relating to the Committee's visit to Kyogle, 1st October 1992
ICAC Committee (1994).	Sixth International Anti-Corruption Conference, 22nd-25th November 1993 and United States Study Tour, 29th November-2nd December 1993
ICAC Committee (1993).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission's operations, 15th October 1993
ICAC Committee (1993).	Inquiry into Section 52 of the ICAC Act and legal representation before the ICAC
ICAC Committee (1993).	Visit to Brisbane, 2nd-3rd November 1993
ICAC Committee (1993).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission's operations, 26th March 1993
ICAC Committee (1993).	Review of the ICAC Act
ICAC Committee (1993).	Minutes of Evidence taken before the Committee Concerning the Review of the Independent Commission Against Corruption Act

ICAC Committee (1993).	Review of the ICAC Act – Correspondence on primary facts issue
ICAC Committee (1993).	Matter raised by Andrew Tink MP
ICAC Committee (1992).	Review of the ICAC Act – Discussion paper
ICAC Committee (1992).	Review of the ICAC Act
ICAC Committee (1992).	Operations Review Committee and Assistant/Deputy Commissioners
ICAC Committee (1992).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission’s operations, 9th November 1992
ICAC Committee (1992).	Fifth International Anti-Corruption Conference 8th-12th March 1992 And Hong Kong Study Tour 11th-18th April 1992
ICAC Committee (1992).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission’s operations, 31st March 1992
ICAC Committee (1991).	Inquiry into matters raised by Paul Gibson MP
ICAC Committee (1991).	Collation of Evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on General Aspects of the Commission’s Operations, 14th October 1991
ICAC Committee (1991).	Collation of Evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on General Aspects of the Commission’s Operations, 27th March 1991
ICAC Committee (1991).	Inquiry into Commission procedures and the rights of witnesses, Second report
ICAC Committee (1990).	Inquiry into Commission procedures and the rights of witnesses, First report
ICAC Committee (1990).	Inquiry into Commission Procedures and The Rights of Witnesses, First Report, together with Minutes of Evidence, Submissions, Minutes of Proceedings, and the report of the Salmon Royal Commission on tribunals of inquiry
ICAC Committee (1990).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission’s operations, 15th October 1990
ICAC Committee (1990).	Openness and secrecy in inquiries into organised crime and corruption: Questions of damage to reputations, Discussion paper prepared by the Hon A.R. Moffitt
ICAC Committee (1990).	Further information about witnesses before the ICAC, Correspondence between the Committee and the Commissioner, Mr Ian Temby QC
ICAC Committee (1990).	Inquiry into a proposal for the televising of public hearings of the ICAC
ICAC Committee (1990).	Collation of evidence of the Commissioner of the ICAC, Mr Ian Temby QC, on general aspects of the Commission’s Operations, 30th March 1990
ICAC Committee (1989).	Report on witnesses for the Committee on the ICAC (Parliamentary Joint Committee)