Parliament of New South Wales

SECOND REVIEW OF THE PROTECTED DISCLOSURES ACT 1994

Report of the Committee on the Office of the Ombudsman and the Police Integrity Commission

AUGUST 2000

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OF
THE PROTECTED DISCLOSURE ACT 1994

REPORT OF THE COMMITTEE ON THE OFFICE OF THE OMBUDSMAN & THE POLICE INTEGRITY COMMISSION

AUGUST 2000

Secretariat
Room 1136 Parliament House Macquarie St Sydney 2000

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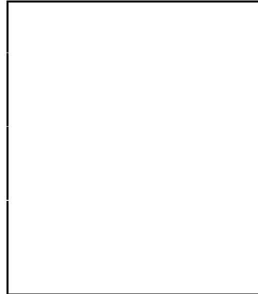
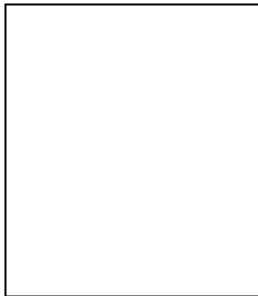
COMMITTEE MEMBERSHIP

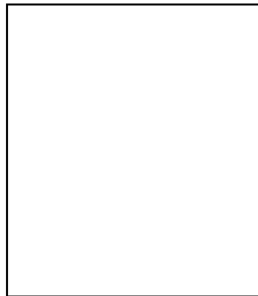
LEGISLATIVE ASSEMBLY



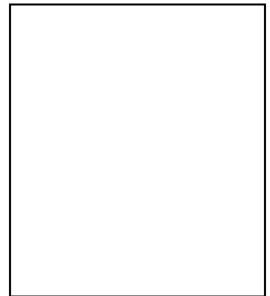
Mr P Lynch MP
Chairperson



The Hon D Grusovin MP
Vice-Chairperson

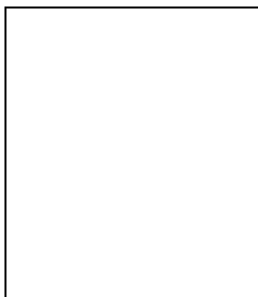


Mr M Kerr MP

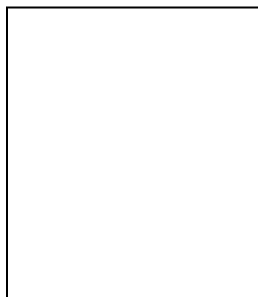


Mr W Smith MP

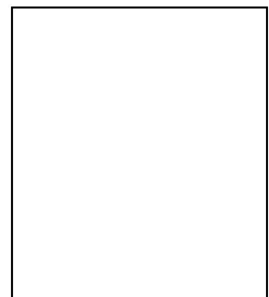
LEGISLATIVE COUNCIL



The Hon P Breen MLC



The Hon J Gardiner MLC



The Hon J Hatzistergos MLC

Secretariat
Ms H Minnican – Director
Ms T Bosch – Research Officer
Ms H Parker – Committee Officer
Ms N O'Connor – Assistant Committee Officer
Ms P Adam – Assistant Committee Officer

FUNCTIONS OF THE COMMITTEE

The Committee on the Office of the Ombudsman and the Police Integrity Commission is constituted under Part 4A of the *Ombudsman Act 1974*. The functions of the Committee under the *Ombudsman Act 1974* are set out in section 31B (1) of the Act as follows:

- to monitor and to review the exercise by the Ombudsman of the Ombudsman's functions under this or any other Act;
- to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Ombudsman or connected with the exercise of the Ombudsman's functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- to examine each annual and other report made by the Ombudsman, and presented to Parliament, under this or any other Act and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report;
- to report to both Houses of Parliament any change that the Joint Committee considers desirable to the functions, structures and procedures of the Office of the Ombudsman;
- to inquire into any question in connection with the Joint Committee's functions which is referred to it by both Houses of Parliament, and to report to both Houses on that question.

These functions may be exercised in respect of matters occurring before or after the commencement of this section of the Act.

Section 31B (2) of the *Ombudsman Act* specifies that the Committee is not authorised:

- to investigate a matter relating to particular conduct; or
- to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint; or
- to exercise any function referred to in subsection (1) in relation to any report under section 27; or
- to reconsider the findings, recommendations, determinations or other decisions of the Ombudsman, or of any other person, in relation to a particular investigation or complaint or in relation to any particular conduct the subject of a report under section 27; or
- to exercise any function referred to in subsection (1) in relation to the Ombudsman's functions under the *Telecommunications (Interception) (New South Wales) Act 1987*.

The Committee also has the following functions under the *Police Integrity Commission Act 1996*:

- ✦ to monitor and review the exercise by the Commission and the Inspector of their functions;
- ✦ 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 their functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed;
- ✦ 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, or arising out of, any such report;
- ✦ to examine trends and changes in police corruption, and practices and methods relating to police corruption, and report to both Houses of Parliament any changes which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector; and
- ✦ 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.

The Act further specifies that the Joint Committee is not authorised:

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

The *Statutory Appointments (Parliamentary Veto) Amendment Act*, assented to on 19 May 1992, amended the *Ombudsman Act* by extending the Committee's powers to include the power to veto the proposed appointment of the Ombudsman and the Director of Public Prosecutions. This section was further amended by the *Police Legislation Amendment Act 1996* which provided the Committee with the same veto power in relation to proposed appointments to the positions of Commissioner for the PIC and Inspector of the PIC. Section 31BA of the *Ombudsman Act* provides:

"(1) The Minister is to refer a proposal to appoint a person as Ombudsman, Director of Public Prosecutions, Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission to the Joint Committee and the Committee is empowered to veto the proposed appointment as provided by this section. The Minister may withdraw a referral at any time.

(2) The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.

(3) The Joint Committee is to notify the Minister, within the time that it has to veto a proposed appointment, whether or not it vetoes it.

(4) A referral or notification under this section is to be in writing.

(5) In this section, a reference to the Minister is;

(a) in the context of an appointment of Ombudsman, a reference to the Minister administering section 6A of this Act;

(b) in the context of an appointment of Director of Public Prosecutions, a reference to the Minister administering section 4A of the *Director of Public Prosecutions Act 1986*; and

(c) in the context of an appointment of Commissioner for the Police Integrity Commission or Inspector of the Police Integrity Commission, a reference to the Minister administering section 7 or 88 (as appropriate) of the *Police Integrity Commission Act 1996*."

CHAIRMAN'S FOREWORD

The Committee on the Office of the Ombudsman and Police Integrity Commission undertook the second statutory review of the *Protected Disclosures Act 1994* upon receiving a referral from both Houses of the New South Wales Parliament in accordance with s.32 of the Act.

The first statutory review, conducted by the previous Parliamentary Committee, served as a logical starting point for the current Committee's inquiries and gave the initial structure for the second review. However, as the review progressed, issues were raised concerning a number of areas which had not been canvassed in 1996. The Committee was also aware that the protected disclosures scheme had not changed significantly since the last review, despite the recommendations contained in the 1996 Parliamentary Committee report and calls from key interested parties involved in the scheme for the implementation of those recommendations.

Consequently, the Committee chose to identify those areas of reform which it considered to be priorities, and make a number of recommendations in other areas also considered important to establishing and maintaining the necessary infrastructure for an effective protected disclosures scheme.

In order for the *Protected Disclosures Act* to realise its objectives there needs to be a recognition within all areas of the public sector of the important role protected disclosures can play in the exposure of corrupt conduct, maladministration, and serious and substantial waste, and of the public interest which is served by such exposure. There is clearly a strong degree of support among the investigating authorities, and key agencies such as the Police Service and the Department of Local Government, for the scheme. However, the impetus for strengthening and improving the protected disclosures scheme needs to be much broader and needs to rely on a more pro-active, supportive response from central agencies dealing with the areas identified by the Committee as requiring reform.

I should like to take this opportunity to thank those agencies and individuals who made submissions to the review and the witnesses who appeared before the Committee to give evidence. The Committee has been critical of instances where it was not offered the cooperation it expected during the inquiry process.

I also wish to record my appreciation for the efforts of the Committee Members who approached this review exercise in a bipartisan fashion and gave full and balanced consideration to the issues before them. The report is a consensus document which reflects the views of the Committee as a whole.

The Committee was ably assisted throughout the review by the staff of the Secretariat.

Paul Lynch MP
Chairperson

EXECUTIVE SUMMARY

The second Parliamentary review of the *Protected Disclosures Act* was undertaken on reference from both Houses of Parliament in accordance with s.32 of the Act.

The Committee commenced its inquiry by reviewing the extent to which recommendations contained in the report of the first review had been implemented. The Committee found that there had only been piecemeal adoption of the recommendations and that no comprehensive package of amendments to the scheme had come forward.

As a second step in the review process the Committee sought comment on the recommendations arising from the first review from the investigating authorities, that is the ICAC, Police Integrity Commission (PIC), Auditor-General, Office of the Ombudsman and PIC Inspector, and other agencies represented on the Protected Disclosures Steering Committee. The Committee then took evidence from representatives of each investigating authority, the Department of Local Government, the Internal Witness Support Unit of the New South Wales Police Service and the New South Wales Branch of Whistleblowers Australia. A full text of the submissions received by the Committee from witnesses is attached at Appendix 2.

While a range of matters were canvassed in material presented to the Committee, in compiling this report the Committee chose to focus on those areas which it considered to be priority areas for reform. These include:

- the establishment of a Protected Disclosures Unit (PDU) within the Office of the Ombudsman;
- the collection and collation by the proposed PDU of statistical data and other information relevant to the operation of the *Protected Disclosures Act;*
- continuation of the role of the DPP and police in the prosecution of offences of detrimental action;
- provision for the Ombudsman to make disclosures to the DPP or police prosecutors for the purpose of conducting prosecutions under s.20 of the *Protected Disclosures Act 1994;* and
- availability of the protections under the Act to public officials making disclosures to the Department of Local Government about serious and substantial waste in local government.

Other recommendations which the Committee believes are warranted include:

- that the *Protected Disclosures Act* be amended to require public sector agencies (including investigating authorities) to inform staff of the existence of internal reporting systems which provide appropriate, effective mechanisms for agency employees to make protected disclosures in accordance with the Act, and that the Office of the Ombudsman monitor compliance with this obligation;
- that public sector agencies failing to respond to the request by the Ombudsman for a copy of their current internal reporting system be liable to appear before the Parliamentary Committee to explain their inaction and the extent of their internal reporting system;

- that the Act be amended to explicitly provide for courts to make orders suppressing the publication of material which would tend to disclose the identity of a public official who has made a protected disclosure;
- that s.20 of the Act be amended to include payback complaints made against a person in reprisal for their having made, or intending to make, a protected disclosure;
- that the proposed PDU give consideration to the merits of false claims legislation along the lines of that operating in the United States; and
- that the Act be amended to clarify that the protections provided under s. 20 and s.21 of the Act extend to correctional officers employed by the Department of Corrective Services who initiate the making of a disclosure notwithstanding the fact that a specific requirement exists under regulation to disclose misconduct.

The Committee also draws attention to the important role to be played by the Steering Committee as a vehicle for developing an all-of-government approach to the protected disclosures scheme.

The Committee considers that the objectives of the *Protected Disclosures Act* remain as relevant and important now as they were when the legislation was initially enacted. The recommendations set out in this report are designed to reinforce the utility and value of the scheme set out in the legislation.

Without action being taken to implement these recommendations, the protections available to persons who wish to report misconduct will be less effective and hence the likelihood of disclosures being made will be reduced.

CHAPTER 1 – CONDUCT OF THE REVIEW

INTRODUCTION

1.1 Referral and invitation for submissions

Section 32 of the *Protected Disclosures Act 1994* provides for a review of the Act to be undertaken by a joint committee of Members of Parliament. The review is to be undertaken as soon as practicable after twelve months from the date of assent, and at two yearly periods thereafter, and the committee must report to both Houses of Parliament after the completion of each review.

The Committee on the Office of the Ombudsman and the Police Integrity Commission conducted the first review of the Act in 1996 and was referred the second review of the Act by both Houses of Parliament in October 1999[1]. The Committee resolved that the initial stage of the review would involve meetings with representatives from the investigating authorities under the Act , namely the Office of the Auditor-General, the Office of the Ombudsman, the Independent Commission Against Corruption, the Police Integrity Commission and the Inspector to the Police Integrity Commission. As the Premier is the Minister with responsibility for administering the *Protected Disclosures Act*, the Committee also decided to meet with officers from the Premier's Department.

On 11 November 1999, the Chairman wrote to the Director-General, Premier's Department, and the head of each investigating authority seeking a response to the recommendations contained in the Report on the previous review of the Act which had been published in September 1996. Each agency's response was treated as a submission to the review and is produced at Appendix 2.

1.2 Public hearings

Following receipt of the submissions from the investigating authorities and the Premier's Department, the Committee planned a series of public hearings, the first of which was held on Tuesday, 28 March 2000. Witnesses appearing at the public hearing included:

Mr Chris Wheeler	Acting NSW Ombudsman
Mr John Feneley	Assistant Commissioner Independent Commission Against Corruption
Mr Andrew Naylor	Solicitor to the Police Integrity Commission
Mr Robert Sendt	Auditor-General, NSW Audit Office
Mr Tom Jambrich	Assistant Auditor-General (Performance Audit), NSW Audit Office
Mr Garry Payne	Director-General, Department of Local Government

[1] see Legislative Assembly Hansard 10/11/99 p.2689 and Legislative Council Hansard 27/10/99 p.2001

Mr Fausto Sut	Manager, Investigation and Review Branch Department of Local Government

A second and final day of evidence was held on Tuesday, 18 April 2000, at which the following witnesses appeared:

Ms Cynthia Kardell	President, NSW Branch, Whistleblowers Australia Inc.
Chief Inspector Glynnis Lapham	Internal Witness Support Unit, NSW Police Service

The Committee corresponded with Dr Gellatly, Director-General, Premier's Department concerning the attendance of representatives from his Department at the public hearing to give evidence, and Committee officers endeavoured to make such arrangements with departmental staff . However, Dr Gellatly advised the Committee by letter, dated 3 April 2000, that his response on the status of the 1996 review recommendations contained the only information he wished to provide on the review.

The Committee considers it essential to the inquiry process that public officials should appear before Parliamentary Committees when requested to do so. Accordingly, the Committee is very disappointed that the Director-General of Premier's Department, or another suitable representative from the Premier's administration, did not participate in the inquiry process by giving evidence at a public hearing. Despite Dr Gellatly's statement that he had no further comments to make on the review, it was open to the Committee to take evidence from Premier's Department on a number of issues relevant to the review. One such matter is recommendation 24 of the 1996 report, which relates to the legal interpretation of certain sections of the Act and which had been referred to the Premier following the first review.

Section 4(2) of the *Parliamentary Evidence Act 1901* empowers a Parliamentary Committee to summon any person, not being a Member of either the Legislative Assembly or Legislative Council to attend and give evidence before the Committee.

The practice of New South Wales Parliamentary Committees is to work on the basis of co-operation. However if the person summonsed refuses to attend the Committee then under sections 7 and 8 of the *Parliamentary Evidence Act 1901* that person can be forced to attend as follows:

1. If any witness so summoned fails to attend and give evidence in obedience to such notice or order, the President or the Speaker, as the case may be, upon being satisfied of the failure of such witness so to attend and that his non-attendance is without just cause or reasonable excuse, may certify such facts under his hand and seal to a Judge of the Supreme Court, according to the form in the second Schedule hereto, or to the like effect.

2. Upon such certificate any Judge of the said Court shall issue his warrant in the form in the Third Schedule hereto, or to the like effect, for the apprehension of the person named in such certificate, for the purpose of bringing him before the Council, Assembly, or Committee to give evidence.

On this occasion the Committee on the Office of the Ombudsman and Police Integrity Commission chose not to exercise its powers.

The significance of the role which can and should be played by Premier's Department in the further development of the protected disclosures scheme is not underestimated by this Committee. The membership of the Protected Disclosures Act Implementation Steering Committee includes a representative of the Premier's Department who regularly attends meetings. Moreover, the Steering Committee reports directly to the Premier and its continued existence depends upon the Premier's support. Both the Parliamentary Committee and the Ombudsman wrote to the Premier concerning the recommendations arising from the first parliamentary review of the Act. Some of the matters raised by the Ombudsman were dealt with by legislative amendment. Other issues, such as the questions of legal interpretation raised by the Parliamentary Committee, have not been addressed.

It is important to the success or failure of the protected disclosures scheme in New South Wales that the Premier's Department be involved and lend its full support.

CHAPTER 2 BACKGROUND

2.1 The Protected Disclosures Scheme

Whistleblowing in the New South Wales public sector is regulated by the *Protected Disclosures Act 1994* which was enacted on 18 December 1994. The aim of the Act as set out in s.3 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.

Definitions

Corruption is defined in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988.* The definition used in the Act is very broad, but generally concerns the dishonest or partial exercise of official functions by a public official. Corruption can take many forms, including: taking or offering bribes, public officials dishonestly using influence, black-mail, fraud, election bribery and illegal gambling. These are just some examples.

Maladministration is defined in s.11 of the *Protected Disclosures Act 1994* as conduct that involves action or inaction of a serious nature that is: contrary to the law; or unreasonable, unjust, oppressive or improperly discriminatory; or based wholly or partly on improper motives.

The Auditor-General has provided the following definition of "*serious and substantial waste of public money*":

> any uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in significant loss/wastage of public funds/resources.

Public officials are any persons employed under the *Public Sector Management Act*, employees of local government authorities, or persons having public official functions or capacities, whose conduct and activities may be investigated by an investigating authority.

Disclosures protected under the Act

The Act provides protection to public officials who make disclosures which "show or tend to show":

- corrupt conduct;
- maladministration; or
- serious or substantial waste of public money.

Not every disclosure made is automatically given legal protection under the *Protected Disclosures Act*. For a disclosure to be protected under the Act, it must meet the following criteria:

- it must be made voluntarily (which includes disclosures made pursuant to any obligation in a Code of Conduct); and

- it must 'show or tend to show' corrupt conduct, maladministration or serious and substantial waste of public money. This means that, if the allegation is proven, it would amount to one of these categories of conduct, or would tend to do so. As a guide, a disclosure needs to do more than simply allege misconduct if it is to comply with this requirement; and

- it must be made to one of the five investigating authorities named by the Act or in accordance with an agency's Internal Reporting Policy.

People who make disclosures anonymously may still be able to receive protection in the event that their identity later becomes known, provided they can prove that they are the author of the disclosure.

A disclosure won't be protected if it:

- is made solely or substantially with the motive of avoiding dismissal or other disciplinary action; or
- is made frivolously or vexatiously; or
- primarily questions the merits of government policy.

Disclosures made to Journalists and Members of Parliament

Disclosures made to journalists or to Members of Parliament will be protected only if certain conditions are met. Firstly, the information provided must be substantially true, and the person making the disclosure must believe it to be substantially true.

In addition, the person making the disclosure to a journalist or Member of Parliament must previously have made substantially the same disclosure in accordance with established internal reporting procedures within the organisation or direct to an investigation authority, and the investigating authority or public authority to whom the matter was referred:

- had decided not to investigate the matter; or
- had decided to investigate the matter but not completed the investigation within six months of the original disclosure; or
- had investigated the matter but not recommended any action in respect of the matter; or
- had failed to notify the person making the disclosure, within six months of the disclosure, of whether or not the matter is to be investigated.

If a disclosure does not meet all of these criteria, it will not be protected by the legislation.

Protection available pursuant to the Act

The Act provides protection by imposing penalties (of $5500 or 12 months imprisonment, or both) on a person who takes "detrimental action" against another person in reprisal for a protected disclosure.

Detrimental action is action which may cause, comprise or involve any of the following:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to employment;
- dismissal from or prejudice in employment; or
- disciplinary proceedings.

In addition, the NSW Ombudsman or the ICAC have powers to investigate allegations of detrimental action. Once a public official has proven that they have made a protected disclosure, and that they have suffered detrimental action, the defendant must prove that the detrimental action was **not** substantially in reprisal for the disclosure.

Means of making a disclosure

Protected Disclosures can be made in two ways. A disclosure can be made internally to an agency head, or externally to an independent external investigating authority. Five investigating authorities are able to investigate protected disclosures. These are the NSW Ombudsman, the Independent Commission Against Corruption (ICAC), the Auditor-General, the Police Integrity Commission (PIC) and the Inspector of the PIC.

2.2 Major legislative amendments

In the period which has elapsed since the first review of the *Protected Disclosures Act 1994* several amendments have been made to the Act, some of which gave effect to recommendations made by the Committee on the Office of the Ombudsman and Police Integrity Commission in the first review.

Consequential amendments were made to the *Protected Disclosures Act* upon the establishment of the Police Integrity Commission (PIC) and the PIC Inspector. The *Police Legislation Amendment Act 1996* provided for:

- the inclusion of the PIC and PIC Inspector in the definition of "investigating authority" under the *Protected Disclosures Act*;
- the inclusion of the *Police Integrity Commission Act 1996* in the definition of "investigating act"; and
- the inclusion of an officer of the PIC officer or an officer of the PIC Inspector in the definition of "public official".

A new s.12A was inserted into the *Protected Disclosures Act* to provide for disclosures concerning police. To be protected, a disclosure to the PIC must be made in accordance with the *Police Integrity Commission Act* and must be a disclosure that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by a

police officer. Disclosures to the PIC Inspector must be made in accordance with the *Police Integrity Commission Act* and must show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money by the PIC, a PIC officer or an officer of the PIC Inspector. To be protected under the Act, a disclosure to an investigating authority concerning the PIC or a PIC officer must relate to a matter referred by the PIC Inspector to the investigating authority under s.90(1)(f) of the Police *Integrity Commission Act*. Provision also was made for disclosures by public officials concerning the PIC Inspector, or an officer of the Inspector, to be investigated by the ICAC.

In 1998 Schedule 1 of the *Ombudsman Act 1974* was amended by proclamation, in accordance with s.14 of the Act, to provide the Ombudsman with jurisdiction to investigate conduct of a public authority arising from the making of a protected disclosure within the meaning of the *Protected Disclosures Act*.[2] This amendment enables the Ombudsman to investigate any allegation of detrimental action arising from the making of a protected disclosure, regardless of to whom the protected disclosure was made (previously the Ombudsman only had jurisdiction to investigate allegations of detrimental action arising from disclosures which had been made originally to the Office of the Ombudsman).

The *Protected Disclosures Amendment (Police) Act 1998* included a member of the Police Service in the definition of "public official" and inserted a new section 9(4) in the *Protected Disclosures Act* to provide that a disclosure made by a member of the Police Service is made voluntarily for the purpose of this section even if it relates to the same conduct as an allegation the member has made in performing a duty imposed by the *Police Service Act* or any other Act. This clarifies that the protections provided under the Act apply to members of the Police Service who voluntarily make a disclosure notwithstanding that they have a legislative obligation to disclose misconduct by other police officers.

The amending legislation also provided that in any prosecution for the offence of detrimental action, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person having made a protected disclosure (see s.20(1A)). This draws on Recommendation 9 of the Committee's 1996 report which proposed that s.20 of the Act be amended to provide that in any proceedings for an offence under that section it should lie with the employer to prove that any detrimental action taken against an employee was not taken in reprisal for the employee having made a protected disclosure. The amendment to s.20 varied the Committee's proposal by applying the obligation to "defendants", not only employers. The Minister stated in the second reading speech on the Bill that the amendment reflects the fact that the definition of detrimental action is broad and includes injury, damage, loss, intimidation and harassment, and that offences under this section are not limited to those committed by employers. For example, a co-worker or any other person could commit the offence of detrimental action.

[2] GG No. 92, 12 June 1998, p.4146

2.3 Implementation of the 1996 review recommendations

The 1996 review of the *Protected Disclosures Act 1994* resulted in 24 recommendations some of which have been implemented in full or in part as detailed below. The responses made by the investigating authorities to the recommendations are contained in Appendix 2.

Recommendation 1 not implemented

Protected Disclosures Unit
The Act should be amended, and funding provided by the Government (refer Chapter 2.1), to enable the establishment of a Protected Disclosures Unit (PDU) within the Office of the Ombudsman with the following monitoring and advisory functions:

(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, legal interpretations and definitions;
(c) to monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;
(d) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;
(e) to audit the internal reporting procedures of public authorities;
(f) to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;
(g) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
(h) 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;
(i) 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
(j) to publish guidelines on the *Protected Disclosures Act 1994* in consultation with the investigating authorities.

Recommendation 2 not implemented

In order to enable the proposed Protected Disclosures Unit to perform its monitoring function, the Act should be amended to include a requirement for public authorities and investigating authorities to notify the Unit of all disclosures received which appear to be protected under the Act. There also should be a requirement for the Unit to be informed of the progress made by public authorities investigating disclosures, at regular intervals, and of the final result of each investigation.

Recommendation 3 partly implemented

Appeal Mechanisms and Feedback
All investigating authorities to provide reasons to a complainant for not proceeding with an investigation of their complaint when such a complaint is a protected disclosure.

Recommendation 4 partly implemented

Codes of Conduct
Codes of conduct and related administrative policies cannot vary the effect of legislation but they can play an important role in explaining and drawing attention to the rights and obligations contained in the *Protected Disclosures Act 1994*. Accordingly, codes of conduct and related policy documents issued by public authorities should contain clear statements on:

- the rights and obligations of staff who receive disclosures or make a disclosure;
- the importance of protected disclosure legislation to the ethical framework and values of the organisation;
- examples of situations which may arise when a protected disclosure is made and the principles which should be adhered to in such circumstances.

Some agencies have incorporated the recommended statements into their codes of conduct and related policy documents but there has not been a comprehensive review of such documents. Premier's Department advised that each agency has developed their own code of conduct based on the model provided by the Department.

Recommendation 5 implemented

Managerial responsibilities
Code of conduct – The code of conduct for members of the Chief Executive Service and Senior Executive Service should include specific reference to their duties and obligations in relation to the investigation of protected disclosures and the protection and support of staff who have made a protected disclosure.

The *Model Code of Conduct* developed by the Premier's Department addresses this recommendation. It includes a statement that managers should ensure all employees have information about internal reporting procedures and makes reference to the Premier's Memorandum dealing with internal reporting systems and the protected disclosures guidelines. The *Model Code of Conduct and Ethics for Public Sector Executives* states that executives are expected to be supportive of staff who make or intend to make protected disclosures.[3]

Recommendation 6 implemented

Contractual obligations
The contracts for members of the Chief Executive Service and the Senior Executive Service should contain a standard provision requiring these officers to ensure that procedures for dealing with protected disclosures are implemented and fostered within their organisation and that support is available to staff who have made, or intend to make, a protected disclosure. Performance review for members of the Chief Executive Service and Senior Executive Service should include an assessment of the extent to which these officers have met the proposed contractual obligations in relation to protected disclosures.

The *Model Contract of Employment* for NSW Chief and Senior Executives includes an obligation for CEOs to ensure employees are aware of the procedures for making protected disclosures and the protections available under the *Protected Disclosures Act.* The model contract also specifies that CEOs are expected to ensure satisfactory introduction and operation of internal reporting systems. Information accompanying the model code suggests that Executive Officers with obligations and responsibilities relating to internal allegations

[3] NSW Ombudsman, *Protected Disclosure Guidelines*, third edition, pp.54-5.

and the individuals who make such allegations should have contracts which refer to these responsibilities.[4]

Recommendation 7 not implemented

The Act should be amended to include 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.

Recommendation 8 not implemented

Protections
The Act should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.

Recommendation 9 implemented through the *Protected Disclosures Amendment (Police) Act 1998*

Section 20 of the Act to be amended to provide that in any proceedings for an offence, it lies with the employer to prove that any detrimental action taken against an employee was not taken in reprisal for the employee having made a protected disclosure.

Recommendation 10 not implemented

Prosecutions
The Act should be amended to require each investigating authority to refer any evidence of an offence under section 20 to the Director of Public Prosecutions (who has responsibility for prosecution of a criminal offence).

Recommendation 11 not implemented

Contract agencies
The Act should be amended to extend protection against detrimental action to any person or body who is engaged in a contractual arrangement with a public authority and makes a protected disclosure.

Recommendation 12 not implemented

The Act should be amended so that where a public official makes a disclosure to the Internal Audit Bureau, which shows or tends to show maladministration, corrupt conduct or serious and substantial waste of public money, the protections contained in the Act should be available notwithstanding that the Internal Audit Bureau does not fall within the definition of a "public authority".

In making this recommendation the Committee recognises that the Internal Audit Bureau, by providing independent auditing services to public authorities, in effect acts as an agent of the Auditor-General and is by the nature of its activities in a position to receive disclosures which may be protected under the Act.

Recommendation 13 not implemented

Local Government
Serious and substantial waste – The Auditor-General's jurisdiction under the Act should be extended to enable him to receive disclosures, which show, or tend to show, serious and substantial waste of public money in local government. The Committee notes that extending the Auditor-General's

[4] ibid, p.54.

jurisdiction under the *Protected Disclosures Act 1994* would require amendments to the *Public Finance and Audit Act 1983.*

Recommendation 14 **implemented** through the *Protected Disclosures Amendment (Police) Act 1998*

Police Service
The *Protected Disclosures Act 1994* should be amended to clarify that the protections provided under sections 20 and 21 should extend to members of the Police Service who voluntarily initiate the making of a disclosure notwithstanding the existence of a general obligation, provided for by regulation, to disclose misconduct. The Committee notes that this proposal would require an amendment to the *Police Service Act 1990* to explicitly provide for a member of the Police Service to be able to make a disclosure which shows, or tends to show, corrupt conduct, maladministration or serious and substantial waste of public money to the appropriate investigating authority.

Recommendation 15 **not implemented**

Elected Representatives
As the application of the *Protected Disclosures Act 1994* to local government councillors and Members of Parliament requires clarification, especially in relation to the definition of "public official" used within the Act, the Committee recommends that this definition should be amended to provide explicitly that the protections of the Act do not apply to Members of Parliament and local government councillors, but that persons in these categories can be the subject of protected disclosures where there is an existing jurisdiction under the relevant investigating authority Act. The result of this proposal would be that disclosures can be made which show or tend to show persons in these categories have committed conduct which can be investigated by the ICAC.

Recommendation 16 **not implemented**

Statistical information & reporting requirements

Public authorities
Statutory provision should be made for regulations requiring public authorities to adopt uniform standards and formats for statistical reporting on protected disclosures. (Precedent *FOI Regulation 1989*).

Recommendation 17 **not implemented**

Public authorities should be required to provide statistics on protected disclosures they receive and forward this information to the proposed Protected Disclosure Unit for inclusion in the Unit's annual report on the *Protected Disclosures Act 1994*.

Recommendation 18 **not implemented**

Statistical information & reporting requirements

Investigating Authorities*:*

The investigating authorities under the Act should consult with each other on the development of uniform reporting categories, standards and formats, as far as is practicable.

Recommendation 19 **implemented**

The investigating authorities should continue to include statistical information on their functions in relation to the *Protected Disclosures Act 1994* in their annual reports.

Recommendation 20 not implemented

Ongoing monitoring and review

20. All public authorities should be required to provide a report to the Parliamentary Joint Committee undertaking the biannual review of the Act in accordance with section 32. Each report should contain particulars of:

- the number of identified protected disclosures received;
- the number of referrals received;
- the number of investigations undertaken and outcomes;
- the resources used to deal with protected disclosures;
- training and education initiatives undertaken to improve staff awareness and understanding of the *Protected Disclosures Act 1994*;
- measures of support provided to employees who have made, or intend to make, a protected disclosure, for example, counselling and support officers;
- internal reporting systems;
- policies and procedures for receiving and managing protected disclosures and for protecting employees who have made disclosures from reprisals;
- any specific authority code which explains the importance of protected disclosures to the ethical framework of the organisation.

Recommendation 21 not implemented

Ongoing monitoring and review

Each investigating authority should furnish the Parliamentary Committee conducting the biannual review of the *Protected Disclosures Act 1994* with a report including information on:

- the number of protected disclosures received;
- the nature of the protected disclosures;
- action taken and outcomes;
- authorities the subject of protected disclosures;
- any difficulties with the operation of the Act which may necessitate legislative amendment;
- systemic issues raised by the investigation of the protected disclosures received by the investigating authority;
- details of joint initiatives undertaken with other investigation authorities in relation to the Act, for example, joint education programs.

Some of the information referred to in this recommendation is published by a number of the investigating authorities in their annual reports.

Recommendation 22 implemented

Definitions

Serious and substantial waste – The Auditor-General should provide some working definitions and examples of the term “serious and substantial waste”, which would assist in elucidating the meaning of the statutory term, and arrange for such material to be circulated to public authorities for inclusion in relevant educative material.

Public Official – The definition of "public official" within the Act should be amended to include a specific reference to "a member of the Police Service" both sworn and unsworn.

The Auditor-General provided some working definitions of the term "serious and substantial waste" and these are available in the Ombudsman's *Protected Disclosures Guidelines*, third edition, pp. 72-3 and at p.18 of the Audit Office's Annual Report for 1998-9. The Auditor's submission to the current review recommends that the *Protected Disclosures Act* be amended to ensure that protection is available to individuals identifying practices that could lead to serious and substantial waste, as distinct from identified actual waste.
The *Protected Disclosures Amendment (Police) Act 1998* included a member of the Police Service in the definition of "public official" within the Act.

Recommendation 23 implemented

Anonymous disclosures – The Committee resolved that it was not necessary to amend the Act to include a reference to the status of anonymous disclosures. However, guidelines on the Act and other advisory material prepared by the proposed 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.

see the Ombudsman's *Protected Disclosures Guidelines*, third edition, pp. 61-3.

Recommendation 24 not implemented

The Committee noted that it did not take evidence on several of the Ombudsman's recommendations, which largely raised questions of legal interpretation. Having regard to the technical nature of the questions and the varying views which appeared capable of being taken on the issues raised, the Committee resolved to refer these matters to the Premier, as the Minister responsible for administering the *Protected Disclosures Act 1994*, for consideration and response to the Committee. See the recommendations and issues contained in the Ombudsman's submission to the Committee Nos. 1, 2, 3, 7, 8, 9, 10, 11, 14, 15, 17, 18, 19, 23, 24, 25.

Copies of the 1996 review report were forwarded to the Premier's Office after the report was tabled on 26 September 1996. This particular recommendation was drawn to the Premier's attention in a letter from the then Committee Chairman, Mr Bryce Gaudry MP, dated 28 November 1996, inviting the Premier to comment on the report and respond to this particular recommendation and highlighting the Ombudsman's support for the recommendations. No response was received.

At the Eighth General Meeting the Ombudsman outlined the following issues as matters requiring attention during the second review of the Act:

1. The extent to which the recommendations and finding in the 1996 review have been implemented, in particular the non-implementation of recommendations 1, 2, 7, 8, 10-13, 15-18 [possibly 20&21], and 24.
2. Reconsideration of various issues raised by the NSW Ombudsman during the first review of the Act and in particular the following issues (listed in Annexure 2 to the 1996 report):

    a) Recommendation 7: that the Act should be amended to clarify what is meant by the reference in section 17 of the Act to the "*merits of government policy*";

b) Recommendation 8: that the reference in section 17 of the Act to the merits of government policy should be clarified to specifically provide that it does not include or extend to the merits of local government policy;

c) Recommendation 10: that the protections of the Act in relation to public officials should be limited to public officials who make disclosures in their capacity as public officials or who make disclosures of information or material of which they became aware or have obtained by virtue of the fact that they are public officials and in that capacity;

d) Recommendation 19: that the Act be amended to expand the exceptions to the confidentiality requirement in s.22 of the Act to specifically refer to:

1) disclosures made in accordance with an internal procedure (per section 14(2)) or code of conduct (per section 9(3);
2) disclosures to persons assigned to investigate or responsible for the investigation of the matter(s) the subject of the protected disclosure; and
3) disclosures made in compliance with a statutory obligation.

e) Recommendation 25: that consideration should be given to an appropriate amendment to the *Freedom of Information Act* to give agencies alternative options for exempting documents containing matter relating to a protected disclosure from release without the need to indicate that the documents relate to a protected disclosure. We put forward the following options for the purpose of fostering debate on this issue:

i. making an appropriate amendment to expand the confidentiality exemption in clause 13 of Schedule 1 to the *FOI Act*; or
ii. incorporating a provision in the *FOI Act* similar to section 31 of the Western Australia *FOI Act 1992* which allows agencies, in appropriate circumstances, to determine an application on the basis that it neither confirms nor denies the existence of such a document but that, assuming the existence of such a document, it would be an exempt document.

3. Reconsideration of recommendation 15 in the report on the 1996 review which provided, relevantly, that the definition of "public official" "*... should be amended to provide explicitly that the protections of the Act* ***do not*** *apply to members of the Parliament and Local Government Councillors,...*" [emphasis added], a proposal that would deny politicians protection under the Act.

4. Amendment of the *Protected Disclosures Act* to make it mandatory that agencies adopt an internal reporting policy. Our audit of internal reporting policies adopted by agencies shows a continuing failure by a number of agencies to either adopt a policy, or adopt an adequate policy.

5. Standardisation of the test for a disclosure to be a protected disclosure (ie. that the disclosure "*shows or tends to show*" one of the three categories of conduct covered in the *Protected Disclosures Act*) and the test for the obligation to report corrupt conduct under the *ICAC Act* (ie. that a person "*suspects on reasonable grounds*" that any matter concerns or may concern corrupt conduct).

6. Consideration of the need to retain section 19(5) of the *Protected Disclosures Act*. This subsection requires that for a disclosure to a Member of Parliament or a journalists to be protected by the Act, amongst other things, "*the disclosure must be substantially true*" – a difficult matter to prove when the circumstances listed in section 19(3) apply.

7. Amendment of the *Protected Disclosures Act* to extend the statute of limitations for the commencement of proceedings under section 20 from 6 months to 12 months.

2.4 The Protected Disclosures Act Implementation Steering Committee

The Protected Disclosures Act Implementation Steering Committee (the Steering Committee) was formed in July 1996. It currently comprises senior representatives from the Premier's Department, The Cabinet Office, The Department of Local Government, the Audit Office, the Office of the Ombudsman, the Independent Commission Against Corruption, the NSW Police Service (Internal Witness Support Unit) and the Police Integrity Commission. Initially focussing on the implementation of the *Protected Disclosures Act*, this inter-departmental committee undertakes a range of initiatives aimed at promoting the principles and effective management of the protected disclosures legislation. The Steering Committee meets periodically, a total of four times for the 1998-9 reporting period, and the costs incurred through membership of the Steering Committee are met by each agency.[5]

Initiatives instituted or supported by the Steering Committee, as outlined in its 1998-9 report to the Premier, include:

- *Better Management of Protected Disclosures* Workshops – Seven interactive workshops were held during 1998-9 mainly for nominated protected disclosures coordinators, senior public sector management members and staff with a role in dealing with disclosures.
- Ongoing assessment of Internal Reporting Policies and provision of advice to agencies and councils – This involves monitoring and assessment by the Department of Local Government and the NSW Ombudsman of the implementation of internal reporting systems in NSW local councils and state agencies and provision of advice by the Ombudsman's Office to agencies following review of the internal reporting systems.
- Focus groups with senior public sector management – These groups are conducted by ICAC with senior representatives from state agencies and local government to discuss findings arising from ICAC research on protected disclosures.
- Protected Disclosures Co-ordinator Database: a database of all nominated protected disclosures co-ordinators, maintained by the ICAC.
- ICAC Introduction to Internal Investigations Workshops: a series of workshops and in-house training conducted by the ICAC through the Institute of Public Administration to enhance the investigative skills of state agencies and local councils.
- Further stages of the ICAC research study, "Monitoring the Impact of the *Protected Disclosures Act 1994*".
- Joint NSW Ombudsman/Audit Office workshops for complaint handling – The Ombudsman's Office has conducted courses and provided advice on complaint handling issues and is completing guidelines to assist non-professional investigators to investigate complaints raising administrative or disciplinary issues.

The Steering Committee's work plan for 1999/2000 was developed in light of the responses provided by protected disclosure coordinators in State public sector agencies and local

[5] Protected Disclosures Act Implementation Steering Committee, *Report to the Premier of NSW - Protected Disclosures Act Implementation Steering Committee 1998-99*, October 1999, pp.2-4

councils to a request from the Steering Committee for information concerning their needs. The work plan involved further internal investigation workshops by ICAC, commencement of the *Better Management of Protected Disclosures* workshops series in metropolitan and regional NSW, updating the Protected Disclosures Co-ordinator database, and release of Ombudsman guidelines for investigating complaints and related training courses[6].

2.5 Protected Disclosures after 5 years – To what extent is the protected disclosures scheme being utilised in the public sector?

Research
In 1995-6 the ICAC conducted a four-phased study of the protected disclosures scheme in NSW. The study involved an investigation of the reporting systems and information strategies being implemented for the purposes of the *Protected Disclosures Act*; exploring the level of awareness and the attitude of public sector organisations and their employees toward the Act; and a comparison of management and employee views about employee needs regarding reporting of corruption.[7]

The four phases of the study were reported on in the ICAC publication *Monitoring the Impact of the NSW Protected Disclosures Act 1994,* released in November 1997. The first phase of the study was conducted in October 1995; the second in the first two months of 1996; the third and fourth phases at the end of 1996. The findings of the phases are summarised below:

Phase 1 Data collection from New South Wales State Government Agencies and New South Wales Local Councils

- less than half (42% of the New South Wales public sector had implemented internal reporting systems in response to the Act)
- only one-third (34%) had undertaken to inform their staff about the existence of the Act
- one-third (31%) had no immediate plans to inform staff.[8]

Phase 2 Interviews with relevant staff from a small sample of organisations.

Educational needs of organisations:

- organisations want to know about the experiences of other organisations with the Act
- organisations want some generic training and information materials to inform their employees about the Act; limited resources meant a preference for one central agency to produce materials for use by all public sector agencies and local councils.

[6] ibid, pp 3-4. 16-17
[7] Independent Commission Against Corruption , *Monitoring the Impact of the NSW Protected Disclosures Act 1994*, November 1997.
[8] ibid, p22.

Protection:

- confusion existed about the legal requirements of organisations to provide protection to their employees and actual ways of physically protecting staff
- country organisations were concerned about their limited capacity to provide effective protection
- ICAC, Ombudsman and Audit Office were perceived as information providers and "safety nets"
- two areas requiring particular attention were the provision of appropriate resources and information about the Act to organisations and addressing the concerns of organisations that do not see the Act as relevant or potentially beneficial for their organisation[9].

Phase 3 Questionnaire to a sample 1255 employees from the sample organisations involved in the second phase:

- 95% of respondents are willing to contemplate the idea of reporting corruption
- the majority of public sector employees (84%) believe something can be done about corruption
- only 59% believed something would be done
- only 44% believed corruption was likely to occur in their workplace
- areas requiring priority attention include junior employees, employees located outside metropolitan areas and local council employees.

Recommendations for organisations:

1. Implement effective internal reporting channels
2. Effectively inform employees about existing internal and external channels and the *Protected Disclosures Act*
3. Managers to make changes within their organisations to create cultures in which employees at all levels have faith that their manager will respond appropriately to reports of corruption and do their best to protect employees from reprisals if they do report corruption[10].

Phase 4 Qualitative research study involving interviews with 30 individuals who had made Protected Disclosures

1. Identified barriers to the success of the *Protected Disclosures Act*:
   (i) Many respondents reported not being informed about the Act.
   (ii) Some respondents believed key people in their organisation were unaware of the Act.
   (iii) A number of respondents believed the legislation would not work far them because their management would actively ignore or undermine it.

2. Barriers to reporting corruption internally:
   (i) All respondents believed their organisations actively discourage the making of reports.

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[9] ibid, pp 46-47.
[10] ibid, pp 68, 71.

(ii) Most respondents found their internal reporting systems in their organisations ineffective and unsatisfactory and reported that the reporting channels exist on paper but were not effective in reality.
(iii) Many respondents reported being punished for reporting issues within their organisation including breaches of confidentiality, ostracism and loss of career opportunities.
(iv) Some respondents reported being bewildered and misled by their organisations which communicated that they wanted them to report wrongdoing but then punished them when they did.
(v) Most respondents reported that their organisations are resistant to tackling the issues which are being raised by staff reporting wrongdoing.
(vi) The source of retaliation which the majority of respondents feared most was senior managers of organisations.
(vii) Many respondents did not believe their organisations were capable of conducting impartial investigations when corruption reports are made and that an independent reporting and investigatory body was necessary.

Recommendations were made that:

- Senior management of organisations should ensure that:
  a) policies and procedures are in place which enable and encourage employees to report workplace wrongdoing
  b) all employees know about those policies and procedures
  c) the attitudes of all managers reflect the policies regarding encouraging and supporting employees to report wrongdoing
  d) the quality and utility of the internal reporting systems is proven
  e) internal investigations are conducted appropriately
  f) they are responding to the referral of matters by the ICAC by conducting fair and honest assessments of the issues.

- Central and accountability agencies (Premiers Department, Cabinet Office, Department of Local Government, Audit Office, Ombudsman's Office, Treasury, Independent Commission Against Corruption) should consider strategies in which organisations are not only compelled to demonstrate that they are complying with internal reporting requirements on paper, but that organisations demonstrate:
  a) that the attitudes of management reflect the policies regarding encouraging and supporting employees to report corruption
  b) the quality and utility of internal reporting systems
  c) that they conduct internal investigations appropriately
  d) that they respond to the referral of matters by the ICAC by conducting fair and honest assessments of the issues.

- Central accountability agencies should consider conducting internal reporting system audits in which organisations are required to demonstrate that their systems are implemented, functional and that their staff are informed about the available reporting channels.

- Central and accountability agencies should consider strategies for making information about ICAC, the *Protected Disclosures Act* and reporting corruption, more accessible

without having to depend on management of senior organisations to make the material available to their staff[11].

One outcome of Phases 1 and 2 of the ICAC study was the establishment of the inter-departmental Steering Committee and the circulation of a Premier's Memorandum compelling all agencies to set up reporting systems in response to the Act.

The ICAC study was conducted in 1995-6 and significant initiatives have since been undertaken which were aimed at addressing the needs identified in the Commission's study. The work of members of the Steering Committee has been discussed in Section 2.4 and includes: workshops to raise the knowledge and skills of protected disclosures co-ordinators, senior public sector management members and all staff dealing with disclosures; auditing and assessment of internal reporting systems, internal investigation workshops; focus groups with public sector management; complaint handling workshops.

The Steering Committee reported to the Premier in 1998-9 that participants in the Protected Disclosures Workshops indicated high changes in the knowledge gained in five key areas:

1) internal reporting systems
2) protection for staff making disclosures
3) benefits for councils/organisations from protected disclosures
4) investigation techniques
5) role of the protected disclosures co-ordinator[12]

The Steering Committee also reported that the Department of Local Government's self-assessment survey to general managers indicated 84% of councils reported they had implemented an internal reporting system in accordance with the Act.
Following encouragement by the Department, improvements were reported on the percentage of councils adopting internal reporting systems. As at 30 June 1999, 172 of the 177 councils in New South Wales had adopted internal reporting systems, three councils adopted systems in July 1999 and the remaining two councils gave a commitment to implement a system.

The Ombudsman had continued to audit internal reporting policies, asking 69 of 132 State agencies (52%) to provide internal reporting policies. Thirty-six agencies responded and 33 agencies failed to respond. The Ombudsman assessed the internal reporting policies to have undergone a positive shift in both compliance with the model policy and in content quality. The following table reports on these improvements[13].

	Very Good	**Adequate**	**Inadequate**		
			Borderline	**Clearly Inadequate**	**Non-existent**
Original Audit	37	15	22	51	8
1998/1999	51	16	18	41	6
Variation	+27.5%	+6%	-18%	-20%	-25%

[11] ibid, pp 81-83.
[12] Steering Committee Report 1998-1999, op. cit., p5.
[13] ibid, pp5-6.

More recent assessment by the Ombudsman's Office of internal reporting systems is discussed in Section 4.1.

In addition, the ICAC reported that the analysis of the focus groups conducted with senior management members from state agencies and local government indicated that they considered the following issues critical to corruption:

- trust in management
- being able to change the organisation's culture
- taking effective and visible action against corrupt behaviour
- commitment from the top, and
- effective training.

This information was distributed to all chief executive officers of state agencies, general managers of councils, public sector, senior officials, local government and interested parties.[14]

Participant responses to the ICAC's internal investigations workshops also have been assessed.

Statistics

Assembling statistical information on the extent to which the protected disclosures scheme is being utilised requires consulting various sources such as the annual reports of investigating authorities and other public sector agencies.

Information obtained during the review was limited. The Department of Local Government submitted that the Investigation and Review Branch had received 1285 complaints in the 1998/1999 financial year of which 19 were protected disclosures under the Act. A further 156 complaints did not fall within the criteria of protected disclosures but were readily identifiable as being provided by council employees, general managers and council staff.

Of the 1758 topics arising from the allegations, 532 (30%) related to corruption and conduct issues, 97 (6%) related to maladministration, 117 (7%) to the misuse of funds.

From the commencement of the Act in 1995 until 30 June 1999, the Department of Local Government received 51 complaints/disclosures seeking protected disclosures status. A total 324 complaints/disclosures were potentially protected disclosures. Of these, 158 complaints were made by councillors, 81 by general managers, 37 by employees, 19 on behalf of councillors, 17 on behalf of general managers and 12 on behalf of employees.[15]

[14] ibid, p.7.
[15] Department of Local Government submission, dated 19 January 2000, pp.7-8.

The following statistics on protected disclosures were obtained from the annual reports of the Audit Office, ICAC and NSW Ombudsman:

Agency	Number of protected disclosures received			
	95/96	**96/97**	**97/98**	**98/99**
Audit Office	18	5	24	19*
Ombudsman	136	179	216	200
ICAC			234	231

* 7 month period only

Protected disclosures statistics for the ICAC, from 1996 to the 1997-98 financial year, as provided in its annual reports are classified as a percentage of the overall complaints received by the Commission. Consequently, compiling trends in this area is difficult. The ICAC does provide information in its annual reports about the source and subject of complaints classed as protected disclosures, as does the Ombudsman's Office and the Audit Office.

The PIC's annual reports provide statistics on the number of police officers/former officers/ Police Service employees who make non-referred complaints to the Commission. Details also are provided of the number of referred complaints received from the Police Service. However, statistics on the number of protected disclosures received by the Police Integrity Commission are not specified as a specific category of complaints. In evidence to the Committee, the Solicitor to the Commission, Mr Andrew Naylor, estimated that the PIC receives two internal police complaints each week, referred from the Ombudsman or the Police Service. He estimated that the number of non-referred complaints received from police officers would be much fewer, perhaps one a month.[16]

The PIC Inspector has not received a disclosure by an employee of the PIC. During 1998-9 two of the complainants to the Inspectorate were police officers who had been treated as a "public official" for the purposes of the Act but had not sought confidentiality in relation to their disclosure.[17] It should be noted that the investigating authorities also have differing classification systems for protected disclosures reflecting the requirements of their respective legislation.

Case Law

To date there are no decided cases that provide general guidance as to how the provisions of the *Protected Disclosures Act* operate in practice.

COMMENT

The Parliamentary Committee notes that the ICAC intends to undertake a further study on protected disclosures following the conclusion of the second Parliamentary review of the *Protected Disclosures Act* and that there is also research being undertaken by the Office of the Ombudsman and other members of the Steering Committee. The Parliamentary Committee considers such research to be valuable in assessing how the Act is working and

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16 Public hearing, 28 March 2000.
17 Submission dated 17 November 1999.

also considers the accumulation of further statistical data about the operation of the *Protected Disclosures Act* to be highly important. It, therefore, fully supports the undertaking of such research.

The Committee considers that the proposed PDU would play a valuable role in the collection and collation of statistics on protected disclosures. In the absence of such information it is difficult to draw conclusions about the extent to which the protected disclosures scheme is utilised and its efficacy.

CHAPTER 3 - PRIORITY AREAS FOR REFORM

Introduction

The recommendations contained in the 1996 Review report served as the starting point for the second parliamentary review of the Act. Those recommendations which had been implemented, in part or in full, were identified (see Chapter 2) and the investigating authorities, Department of Local Government and Premier's Department were invited to respond to all of the recommendations. The submissions received by the Committee are reproduced in full at Appendix 2.

As the second review progressed it became evident that the Committee's inquiries would be of less value if they were confined solely to a re-examination of the 1996 review recommendations. In the absence of any comprehensive package of legislative and administrative reforms in relation to the protected disclosures scheme, the Committee resolved that the most productive approach to the review of the Act would be to identify those areas which it considered to be priority areas for reform.

The first section of this chapter outlines the recommendations identified by the Ombudsman and Steering Committee as priorities. The second section identifies those areas considered by the Parliamentary Committee to be priorities and highlights particular issues or recommendations supported by the majority of parties involved with the Act. Section 3.2 also examines some issues which were subject to disagreement at the commencement of the second review but which lent themselves to compromise solutions as a result of the inquiry process.

It is the view of the Committee on the Office of the Ombudsman and the Police Integrity Commission that the areas outlined in Chapter 3 are highly important and should form the basis for the next stage of reform of the protected disclosures scheme. The Committee also believes that failure to address these areas will impede the development and enhancement of the protected disclosures scheme to the detriment of public sector administration and standards of accountability. There seems to be little purpose served in reviewing the *Protected Disclosures Act* if it is to remain a largely static statutory scheme. Key agencies have advocated changes aimed at refining the operation of the Act and promoting its objectives. It is the opinion of this Committee that the priorities identified in this chapter represent the considered, and often agreed position, of those bodies mostly concerned with the protected disclosures scheme and, as such, they are deserving of detailed and thorough consideration.

The Premier's Department in its submission to the current review, noted that the Protected Disclosures Steering Committee is a "whole of government" committee. It, therefore, seems appropriate to the Parliamentary Committee that the Protected Disclosures Steering Committee should play a role in the development of the Executive Government's response to the matters raised in this report.

Recommendation 1

The Committee recommends that the particular areas identified in this report as priority areas for reform of the protected disclosures scheme, together with the previous recommendations made by the Ombudsman and Steering Committee, be the subject of a comprehensive and thorough evaluation by the Premier, as the Minister with administrative responsibility for the *Protected Disclosures Act 1994,* and that the Steering Committee be fully involved during this process.

3.1 Priorities identified by the Ombudsman and the Steering Committee

3.1.1 Ombudsman

Following the first Parliamentary Committee review of the *Protected Disclosures Act 1994,* the then Ombudsman, Ms Irene Moss, wrote to the Premier on 11 November 1996 expressing support for the recommendations contained in the 1996 Review report, and in particular the following recommendations:

1) the establishment of a Protected Disclosures Unit to perform monitoring and advisory functions in relation to the Act (recommendations 1 and 2);

2) the inclusion of specific reference in the Code of Conduct for members of the Chief Executive Service and the Senior Executive Service as to their duties and obligations in relation to:

   - the investigation of protected disclosures; and
   - the protection and support of staff who have made protected disclosures (recommendation 5).

3) the amendment of the Act to include 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 (recommendation 7);

4) the amendment of section 20 of the Act to reverse the onus of proof in relation to detrimental action taken against employees substantially in reprisal for the making of protected disclosures – similar to recent amendments to the ICAC Act, the Ombudsman Act and an equivalent provision in the *Police Integrity Commission Act* (recommendation 9);

5) clarifying that the protections provided under the Act extend to members of the Police Service who make a voluntary disclosure (recommendation 14).

Ms Irene Moss provided with her correspondence copies of previous submissions made by the Ombudsman's Office to the first parliamentary review into the Act on the cost of work undertaken by the Office since the commencement of the protected disclosures scheme along with an estimate of the cost of establishing a PDU within the Office.

On 14 October 1997, Ms Moss, wrote to the Cabinet Office concerning the recommendations made by the Parliamentary Committee arising from the first review of the *Protected Disclosures Act.* Ms Moss recommended in her letter that amendment of the Act be progressed in two stages and identified those reforms which she considered to be most pressing, namely, the confused status of police in relation to the Act and the inadequacy of protections provided for whistleblowers. It was suggested that the remaining issues arising from the Parliamentary Committee's review could be addressed in time for the next session of Parliament.

As noted in section 2.2 of this report, recommendations 5, 9 and 14 of the 1996 review report have been implemented.

3.1.2 Steering Committee

In its annual report for 1998-9, the Protected Disclosures Act Implementation Steering Committee informed the Premier of those recommendations which it felt should be treated as priorities. Specifically, the Steering Committee agreed to support implementation of three recommendations from the 1996 Review Report:

> *"(7) The Act should be amended to include 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."*
>
> The benefit of implementing the above recommendation is that it would indicate to agencies that they should take positive steps to protect whistleblowers. This[sic] is currently no such obligation on agencies, only criminal sanction where a person has engaged in detrimental action against a whistleblower.
>
> "*(11) The Act should be amended to extend protection against detrimental action to any person or body who is engaged in a contractual arrangement with the public authority and makes a protected disclosure".*
>
> The recommendation becomes increasingly relevant the more public authorities contract out their activities. In January this year the Minister for Public Works and Services released a whole of government procurement framework. When releasing the documents he stated that the NSW Government currently spends $10 billion each year on procurement.
>
> The framework includes a Policy Statement and Code of Practice for NSW Government Procurement. The Code establishes standards of behaviour and ten ethical principles to be observed by all service providers, including contractors, suppliers, subcontractors, consultants and agents. Service providers are required to attest to their probity in all their business dealing with government agencies.
>
> This requirement for contractor to demonstrate high ethical standards should be balanced with the provision of protection under the *Protected Disclosures Act*. A key feature of demonstrating high ethical standards includes not turning a blind eye to the wrong doing of others.
>
> In January 1999 the ICAC undertook a survey to consultants and contractors and released a report P*rivate contractors' perceptions of working for the NSW Public Sector.* The report encouraged organisations to educate private contractors about their public duty, the values

> and principles which underpin the operation of the public sector and the importance of maintaining high ethical standards.
>
> "*(16) Statutory provisions should be made for regulations requiring public authorities to adopt uniform standards and formats for statistical reporting on protected disclosures (Precedent FOI Regulation 1989)"*
>
> While public authorities and statutory bodies are required under the *Annual Reports (Public Authorities) Act 1985* and the *Annual Reports (Statutory Bodies) Act 1985* to include in their annual reports details of the extent and main features of consumer complaints, there is no obligation to include equivalent information about internal complaints and in particular protected disclosures.
>
> Given the information that will be required by the Parliamentary Joint Committee to carry out the ongoing biannual reviews of the implementation of the *Protected Disclosures Act*, and to help ensure that agencies can be held properly accountable between such reviews, it would be of great assistance if the schedules to the Regulations made under the two Annual Report Acts were amended to include a requirement to report on protected disclosures. This could include:
>
> - the number of identified protected disclosures received
> - the number of protected disclosures referred on by the agency to another public official, public authority or investigating [authority] sic.
> - the number of investigations undertaken and their outcomes
> - the impact of protected disclosures on the activities of the agency
> - training and education initiatives undertaken to improve staff awareness and understanding of the P*rotected Disclosures Act*.[18]

On 6 July 1999, the Chair of the Steering Committee, Mr Peter Gifford, wrote to the Director-General of the Cabinet Office, Mr Roger Wilkins, concerning the implementation of recommendations from the parliamentary review of the *Protected Disclosures Act*. Mr Gifford outlined the recommendations which had been implemented, either in part or in full, and those which had not been implemented. His letter also referred to the likelihood of the second review of the Act occurring late in 1999.

The letter from the Steering Committee recommends that, prior to the second Parliamentary Committee review of the Act, consideration should be given to implementation of recommendations 7, 11 and 16 of the 1996 Review report, as highlighted in the Steering Committee's annual report for 1998-9. A second letter from the Steering Committee Chair to the Director-General of the Cabinet Office, dated 22 July 1999, advised that the Steering Committee had resolved on 7 July that consideration also should be given to implementing recommendation 13 of the 1996 Report which related to disclosures about serious and substantial waste of public money in local government. Mr Gifford noted that the decision of the Steering Committee concerning this particular recommendation was not unanimous and that the representative for the Department of Local Government had indicated that the Minister for Local Government did not support the recommendation.

The Acting Director-General of the Cabinet Office, Ms Kate McKenzie, wrote back to the Chairman of the Steering Committee on 24 August 1999 stating that "as none of the Committee's previous recommendations . . . appears [sic] to be pressing, I consider that it

[18] Steering Committee Annual Report to the Premier for 1998-9, p18

would be prudent to await the outcome of that further review." [ie the second Parliamentary review of the *Protected Disclosures Act*]

COMMENT

The Parliamentary Committee supports the approach taken by the Steering Committee in advising the Cabinet Office of those recommendations which it regarded as priority areas for reform. The Parliamentary Committee also notes that amendments were made to the *Protected Disclosures Act* and other relevant statutes to deal with some of the recommendations highlighted by the Ombudsman as being particularly important, specifically, recommendations 9 and 14. However, it should be emphasised that the amendments made to the legislation did not address any of the recommendations identified as priorities by the Steering Committee.

In conducting this review of the *Protected Disclosures Act,* the Parliamentary Committee considered the annual reports of the Steering Committee and had full regard to the views expressed by that Committee. The Parliamentary Committee considers that the views of the Steering Committee should be accorded considerable weight as being representative of a "whole of government" approach to the protected disclosures scheme. The Steering Committee should play a central role in determining the strategic direction of the development of the protected disclosures scheme.

It is the opinion of this Committee that the proposal put by the Steering Committee to the Cabinet Office for a series of recommendations to be adopted at the very least warranted a detailed and considered response as a matter of some priority. The Parliamentary Committee is concerned at the dismissive attitude expressed by the Acting Director-General of the Cabinet Office, Ms Kate McKenzie, in her correspondence on the Steering Committee's proposal. The matters raised by the Steering Committee deserved prompt attention rather than being made conditional upon the uncertain timing of the next Parliamentary review.

As it turned out, this Committee did not receive a referral from both Houses of Parliament to conduct the review until 10 November 1999. At that stage, due to the Parliamentary timetable, the Committee was not in a position to conduct public hearings for the review until March 2000, so resulting in a considerable delay in undertaking the current review. If more expeditious consideration had been given to the Steering Committee's proposals much needed reform of the protected disclosures scheme may already have been in place before the commencement of the second statutory review.

During the second review of the Act, the Parliamentary Committee was advised by Dr Gellatly in the cover letter to the Premier's Department submission that Cabinet Office Legal Branch has an on-going role, and particular expertise, in commenting on the implementation of any recommendations arising from the periodic review of the Act and that Cabinet Office did not at this time wish to provide a formal submission but intended to make appropriate comments upon publication of the Committee's report and in light of comments by other interested parties. The Committee notes that the Cabinet Office did not make a comprehensive response to the recommendations contained in the report on the 1996 review of the Act.

Recommendation 2:

(a) The Protected Disclosures Act Implementation Steering Committee should continue to promote the principles and effective management of the protected disclosures scheme within Government, and play a central role in determining the strategic direction of the development of the protected disclosures scheme.

(b) As part of performing the above functions, the Steering Committee should continue to provide an Annual Report on its activities and issues relevant to the protected disclosures scheme. This report should include details of all proposals put forward by the Steering Committee pertaining to the legislative provisions dealing with protected disclosures and any related administrative practices.

(c) The Steering Committee's Annual Report be tabled in Parliament.

(d) Proposals put forward by the Steering Committee should be considered promptly and be subject to a detailed response, a copy of which should be provided to the Committee on the Office of the Ombudsman and the Police Integrity Commission.

3.2 Priorities identified by the Parliamentary Committee

3.2.1 A DEDICATED PROTECTED DISCLOSURES UNIT

Background – The first recommendation contained in the 1996 Review Report proposed the creation of a Protected Disclosures Unit as follows:

The Act should be amended, and funding provided by the Government (refer Chapter 2.1), to enable the establishment of a Protected Disclosures Unit (PDU) within the Office of the Ombudsman with the following monitoring and advisory functions:

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, legal interpretations and definitions;
c) to monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;
d) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;
e) to audit the internal reporting procedures of public authorities;
f) to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;
g) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
h) 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;
i) 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

j) to publish guidelines on the *Protected Disclosures Act 1994* in consultation with the investigating authorities.

The dedicated unit would perform a range of advisory, educational and monitoring functions which would serve as a central focus for the implementation and development of the protected disclosures scheme within the New South Wales public sector. The Parliamentary Committee conducting the first review of the Act reported that "both the public authorities which receive and investigate disclosures, and the public officials who make disclosures, require assistance on matters such as the interpretation of legislative provisions, the classification or status of disclosures, investigative procedures and available options for reporting misconduct." [19]

The 1996 review report did not recommend that the Protected Disclosures Unit should have an investigative function as that function is best performed by the investigating authorities and other public authorities which have received disclosures either directly or by referral. However, the report did propose that the Unit should have a monitoring role which would enable the Ombudsman to report to the Minister and Parliament if dissatisfied with the performance of a public authority in the handling of a protected disclosure. [20]

It should be noted that the report relied upon the definitions which apply under the Act and, accordingly, distinguished between public authorities and investigating authorities. The ICAC highlighted in its submission to the current review that confusion may arise as investigating authorities also may be considered to be public authorities: the definition of a public authority under the Act is 'any public authority whose conduct or activities may be investigated by an investigating authority'.

The proposed monitoring role of the PDU was never intended by the previous Committee to extend to the conduct of investigations undertaken by the investigating authorities. This was clearly outlined in the report:

> The Committee did not consider that the PDU should be responsible for overseeing the actual operational performance of the investigating authorities. Such a role would compromise the final responsibility of investigating authorities for investigating matters which fall within their jurisdiction. Consequently, it is preferred that the PDU's oversight role in respect of the investigating authorities should be confined to a monitoring function aimed at ensuring that broad systemic trends are observed. This function should be one that involves overall assessment of the handling of disclosures by investigating authorities rather than one that involves overseeing the actual conduct of investigations. [21]

The jurisdiction of the PDU in relation to its monitoring function was specified in Recommendation 2 of the report which proposed that all public authorities and investigating authorities would be required to notify the PDU of all disclosures received which appear to be protected under the Act. Apart from this notification requirement, the recommendation proposed a further requirement that public authorities investigating disclosures regularly inform the Unit of the progress made in the investigation and the final result. It was not intended that the requirement to report on progress during protected disclosure investigations would apply to investigating authorities: a point clarified in the body of the report.

[19] Committee on the Office of the Ombudsman and Police Integrity Commission, *Review of the Protected Disclosures Act 1994*, September 1996, p.38.
[20] ibid
[21] ibid

The previous Committee further recommended that the proposed unit be located within the Office of the Ombudsman and funded to the extent necessary to secure its viable operation. This was considered to be more cost-effective and practical than the creation of a completely separate agency with full investigative powers: an option which had been put to the Committee during evidence. Locating the PDU within the Office of the Ombudsman would acknowledge the de facto advisory role performed by the Office since the commencement of the Act, and the cooperative approach taken by the Office towards other investigating authorities and relevant bodies on the promotion and implementation of the Act, the conduct of investigations and educational and training initiatives. [22]

Current review of the Act

As part of the current review, the Parliamentary Committee sought submissions and opinions about the previous recommendation on the establishment of the Protected Disclosures Unit. The Premier's Department responded that the need for such a unit "would require further analysis to assess demand" and that the Protected Disclosures Act Implementation Steering Committee provides a "whole of government" approach to a range of the activities suggested for the unit.

The Parliamentary Committee supports the "whole of government" approach to the Act which has been achieved through the work of the Protected Disclosures Act Implementation Steering Committee and values the coordinating role played by the Steering Committee, especially in relation to education and training programs. However, arguments were put to the Parliamentary Committee that the existence of a PDU would enhance the operation of the Act and lead to the development of initiatives.

The Office of the Ombudsman maintains its support for a Protected Disclosures Unit and submitted that such a unit would:

- Provide a central port of call for all persons seeking advice on the Act
- Advice on the Act is more likely to be correct and comprehensive if it comes from experts and more likely to be consistent if it comes from one source
- Allow a general picture to be developed of the state of knowledge/levels of confusion about the Act in the public sector/sorts of issues and aspects of the legislation least understood across the board. At present the Office mainly hears from officials/agencies who acknowledge the limitations in their understanding of the Act. The establishment of the PDU will enable a proper overview of the Act's implementation, and to see whether those agencies that believe they understand the Act actually do. (Especially to see what matters are being assessed as protected disclosures and what are not)
- Enable the collection/collation and analysis of statistics on different aspect of the legislation and thus the identification of systemic issues, including the most common problems and the best ways of solving them (legislatively/administratively/through training etc)
- Enable the collection and collation of comprehensive statistics on numbers of protected disclosures made throughout the public sector
- Enable assessment of protected disclosures to be scrutinised
- Enable monitoring of the conduct of investigations to ensure an appropriate standard (similar to the police and child protection roles of the Ombudsman)

[22] ibid.

- Enable the systems in place for dealing with protected disclosures to be kept under scrutiny (similar to the police and child protection roles of the Ombudsman)
- Assess the extent of compliance with the Act by public authorities (eg. Are some disclosures being erroneously rejected by coordinators as vexatious in spite of the clear working of the Act which stipulates that only the CEO can make this judgement?)
- Increase auditing opportunities, where appropriate (eg audits can be conducted to gain a better understanding of the sorts of matters assessed by public authorities as showing or tending to show maladministration or corrupt conduct or serious and substantial waste)

The Office of the Ombudsman went on to argue that a PDU also would enhance the operation of the Act in several ways. For example:

- additional resources for the advisory function
- additional resources to enable ongoing audit of internal reporting procedures
- additional resources for education and training programs conducted by the unit and other interested bodies
- provision of more informed and better targeted education/training
- additional resources to facilitate the ongoing review and updating of the PD Guidelines
- enhance the profile, and therefore status for protected disclosures
- streamline the dissemination of information
- enable even more informed advice to the PJC on the review of the Act[23]

It was the Office's view that at present any assessment of the Act and the extent to which it is achieving its objectives is largely anecdotal. The proposed PDU would provide more systematic and reliable data on which to base policy decisions and would enable assessment of the adequacy of the systems adopted by public authorities, disclosures and the standards of investigations carried out by agencies [24]

With regard to the second recommendation in the report, that is, for public authorities to notify the PDU of all disclosures which appear to be protected, the Office felt the effectiveness of the unit would be enhanced if public authorities were required to advise in general terms, the number of disclosures assessed as not coming within the legislation and the broad reasons for these determinations (eg because they do not concern a public official; they are vexatious/frivolous; the disclosure does not show or tend to show maladministration, corrupt conduct or serious and substantial waste; it is in the nature of a grievance etc). The Office considered that such information was arguably equally important in terms of assessing the operation and implementation of the Act[25].

The Acting Ombudsman, Chris Wheeler, gave evidence that the role of the proposed PDU would be analogous to roles already performed by the Office in other areas of the Ombudsman's jurisdiction:

> **Mr WHEELER:** . . . It would allow a proper overview of the Act's implementation, the preparation of statistics, of course, about how disclosures are being made and dealt with. We have an analogous role in relation to complaints about police, where we oversight the investigation of police investigations to make sure they are done properly and that the findings are reasonable given the information that comes forward. That is done in

[23] Document tabled by the Acting Ombudsman, public hearing 28 March 2000, entitled "Protected Disclosures Unit".
[24] ibid
[25] ibid

> circumstances where the Police Integrity Commission still carries out its corruption fighting role in relation to serious police misconduct. It works quite well.
>
> We have a similar role in relation to child protection matters, where all public officials who are aware of allegations of child abuse, plus all teachers in private schools, are required through their chief executive officers to notify us of every allegation. We then make sure that those allegations are properly dealt with, that they are recorded where they are supposed to be recorded and that they are investigated and that the investigation is a proper investigation and that the findings are reasonable in the circumstances. I see it as analogous to those two roles that we would keep under scrutiny the systems in place for dealing with protected disclosures, and we would also look at individual cases to ensure that they were done properly.
>
> In that regard, I would refer you to s.25B of the Ombudsman Act, which talks about the Ombudsman keeping under scrutiny the systems for handling and responding to child abuse allegations or child abuse convictions involving employees, and s.160 of the Police Service Act which looks at the Ombudsman keeping under scrutiny of the systems established within the Police Service for dealing with complaints. I would see that such a unit would perform such a role in relation to protected disclosures. Not necessarily in relation to the work of other investigative authorities; they should know how to investigate a complaint and how to deal with it properly. I am talking about general public authorities who do not have any experience in this area or limited experience of handling these sorts of matters. I have set out the other points in the document that has been handed round.[26]

The Independent Commission Against Corruption (ICAC) advised that Committee that:

> "[it] believes that the ideal of a "one stop shop" to provide advice to members of the public in a consistent manner, whilst superficially attractive, would not work in practice because complainants will naturally seek advice from the agency they are complaining to and any attempt to promote one agency as the source of advice on protected disclosure matters could lead to confusion on the part of complainants who would understandably question why they needed to contact more than one agency in respect to their complaint." [27]

Nevertheless, the Commission is not opposed to the establishment and funding of a unit within the Office of the Ombudsman to perform the following functions:

- to provide advice to persons who intend to make, or have made, a protected disclosure;
- to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;
- to audit the internal reporting procedures of public authorities;
- to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;
- 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
- to publish guidelines on the *Protected Disclosures Act 1994* in consultation with the investigating authorities.

With regard to the monitoring functions proposed for the PDU, the ICAC considered that there should be no suggestion that such a unit could monitor investigations of the ICAC or other investigative authorities as this would compromise the independence of such

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[26] Evidence, public hearing, 28 March 2000.
[27] ICAC submission, dated 17 December 1999.

authorities. The Commission would be reluctant to routinely provide information on investigations to any other agency. It also claimed that there should be no suggestion that the PDU should monitor investigations by public authorities concerning corrupt conduct as such matters must be reported to the ICAC, which has responsibility for dealing with allegations of corrupt conduct.

In terms of the advisory function recommended for the PDU, the Commission felt that it might be appropriate for investigating authorities to provide general advice to public authorities on protected disclosure matters but that public authorities should seek legal advice from the Crown Solicitor.

The Commission felt that if the PDU acted as a central agency for collecting statistics it was important to reserve the discretion for investigating authorities to maintain confidentiality of operational information and details of disclosures. Information such as the name of the public authority involved and the category of alleged conduct could be provided to the PDU without compromising the independence of the investigative authorities or revealing the identity of complainants. The Commission also stressed that it should not be precluded from continuing to conduct its own research and education programs and that any duplication of effort in respect of this area should be avoided through consultation rather than legislative provision, as the latter could compromise the ICAC's independence in developing strategies to combat corruption.

In relation to the second recommendation concerning the PDU's proposed monitoring function, the ICAC submitted that it should not be required to notify the unit of matters which appear to be protected or of progress in dealing with them . The Commission restated that it would be undesirable for its independence to be compromised by oversight of its operational procedures. It declared that any amendments to the legislation should reflect the comments in the 1996 review report to the effect that the PDU should not be responsible for overseeing the actual operational performance of the investigating authorities. The ICAC explained that it often refers matters to public authorities pursuant to s.53 of the ICAC Act for investigation and that a report back may be required under s.54. The ICAC argued that in these circumstances, the PDU should not monitor the investigation by the public authority as the Commission was the appropriate body to do so given its specific legislative mandate and corruption investigation skills. The ICAC further reiterated that the PDU should not generally monitor the investigation by public authorities of matters concerning corrupt conduct as this could cut across the Commission's relationship with government agencies and create confusion about reporting responsibilities. [28]

The Police Integrity Commission also declared its support for the establishment of a suitably funded Protected Disclosures Unit within the Office of the Ombudsman in its submission to the review. The PIC noted that the Ombudsman's Office, in conjunction with the Protected Disclosures Steering Committee, had been performing the functions of the proposed Protected Disclosures Unit apparently without the additional funding envisaged in the original recommendation.[29]

Commenting on the proposed monitoring function for the Unit, the PIC cautioned against imposing a requirement, especially on investigating authorities, to notify the proposed PDU of all disclosures which appear to be protected under the Act, and questioned whether it will

[28] ibid.
[29] Police Integrity Commission submission, dated 1 February 2000.

always be in the public interest for a third party such as the PDU to be notified of the fact of a protected disclosure and progress in respect of its investigation.

The PIC drew an analogy between the proposed notification scheme to the PDU and the police complaints scheme. Under the police complaints legislation the Commission is required to refer all category 2[30] police complaints to the Commissioner of Police and to forward the Ombudsman a copy of those category 2 complaints which are notifiable. However, the PIC is not obliged to advise the Police Service or Ombudsman whether it has received a Category 1 complaint. There is no obligation on the PIC to bring complaints made directly to it to the attention of either the Ombudsman or the Police Service.

The PIC advised that this arrangement is consistent with the secrecy provisions of s.56 of the *Police Integrity Commission Act*. The exceptions to the secrecy provisions include disclosure where the communication is for the purposes of the Act, where it is in connection with the exercise of the person's functions under the Act, or where the information is required for a prosecution or disciplinary proceedings instituted as a result of an investigation by the Commission. Apart from these exceptions, the Commission states that it is the policy of the *Police Integrity Commission Act* that it is not in the public interest for information acquired by the Commission to be further divulged unless there is an overriding reason why it is necessary in the public interest to do so.

The Commission further advised that this policy recognises that, in relation to allegations about serious police misconduct, complainants are actually informants and are thereby entitled to the confidentiality protections afforded informants at common law. According to the Commission, the public interest in maintaining informant confidentiality is that it assists to encourage members of the public to provide information to the Commission, safe in the knowledge that the information will not be passed on to anyone else without their consent or good reason. It is the view of the Commission that a blanket requirement that the proposed PDU be informed of all protected disclosures has the potential for informants to lose confidence in the ability of the Commission to maintain confidentiality in respect of their disclosures, thus putting at risk the flow of information concerning serious police misconduct and corruption from the public to the PIC.

The PIC emphasised that recognition must be given to the fact that it is different from other public sector agencies, has extensive investigative powers and is subject to strict secrecy provisions. Further the Commission is accountable to the Inspector of the PIC and if the Commission failed to comply with its obligations under the *Protected Disclosures Act*, for example, by breaching the confidentiality provisions set out in s.22, then the Inspector may make a report to Parliament.

In conclusion, the PIC commented that as far as it is concerned "it is unnecessary and potentially counter-productive for the Commission to be required to notify the proposed PDU of all new protected disclosures and to keep the proposed PDU informed of progress as

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[30] Category 1 police complaints are the more serious complaints made against police officers, eg. perverting the course of justice, serious assault, an offence carrying a maximum custodial sentence greater than 5 years, and improperly interfering in a police investigation. Conduct falling within this category is determined by a class or kind agreement between the PIC Commissioner and the Ombudsman. Category 2 complaints are any other classes or kinds of complaints against police officers. 'Non-Referred' Category 1 complaints are those received directly by the PIC or from any source other than the Police Service or Ombudsman. 'Referred' Category 1 complaints are referred to the PIC by the Police Service or Ombudsman.

regards the investigation of each protected disclosure". It noted that the Ombudsman had expressed the view that Recommendation 2 should apply to public authorities, as distinct from investigating authorities, and the Commission agreed that it would be "inappropriate and unnecessary" for the proposed PDU to monitor the investigation of protected disclosures by other investigating authorities[31].

According to the NSW Branch of Whistleblowers Australia, the functions of the Protected Disclosures Unit proposed in the 1996 Review report are inadequate. Adopting the same position as it took for the first parliamentary review, Whistleblowers Australia recommended the establishment of an independent Public Interest Disclosure Agency (PIDA) put briefly to:

i. develop a positive and effective public profile for public interest whistleblowing
ii. receive, refer (for investigation) and monitor public interest disclosures
iii. initiate and or instruct, and monitor whistleblower protections
iv. maintain the primacy of the wider public interest.[32]

COMMENT

It is the opinion of this Committee that in order to evaluate the continued need for a Protected Disclosures Unit several questions must be answered:

- What functions of the proposed Protected Disclosures Unit are already being performed by investigating authorities, the Steering Committee and other bodies?

- What functions of the proposed PDU are not being performed by investigating authorities and other agencies?

- Would the establishment of a Protected Disclosures Unit result in duplication of effort and waste of resources?

- Would the establishment of a PDU in the current circumstances, support the objectives of the *Protected Disclosures Act 1994* and enhance its operation?

- What level of support exists for the establishment of a Protected Disclosures Unit located within the Office of the Ombudsman?

Each of these questions is dealt with below.

What functions of the proposed Protected Disclosures Unit are already being performed by investigating authorities, the Steering Committee and other bodies?

Submissions and evidence to the Parliamentary Committee indicate that the members of the Protected Disclosures Steering Committee, both individually and collectively, continue to make significant contributions to the provision of advice, education and training about the Act. The 1998-9 Annual Report of the Steering Committee outlines the initiatives undertaken

[31] ibid.
[32] Whistleblowers Australia Inc. (NSW Branch), submission dated 17 April 2000.

by its member agencies to support the protected disclosures scheme (see section 2.4 for details).

The Annual Report shows that the Steering Committee has endeavoured to coordinate projects relating to the *Protected Disclosures Act* and that member agencies have developed separate areas of specialisation reflective of their respective jurisdictions. For example:

- the Department of Local Government an Ombudsman's Office have monitored and assessed internal reporting systems within local councils and state agencies;
- the NSW Ombudsman has audited internal reporting policies within state agencies, conducted workshops for complaint handling, and prepared guidelines for the investigation of disclosures alleging maladministration and serious and substantial waste;
- the ICAC has conducted a research study on the impact of the Act which it plans to monitor and has followed up with focus groups among senior management of local government and State agencies;
- the ICAC also maintains a database of protected disclosures coordinators and has promoted workshops and publications on internal investigations[33].

The Steering Committee's Annual Report concluded by stating that it wishes to continue the provision of: training in metropolitan and regional NSW; accessible and practical guidelines for the management of disclosures and investigations; and targeted communication strategies to reach all audiences. In order to achieve these aims the Steering Committee proposed forming "strategic links with central agencies and exploring new avenues to assist staff and management in local councils and state agencies to understand the provisions of the legislation and assist in better management of protected disclosures"[34].

Evidence taken during the review confirmed the extent of the initiatives which have been taken by investigating authorities and other agencies to support implementation of the *Protected Disclosures Act*. For instance, the Office of the Ombudsman submitted that it has undertaken activities such as developing and updating guidelines, clarifying aspects of the Act with the Crown Solicitor, providing advice to agencies and potential whistleblowers, assisting with the organising and running of protected disclosures workshops, and auditing internal reporting policies[35].

The ICAC submitted that most of the proposed functions of the PDU are already being carried out by one or more of the investigating authorities and that it would be important to ensure that a PDU did not unnecessarily duplicate the tasks already being performed by the investigating authorities. The Commission outlined that it has been involved in providing advice to agencies on internal reporting systems; that the Ombudsman's Office provides an advisory service for potential complainants; and, that the Steering Committee has provided advice and guidance to state agencies and councils on the implementation of the Act and has actively promoted training by arranging workshops[36].

The Department of Local Government conducted a self assessment project of all councils by sending a circular on the management of protected disclosures to all General Managers. The

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[33] Steering Committee, op. cit., pp.3-9.
[34] ibid, pp.8-9
[35] Office of the Ombudsman, submission dated 14 December 1999.
[36] ICAC submission, dated 17 December 1999.

survey was aimed at: assisting the Department to ascertain the extent to which councils had implemented clear and unequivocal protection to whistleblowers; identifying particular areas of administration of the Act in which further education and training may be required; and, providing assistance to General Managers in identifying any areas in the management of protected disclosures which need improvement[37]. In conjunction with the ICAC, the Office of the Ombudsman and the Institute of Municipal Management, the Department conducted regional workshops to assist councils in the implementation of internal reporting systems. The Department also is involved with the NSW Audit Office in the *Better Management of Protected Disclosures Workshops*.

Using the proposed functions of the PDU as a checklist and the information provided by the Steering Committee, Office of the Ombudsman and the ICAC, it is evident that work has been undertaken in relation to most of the proposed functions of the Protected Disclosures Unit.

Functions of the proposed PDU	Performance of the function
a) to provide advice to persons who intend to make, or have made, a protected disclosure	Office of the Ombudsman gives such advice through guidelines and direct contact with senior staff but claims that the lack of a unit and resources means the availability of this service is not as widely known among public sector staff as it could be. ICAC informed the Committee that the Steering Committee also provides advice to public authorities on the implementation of the Act.
b) to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, legal interpretations and definitions;	
c) to monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;	The Ombudsman's Office has no legislative power to perform this task.
d) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;	The Office of the Ombudsman audited the internal reporting policies adopted by over 133 agencies and gave feedback to the agencies involved. ICAC's Corruption Prevention Unit provides advice to agencies on internal reporting systems.
e) to audit the internal reporting procedures of public authorities;	
f) to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;	The Office of the Ombudsman submitted that it had been prevented from performing this function by a lack of resources but that it had, as a member of the Steering Committee, participated in surveying protected disclosures coordinators in 1999.
g) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;	The Office of the Ombudsman has not undertaken this function due to a lack of resources and power.
h) 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;	The Office of the Ombudsman has not published an annual report on protected disclosures because of a lack of power. However, it has identified systemic issues and problems with the Act in each of the Ombudsman's Annual Reports.
i) to coordinate education and training programs in consultation with the investigating authorities and provide advice to public authorities seeking assistance	Members of the Steering Committee have contributed to the development and presentation of workshops.

[37] Department of Local Government Circular to Councils, "Management of Protected Disclosures – Self-assessment Project", 3 March 1998.

	in developing internal education programs; and	
j)	to publish guidelines on the *Protected Disclosures Act 1994* in consultation with the investigating authorities.	The Office of the Ombudsman publishes Protected Disclosures Guidelines.

Nevertheless, the Committee is of the view that there is scope for these activities to be performed more effectively were they undertaken in a more centralised, coordinated fashion.

What functions of the proposed PDU are not being performed by investigating authorities and other agencies?

The information obtained during the review shows that the advisory and educative functions envisaged for the Protected Disclosures Unit have largely been performed on a de facto basis by the investigative authorities where the functions relate to their jurisdictions. The Office of the Ombudsman and the Independent Commission Against Corruption have been particularly active in providing advice, education and training, and undertaking research. However, a number of functions for the proposed Unit have not been the subject of any initiatives by the Steering Committee or individual agencies, including:

- the monitoring of investigations of protected disclosures by public authorities
- the collection and collation of statistics on protected disclosures
- publication of an annual report on protected disclosures

The remaining proposed functions of the PDU have been performed only in part and the Parliamentary Committee is concerned that these particular functions should be provided not on an ad hoc basis but in a consistent, regular way as part of a planned strategy for the implementation and promotion of the Act. For instance, the advisory service provided by the Office of the Ombudsman to persons making protected disclosures and to public authorities investigating disclosures is of limited value if the Office has insufficient resources to actively promote the availability of the service.

The lack of statistical information available to this Committee concerning the operation of the Act has been a significant impediment to the current parliamentary review. Investigating authorities provided statistical data on disclosures relating to their jurisdictions and some statistical material was available through the ICAC's research but in the absence of collated data it was not possible for this Committee to draw comparisons about protected disclosures across jurisdictions or to measure trends over time. It also proved impossible to effectively gauge the response of public authorities to the Act when their views have not been consistently or widely measured, although it should be noted that the Steering Committee did survey protected disclosures coordinators. Consequently, the Parliamentary Committee could not draw firm conclusions about the extent to which the *Protected Disclosures Act* is realising its objectives and being utilised to expose corrupt conduct, maladministration and serious and substantial waste of public money within the NSW public sector.

Would the establishment of a Protected Disclosures Unit result in duplication of effort and waste of resources?

Although the proposed PDU would carry out some activities which are already being undertaken by the investigative authorities and other agencies represented on the Steering Committee, the Parliamentary Committee considers that these activities would be likely to be

performed more efficiently by a small PDU. The performance of these activities by a PDU would allow investigative authorities and other agencies to focus on the performance of their core functions and avoid the possibility of work relating to protected disclosures being displaced by other higher priority tasks associated with these core functions.

As previously noted, several of the functions intended for the proposed PDU have already been the subject of initiatives by investigating authorities, acting individually or collectively, as part of the Steering Committee. The Parliamentary Committee has not requested the investigating authorities to provide detailed assessments of the administrative and other resources used to perform these functions and is not aware of any additional funding provided to agencies for such purposes. The Office of the Ombudsman submitted that its advisory and educative activities relating to protected disclosures have been conducted at the expense of core work and that this has had significant resource implications for the Office[38].

In addition to the resources used in separate activities relating to the Act, each of the member agencies of the Steering Committee also sends a senior officer to Steering Committee meetings and the ICAC furnishes administrative support for the Steering Committee. It is the view of the Parliamentary Committee that, given the level of resources currently expended by investigating authorities towards individual and collective activities relating to the implementation and promotion of the Protected Disclosures Act, it would be more cost-effective and efficient if a small Protected Disclosures Unit were to be established.

In the event that a Protected Disclosures Unit were established, it obviously would be important to avoid unnecessary duplication of those tasks already being performed by the investigating authorities and the Steering Committee. The Parliamentary Committee considers that such duplication can be avoided given the level of operation which has been demonstrated thus far by investigating authorities and other Steering Committee members. The Parliamentary Committee takes the view that the existence of a PDU would not prevent any investigating authority from providing advice and education, or conducting research, on protected disclosures at their discretion.

The Parliamentary Committee also considers that a Protected Disclosures Unit would serve as a centre for policy development in relation to the protected disclosures scheme. Strengthening and developing the protected disclosures scheme will best be achieved through systematic evaluation of the legislation and comprehensive policy analysis by individuals experienced in the operation of the Act.

It would seem appropriate for an inter-agency working group such as the Steering Committee to propose the overall direction for reform of the scheme and for a Protected Disclosures Unit to formulate specific policy proposals and suggest legislative amendments supportive of the directions suggested by the Steering Committee. The Premier, as the Minister with administrative responsibility for the *Protected Disclosures Act,* would continue to bring forward to Cabinet any proposals for legislative reform of the protected disclosures scheme. However, the arrangement proposed by the Parliamentary Committee should assist in producing more sustained and improved policy analysis and development upon which legislative proposals can be based.

[38] Office of the Ombudsman, submission dated 14 December 1999.

Would the establishment of a PDU in the current circumstances support the objectives of the *Protected Disclosures Act 1994* and enhance its operation?

The Parliamentary Committee supports the "whole of government" approach to the Act that has been developed through the work of members of the Steering Committee as being consistent with the objectives of the legislation and enhancing the operation of the Act.

Despite the useful work currently being undertaken by the Steering Committee, investigating authorities and other relevant agencies, the Committee feels that there is still a valuable role for a PDU. The Parliamentary Committee endorses the view of the Ombudsman's 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 Ombudsman's Office pointed out that, given the complexities of the Act and the various interpretations to which it is open, one important advantage of the PDU is that it would be a central repository for the collection and dissemination of consistent advice about the meaning of the Act.

To date, the Office has been a key performer of this role, providing advice on the Act to both agencies and potential whistleblowers, and seeking Crown Solicitor's advice in cases where the meaning or operation of the Act were in doubt. The Office also makes this advice available to all interested parties, individually on request, and in the Ombudsman's *Protected Disclosures Guidelines*. The Office pointed out that it has not been uncommon for agencies to receive conflicting advice about internal reporting policies or to have focussed on their own particular interest area when giving advice, rather than giving broader advice on all key issues pertaining to the Act. With regard to the monitoring function of the proposed PDU, the Office asserted that it "is appropriate that primary responsibility for reviewing internal reporting procedures lies with an expertly staffed PDU"[39].

The Office acknowledged the coordinating role of the Steering Committee and its efforts to successfully address problems in coordination between the representative agencies. However, it did not consider the Steering Committee to be "an adequate substitute for a full time PDU, staffed by specialists with expertise in the area, and dedicated to the identified functions". Nor did it envisage that implementation of the recommendation for a PDU would affect the role of the Steering Committee in coordinating the activities of the investigating authorities, Department of Local Government, Cabinet Office, Premier's Department and the Police Service. Instead, the Office considered that a PDU would provide an administrative resource from which the Steering Committee could action its initiatives[40].

The Parliamentary Committee considers that the case for a Protected Disclosures Unit is strengthened by the experience of establishing a similar unit in New South Wales following the enactment of freedom of information legislation. In 1989 an FOI Unit was established within the Premier's Department to plan and coordinate implementation and monitoring of the *Freedom of Information Act*. Within its first year of operation, the Unit developed the administrative and policy framework for the legislation, prepared policy and procedure manuals, developed computer software, designed staff training programs and resource materials, delivered courses, developed a community education strategy, and conducted a public information campaign about the Act[41].

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[39] ibid.
[40] ibid.
[41] Freedom of Information Act, *Annual Report for 1989-90*, p.1

The FOI Unit originally consisted of seven personnel performing a range of advisory and monitoring functions not dissimilar to those proposed for the Protected Disclosures Unit. It had two major objectives:

1. to facilitate the introduction and implementation of FOI in NSW, through –

    - development of policies and procedures
    - provision of training, advice and assistance;
    - coordination of legal advice, appeals and issue of Ministerial certificates; and
    - provision of advice and assistance to community groups and individuals.

2. to monitor and review the operation of FOI in NSW through –

    - regular collection of statistics;
    - undertaking periodic reviews;
    - preparation of the Premier's Annual Report to Parliament. [42]

The FOI Unit within Premier's Department closed in 1991, approximately two years after the commencement of the *FOI Act*. Since that time, the Office of the Ombudsman's FOI Unit has assumed the role of continuing to monitor freedom of information in New South Wales. In the Parliamentary Committee's view the role of the PDU would be akin to the valuable role previously played by the FOI Unit within the Premier's Department. The work of that unit demonstrated the impetus which a dedicated unit can play in enhancing awareness of, and promoting the objectives of, a legislative scheme.

What level of support exists for the establishment of a Protected Disclosures Unit located within the Office of the Ombudsman?

It is envisaged that the Protected Disclosures Unit would be modelled on the Ombudsman's FOI Unit and that it would require a small staffing component of approximately two effective full-time positions. Significantly, the Ombudsman's Office concluded that in practical terms "the only chance for the Office to be funded to perform the various roles listed in the recommendation [to establish a PDU] would be if a new statutory role were to be given to the Office". [43]

The ICAC gave qualified support to the proposal of a PDU, but was not opposed to the establishment and funding of a unit within the Office of the Ombudsman to perform the following specific functions:

- to provide advice to persons who intend to make, or have made, a protected disclosure;
- to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;
- to audit the internal reporting procedures of public authorities;
- to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;

[42] ibid, p.3.
[43] Office of the Ombudsman, submission dated 14 December 1999.

- 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
- to publish guidelines on the *Protected Disclosures Act 1994* in consultation with the investigating authorities.

The ICAC opposed any suggestion that the PDU could monitor investigations of the ICAC or other investigative agencies as this would compromise the independence of those agencies. It also was opposed to the proposal that the PDU should monitor investigations by public authorities concerning corrupt conduct as such matters should be reported to the ICAC. Regarding advice on the Act, the Commission considered that public authorities should seek legal advice from the Crown Solicitor on protected disclosure matters and that it might be appropriate for investigating authorities to provide general advice. The Commission also was concerned to ensure that the existence of a PDU would not preclude the ICAC from conducting its own research and education programs about protected disclosures.[44]

The Police Integrity Commission fully supported the establishment of a suitably funded PDU within the Ombudsman's Office, noting that the Office, in conjunction with the Steering Committee, had been performing the functions of the proposed PDU without additional funding. In evidence taken during the review the Solicitor to the Police Integrity Commission, Mr Andrew Naylor, confirmed the Commission's general support for the establishment of a PDU within the Office of the Ombudsman. He told the Chairman:

> **Mr NAYLOR:** . . . I understand that, since the enactment of the protected disclosures legislation, the Ombudsman's Office has assumed a de facto role in trying to ensure that there is compliance, fielding complaints and requests for advice from members of the public, public officials and public authorities in relation to how the Act operates. It seems to the Commission that the Ombudsman is the appropriate body to handle that function. Therefore, it appears something of a natural extension for it to have established within it the Protected Disclosures Unit to handle those functions.
>
> Like ICAC, the Police Integrity Commission is concerned about maintaining its independence as an investigating authority under the Protected Disclosures Act and under its own Police Integrity Commission legislation. I see from the Ombudsman's submission that it is not suggested that the Protected Disclosures Unit have a role in oversighting or scrutinising the work of investigating authorities such as the Police Integrity Commission and ICAC. That is an important concession having regard to the fact that both ICAC and the PIC operate independently and are scrutinised separately[45].

[44] ICAC submission, dated 17 December 1999.
[45] Public hearing 28 March 2000.

CONCLUSION

The Parliamentary Committee commends the approach of the Steering Committee and its coordination of projects concerning the Act. In the opinion of this Committee, the "whole of government" approach taken to training and education about the Protected Disclosures Act is invaluable and the coordinating role of the Steering Committee should be supported. It is evident from the material available to the Parliamentary Committee that the Steering Committee relies heavily upon its member agencies drawing on the expertise they have developed in their respective jurisdictions to undertake initiatives relevant to their core functions. This is an appropriate and practical approach to coordinating support strategies for the implementation of the Act where resources are limited. However, notwithstanding the valuable work of the Steering Committee, there remain areas relating to the implementation of the Act that cannot be accommodated through a mechanism such as the Steering Committee.

The functions outlined in the previous report for the proposed PDU include several which would be unsuitable for the Steering Committee to perform as they require the effort and resources only available to a unit with a sustained focus on the protected disclosures scheme. It would be more appropriate for the Steering Committee to continue in a coordinating role rather than to undertake specific projects, such as auditing internal reporting systems, surveys and collecting statistical data. In practical terms, the Steering Committee meets infrequently, approximately every quarter during the last annual reporting period, and for this reason alone does not have the capacity to undertake many of the roles envisaged for a Protected Disclosures Unit.

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. The role and functions of the PDU would complement those of the Steering Committee and the Unit also could provide the Steering Committee with administrative and executive support. The proposed PDU is the most cost-effective and efficient method of achieving a targeted, strategic approach to the development and evaluation of the protected disclosures scheme. In the absence of any objections to the proposal that a Protected Disclosures Unit be established and located within the Office of the Ombudsman, and in light of the evidence supporting the need for a renewed focus on the implementation and operation of the Act, the Parliamentary Committee has resolved to reiterate Recommendation 1 of the 1996 report with the following amendments:

✦ *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* – The change to this proposed function reflects the Committee's agreement with comments by the ICAC that it would be appropriate for the PDU to provide general legal advice on the Act and that, consistent with usual practice, it would be more appropriate for agencies to consult the Crown Solicitor on questions of strict legal interpretation.

✦ *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* – The amendment to this proposed function

acknowledges the coordinating role of the Steering Committee and the importance of avoiding any duplication of effort in relation to education and training initiatives.

- *develop proposals for the reform of the protected disclosures scheme, in consultation with the investigating authorities and the Protected Disclosures Act Implementation Steering Committee* –Implementation of this proposed amendment would support a more comprehensive approach to reform of the protected disclosures scheme, providing for the Steering Committee to make proposals for the overall direction of reform on the basis of its "whole of government" approach and for the Protected Disclosures Unit to formulate and suggest specific policy proposals, legislative amendments, and administrative measures aimed at improving the operation of the Act.

- *to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee* – Inclusion of this role in the functions proposed for the Protected Disclosures Unit would enable the Steering Committee to use the staff of the PDU to assist in preparing for Steering Committee meetings. Apart from the desirability of increasing the amount of expert administrative and executive support available to the Steering Committee, this recommendation should have the added advantage of reducing the resources committed by member agencies to Steering Committee activities, resulting in a more cost-efficient method of managing the Steering Committee.

The Parliamentary Committee notes that some misconceptions arose with regard to Recommendation 2 of the 1996 review report. Investigating authorities commented that it would be undesirable to require monitoring of their protected disclosure investigations by a PDU as such a role would compromise their independence. A full reading of the text of the 1996 report indicates that the previous Parliamentary Committee expressed the view that the PDU should not be responsible for overseeing the actual operational performance of the investigating authorities as this would compromise the final responsibility of investigating authorities for investigating matters which fall within their jurisdiction. The previous Committee proposed that the PDU's oversight role in respect of the investigating authorities should be confined to a monitoring function aimed at ensuring that broad systemic trends are observed. The present Parliamentary Committee supports this position.

Recommendation 3

The Committee recommends that the *Protected Disclosures Act 1994* be amended to enable the establishment of a Protected Disclosures Unit (PDU) 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 monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;
(d) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;
(e) to audit the internal reporting policies and procedures of public authorities;
(f) to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;
(g) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
(h) 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;
(i) 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;
(j) to publish guidelines on the Act in consultation with the investigating authorities;
(k) to develop proposals for reform of the Act, in consultation with the investigating authorities and Protected Disclosures Act Implementation Steering Committee; and
(l) to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.

Recommendation 4

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:

(a) public authorities and investigating authorities to notify the Protected Disclosures Unit of all disclosures received which appear to be protected under the Act;

(b) 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

(c) investigating authorities to notify the Protected Disclosures Unit of the final result of each protected disclosure investigation they carry out.

3.2.2 Prosecutions

Another key issue which has been examined by the Parliamentary Committee as part of the second review of the Act is the issue of responsibility for prosecution of offences for detrimental action taken against a public official in reprisal for the making of a protected disclosure. The previous Parliamentary Committee dealt with the same issue in the 1996 review of the Act.

On that occasion, the practical difficulties in the way of initiating criminal proceedings in respect of detrimental action were noted and the conclusion was reached that one way of enhancing the effectiveness of the offence provision 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 the offence may have been committed. The previous Committee recommended that:

> **Recommendation 10**
> The Act should be amended to require each investigating authority to refer any evidence of an offence under section 20 to the Director of Public Prosecutions (who has responsibility for prosecution of a criminal offence).[46]

During the current review of the Act the issue of prosecutions under s.20 was canvassed again with a number of the investigating authorities who indicated that they were not aware of any such prosecutions having been initiated.

Responding to questions from the Chairman of the Parliamentary Committee, the then Acting Ombudsman, Chris Wheeler, highlighted the difficulties confronting individuals trying to launch a private criminal prosecution:

> **CHAIR:** You made the comment that, with one exception, there has been no use made of any prosecution for detrimental action against the whistleblower, that is, no whistleblower has felt it necessary to have proceedings instituted against a government department for paying back on the whistleblower for blowing the whistle. Is that because there are no whistleblowers who are having detrimental action taken against them? Is it because the Act is so convoluted and complicated that whistleblowers take one look at it and throw their hands in the air, or is there some other explanation?
>
> **Mr WHEELER:** From comments made to me by people who ring up asking for advice, there are certainly a lot of whistleblowers who believe that detrimental action has been taken against them. But it is not an easy decision to decide that you will start a private criminal prosecution against your employer, where you have to pay, you have to organise, you have to do everything yourself. It is not as if the DPP or the police are taking this thing on. You personally have to go to a lawyer, you have to commence proceedings, and you have to run those proceedings. In the case in question, certainly it was financially devastating for the person who took the action when he failed. You have to bear that in mind as well, if you are not successful, that could be something that you will pay for a long time. Ordinary members of the public do not contemplate as an option going into a court and prosecuting their employer, and that is what it comes down to. I get a number of people ringing up asking who they can get to take an action for them, whether they can get the DPP, the police, their employer, or whatever it might be. The answer is no. The police might take it on if there was

[46] Committee on the Office of the Ombudsman and the Police Integrity Commission, op. cit., pp.79-80.

something else involved, for example, a serious fraud, assault, or some other matter that they would see as normally falling within their area of responsibility.

CHAIR: There is no legal reason why the DPP or the police could not take it on, but you are suggesting that as a matter of their determination about public policy they do not see it as a priority for them to pursue that?

Mr WHEELER: That is right. [47]

Ms Cynthia Kardell, President of the NSW Branch of Whistleblowers Australia, shared the view that problems with the referral of evidence hampered the prosecution process and that it was possible for the DPP to prosecute offences under s.20 of the Act:

CHAIR: What emerged from the last hearing was that the Director of Public Prosecutions clearly has the jurisdiction to pursue those prosecutions but has not and the issue is why not. Is it that there are no acts of retribution which would sound a potential action . . . or that the DPP as a matter of public policy thinks other things are more important for them to pursue or whether whistleblowers simply are not coming forward or not encouraged to come forward to the DPP? The legal structure is there to allow the DPP to do it, but it is not happening.

Ms KARDELL: It needs somebody to refer the matter to the DPP in the first instance. I suggest that if a private citizen were to forward details to the DPP, mostly it would not get up. They are not in a position to provide a brief of evidence sufficient to encourage the DPP to take the view that he should prosecute, and the DPP will not investigate. He will accept evidence, consider it and determine that he will not prosecute. Really, that is something that the State or the arms of the State should attend to in the form of referrals from ICAC and the Ombudsman if they had the power.

CHAIR: Or, ideally, a PIDA/PDU? [Public Interest Disclosures Agency]

Ms KARDELL: Or a PIDA, yes. And PIDA would stand apart from investigations and that would be the joy of it. . . [48]

While the complexities and difficulties of the Act were one reason why there were no prosecutions for detrimental action, Mr Wheeler did not hold it to be the primary reason for a lack of prosecutions:

Mr WHEELER: . . . the crucial factor, from what people have said to me, is that they do not know how to get into a court, they do not know how to commence a proceeding. Most people who want to do these are not senior bureaucrats on lots of money. They are normally much lower down, money is a big issue for them and consulting a lawyer is a big expense. Not many lawyers would know anything about this Act; it is not one that many would consult on a regular basis. [49]

A related issue raised by the Office of the Ombudsman concerns s.35 of the *Ombudsman Act 1974.* Section 35 of the *Ombudsman Act* states that:

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[47] Public hearing, 28 March 2000.
[48] Public hearing, 18 April 2000.
[49] Public hearing, 28 March 2000.

35 Ombudsman, officer or expert as witness

(1) The Ombudsman shall not, nor shall an officer of the Ombudsman who is not a member of the Police Force, be competent or compellable to give evidence or produce any document in any legal proceedings, or in any proceedings before the Police Tribunal of New South Wales, in respect of any information obtained by the Ombudsman or officer in the course of the Ombudsman's or officer's office.

(2) Subsection (1) does not apply to any legal proceedings:

(a) under section 21A, 35A, 35B or 37,

(b) under Part 3 of the *Royal Commissions Act 1923*,

(c) under Part 4 of the *Special Commissions of Inquiry Act 1983*, or

(d) under Division 2 of Part 5 of the *Freedom of Information Act 1989* arising as a consequence of a determination made by the Ombudsman under section 24 or 43 of that Act.

(3) Subsection (1) applies to a person whose services are engaged under section 23 in the same way as it applies to the Ombudsman and officers of the Ombudsman.

According to Mr Wheeler, s.35 places limitations on the Ombudsman's ability to refer evidence of detrimental action to the DPP. The Committee explored the possibility that the Ombudsman would be able to furnish information relevant to the prosecution of a detrimental action offence to the DPP, in some circumstances, in the evidence given by Mr Wheeler:

> **The Hon. J. HATZISTERGOS:** With regard to section 35, I can understand why you may not be able to produce that material in court, but why do you say that you are precluded from producing the information to the DPP?
>
> **Mr WHEELER:** I do not think I said I was precluded from giving it to the DPP. We might be able to do that. Certainly there is section 31AB in the Ombudsman Act, which allows us to furnish information to the DPP. But we could not personally produce it in a court.
>
> **The Hon. J. HATZISTERGOS:** But you could provide it to the DPP?
>
> **Mr WHEELER:** Provided the DPP has the power to get it from us. That is the one prerequisite for that section to apply: that they have to have a power to be able to obtain it from us. I do not know whether the DPP actually does have that power. Certainly it has never happened. The ICAC, the other agency mentioned in that section, has the power.

Section 31AB of the *Ombudsman Act* provides that:

31AB Ombudsman may furnish information to ICAC and DPP

(1) The Ombudsman may, at any time, furnish information obtained by the Ombudsman in discharging functions under this or any other Act to the Director of Public Prosecutions or to the Independent Commission Against Corruption.

(2) However, the Ombudsman must not disclose information that could not otherwise be disclosed under this Act or could not:

(a) in the case of the Director of Public Prosecutions - be obtained by the Director under the *Director of Public Prosecutions Act 1986* or any other Act, or

(b) in the case of the Independent Commission Against Corruption - be obtained by the Commission under the *Independent Commission Against Corruption Act 1988* or any other Act.

The Committee subsequently sought comment from the Director of Public Prosecutions on Mr Wheeler's evidence.

The Deputy Director of Public Prosecutions, Mr Blackmore, confirmed that the Office had not prosecuted any offences of detrimental action under s.20 of the *Protected Disclosures Act.* He indicated that proceedings for an offence against the Act would be dealt with before a Local Court. Prosecuting in summary hearings in the local court is generally the province of police prosecutors or, to a lesser extent, the Crown Solicitor in matters akin to these prosecutions, such as breaches of the Jury Act, the Electoral Act and so forth. Mr Blackmore expected that:

> . . . proof of an offence under s.20 of the Act would entail calling the whistleblower and obtaining evidence from the relevant agency to establish that the disclosure was a protected one and the action occurred. Under s.20(1A) of the Act it is then for the defendant to prove on the balance of probabilities that the detrimental action shown to be taken was not substantially in reprisal for the person making a protected disclosure.
>
> This Office has no investigative function and any matters we prosecute are investigated by an investigating agency such as the police. Any evidence obtained by the investigating agency would have to be admissible in court. Any evidence obtained by the Ombudsman in the course of an investigation would have to be admissible other than through the Ombudsman (by reason of s.35 of the Ombudsman Act 1974). Evidence obtained under compulsion in the course of an investigation by the Ombudsman would not in any event be admissible[50].

Mr Blackmore suggested that the Crown Solicitor would be the appropriate authority to prosecute the offence of detrimental action, after investigation and referral to it of admissible evidence by an investigating agency.

The Crown Solicitor, Mr Ian Knight, in turn was asked to comment on the advice received from the Deputy DPP. On the issue of instituting proceedings for an offence under s.20, the Crown Solicitor indicated that the *Protected Disclosures Act* does not impose any restriction upon who may lay an information for such an offence and that any person may act as the informant (s.55 *Criminal Procedure Act 1986*). However, he held that in relation to the prosecution of criminal offences "there are sound reasons for reposing responsibility in a prosecutor who represents that State rather than in the victim of the alleged offence."[51]

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[50] Letter from AM Blackmore, Deputy Director of Public Prosecutions, dated 14 April 2000.
[51] Letter from IV Knight, Crown Solicitor, dated 27 June 2000.

The Crown Solicitor argued that such a criminal offence involves more than just an interference with private rights and that the State should have an interest in ensuring persons who make a protected disclosure are not the subject of reprisals, particularly where the alleged offences are alleged to have been committed by public officials. The advice outlines the following reasons against leaving the discretion to commence and continue a prosecution to the victim:

- there may be a danger that it could be used for collateral purposes and the discretion may not properly exercised;
- it may be undesirable to require a person who claims to have been the victim of a reprisal to further provoke the offender by instituting criminal proceedings; and
- it may be more appropriate that an independent prosecuting authority undertake this role.

The Crown Solicitor expressed the following view about the most appropriate authority to institute proceedings for detrimental action offences:

> It seems to me that the authorities best suited to undertake such a role are the DPP and the police. Both the DPP and police officers may exercise an independent prosecutorial discretion and commence proceedings in their own name, without the intercession of an instructing agency. The DPP and the police may also be in a stronger position to justify disclosure of information by the Ombudsman to them under the *PD Act* or the *Ombudsman Act*, though it may be that some steps will need to be taken by way of legislative review whichever course is taken. . . . While, as the Deputy DPP has observed, the DPP has no investigative function, where matters referred to the DPP require further investigation this is generally undertaken by police. [52]

Commenting on the Deputy DPP's suggestion that the Crown Solicitor would be the appropriate prosecuting authority, Mr Knight advised that he can and does act as solicitor for various departments and agencies in the conduct of summary prosecutions but there is a significant difference between the roles of the Crown Solicitor and the DPP. The Crown Solicitor can act only as a solicitor, essentially providing legal services to Government. As a result, he is competent to act only upon instructions from client departments and agencies, though he can provide advice to an instructing agency in this respect. Therefore, the Crown Solicitor could only act in prosecutions under s.20 of the *Protected Disclosures Act* if so instructed by an appropriate agency. The latter could be an investigating authority such as the Ombudsman or a nominal informant such as an officer of the Premier's Department (given that the Premier is the Minister responsible for administering the Act), or a police officer.

The Crown Solicitor indicated that while he was prepared to accept instructions in such matters he would be obliged to decline to act in those cases where a conflict of interest existed. For example, in respect of the prosecution of an officer who was instructing him in another matter, or where he had already acted in proceedings, or given advice, in connection with events relating to the alleged offence. As a result, decisions by the Crown Solicitor as to whether he could accept instructions in relation to s.20 offences would have to be made on a case by case basis.

The Crown Solicitor's advice notes that s.35 of the *Ombudsman Act* provides that neither the Ombudsman nor officers of the Ombudsman are competent and compellable to give evidence

[52] ibid.

or produce documents in legal proceedings and that such proceedings would include a prosecution under s.20 of the *Protected Disclosures Act*. However, it was not clear to the Crown Solicitor that s.35 would pose a significant difficulty to a prosecution, providing the Ombudsman is authorised to disclose information and evidence to the relevant prosecuting authority, to facilitate proof that a disclosure satisfying the Part 2 of the Act had been made. He envisaged that if a protected disclosure was made to the Ombudsman, a prosecution for an alleged reprisal might be inhibited if the complainant's evidence of the making and nature of the disclosure could not be supported by evidence from the Office of the Ombudsman. The Crown Solicitor concluded that:

> . . . the Ombudsman's powers of disclosure are not sufficient to ensure a prosecuting authority can obtain the necessary evidence to undertake a prosecution for an offence under s.20 of the *Protected Disclosures Act* and legislative amendment should provide for disclosure by the Ombudsman for the purposes of proceedings under s.20. [53]

With regard to the proposition that the complainant should be left with carriage of the case, the Crown Solicitor considered that proof of an offence under s.20 would not be a straightforward task. As a result, it would be unrealistic to expect a lay complainant to conduct a prosecution and lead evidence to prove an offence. The cost of privately engaging legal practitioners, and the prospect of a costs order, if unsuccessful, also would be a significant deterrent to enforcement of s.20.

The Crown Solicitor further advised that as the existing guidelines for Crown representation or ex gratia assistance do not extend to the prosecution of criminal offences, any proposal to provide assistance to private complainants in relation to offences under s.20 of the *Protected Disclosures Act* would require an extension of the existing guidelines and some form of approval process. In these circumstances, the DPP and police would have no role, unless the DPP took over a prosecution. Also, the Crown Solicitor indicated that he would be reluctant to accept instructions from a private complainant as this would seem incompatible with his role as a provider of legal services to Government and would require the approval of the Attorney General. In his view, it would be more appropriate for the Legal Representation Office to act for a complainant or, alternatively, complainants could be provided with funding to instruct private practitioners to act. Consideration of an indemnity in relation to costs orders in matters where assistance was approved would be appropriate.

The advice notes that under s.29 of the *Ombudsman Act* the Ombudsman appears to have greater power to disclose information in relation to an investigation of a complainant than to a prosecuting authority. However, the Crown Solicitor felt that the need for the Ombudsman to have an appropriate power of disclosure, and to provide evidence in a prosecution, would still require examination.

In summary, Mr Knight concluded that:

- it would be appropriate for prosecutions under s.20 to be conducted by a prosecuting authority rather than the victim of the alleged offence.

- the DPP or police could exercise an independent discretion as to whether a prosecution should be taken for an offence under s.20.

[53] ibid.

- the Crown Solicitor could act as solicitor in prosecutions under s.20, upon instructions from a department or agency of Government. In some matters [he] may be prevented from acting by a conflict of interest.

- the Ombudsman's powers to make disclosure to prosecuting authorities are not adequate to properly support prosecutions under s.20.

COMMENT

The protected disclosures scheme ultimately depends for its effectiveness on the utility of the legislative provisions which provide that detrimental action taken in reprisal for the making of a protected disclosure is an offence. However, uncertainty about who should prosecute such cases throws the protections offered by the scheme into doubt. The Parliamentary Committee is concerned that apparent legal constraints on the communication of information by the Ombudsman's Office also may hamper the effectiveness of the offence provisions.

Having considered the various opinions put to it on the matter, the Parliamentary Committee expresses the view that prosecutions under s.20 of the *Protected Disclosures Act* should be conducted by the Director of Public Prosecutions or the police. The Committee accepted that there were various impediments in the way of the Crown Solicitor's office being viewed as the prosecuting authority. Most offences are prosecuted by the Director of Public Prosecutions or the police, and the Committee considered that it may detract from the seriousness with which the offence provisions of the *Protected Disclosures Act* are viewed for other, less common arrangements to be made in respect of them. The Parliamentary Committee considers it inappropriate for victims to play any role in the prosecution process apart from that of witness.

The Committee notes the concerns expressed by the then Acting Ombudsman that at present s.35 of the *Ombudsman Act* places barriers in the way of the Ombudsman's Office providing information and evidence to prosecution authorities which could be used in pursuing proceedings in relation to detrimental action. The Committee considers that this issue needs to be put beyond doubt. It, therefore, proposes that the *Ombudsman Act* be amended to provide that where the Ombudsman considers that there is prima facie evidence in the possession of the Office that detrimental action has been taken in reprisal for the making of a protected disclosure, the relevant material can be communicated to the appropriate prosecution authority for use in prosecution proceedings.

Recommendation 5

(a) Prosecutions under s.20 of the *Protected Disclosures Act 1994* can presently be conducted by the Director of Public Prosecutions or the police and the Committee recommends no alteration to this situation.

(b) The *Ombudsman Act 1974* be amended to provide for the Ombudsman to make disclosures to the Director of Public Prosecutions or police prosecutors for the purpose of conducting prosecutions under s.20 of the *Protected Disclosures Act 1994*.

3.2.3 Statistical information and reporting requirements

Recommendations 16-21 of the 1996 review report were aimed at remedying the lack of statistical data available on the operation of the Act prior to the second review. The recommendations were:

Statistical information & reporting requirements
Public authorities*:*

16. Statutory provision should be made for regulations requiring public authorities to adopt uniform standards and formats for statistical reporting on protected disclosures. (Precedent *FOI Regulation 1989*).

17. Public authorities should be required to provide statistics on protected disclosures they receive and forward this information to the proposed Protected Disclosure Unit for inclusion in the Unit's annual report on the *Protected Disclosures Act 1994*.

Statistical information & reporting requirements
Investigating Authorities*:*

18. The investigating authorities under the Act should consult with each other on the development of uniform reporting categories, standards and formats, as far as is practicable.

19. The investigating authorities should continue to include statistical information on their functions in relation to the *Protected Disclosures Act 1994* in their annual reports.

Ongoing monitoring and review

20. All public authorities should be required to provide a report to the Parliamentary Joint Committee undertaking the biannual review of the Act in accordance with section 32. Each report should contain particulars of:

    - the number of identified protected disclosures received;
    - the number of referrals received;
    - the number of investigations undertaken and outcomes;
    - the resources used to deal with protected disclosures;
    - training and education initiatives undertaken to improve staff awareness and understanding of the *Protected Disclosures Act 1994*;
    - measures of support provided to employees who have made, or intend to make, a protected disclosure, for example, counselling and support officers;
    - internal reporting systems;
    - policies and procedures for receiving and managing protected disclosures and for protecting employees who have made disclosures from reprisals;
    - any specific authority code which explains the importance of protected disclosures to the ethical framework of the organisation.

21. Each investigating authority should furnish the Parliamentary Committee conducting the biannual review of the *Protected Disclosures Act 1994* with a report including information on:

    - the number of protected disclosures received;
    - the nature of the protected disclosures;
    - action taken and outcomes;
    - authorities the subject of protected disclosures;

- any difficulties with the operation of the Act which may necessitate legislative amendment;
- systemic issues raised by the investigation of the protected disclosures received by the investigating authority;
- details of joint initiatives undertaken with other investigation authorities in relation to the Act, for example, joint education programs.

The previous Committee had found that it had no real indication of the extent to which the Act had been utilised by public officials. There was no central body of statistics on the number and types of protected disclosures that had been made to public authorities, the number of disclosures that had been investigated by public authorities and the outcomes of those investigations. Inquiries made by the Committee to agencies through their relevant Minister had failed to produce the required information resulting instead in general responses detailing educative, policy and administrative measures taken in response to the introduction of the legislation. As a result, the Committee had conducted the review largely in a quantitative vacuum. ICAC surveys of public authorities and persons who had made disclosures conducted in 1995 provided some information however this had become dated. While the investigating authorities reported on their protected disclosures activities in their annual reports different classification systems made it difficult to draw comparisons between their jurisdictions[54].

The PIC holds no objection to recommendations 16-21. However, it is not in a position to provide statistics in respect of the number of protected disclosures received and the action taken on each disclosure for the current or previous financial years. It was in the process of compiling relevant statistics at the time of the second review of the Act and undertook to forward them to the Committee when they became available.[55]

The ICAC submitted that it would support the adoption of uniform standards and formats for statistical reporting by public sector agencies (excluding investigating authorities) of protected disclosures in Annual Reports if that involved provision of statistics and the number of protected disclosures, the number investigated and the outcome.[56]

With regard to recommendations 18 and 19 of the 1996 review report, which dealt with the provision of statistical information by investigating authorities, the ICAC commented:

> The development of uniform reporting categories would be difficult. The investigating authorities deal with different types of conduct and necessarily have different categories of complaints. The investigating authorities operate under different legislation and this also affects the categorisation of disclosures. For example disclosures to the Ombudsman must be in writing whereas the ICAC can accept disclosures made by telephone or in a visit to the ICAC.[57]

The Commission agreed that investigating authorities should continue to include statistics in their Annual Reports. An overriding concern expressed by the Commission was that if the PDU was to act as a central agency for collecting statistics, it would be important to reserve a discretion for investigating authorities to maintain confidentiality in relation to details of disclosures and other operational information.

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[54] Committee on the Office of the Ombudsman and Police Integrity Commission, op. cit., p.123.
[55] PIC submission, dated 1 February 2000.
[56] ICAC submission, dated 17 December 1999.
[57] ibid.

The Premier's Department did not support recommendations 16-21 commenting that agencies currently have a complex arrangement of compliance reporting which they are required to provide. The Premier's Department was reviewing this issue for submission of a proposal to the Premier for consideration and was of the view that compliance reporting should be streamlined rather than applying further requirements on agencies.[58]

COMMENT

The Committee has noted the comments made by the investigating authorities concerning recommendations 18 and 19 as they apply to investigating authorities. It is important to understand that recommendations 16 and 17 in the 1996 review report were aimed at public agencies excluding investigating authorities, and that recommendations 18 and 19 were intended to cover the latter.

The Committee agrees with the view of the previous Committee, and witnesses to the first review, that the central collation of statistics by a single body is necessary if the operation of the protected disclosures scheme is to be properly monitored. This is a role envisaged by the Committee for the proposed PDU.

Arguments put by investigating authorities about the importance of preserving confidentiality, in order that operations are not compromised, are recognised by the Committee. The Committee considers that every effort should be made to monitor trends and systemic changes relevant to protected disclosures without compromising appropriate confidentiality. Towards this end, the Committee believes that it would be appropriate for investigating authorities to develop reporting categories, standards and formats which would enable meaningful information to be collected about the Act.

Such information as outlined in recommendations 20 and 21, for collection by public authorities and investigating authorities respectively, would seem to the Committee to enable the collection of information necessary for conclusions to be drawn about the effectiveness of the protected disclosures scheme.

With regard to the argument that further reporting requirements should not be placed upon public sector agencies, the Committee considers that the information which it proposes should be gathered about protected disclosures is information which agencies should be collecting in any case for management purposes. The Committee reaffirms that statistical material should not be collected in such a way that it would identify individuals.

3.2.4 Local Government

Recommendation 13 of the 1996 review report proposes that:

> The Auditor-General's jurisdiction under the Act should be extended to enable him to receive disclosures which show, or tend to show, serious and substantial waste of public money in local government. The Committee notes that extending the Auditor-General's jurisdiction under the *Protected Disclosures Act 1994* would require amendments to the *Public Finance and Audit Act 1983*.

[58] Premier's Department submission, undated.

The background to the previous Committee's proposal was dealt with in Chapter 13 of the 1996 report. That Committee concluded that the Auditor-General's proposal to extend his jurisdiction under the *Protected Disclosures Act* to include local government would constitute a significant extension of his jurisdiction. However, the previous Committee considered there to be merit in the recommendation as it would preserve consistency between the jurisdictions of the three investigating authorities for the purpose of investigating protected disclosures under the Act. It seemed incongruous to the Committee that investigations may be conducted by the investigating authorities or a referred body, such as the Department of Local Government, into maladministration and corrupt conduct within local government but that serious and substantial waste was not investigated.

The previous Committee also was influenced in its decision by the feeling that neither the Office of the Ombudsman nor the ICAC would be in a position to offer the same auditing investigative capacity as the Auditor-General. In the previous Committee's view this undermined the effectiveness of the Act in relation to protected disclosures about serious and substantial waste in local government.

During the second review of the Act, the Director-General of the Department for Local Government, Mr Garry Payne, made the following comments on this proposal in his opening statement to the Committee:

> **Mr PAYNE**: …The Department maintains a very strong commitment to the philosophy of the protected disclosures legislation. In fact, the Department is represented on the Protected Disclosures Steering Committee. However, the Department was not involved in the development of the legislation and, whether by design or fault, was excluded as an investigating authority, despite an amendment which brought local government employees and councillors under the provisions of the Act. The Department is the State agency with the primary role and responsibility for the oversight of local government, in terms of operational and financial effectiveness and efficiency. In fact, the Local Government Act provides the legislative framework for local government and many of the checks and balances powers fall to the Minister and/or the Department—for example, provisions such as rate capping, investigations, pecuniary interests, loan allocations, surcharge provisions, access and information, et cetera.
>
> The Department's role focuses on, but is not limited to, issues related to conduct, maladministration, financial capacity and operational effectiveness, and includes mismanagement, waste, et cetera. Recent examples of intervention by the Department have included Bega, Windouran and Ku-ring-gai councils. The basis for the removal of a council is often found in the initial investigation conducted by the Department. Obviously, the Department in this role receives allegations and disclosures about a wide range of issues involving staff and councillors from a wide range of sources. Currently we cannot provide any level of protection afforded to investigating authorities under the Protected Disclosures Act…[59]

Mr Payne stated that the Department was not seeking inclusion as an investigative authority for territorial gain or additional resources but in order to perform its job better. The Department possessed investigating and financial skills and could access relevant operational data.

[59] Public hearing 28 March 2000

The Auditor-General, Mr Bob Sendt, clarified in his evidence that the Audit Office was seeking a mandate to look at local government generally, not simply in respect of protected disclosures but also in respect of financial audits. Mr Sendt could not provide the Committee with exact numbers of complaints received by the Audit Office concerning local government, however, he did consider that a gap existed in the accountability or review mechanism. On occasion, other investigating authorities had sought the Audit Office's expert assistance when dealing with protected disclosures:

> **The Hon J HATZISTERGOS**: …Is it your argument that those organisations are not as equipped as you are to investigate substantial and serious waste?
>
> **Mr JAMBRICH:** I shall give an example. Recently we received representations from ICAC when that organisation requested our assistance with a protected disclosure that related to local government. We went through the case with ICAC, and we were able to provide some general assistance. Unfortunately we had to decline an involvement on the basis that we could not investigate cases that relate to local government. So in fact ICAC came to us and asked us for help because the matter was not within its expertise.
>
> **The Hon J HATZISTERGOS:** So they needed to lean on you to help them to investigate something.
>
> **Mr SENDT:** They asked us how they could go about looking at that particular aspect…[60]

The Audit Office had in certain cases conducted performance audits on matters which had their origins in protected disclosures:

> **Mr SENDT:** …If we are convinced they are genuine cases of serious and substantial waste, and after a preliminary investigation find that that is the case, we would attempt to build a performance audit report around them in such a way that we got some additional advantage out of the report to simply investigating the protected disclosure. For example, I mentioned the case to the University of Western Sydney, where there was a protected disclosure complaint. What we did was to broaden our investigation and look at the efficiency and effectiveness with which the administration of the three campuses was carried out.
>
> **The Hon P J BREEN:** I think you did a special audit too on university staff being involved in outside employment?
>
> **Mr SENDT:** Yes.
>
> **The Hon P J BREEN:** Did that also come out of a protected disclosures matter?
>
> **Mr JAMBRICH:** The genesis was from a protected disclosure. It was from the University of New South Wales. We dealt with that one but at the same time we considered that the topic would be such that we should really extend the audit to all the other universities as well, which we did, Obviously, we had to drop off certain other audits…[61]

[60] ibid
[61] ibid

Mr Sendt considered that it would still be appropriate for the Audit Office to investigate protected disclosures about serious and substantial waste in local government even if the Audit Office's jurisdiction was not generally extended into local government.

Referring to the Audit Office proposal that it should be allowed to investigate substantial waste in local government, the Acting Ombudsman stated:

> **Mr WHEELER:** …Of course, the problem with local government matters is that there is no equivalent of the Audit Office. In terms of complaints of substantial and serious waste—particularly given the Department of Local Government is moving away from the complaint handling role, other than to deal with pecuniary interests and that sort of issue—there are not that many alternatives. Going to the private enterprise auditing firm that is employed by the council is not really an option…[62]

In its submission the Office of the Ombudsman considered implementation of recommendation 13 of the 1996 report to be particularly important because:

> It is anomalous that the option available to all other public officials in NSW, of making a protected disclosure about serious and substantial waste of public money to the Auditor-General, is denied to council staff and councillors.[63]

The ICAC agreed with recommendation 13 and the PIC did not object to the recommendation.

The Parliamentary Committee noted that the Chair of the Steering Committee, Mr Peter Gifford, had written to the Director-General of Cabinet Office, Mr Roger Wilkins, in favour of the recommendation but highlighting that the Department of Local Government had indicated the Minister's opposition to the recommendation[64]. Mr Gifford advised Mr Wilkins that:

> At a meeting of the Committee on 7 July it was resolved that I communicate to you the Committee's view that consideration should also be given to recommendation 13 in the above report which is in the following terms:
>
> > "*Local Government*
> > 13. *Serious and substantial waste – The Auditor-General's jurisdiction under the Act should be extended to enable him to receive disclosures which show or tend to show, serious and substantial waste of public money in local government. The Committee notes that extending the Auditor-General's jurisdiction under the Protected Disclosures Act 1994 would require amendments to the Public Finance and Audit Act 1983."*
>
> As the *Protected Disclosures Act* currently stands, council staff and councillors do not have the option of making a disclosure about serious and substantial waste of public money to the Auditor-General – an option that is available to all other public officials in New South Wales.
>
> Should a council employee or councillor wish to make a disclosure about serious and substantial waste of public money they must make the disclosure internally to the

[62] Public hearing, 28 March 2000.
[63] Office of the Ombudsman, submission dated 14 December 1999.
[64] Letter dated 22 July 1999.

> general manager or in accordance with the council's internal reporting policy. Should they wish to make an external disclosure, this is only possible where the serious and substantial waste can be categorised as maladministration (allowing a disclosure to be made to the NSW Ombudsman) or corrupt conduct (allowing a disclosure to be made to the ICAC). However, such disclosures cannot be made by council staff or councillors to the investigating authority with primary expertise in this area.[65]

The Committee canvassed the suggestion that the Department of Local Government be made an investigating authority with witnesses during the second review of the Act. The Acting Ombudsman confirmed that the Office's views on the proposal were outlined in the 1996 review report. The Office held that investigating authorities should be bodies subject to scrutiny by a parliamentary committee. Mr Wheeler offered the following alternative approach:

> Anybody who makes a disclosure direct to the Ombudsman, to the ICAC or to the Police Integrity Commission are covered by the protections in those Acts. Those protections mirror the protections in the Protected Disclosures Act, the reverse onus of proof, et cetera. Maybe the way around this is to have the similar protection in the Local Government Act for people who make a disclosure to the Department of Local Government. Then you get round the problem. The protections are provided, but the investigating authorities as such are still only bodies with parliamentary scrutiny.[66]

The Chairman put this proposal to the Director-General, Mr Payne:

> **CHAIR:** …One of the proposals made today was to not include the Department of Local Government as an investigating authority but to make amendments to the Act so that people who make complaints to you would receive protection—that is, a similar provision to that which is in the Independent Commission Against Corruption Act and the Ombudsman's Act so that they get a range of protections. What is your view about that?
>
> **Mr PAYNE:** …I think that is a viable option. I stress, we will continue to do what we do. It is not so much for us, but mainly for the complainant.
>
> **CHAIR:** The whole purpose of this exercise is the protection of the complainant and how we can best achieve that.
>
> **Mr PAYNE:** Some people ask whether they have protection. When we say no, I think it would be reasonable to say that a number of them want to continue with the complaint. But there is always the risk, while they do not have that protection afforded by other agencies…[67]

In order to circumvent the problem of lack of protection for individuals wishing to make disclosures to the Department of Local Government it had been necessary for the disclosures to be put to one of the investigating authorities, depending on the issue, and the matter could be referred back to the Department. The Department was then able to use its powers to investigate the matter and report back to the investigating authority. In other cases, the Department had taken on issues for investigation as a

[65] ibid.
[66] Public hearing, 28 March 2000.
[67] ibid.

complaint from the Director-General or provided evidence at an inquiry and conducted an investigation[68].

Another possible solution posed by the Parliamentary Committee was to have an internal reporting policy in each council with all complaints to be made to the Department of Local Government. Mr Wheeler pointed out that a difficulty with this option is that the Act would have to be amended as at present an internal reporting policy can only be internal to that agency.

COMMENT

The Committee notes that there is a lacuna in respect of local government and the reporting of disclosures about serious and substantial waste of public money in this area. The previous Committee recommended that the Auditor-General's functions be extended to enable him to receive disclosures regarding such waste. This recommendation has not been implemented.

The Committee, therefore, considers that an alternative approach would be to afford the protections available under the *Protected Disclosures Act* to disclosures about serious and substantial waste of public money in local government that are made to the Department of Local Government.

This approach would not involve varying the jurisdiction of any agency, but would provide a mechanism for protecting, and so encouraging, disclosures about waste in local government. This proposal was not opposed by the Director-General of the Department when the Committee raised it with him.

Recommendation 6

That the protections available to public officials under the *Protected Disclosures Act 1994* also be available to public officials making disclosures to the Department of Local Government about serious and substantial waste in local government.

[68] ibid.

CHAPTER 4 ISSUES ARISING FROM THE REVIEW

4.1 Internal Reporting Systems

The third edition of the Ombudsman's *Protected Disclosures Guidelines* state that it is important that public authorities establish internal reporting systems to facilitate the making of disclosures by their staff as internal reporting systems:

- encourage staff to make disclosures internal to the authority, as an alternative to external disclosures to one of the investigating authorities nominated in the Act;
- provide an alternative reporting channel for internal disclosures which could otherwise only be made under the Act to the Principal Officer of the authority;
- ensure that disclosures by staff are properly and appropriately assessed, dealt with and acted upon; and
- ensure that the protection of the Act is fully available to staff at all levels in the organisation[69].

The Guidelines identify matters which should be included in internal reporting policies to establish effective internal reporting systems for the purpose of the *Protected Disclosures Act*. They also set out model internal reporting policies.

At the time of the 1996 review of the Act, the Department of Local Government advised that its only real indication of the extent to which internal reporting systems had been implemented by local councils, had been obtained from ICAC surveys. Conducted in 1995-6 the surveys showed that a little over one-third of local councils had implemented some form of internal reporting system to enable protected disclosures to be made. ICAC also found that almost one-quarter of councils had not yet given any consideration to establishing formal channels to enable protected disclosures to be made in their organisation[70].

In 1997-8 a review by the Ombudsman of the content of internal reporting policies adopted by state government agencies was conducted in which each internal reporting policy was assessed against set criteria. Common problems with internal reporting policies identified by the review included:

- documentation not including a strong statement of management support for whistleblowing and whistleblowers, and opposition to corrupt conduct, maladministration and serious and substantial waste of public money.

- documentation providing insufficient information about:

  - the *Protected Disclosures Act*, including the meaning of key terms;
  - alternative internal reporting channels available under the policy;
  - the roles and responsibilities of parties, such as the principal officer of the agency/the disclosures coordinator/nominated disclosures officers/whistleblowers;
  - advice as to how disclosures will be dealt with by the agency;
  - identification of the external reporting options available to staff (ie the Auditor-General, ICAC, NSW Ombudsman or PIC);

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[69] NSW Ombudsman, *Protected Disclosures Guidelines*, third edition, pp.16-17.
[70] Committee on the Office of the Ombudsman and Police Integrity Commission, op. cit., p.60.

- advice as to the statutory and/or administration protections available either under the Act or from the agency;
- a statement of agency commitment to the importance of maintaining confidentiality, as well as advice as to the confidentiality provisions of the Act and the circumstances where confidentiality may not be available;
- documentation failing to identify the distinction between '*suspects on reasonable grounds*' for the purposes of the *ICAC Act* and '*shows or tends to show'* for the purposes of the *Protected Disclosures Act*.
- documentation failing to emphasise the need for disclosures to '*show or tends to show*' one of the three categories of conduct covered by the Act, not merely allege that such conduct has occurred;
- documentation incorrectly indicating that a protected disclosure can be based on suspicion (ie. '*suspects on reasonable grounds*') whereas the requirements under the Act is that disclosures '*show or tend to show*' one of the three categories of conduct covered by the Act;
- advice as to when an employee of the agency can make a disclosure to an MP or journalist failing to state that the whistleblower must have reasonable grounds for believing that the disclosure is substantially true and that the disclosure must in fact be substantially true;
- documentation failing to clarify that the frivolous and vexatious limitation in the Act applies only to the motivation of the person making the disclosure, not to the content of the disclosure;
- the definition of '*maladministration*' being incorrect by failing to indicate that the conduct must be of a '*serious nature*';
- documentation relating to protected disclosures being grafted onto an existing reporting system for corrupt conduct/fraud and therefore failing to deal with 'maladministration' or 'serious and substantial waste of public money' issues;
- documentation being too simplistic by stating that staff disclosing matters to one of the internal channels will be afforded protection under the Act, without indicating the other prerequisites for such protection to apply;
- documentation modifying a grievance policy and procedures by including provision for disclosures under the *Protected Disclosures Act* . . . [71]

Early in 1999, a total of 69 letters were sent by the Ombudsman's Office to agencies requesting a copy of their current adopted internal reporting policy. This was aimed at completing the Office's audit and maintaining a database of internal reporting policies.

At the time of the 8th General Meeting in November 1999, the Ombudsman's Office advised that of the total 69 agencies written to in April 1999, 36 agencies responded. An assessment of the responses, or lack thereof, from the 69 agencies found that:

- 33 agencies (ie 48%) had failed to respond;
- 10 agencies that responded had not addressed the problems previously brought to their attention by the Deputy Ombudsman;
- 7 had made changes to their procedures/policies, but the documentation was still inadequate;
- 7 improved their documentation to an adequate standard; and

[71] NSW Ombudsman, *Protected Disclosures Guidelines*, op. cit., pp.25-7.

- 5 based their revised procedures on the model policy (Annexure A to the Ombudsman's Protected Disclosures Guidelines).

The conclusions drawn at this stage from the Office's audit of the standard of internal reporting procedures were:

	Very Good	Adequate	Inadequate
1997/98 Review	37 (28%)	15 (11%)	81 (61%)
1998/99 Review	51 (39%)	16 (12%)	65 (49%)

The percentage of agencies whose documentation was at least adequate has increased from 39% to 51% between 1997/98 and 1998/99. Of the agencies whose documentation was found to be very good or at least adequate by the time of the 1998/99 review, 39 had largely adopted the model policy and 17 had based their policy and/or procedures on the model to a significant degree (not always a complete success).[72]

An assessment conducted in March 2000 of the 39 responses received by the Office of the Ombudsman showed:

- 13 responding agencies had either not addressed the problems previously brought to their attention, or had made changes but the documentation was still inadequate
- 26 responding agencies had improved their documentation to an adequate standard.

The audit results indicated a significant improvement over the results of the 1997-8 review:

- 56 (42%) are to a high standard
- 19 (14%) are to an adequate standard
- 57 (43%) are inadequate[73]

The Parliamentary Committee discussed these findings with the then Acting Ombudsman, Mr Wheeler, during public hearings for the second review of the Act:

> **Mr WHEELER:** We have been conducting a review of the internal reporting policies adopted by agencies in the past couple of years. It began with a Premier's memorandum that asked agencies to supply copies of their internal reporting policies, but there was a fairly poor response to that memorandum. We have been following up that matter as time allows. I wrote to a range of agencies—about 69—early last year saying either that we had looked at their policy, did not think it was too good and had given advice, or that they had not provided information and could they please do so. We have received 39 responses from those agencies. The overall results show that about 56 agencies—or 42 per cent—of the 133 agencies we looked at have a high standard of internal reporting policy; for starters, they actually have a policy and, secondly, it is fairly good. About 14 per cent of agencies—that is 19—have inadequate documentation and 57 agencies, which is 43 per cent, have quite inadequate or

[72] Committee on the Office of the Ombudsman and Police Integrity Commission, *Eighth General Meeting with the Ombudsman*, p.36
[73] Document entitled "Review of Internal Reporting Systems", dated 27 March 2000, tabled by the Acting Ombudsman on 28 March.

> non-existent policies. A large number of those agencies had received a letter from us explaining in detail where we believed their policy was deficient.
>
> **CHAIR:** So six years after the introduction of the Act, 43 per cent of pubic agencies have either no code or an inadequate one.
>
> **Mr WHEELER:** That is correct.
>
> **The Hon. J. HATZISTERGOS:** I raised this question about a year ago and suggested that you should take some action against agencies that do not have a code or a policy. What have you done about that?
>
> **Mr WHEELER:** Apart from trying to follow up with the agencies that we have been writing and talking to, I have produced a review. It is a two-page document that sets out the results of our audit and lists some of the larger agencies that have not complied. We said in our annual report that, the next time the Committee reviewed the Act, we would name those agencies that had not complied. It is a question of how much time it takes to deal with this matter. Reviewing the documentation takes long enough; writing to the agencies and giving them feedback takes even longer. We have not had time to telephone all 57 agencies to say that we are sick of writing letters and that we want some results.[74]

Mr Wheeler's report on the review of internal reporting systems confirmed:

- details of the Office's audit of each internal reporting policy received by the Premier's Department in response to Premier's Memorandum 96/24 (the latter required all agencies to adopt internal reporting procedures for the purposes of the *Protected Disclosures Act*); and,
- the general adequacy of, and any deficiencies and inaccuracies, in the internal reporting policy for each agency.

At the Parliamentary Committee's request, Mr Wheeler provided as part of his evidence a list of the larger agencies who had not responded to the Ombudsman's request in 1999 for a copy of their current internal reporting policy. The agencies concerned were:

Department of Aboriginal Affairs
Historic Houses Trust
Judicial Commission
NSW Fire Brigades
NSW Fisheries
NSW Lotteries
Public Trustee
Department of Public Works and Services
Department of Sport and Recreation
State Emergency Service
State Revenue
Surveyor-General's Department
Superannuation Administration Authority
Sydney Opera House Trust
Transgrid
Treasury

[74] Public hearing, 28 March 2000.

University of Technology, Sydney
Western Sydney University

The Ombudsman's Office intended to write again to the above agencies requesting copies of their current internal reporting policies. In later correspondence to the Committee, Mr Wheeler subsequently advised that after the public hearing on 28 March the Office had received responses from a number of agencies. He confirmed that as of 26 July the agencies which had still failed to respond to the Office's most recent request for copies of current internal reporting policies were:

Department of Aboriginal Affairs
Judicial Commission
State Emergency Service
Surveyor-General's Department
TransGrid
Treasury
University of Technology, Sydney
Western Sydney University

Mr Wheeler further advised that the Office had revised its findings from the assessment of the responses received to be:

- 18 responding agencies had either not addressed the problems previously brought to their attention, or had made changes but the documentation was still inadequate (13 prior to the commencement of public hearings for the second review);
- 26 responding agencies had improved their documentation to an adequate standard (the same number as before the public hearings) – of which 10 adopted the model policy and a further 7 based their revised procedures on the model;
- several agencies had been amalgamated or had ceased to exist.

The audit results were now:

- 57 (44%) are to a high standard;
- 21 (16%) are to an adequate standard;
- 52 (40%) are inadequate or do not exist.[75]

On 7 August 2000, Mr Wheeler advised that he had received additional correspondence as follows:

- NSW Fire Brigades (advising that the Commissioner has directed that an immediate review of the Brigades' internal reporting system be carried out, including addressing the changes to the reporting system necessary to ensure compliance with our recommendations);

[75] Letter from the Deputy Ombudsman to the Chairman, dated 26 July 2000.

- TransGrid (advising that they have no record of receiving my letter of 10 March 1999 but are currently undertaking a consultative process with staff to produce a new Code of Ethics and Conduct, which covers the provisions of the *Protected Disclosures Act*, and hope to forward us a copy by early September). [76]

The Parliamentary Committee canvassed possible options for incentives which would result in internal reporting policies and procedures being adopted by all public sector agencies. For example, it was suggested that the Parliamentary Committee could write to the various public sector agencies concerned and have them appear before the Committee to explain why they have not adopted a code or why their code continues to be assessed as inadequate. Another option was to impose a mandatory requirement to adopt an internal reporting policy and procedures. A combination of both measures also was suggested. The Parliamentary Committee considers that such measures may be warranted given the level of cooperation by some agencies in this area and the unacceptable reasons offered by certain agencies for failing to adopt internal reporting systems, apparent in the following exchange:

> **The Hon. J. HATZISTERGOS:** Have agencies given any valid reasons why they have not complied?
>
> **Mr WHEELER:** The normal responses include: "We have lost the letter", "The person who was supposed to be dealing with that matter has left", or "It is being dealt with in another part of the organisation". There are all sorts of excuses.
>
> **The Hon. J. HATZISTERGOS:** There are no valid ones.
>
> **Mr WHEELER:** I do not know whether they would be considered valid reasons.[77]

The situation with regard to the adoption of internal reporting systems by local councils had improved significantly since the first parliamentary review of the Act. Department of Local Government representatives gave evidence that all 177 local councils had adopted internal reporting systems although the quality of each system was not a matter on which the Department was in a position to comment at present:

> **The Hon. J. HATZISTERGOS:** Do you assess the policies?
>
> **Mr SUT:** No, we have not gone to that extent through the survey. We structured it in such a way as to assist councils in reviewing their policies as to what are critical items that should be in the IRSs but we have not called in the 177 policies. We may from time to time have a need to look at particular policies.
>
> **The Hon. J. HATZISTERGOS:** One of the things the Ombudsman's Office told us today is that a number of agencies under its jurisdiction have not prepared policies and a number of them that have prepared policies are quite inadequate. They may be going to the extent of actually identifying publicly those who have policies or have inadequate policies. Do you intend to do that yourselves?
>
> **Mr PAYNE:** The answer to that is yes. We find a number of things like local government reports, and so on. We will turn them up in reviews through the annual reports and reviews over a period of time. It is not going to happen overnight. If we find an example of a poor policy, we will assist the council to fix that and broadcast back to the rest of the sector to

[76] Letter from Deputy Ombudsman, dated 7 August 2000.
[77] Public hearing, 28 March 2000.

make sure they are not doing the same thing. I cannot talk on the IRSs but in terms of State environment reports, in 1993 they were fairly poor. In 1999 they are very good documents and are getting some acclaim from the environmental sectors. So, we do look at those things. Having said that, 177 have told us they have policies in place. I cannot talk about quality, but I would assume we have been given the correct information.

The Hon. J. HATZISTERGOS: Do you intend to vet them, go through them, and give councils advice as to whether those policies meet adequate standards?

Mr PAYNE: We would vet them over time.

The Hon. J. HATZISTERGOS: Have you any time limit in mind?

Mr PAYNE: I would not have the capacity to do it even within 12 months. You are looking at a number of years to go through them. If we go into a council, we will look at these things when we are in there. That is our normal operational method.

The Hon. J. HATZISTERGOS: So, it is reactive rather than proactive?

Mr PAYNE: No, not necessarily. We are not always reactive in a council. We have been doing financial analyses of councils on a proactive basis.

The Hon. J. HATZISTERGOS: Do you have a model policy?

Mr SUT: We have assisted the Ombudsman in the production of its guidelines to councils, and we are finding from the ones we have looked at that they tend to follow the model policy.[78]

COMMENT

The Committee acknowledges that internal reporting systems that are utilised only infrequently can fall into disuse. After all, it is to be hoped that the forms of misconduct that can be reported on under the *Protected Disclosures Act* will occur only infrequently. Nevertheless, if the protected disclosures legislation is to be effective, the appropriate infrastructure has to be in place, and the public authorities covered by the legislation must have the responsibility for maintaining this infrastructure.

The Committee, therefore, considers that there is a need to require agencies to ensure that at least once a year all staff are advised of the internal reporting mechanisms that exist in that agency and that they are encouraged to make use of the mechanisms where appropriate. The Committee considers the monitoring role undertaken by the Ombudsman in relation to internal reporting systems to be a valuable way of checking on the performance of public sector authorities in this area.

The Committee intends to monitor cases where agencies are failing to develop and implement internal reporting systems and to promulgate them to staff.

[78] ibid.

Recommendation 7	
(a)	That the *Protected Disclosures Act 1994* be amended to require public sector agencies, including investigating authorities, to inform staff of the existence of internal reporting systems, which provide appropriate, effective mechanisms for agency employees to make protected disclosures in accordance with the Act, and that the Office of the Ombudsman monitor compliance with this obligation.
(b)	That the public sector agencies failing to respond to the request by the Ombudsman for a copy of their current internal reporting system be liable to appear before the Parliamentary Committee to explain their inaction and the extent of their internal reporting system.

4.2 Protections

The NSW Police Service Internal Witness Support Unit (IWSU), a member of the Protected Disclosures Steering Committee, submitted a number of proposals for amendments to the *Protected Disclosures Act*. The proposals were considered by the Parliamentary Committee and following evidence from the Manager of the Unit, Chief Inspector Glynnis Lapham, the Committee sought the advice of the investigating authorities.

The Police Service raised two specific proposals relating to the protections available under the *Protected Disclosures Act 1994*:

1. amendment of the *Protected Disclosures Act 1994* to include a provision allowing for ordering non-publication of information; and

2. amendment of the *Protected Disclosures Act 1994* to provide for the same protection against payback complaints as is available under s.206(5)(f) of the *Police Service Act 1990*.

A third issue arising from the Police Service submission was the question of whether the reversal of onus of proof provided for in the *Protected Disclosures Act*, where proceedings are taken alleging that detrimental action has occurred over the making of a protected disclosure, should also apply in the same context under the *Police Service Act*.

4.2.1 Proposal 1: Non-publication of information

Section 22 of the *Protected Disclosures Act 1994* provides that an investigating authority, public authority or public official to whom a protected disclosure is made or referred is not to disclose information that might identify, or tend to identify, the person who has made the disclosure. Exceptions to this include:

- where the person consents in writing to the disclosure;
- where it is essential, having regard to the principles of natural justice, that the identifying information be released to a person whom the disclosure concerns;
- where the disclosure of the identifying information is necessary to investigate the matter effectively; or
- where the disclosure is in the public interest.

The Police Service has proposed that a blanket provision is needed to ensure protection of the identity of public officials making protected disclosures can be consistently provided for by statute rather than on the basis of mechanisms such as the granting of suppression orders. The Police Service pointed out suppression orders granted after the commencement of court proceedings do not prevent the identity of an internal witness becoming known to the person whose conduct has been called into question. The proposal would provide for protection of the identity of all public officials making protected disclosures not just internal witnesses from the Police Service.

In support of its proposal the Police Service cited the case of *R-v-Mills* at Moree District Court, 11 August 1998, in which Judge Payne granted a general suppression order in relation to a Police Service internal witness, who was the main prosecution witness. The order was requested by the Crown Prosecutor who indicated that there was no specific legislation to cover this order and suggested a legislative amendment to provide for non-publication in future similar situations.

The Police Service pointed out that internal witnesses appear in a number of jurisdictions which operate under legislation that provides for non-publication of information. For example:

- *Police Integrity Commission Act 1996* – s.52 (1) and (2)
- *Law Enforcement (Controlled Operations) Act 1997* – s.28
- *Independent Commission Against Corruption Act 1988* – s.112
- *Witness Protection Act 1995* – s.24 and s.26
- *Coroners Act 1980* – s.44
- *Ombudsman Act 1974* – s.17, s.34, s.35

The legislative provisions referred to are not limited to the non-publication of information. They extend to disclosure provisions, provisions requiring investigations to be conducted in private, and the discretion to remove persons from proceedings.

The Manager of the Internal Witness Support Unit, Chief Inspector Glynnis Lapham, explained to the Parliamentary Committee that the Police Service proposal concerning non-publication orders was based on specific incidents involving the appearance of police internal witnesses in legal proceedings. Chief Inspector Lapham gave evidence that:

> **CHIEF INSPECTOR LAPHAM**: The Protected Disclosures Act and Police Service Act are strong on confidentiality. Our Unit tries to protect the identity of people as far as we can. However, it seems that as soon as the matter goes outside the Police Service to the Director of Public Prosecutions or any other area of prosecution, all confidentiality goes out the window. If non-publication orders were included in the Protected Disclosures Act, they could be used when necessary or when people asked for them. A magistrate or judicial officer would then have greater power to prohibit the identity of those people being made public outside the court. I am not talking about internal witnesses being given a pseudonym or false identity. Their evidence should be tested. I am fully supportive that they should stand up in court, give evidence and be cross-examined. There is no doubt about that.
>
> However, people are discouraged if they feel they will be open to ridicule by the press, perhaps by their family and by people at their workplace and that they will be hounded and have their privacy invaded. People may be more encouraged to come forward if they know

> that their protection does not stop with the Police Service, that it continues outside the Police Service to the ultimate, which is testing their evidence at court. On a number of occasions, the Director of Public Prosecutions has asked for the judge or magistrate to order a non-publication order, and we have been successful up to this stage. However, I feel an amendment to the Protected Disclosures Act would make an application stronger[79].

The proposal was aimed at strengthening the ability of internal witnesses or public officials making protected disclosures to maintain confidentiality. It was not aimed at usurping the role of the courts in any way. Chief Inspector Lapham told the Committee:

> **CHAIR:** At present courts have a general capacity to suppress such information. Your argument is that there is merit in having a specific provision to deal particularly with whistleblowers?
>
> **Ms LAPHAM:** Yes, for people who come forward and give evidence. Generally, it would be difficult to limit the provision to particular people. If the provision is there in general terms, as it is in a number of other Acts of Parliament which I have nominated, it would be up to an internal witness to ask for a non-publication order to be granted. Some internal witnesses may say, "I don't care, I can walk down the street and have my photograph taken." Generally, they would be people who have already declared themselves in the workplace and a lot of people know that they are an internal witness in the matter. They are proud of it and have no worries about everyone knowing. They probably do not have any worry about being in court. Other people who are susceptible may feel that they would be prone to either harassment or some public intimidation or that their privacy would be interfered with. This provision would allow them to be given a non-publication order more easily.
>
> **CHAIR:** The scheme you are talking about would still leave the discretion with the judge as to whether he or she would grant the order?
>
> **Ms LAPHAM:** That is right. At this stage it does not appear at all, and an application for non-publication requires a great deal of argument to and fro. . . . The basis is that I feel that people are discouraged to come forward if they think they will be exposed and harassed by the media. Their evidence should be tested, so I am not talking about pseudonyms. . . .
>
> **CHAIR:** That there are similar provisions in other legislation.
>
> **Ms LAPHAM:** That is right[80].

She went on to give evidence that offences of detrimental action under the *Police Service Act* were difficult to prove:

> **CHAIR:** How many actions have there been for detrimental action under the Police Service Act?
>
> **Ms LAPHAM:** Only one of which I am aware, and the Director of Public Prosecutions withdrew. A summons was issued. I have not seen the advising as to why they withdrew, but my information was that the intent to deliver detrimental action was difficult to prove. The reverse burden of proof does not operate under section 206, so it was up to the prosecution to prove it and it is not an easy thing to do. Under section 20 with the reverse burden of proof it is up to the defence to actually prove[81].

[79] Public hearing, 18 April 2000.
[80] ibid.
[81] ibid.

The Parliamentary Committee later canvassed the non-publication order proposal with key witnesses including the investigating authorities in order to determine whether the Police Service proposal raised issues for the investigation of protected disclosures and the operations of such authorities.

The ICAC Commissioner responded that the Commission did not believe it would necessarily be the case that it would be necessary to identify a person as the person who made the disclosure. According to the Commission, a person would give evidence as a witness to certain conduct and the fact of the disclosure would be irrelevant. However, the Commission did envisage that in some cases cross-examination of the witness might result in the fact of the disclosure becoming known and lead to considerable distress to the witness and family members if it became widely known, especially in small towns. It also noted that the identity of a Police Service internal witness is usually known to the police officer who is the subject of proceedings and that this could be the case in matters involving persons who are not police officers.

The ICAC submission states that the making of an order suppressing publication of identifying details might assist in maintaining confidentiality. It concludes with an expression of support for the inclusion of a provision in the *Protected Disclosures Act* relating to non-publication orders and recommends that express provision be made for the exercise of the discretion to make an order in appropriate cases. The Commission recommended that such an order need not be confined to non-publication in the media and suggested that where the safety or well-being of a person was at risk a general suppression order could be made.[82]

The Auditor-General saw merit in amending the *Protected Disclosures Act* to protect the identity of persons who make protected disclosures from media exposure, in the event that they are required to give evidence in consequential legal proceedings, and gave his support to the Police Service recommendation[83]. Similarly, the Commissioner of the Police Integrity Commission declared support for the proposal, which the PIC considers akin to the power at common law to prevent the disclosure of information that may have the effect of enabling the identification of confidential informers[84].

The Office of the Ombudsman also supported the proposal for making provision for non-publication orders under the *Protected Disclosures Act*. The Office considers confidentiality to be one of the most effective protections provided by the Act and for this reason it attached great importance to maintaining proper confidentiality of the identity of whistleblowers. The Office strongly counsels protected disclosure coordinators to alert whistleblowers of the terms of s.22 at the outset and the circumstances in which their identity may be required to be disclosed. Whistleblowers must generally be informed that if their protected disclosure forms the basis of subsequent criminal or disciplinary proceedings it is most likely that their identity will have to be disclosed.

The Office considered that it would be appropriate for the *Protected Disclosures Act* to make provision for suppression orders in the context of judicial proceedings. This would enable the provision to be invoked, where appropriate, and would be effective in preventing the identity of a whistleblower being reported in the media. The Office did outline circumstances in

[82] Letter from Commissioner Moss, ICAC, dated 17 May 2000.
[83] Letter from the Auditor-General, Mr Sendt, dated 5 June 2000.
[84] Letter from Commissioner Urquhart, PIC, dated 25 May 2000

which such protection was not effective, for example, when a journalist arrived at court after the suppression order was made and was not aware of its existence. However, the Office concluded that the fact that it is an offence to make a publication in contravention of a direction is an appropriate sanction for dealing with such situations.

The Office submitted that the Police Service proposal be taken a step further. It argued that suppression or non-publication orders do not address the fact that proceedings are conducted in an open court and witness details are published in court transcripts. While the Office acknowledged that the public interest in having open hearings generally outweighs a whistleblower's interest in keeping their identity confidential, it felt that in appropriate circumstances provision should be made to permit a witness to adopt a pseudonym or code name. Witnesses would still be obliged to stand up in court and have their evidence tested. If possible, the Office sought a similar provision to be made in relation to disciplinary proceedings[85].

As the proposal raised issues falling within the administrative responsibility of the Minister for Police, the Committee sought the Minister's views on the proposal. In response, the Acting Minister for Police, The Hon. John Aquilina MP, wrote to the Committee that:

> Provisions which help to drive out or minimise corruption, maladministration and misconduct and promote accountability must obviously be supported. It is not clear however how such a matter would best be advanced – for example, whether the *Protected Disclosures Act 1994* or *Criminal Procedure Act 1986* should be amended. I have no view on this. An amendment is supported in principle, subject to these factors being properly balanced and considered.[86]

COMMENT

The lack of a non-publication provision within the *Protected Disclosures Act* does appear to offer public officials making protected disclosures less protection than internal witnesses appearing before the PIC, the ICAC, Coroner and Ombudsman. It is relevant to note that in commenting on recommendation 2 from the 1996 review the Police Integrity Commission emphasised that the notification and referral process involved in the police complaints system illustrates the public interest in maintaining complainant confidentiality.

The Parliamentary Committee considers that the *Protected Disclosures Act* should be amended to make some form of explicit provision for the courts to make orders suppressing the publication of material which would tend to disclose the identity of a person who has made a protected disclosure. The existence of such a provision would constitute an important inducement for public officials to make disclosures of misconduct under the protected disclosures scheme.

Such orders would not be made automatically but on application only. This approach would enable the courts to weigh up the desirability of issuing such orders having regard to the circumstances of individual cases.

[85] Letter from the Acting Ombudsman, Mr Chris Wheeler, dated 23 May 2000.
[86] Letter from the Acting Minister for Police, dated 31 July 2000.

Recommendation 8

The *Protected Disclosures Act 1994* be amended to make some form of explicit provision for the courts to make orders suppressing the publication of material which would tend to disclose the identity of a public official who has made a protected disclosure.

4.2.2 Proposal 2: Protection against payback complaints

Section 20 (2) of the *Protected Disclosures Act* defines “detrimental action” to be “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) disciplinary proceeding”.

Section 206(5) of the *Police Service Act* gives an identical definition of detrimental action except that the definition was amended through the *Police Service Amendment Act 1999* to include “the making of a complaint, or the furnishing of a report, under this Act or the regulations”, that is, payback complaints. The inclusion of payback complaints in this definition of detrimental action took effect on 1 February 2000. In the second reading speech on the Bill, the Minister for Police explained that this amendment implemented recommendation 107 of the Royal Commission into the NSW Police Service which was aimed at improving the level of support provided to internal witnesses.

The Minister made reference to the Royal Commission’s finding that "internal witnesses fear harassment and ostracism as a result of reporting the misdeeds of their colleagues" and that "there was evidence that internal witnesses are at risk of being the subject of ‘payback’ complaints and disciplinary charges", although not all internal witnesses are subject to such treatment. The Royal Commission recommended that:

> 107. There be given wide publicity within the Police Service of the fact that the making of "payback complaints", together with other forms of harassment of internal witnesses, will invoke the Commissioner’s confidence provisions of the Police Service Act 1990, and constitute a criminal offence.

The Minister stated that although it is already an offence under s.206 of the *Police Service Act* to take detrimental action against another police officer as reprisal for that officer making a protected allegation, the amendment to s.206 would clarify that a "payback complaint" can constitute detrimental action, that is, a criminal offence. The making of legitimate complaints would not be prevented by this provision as only those complaints that are made substantially in reprisal against an officer who has made a protected allegation will constitute an offence[87].

The Police Service IWSU argued that the different definitions of detrimental action under the *Police Service Act* and *Protected Disclosures Act* creates an anomaly which affords a police officer making a “protected allegation” in the performance of a duty, or in accordance with

[87] Minister for Police, The Hon. P.F.P. Whelan MP, Police Service Amendment Bill 1999, Second reading speech, Hansard (Legislative Assembly), 9 November 1999.

procedures for making allegations of police misconduct or criminal activity under the *Police Service Act* or any other Act, greater protection against detrimental action than those lodging protected disclosures under the *Protected Disclosures Act*. Consequently, the Police Service proposed that the definition of detrimental action under s.20 of the *Protected Disclosures Act* be amended to include the provision found in s.206 (5)(f) of the *Police Service Act*. According to the Police Service, such an amendment would encompass all public officials and deal with the issue of payback complaints.

The ICAC Commissioner noted that the amendment to s.206 of the *Police Service Act* to include the making of payback complaints in the definition of "detrimental action" was inserted following recommendation 107 of the Royal Commission into the NSW Police Service which was aimed at improving the level of support provided to internal witnesses. In the Commission's view it was not necessary to similarly amend the *Protected Disclosures Act* as the making of a "payback complaint" is already covered by the existing definition of detrimental action. It reiterated that the Royal Commission considered such complaints to be a form of harassment and the ICAC felt payback complaints also could involve prejudice to employment which is covered by the existing definition[88].

Similarly, the Audit Office did not see any need to provide specific protection against "payback complaints" on the grounds that while the proposed amendment would provide some consistency between the Acts, the current provisions would seem to provide sufficient protection against such complaints. [89]

The Commissioner of the Police Integrity Commission advised that the PIC supports the proposal and, in doing so, noted that occasionally complaints are received which give rise to concerns that they may have been made maliciously. However, proving that a complaint was made in reprisal for the lodgement of a protected disclosure may be extremely difficult. The PIC Inspector supported the comments made by the PIC Commissioner[90].

The Office of the Ombudsman indicated its support for broadening s.20 of the *Protected Disclosures Act* to bring it into conformity with the definition of detrimental action put forward by the Police Service. In the view of the Office, while payback complaints are less common in other areas of the public sector, public officials other than members of the Police Service should be explicitly protected from payback complaints. The Office felt that although payback complaints may fall within the existing definition of "detrimental action" it is an additional burden for a whistleblower to satisfy[91].

The Acting Minister for Police, The Hon. John Aquilina MP, wrote to the Committee on 31 July 2000 indicating support for the Police Service proposal on two grounds:

> *First*, in all other respects, the provisions are substantially the same. This amendment would bring the *Protected Disclosures Act 1994* into conformity with the *Police Service Act 1990*. *Second*, the proposal is consistent with the object of the legislation – namely, to encourage and facilitate disclosures in certain instances. . . .

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[88] Letter from Commissioner Moss, ICAC dated 17 May 2000.
[89] Letter from the Auditor-General, Mr Sendt, dated 5 June 2000.
[90] Letter from Commissioner Urquhart, PIC, dated 25 May 2000; letter from Inspector Finlay, dated 25 May 2000.
[91] Letter from Acting Ombudsman, Mr Wheeler, dated 23 May 2000.

> An extension – to extend section 20(2) of the *Protected Disclosures Act 1994* to mirror section 206(5)(f) of the *Police Service Act 1990* – would help to meet the object of the legislation. The amendment under the *Protected Disclosures Act 1994* would need to be suitably tailored to suit public service employees.

COMMENT

On the basis of the material before it, the Parliamentary Committee considers that "payback complaints" already fall within the existing definition of "detrimental action" contained in s.20 of the *Protected Disclosures Act* . However, the specific reference to payback complaints in s.206 of the *Police Service Act* and the absence of such a reference in s.20 of the *Protected Disclosures Act*, may lead to some uncertainty as to whether payback complaints fall within the scope of detrimental action under the latter Act. To resolve any such uncertainty it would be desirable to clearly provide for consistency between the definitions of "detrimental action" in both the *Protected Disclosures Act* and the *Police Service Act* in order that there should be no question that payback complaints are covered by both statutes.

Recommendation 9

Section 20 of the *Protected Disclosures Act 1994* be amended to include payback complaints made against a person in reprisal for their having made, or intending to make, a protected disclosure.

4.2.3 Reversing the onus of proof

Recommendation 9 of the 1996 Report recommended that:

> Section 20 of the [Protected Disclosures] Act to be amended to provide that in any proceedings for an offence it lies with the employer to prove that any detrimental action taken against an employee was not taken in reprisal for the employee having made a protected disclosure.

This recommendation was made because of doubts about the effectiveness of the offence provision at s.20 of the Act and its consequent value in providing protection to persons who have made protected disclosures. The previous Parliamentary Committee considered that it may be difficult in many cases to establish to the criminal standard of proof that an offence of detrimental action had been committed in reprisal for the making of a protected disclosure. By placing the onus on a defendant authority to prove that the action was not taken as a reprisal it was hoped that the offence provisions would be more capable of being invoked and that whistleblower confidence in the efficacy of the protections available under the Act would be boosted. [92] The recommendation was given effect by the *Protected Disclosures Amendment (Police) Act 1998*.

During the second review of the Act the Committee examined whether the reversal of onus of proof provided for in the *Protected Disclosures Act* should also apply in the same context under the *Police Service Act*. This issue arose as the Police Service submission highlighted that:

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[92] Committee on the Office of the Ombudsman and Police Integrity Commission, op. cit., p.78.

> . . . If all else is equal and due to the reverse onus of proof, any prosecution relating to the detrimental action, should be more successful under the Protected Disclosures Act rather than the Police Service Act[93]. . .

The Auditor-General supported the proposal on the grounds that "such an amendment would provide a consistent framework for the administration of protected disclosures under both Acts". [94] The Commissioner of the ICAC agreed that the *Police Service Act* should be amended to provide that the reversal of the onus of proof applies to prosecutions under s.206 of the Act. The Commissioner wrote:

> It is inequitable that a police officer who proceeds under s206, or on whose behalf proceedings are taken, should be penalised by electing to proceed under that section rather than s.20[95].

The Ombudsman's Office and Police Integrity Commission were more qualified in expressing their support. The then Acting Ombudsman, Mr Chris Wheeler, wrote that the Office appreciated that certain complexity would be removed if all protected disclosures made by members of the Police Service could be dealt with under the *Police Service Act* and noted that at present dealing with allegations as protected disclosures under the *Protected Disclosures Act* did have the advantage that a reverse onus of proof applies in respect of the detrimental action offence provisions. He advised that while the Office supports the proposal in principle it envisaged that it would not be easy to implement in practice. In addition, Mr Wheeler pointed out that s.206 of the *Police Service Act* has a much broader application than the *Protected Disclosures Act* as it encompassed all allegations, and not just public interest allegations. The Office did not believe it would be appropriate for a reverse onus of proof to apply generally in respect of s.206 and concluded that if the proposal were implemented it would have to involve two different onus of proofs, depending on the nature of the allegations. [96]

The Commissioner of the PIC, the Hon. Judge P.D. Urquhart QC, expressed qualified support for the proposal but for reasons different to those advanced by the Police Service. Commissioner Urquhart's advice states that the anomaly identified by the Police Service between s.20 of the *Protected Disclosures Act* and s.206 of the *Police Service Act* did not, of itself, constitute sufficient reason to justify an amendment of the kind proposed. He held that "the mischief created either by the inconsistency between the two provisions or by the fact that the onus of proof rests with the prosecution, must present difficulties that can only be resolved by legislative reform." Commissioner Urquhart felt that no apparent harm seems to result from the inconsistency between the two sections and he pointed out that prior to s.9(4) of the *Protected Disclosures Act* coming into force on 27 November 1998 police were at a real disadvantage because they could not avail themselves of the Act.

The Commissioner went on to submit that, in the absence of any body of jurisprudence relating to prosecutions brought under either s.20 of the *Protected Disclosures Act* or s.206 of the *Police Service Act,* it was difficult to answer in the abstract the question of whether

[93] NSW Police Service submission, dated 31 March 2000.
[94] Letter from the Auditor-General, Mr Sendt, dated 5 June 2000.
[95] Letter from Commissioner Moss, ICAC, dated 17 May 2000.
[96] Letter from Acting Ombudsman, Mr Wheeler, dated 23 May 2000.

problems exist with the onus of proof remaining on the prosecution. From a policy perspective he outlined the following arguments against the proposal:

i. During the hearings on the occasion of the first review of the *Protected Disclosures Act* in 1996, Mr David Bennett QC submitted that reversing the onus of proof would likely have the undesirable effect of obliging a defendant to give reasons for what motivated the alleged detrimental action, at the possible expense of the defendant's privilege against self-incrimination (see Committee on the Office of the Ombudsman and Police Integrity Commission, *Review of the Protected Disclosures Act 1994*, September 1996, p.75)

ii. The mere fact that the prosecution may experience difficulties in proving that action was taken in reprisal for the making of a protected disclosure is not, of itself, sufficient to justify the onus being reversed.

In favour of the proposal, he commented that it could be argued reversing the onus of proof may serve to deter police officers from making reprisals against other police who have made protected allegations and help to encourage informers to come forward to disclose allegations of misconduct. The PIC disagreed with the argument that because a police officer is under an obligation to report an allegation of misconduct or criminal activity by another police officer, reversing the onus of proof would not result in any additional incentive for informers to come forward. It was the experience of both the Royal Commission and the PIC that police internal witnesses are an extremely valuable source of information about police misconduct and corruption. Commissioner Urquhart advised that experience also suggests that the existence of a duty to report misconduct is not necessarily enough to encourage informers to come forward. He concluded that,

> If reversing the onus of proof can truly encourage informers to come forward then serious consideration should be given to the proposal. If, on the other hand, evidence emerges that defendants are being unduly prejudiced by reversal of the onus of proof, the proposal should be re-considered[97].

Advice from the Acting Minister for Police, The Hon. John Aquilina MP, indicated support in principle for a change to a reverse onus provision although Mr Aquilina considered that the matter required careful consideration. He wrote that the absence of a reverse onus provision in the *Police Service Act* may have been an oversight:

> As with the payback provision, there would seem to be no reason to differentiate between the circumstances under each piece of legislation. Together with the inclusion of a payback complaint, the change would ensure conformity – that is, it would ensure that all public officials are afforded the same protection against reprisals.
>
> Reverse onus provisions, of course, raise issues of high policy which are particularly sensitive issues when a gaol penalty is involved. However, it should be noted that the reverse onus only relates to an element of the offence regarding the motivation for the defendant's actions. In other words, the Crown must still show that the defendant hurt, intimidated, harassed, discriminated against, etc. the person. This would soften the effect of any reverse onus. Furthermore, motivation would arguably be more difficult for the Crown to prove (more so than the usual difficulty of proving that a person *intended* to do what they did (murder, rob, etc), which can usually be inferred from their actions)[98].

[97] Letter from Commissioner Urquhart, PIC, dated 25 May 2000.
[98] Letter from the Acting Minister for Police, dated 31 July 2000.

COMMENT

The Committee notes the division of opinion relating to the issue of reversing the onus of proof in the *Police Service Act 1993*. Reversing the onus of proof has the scope to make more effective the protection available to those who make protected disclosures, but can also create possible unfairness by casting on a defendant the responsibility of proving his or her innocence.

In principle, the Committee is of the view that there should be consistency between the *Police Service Act* and the *Protected Disclosures Act* to the extent that where the reverse onus of proof applies under the latter Act, it should also apply under the former Act.

Whether the reverse onus should apply to the broader situations covered by the relevant provisions of the Police Service Act is a more complicated issue on which the Committee does not wish to express a firm view. The Committee considers that this is a matter for the Minister for Police. In this regard it notes that the Acting Minister for Police has expressed in-principle support for the proposal to have a reverse onus provision made part of s.206 of the *Police Service Act.*

Recommendation 10:

The Committee recommends that there should be consistency between the *Police Service Act 1990* and the *Protected Disclosures Act 1994,* so that the reverse onus of proof would apply in respect of allegations made under the *Police Service Act* which also would be able to be categorised as protected disclosures in terms of the *Protected Disclosures Act.*

4.2.4 False claims legislation

Recommendation 8 of the 1996 Review report proposed that:

> The Act should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.

The previous Committee did not support recovery of punitive damages by public officials who make protected disclosures. In dealing with issues such as prosecuting the criminal offence of detrimental action and obtaining compensation for such action, it stated:

> A solution to these difficulties would be to establish a civil cause of action which a victim of reprisal action could take. As civil proceedings would be involved, the lower "balance of probabilities" standard would facilitate the prospects of success. By providing a more effective remedy, the likelihood of reprisal action occurring would be diminished. The fact that the damages would be received by the plaintiff/victim would mean that any loss suffered could be compensated. However, it would appear preferable that damages should be confined to compensation for actual financial loss suffered as a result of the detrimental action, and hence that punitive damages should not be recoverable. This position would lessen the prospect of litigation being initiated for financial gain. [99]

[99] Committee on the Office of the Ombudsman and the Police Integrity Commission, op. cit., p.72.

In its response to Recommendation 8, the NSW Branch of Whistleblowers Australia submitted to the Committee that:

> A separate civil right to seek compensatory damages in addition to the existing criminal sanctions, is both essential and long overdue. See our Submission under headings "Whistleblower Protections" and "The Public Interest Privatised".
>
> The cause of action presumably, is a breach of statutory duty, arising out of a breach of a duty of care or and or contract. The appropriate defendant would be the person or persons, natural or not, who is/are personally and or vicariously liable. The applicant should bear the onus of proof on the balance of probabilities.
>
> Also a finding in favour of the whistleblower should follow as a matter of course, where the alleged wrongdoing, the subject of the disclosure, is established. On the basis that it is more likely than not, that the detrimental action is causally connected to the disclosure.
>
> Punitive or exemplary damages, although likely to be rare in this jurisdiction, should be open to the applicant on common law principles, where it could be proved that the defendant had acted with contumelious disregard. More importantly, it should be understood that there is nothing inherently wrong, legally or morally, in such an award to a whistleblower. In this respect the Committee might also consider an entirely different approach and result, under the United States of America whistleblower legislation, where the government is always the primary beneficiary of the award or settlement for punitive damages[100].

The associated sections of the submission recommend that it would be possible to foster "public interest whistleblowing" by providing the whistleblower with, amongst other things:

i. standing to bring a civil claim for compensatory damages (e.g. refer USA legislation, False Claims Act)
ii. standing (as relator or agent of the State) to bring a civil claim for exemplary damages (e.g. refer USA legislation, False Claims Act)[101]

Whistleblowers Australia recommended that the Committee form a working party to investigate the relevance and efficacy of the USA False Claims Act to the NSW protected disclosures scheme. According to the submission, the False Claims Act has the following benefits:

> You might consider this act because, unlike the Protected Disclosure Act, it gets unambiguously to the heart of the matter. Government loss is its focus. Not the whistleblower or the nature and quality of the disclosure.
>
> Equally, practical statutory measures provide "retaliation protection" in the form of an entitlement to the reimbursement of legal costs, reinstatement and double back pay. The whistleblower is given real and relevant protection, within the same legislative framework, requiring only a civil burden of proof.
>
> . . . In addition, it has re-worked the whistleblower image, from that of dobber, to (public spirited) umpire, player or interested bystander.

[100] Whistleblowers Australia Inc. (NSW Branch), submission dated 17 April 2000.
[101] ibid.

> Legislation in the form of a qui tam action would not supplant the Protected Disclosure Act. It would vary and, over time, concentrate whistleblower prosecution in the hands of the private sector. It would still remain for the existing legislation to give force to the arrangements operating within the workplace, and to underpin the wider public interest culture.
>
> You could say that this was the ultimate in privatisation and in the public interest[102].

The submission also contained the proposal that a bill be introduced to enact the False Claims Act (NSW). Ms Kardell clarified Whistleblower Australia's position on this issue in her evidence:

> **Ms KARDELL:** . . . What it seems to have done in the United States of America is change the idea of whistleblower in a fundamental and most attractive way, because it now emphasises the things that you would like to have emphasised. Whistleblowers are not dobbers, they are not rats under the house or any such thing; they are umpires, they are sound players, they are rule keepers, they are all sorts of people. They do get a reward, but I would say that before you see that as being grubby—and some might—at the end of the day you probably do need a reward because by then your life has been subsumed into the process. You have probably lost all your assets and you are living your life in the pursuit of the government's loss. As I understand it, it usually involves five, six or seven years of your life.
>
> Part of that legislation also provides for what they call whistleblower protection. So it is all under one piece of legislation. So you go to court, you prosecute, you retrieve the money for the government and as part of that process you get your back pay, you perhaps get your job back and you also get an award and your legal costs covered if you have prosecuted. It seems to me that it is an eminently fair way to approach the thing. The other thing that has happened in the USA is that it has become attractive to the legal profession and there are firms which exist to service whistleblower qui tam actions. In recent times they have evolved to take account of environmental disasters, public safety disasters, abuse of power, and improper purpose. Whereas before the Act started and just took account of fraud—plain no-frills fraud, embezzlement all those things—it has now evolved to take account of those other activities. I would like to see the Committee set up a working party to look at whether there is some sense in taking those notions into an Act in this State.
> . . .
>
> You are probably talking about individuals on the fringe of the public service, which will be a bigger area over time with privatisation and contracts and the like. That is probably where you are going to see it in action. I am not saying that this would replace the public interest disclosure or a PIDA or the things that keep the public sector alive and healthy. It is an Act which would look at the fringes of government and the people who deal with government and the people who seek to misappropriate the government's funds[103].

The Whistleblower submission holds that the provisions of the American false claims scheme turn on the notion of punitive damages.

US FEDERAL CIVIL FALSE CLAIMS ACT

Legislation – The False Claims Act imposes civil liability on any person or entity who submits a false or fraudulent claim for payment to the United States government. It prohibits:

[102] ibid.
[103] Public hearing, 18 April 2000.

- making a false record or statement to get a false or fraudulent claim paid by the government;
- conspiring to have a false or fraudulent claim paid by the government;
- withholding property of the government with the intent to defraud the government or to wilfully conceal it from the government;
- making or delivering a receipt for the government's property which is false or fraudulent
- buying property belonging to the government from someone who is not authorised to sell the property; or
- making a false statement to avoid or deceive an obligation to pay money or property to the government.

It also is improper to cause someone to submit a false claim.

Under s.3729 of the False Claim Act anyone who violates the Act is liable to the Government per claim for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages sustained by the Government because of the act of that person. A number of exceptions are provided. A person who violates the Act also shall be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages. Section 3730 of the Act provides for actions by private persons and enables a person to bring a civil action for a violation of s.3729 for the person and for the United States Government. The whistleblower bringing such a suit is called a qui tam relator[104].

The action is brought in the name of the Government and the Government may elect to intervene and proceed with the action after it receives the complaint and the material evidence and information. If the Government proceeds with the action it has primary responsibility for prosecuting the action and the person who brought the action continues as a party to it. Notwithstanding the objections of the person initiating the action, the Government may settle the action with the defendant if the court determines that the proposed settlement is fair, adequate and reasonable.

Should the Government elect not to proceed with the action, the person who initiated the action has the right to conduct it. The court may permit the Government to intervene at a later date. It also is open to the Government to pursue its claim through an alternative remedy including administrative proceedings. Where the Government proceeds successfully with the action the qui tam plaintiff is awarded at least 15% but not more than 25% of the proceeds of the action or claim settlement, depending upon the extent to which the person substantially contributed to the prosecution of the action. If the Government does not proceed with the action, the person bringing the action or settling the claim shall receive an amount which is not less than 25% and not more than 30% of the proceeds of the action or settlement. All legal expenses, fees and costs are awarded against the defendant.

In actions where the defendant prevails and the court finds that the person bringing the action was frivolous, vexatious or harassing, the court may award reasonable attorney's fees and expenses to the defendant. The Act provides for any employee who is discharged, demoted, suspended, threatened, harassed, or discriminated against by their employer because of lawful

[104] www.falseclaimsact.com/description.html

acts by the employee in relation to the False Claims Act, to be entitled to all relief necessary, including reinstatement [105]

Similar legislation has been enacted in other states, for example, the California False Claim Act, the Florida False Claims Act, the Illinois Whistleblower Reward and Protection Act and the Tennessee Health Care False Claims Act.[106]

Background - The False Claims Act was passed by Congress in 1863 as a mechanism to protect the Union Army from fraudulent suppliers during the Civil War. It provided both criminal and civil penalties, contained a qui tam[107] provision, and permitted a whistleblower (relator) to collect 50% of the damages. In 1943, reacting against what it considered to be "parasitic" qui tam relators, Congress restricted the relator's role under the Act, by narrowing the application of the qui tam provisions and reducing the whistleblower's share in the proceeds of a successful action from 50% to a maximum of 25%, in cases where the government did not help with the litigation and 10% in cases where it did help. The Act and the qui tam provisions were largely unchanged and disused until 1986 when, as an anti-fraud measure, Congress significantly amended the Civil False Claims Act to broaden its application and re-establish the role of the qui tam relator. The 1986 amendments expanded the role of, and increased the awards payable to, the qui tam plaintiff, and provided whistleblower protections for employees discriminated against by their employers for their participation or involvement in a qui tam action.[108] The amendments to the act included:

- defining by statute the level of mens rea needed to be liable for submitting a false claim to include submitting claims with deliberate ignorance or reckless disregard as to the truth of the information contained on the claim;
- requiring the government or qui tam relator to adduce proof of the submission of a false claim by a preponderance of evidence instead of higher standards imposed by the courts;
- enlarging the time within which a false claims act case may be bought;
- providing for treble damages;
- enhancing the qui tam relator's role in the litigation and enlarging his or her share to between 15-25% where the government participates in the litigation, or 25-30% where the government declines to participate in the litigation;
- mandating that the defendant pay the attorney's fees of a successful qui tame relator; and
- protecting relators from retaliation by their employers.[109]

Statistics issued by the Department of Justice on 30 September 1999 show that there had been a total of 2959 qui tam cases filed to date. This involved an increase in the number of qui tam cases filed from 33 in 1987 to 483 in 1999. The total amount recovered under the False Claims Act where there was an associated qui tam case was $2.887 billion. Recoveries in qui

[105] www.ffhsj.com/quitam/fca.htm ; www.taf.org/taf/docs/quitam.html

[106] www.falseclaimsact.com/states.html

[107] The phrase qui tam derives from the Latin phrase "Qui tam pro domino rege quam pro se ipso" which translates as "Who sues on behalf of the King, as well as for himself". Qui tam provisions give private citizens the ability to bring actions on behalf of the government. Under English common law qui tam provisions allowed a private party to bring a suit against someone who had violated the law and to be paid a bounty for their efforts and as an encouragement to other individuals to bring similar suits. Qui tam provisions were grafted onto many United States statutes. Source: False Claims Act Resource Centre, www.falseclaimsact.com/history.html

[108] House of Representatives report, 99th Congress, 2nd session, Report 99-660, False Claims Amendments Act of 1986, www.ffhsj.com/quitam/fcaa.htm

[109] False Claims Act Resource Center, www.falseclaimsact.com/history.html

tam cases pursued by the Department of Justice had risen from $355,000 in 1988 to $474 million in 1999.[110] The Department had recovered $2.698 billion in false claim cases that it had entered or otherwise pursued. To date, the total False Claims Act amount recovered by relators in cases declined by the Department of Justice was $189 million.[111]

COMMENT

This Committee supports Recommendation 8 made by the previous Committee and agrees that it would be preferable for damages to be confined to compensation for actual financial loss suffered as a result of the detrimental action rather than punitive damages. This position would lessen the prospect of litigation being initiated for financial gain.

The Committee does not accept the premise put by Whistleblowers Australia that the False Claims Act is based upon the notion of punitive damages. Rather the United States Federal Civil False Claims Act promotes a system of financial benefits for persons who initiate litigation about false and fraudulent claims. It appears to be based on legal procedures, such as the right for private litigants to initiate proceedings in the name of the Government, which do not form part of the usual legal process which operates in New South Wales.

However, the Committee does consider that the principles underlying the American legislation may have some merit and be worth considering in the New South Wales context, and that further research and analysis is warranted on this issue. Consequently, it recommends that the proposed PDU, in consultation with the Steering Committee, examine the False Claims Act with a view to recommending implementation of any elements of the statute suited to the NSW jurisdiction. It would seem most effective if this research were undertaken with the assistance of accurate statistical data on the operation of the *Protected Disclosure Act*.

Recommendation 11

That the merits of a false claims statutory scheme for New South Wales incorporating features of the United States Federal False Claims Act be examined by the proposed Protected Disclosures Unit in consultation with the Steering Committee.

4.3 Corrective Services

Recommendation 14 of the 1996 Review report states:

> The *Protected Disclosures Act 1994* should be amended to clarify that the protections provided under sections 20 and 21 should extend to members of the Police Service who voluntarily initiate the making of a disclosure notwithstanding the existence of a general obligation, provided for by regulation, to disclose misconduct. The Committee noted that this proposal would require an amendment to the *Police Service Act 1990* to explicitly provide for a member of the Police Service to be able to make a disclosure which shows, or tends to

110 FCA Statistics, Fried Frank Qui Tam Page, last updated 31 January 2000 at www.ffhsj.com/quitam/fcastats.htm

111 Includes approximately $145 million of recoveries in cases currently under appeal. Relators also have received more than $64.3 million in declined cases where none of the recovery was characterised as damages to the government or penalties under the False Claims Act.

show, corrupt conduct, maladministration or serious and substantial waste of public money to the appropriate investigating authority.

This recommendation was later implemented with the passage of the *Protected Disclosures Amendment (Police) Act 1994.*

As part of its response to this particular recommendation, the Independent Commission Against Corruption submitted that a similar amendment is needed for correctional officers employed by the Department of Corrective Services who are required by regulation to report misconduct by other correctional officers to a more senior officer. Such disclosures are not voluntary and, therefore, not subject to protection.

Regulation 35 of the Correctional Centres (Administration) Regulation 1995 specifies:

Reporting of misconduct by prison officers

35. **(1)** If:

(a) an allegation is made to a prison officer that another prison officer has, while carrying out his or her duties as a prison officer, engaged in conduct which, in the opinion of the officer to whom the allegation is made, constitutes a criminal offence or other misconduct; or
(b) a prison officer sincerely believes that another prison officer has engaged in conduct of that kind,

the prison officer must report the conduct (or alleged conduct) to a prison officer who is more senior in rank than the officer making the report.

(2) The senior prison officer must report the conduct (or alleged conduct) promptly to the Commissioner if the senior prison officer believes that it:

(a) constitutes (or would constitute) a criminal offence by the prison officer; or
(b) would provide sufficient grounds for preferring a departmental charge against the prison officer.

(3) Subclause (1) does not apply to conduct or alleged conduct:

(a) that has been made the subject of a departmental charge; or
(b) that has been the subject of evidence or other material given, or submissions made, in the course of criminal proceedings; or
(c) that has already been reported under this clause to a more senior prison officer.

Clause 35 (4) of the regulation provides that:

(4) A prison officer must not, in relation to any other prison officer:

(a) fail to approve or recommend the promotion of the other officer; or
(b) take, approve or recommend disciplinary action against the other officer; or
(c) direct, approve or recommend the transfer of the other officer to another position in the Department; or
(d) make, approve or recommend a decision which detrimentally affects the benefits or awards of the other officer; or
(e) fail to approve or recommend that the other officer receive education or training which could reasonably be expected to improve the officer's opportunities for promotion or to confer some other advantage on the officer; or
(f) change the duties of the other officer so that they are not appropriate to the officer's salary or position or approve or recommend such a change; or
(g) otherwise act to the detriment of the other officer,

in retaliation against the other officer because he or she has acted in accordance with this clause or has disclosed information relating to conduct contrary to law to any other prison officer.

(5) A prison officer who contravenes a provision of this clause (including failing to report misconduct that has been reported to the officer) is not guilty of an offence. However the prison officer may be dealt with for a breach of discipline under Part 5 of the Public Sector management Act 1988.

The Assistant Commissioner to the ICAC, Mr John Feneley, clarified the issue in his evidence:

> **Mr FENELEY:** In the context of our inquiry into prisons, which has been going on for some time, and through our work in relation to protected disclosures generally, we became aware of the fact that there seemed to be similar issues for Corrective Services officers as there are for police officers, absent some amendment to the legislation. So that they are under a positive duty to make a report, and if they are under a positive duty, under the legislation as it currently stands they cannot be classified as protected disclosures. It seemed to us that, for the sake of completeness, amendments should be made to ensure that those officers are covered by the legislation.
>
> **CHAIR:** In much the same way as amendments were made for members of the Police Service.
>
> **Mr FENELEY:** That is correct[112].

The Committee brought the issue to the attention of the Minister for Correctives Services, the Hon. R J Debus MP, who supported an amendment to the *Protected Disclosures Act* to protect correctional officers who are required by regulation to make a disclosure, in similar terms to that which extended the protections available under the Act to members of the Police Service required to make disclosures under the *Police Service Act*.[113]

COMMENT

The protection available under the *Correctional Centres (Administration) Regulation 1995* is available only to a correctional officer in respect of another correctional officer. Moreover, the protection takes the form of having the prohibited reprisal action constitute a breach of discipline under the *Public Sector Management Act 1988*, rather than constituting an offence. In this respect the *Correctional Centres (Administration) Regulation 1995* should be brought into conformity with the position prevailing under the *Protected Disclosures Act*.

The Committee agrees that the protection available to correctional officers should be the same as that available, in analogous circumstances, to all public officials who make disclosures in terms of the *Protected Disclosures Act*.

[112] Public hearing, 28 March 2000.
[113] Letter from the Minister for Corrective Services, dated 17 May 2000.

Recommendation 12

The *Protected Disclosures Act 1994* should be amended to clarify that the protections provided under sections 20 and 21 of the Act extend to correctional officers, employed by the Department of Corrective Services, who initiate the making of a disclosure notwithstanding the fact that they are under a specific requirement, provided for by regulation, to disclose misconduct.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that the particular areas identified in this report as priority areas for reform of the protected disclosures scheme, together with the previous recommendations made by the Ombudsman and Steering Committee, be the subject of a comprehensive and thorough evaluation by the Premier, as the Minister with administrative responsibility for the *Protected Disclosures Act 1994,* and that the Steering Committee be fully involved during this process.

Recommendation 2

(a) The Protected Disclosures Act Implementation Steering Committee should continue to promote the principles and effective management of the protected disclosures scheme within Government, and play a central role in determining the strategic direction of the development of the protected disclosures scheme.

(b) As part of performing the above functions, the Steering Committee should continue to provide an Annual Report on its activities and issues relevant to the protected disclosures scheme. This report should include details of all proposals put forward by the Steering Committee pertaining to the legislative provisions dealing with protected disclosures and any related administrative practices.

(c) The Steering Committee's Annual Report be tabled in Parliament.

(d) Proposals put forward by the Steering Committee should be considered promptly and be subject to a detailed response, a copy of which should be provided to the Committee on the Office of the Ombudsman and the Police Integrity Commission.

Recommendation 3

The Committee recommends that the *Protected Disclosures Act 1994* be amended to enable the establishment of a Protected Disclosures Unit (PDU) 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 monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;
(d) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems;
(e) to audit the internal reporting policies and procedures of public authorities;
(f) to monitor the response of public authorities to the Act, for example, through surveys of persons who have made disclosures and public authorities;

(g) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
(h) 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;
(i) 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;
(j) to publish guidelines on the Act in consultation with the investigating authorities;
(k) to develop proposals for reform of the Act, in consultation with the investigating authorities and Protected Disclosures Act Implementation Steering Committee; and
(l) to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.

Recommendation 4

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:

(a) public authorities and investigating authorities to notify the Protected Disclosures Unit of all disclosures received which appear to be protected under the Act;

(b) 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

(c) investigating authorities to notify the Protected Disclosures Unit of the final result of each protected disclosure investigation they carry out.

Recommendation 5

(a) Prosecutions under s.20 of the *Protected Disclosures Act 1994* can presently be conducted by the Director of Public Prosecutions or the police and the Committee recommends no alteration to this situation.

(b) The *Ombudsman Act 1974* be amended to provide for the Ombudsman to make disclosures to the Director of Public Prosecutions or police prosecutors for the purpose of conducting prosecutions under s.20 of the *Protected Disclosures Act 1994*.

Recommendation 6

That the protections available to public officials under the *Protected Disclosures Act 1994* also be available to public officials making disclosures to the Department of Local Government about serious and substantial waste in local government.

Recommendation 7

(a) That the *Protected Disclosures Act 1994* be amended to require public sector agencies, including investigating authorities, to inform staff of the existence of internal reporting systems, which provide appropriate, effective mechanisms for agency employees to make protected disclosures in accordance with the Act, and that the Office of the Ombudsman monitor compliance with this obligation.

(b) That the public sector agencies failing to respond to the request by the Ombudsman for a copy of their current internal reporting system be liable to appear before the Parliamentary Committee to explain their inaction and the extent of their internal reporting system.

Recommendation 8

The *Protected Disclosures Act 1994* be amended to make some form of explicit provision for the courts to make orders suppressing the publication of material which would tend to disclose the identity of a public official who has made a protected disclosure

Recommendation 9

Section 20 of the *Protected Disclosures Act 1994* be amended to include payback complaints made against a person in reprisal for their having made, or intending to make, a protected disclosure.

Recommendation 10

The Committee recommends that there should be consistency between the *Police Service Act 1990* and the *Protected Disclosures Act 1994,* so that the reverse onus of proof would apply in respect of allegations made under the *Police Service Act* which also would be able to be categorised as protected disclosures in terms of the *Protected Disclosures Act.*

Recommendation 11

That the merits of a false claims statutory scheme for New South Wales incorporating features of the United States Federal False Claims Act be examined by the proposed Protected Disclosures Unit in consultation with the Steering Committee.

Recommendation 12

The *Protected Disclosures Act 1994* should be amended to clarify that the protections provided under sections 20 and 21 of the Act extend to correctional officers, employed by the Department of Corrective Services, who initiate the making of a disclosure notwithstanding the fact that they are under a specific requirement, provided for by regulation, to disclose misconduct.

APPENDIX 1

MINUTES

Meeting held 6.05pm, Wednesday 9 August 2000
Waratah Room, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P Breen MLC
Mrs Grusovin MP	Hon J Gardiner MLC
Mr Kerr MP	Hon J. Hatzistergos MLC

Apologies: Mr Smith MP

Also in attendance: Ms H Minnican (Committee Director) and Ms H Parker (Committee Officer)
. . .

General Business
. . .

b) Late correspondence was circulated to Members: Minister for Police dated 31 July 2000, Deputy Ombudsman dated 26 July 2000 and Ms Carol O'Donnell dated 10 July 2000, all pertaining to the second review of the *Protected Disclosures Act 1994*.

c) The draft report on the review of the *Protected Disclosures Act* was distributed to Members in preparation for deliberations at the next Committee meeting. The Secretariat was directed to draft an additional paragraph to be inserted in section 1.2 dealing with the subpoena powers which the Committee can exercise.
. . .

The meeting closed at 6.25 pm.

MINUTES

Meeting held 6.30pm, Wednesday 24 May 2000
Room 1043, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon J. Gardiner MLC
Mrs Grusovin MP	Hon J. Hatzistergos MLC
Mr Kerr MP	
Mr Smith MP	

Apologies: Hon P. Breen MLC

Also in attendance: Ms H Minnican (Committee Director), Ms T van den Bosch (Research Officer) and Ms H Parker (Committee Officer)
. . .

Business Arising from the Minutes
. . .

The Director briefed the Committee on progress regarding the review of the Protected Disclosures Act.

The Committee noted correspondence from:

I. the Acting Ombudsman, dated 23 May 2000, concerning proposals put in evidence during the Protected Disclosures Act review.

II. the Minister for Corrective Services, dated 17 May 2000, concerning the protections available to correctional officers who make protected disclosures.

Correspondence received
. . .

Item 3 Letters from the Minister for Police, dated 28 April 2000, forwarded as cover letters for the Police Service submissions to the Protected Disclosures Act Review were noted.

Item 4 THE COMMITTEE NOTED RECEIPT OF CORRESPONDENCE FROM THE COMMISSIONER OF THE ICAC, DATED 17 MAY 2000, IN RESPONSE TO SEVERAL PROPOSALS ARISING FROM EVIDENCE DURING THE REVIEW.
. . .

The meeting closed at 7.05 pm sine die.

MINUTES

Meeting held 10.00am, Tuesday 18 April 2000
Waratah Room, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mr Lynch MP	Hon P. Breen MLC
Mrs Grusovin MP	Hon J. Gardiner MLC

Mr Kerr MP Hon J. Hatzistergos MLC
Mr Smith MP

Also in attendance: Ms H Minnican, Ms T van den Bosch and Ms H Parker

PUBLIC HEARING

The Chairman opened the public hearing at 10.05 am.

Cynthia Kardell, President, Whistleblowers Australia Inc (NSW Branch), affirmed and acknowledged receipt of summons. Ms Kardell tabled a submission and addressed the Committee. The Chairman questioned Ms Kardell, followed by other Members of the Committee. Questioning concluded the witness withdrew.

The Committee took a short adjournment at 11.18 am.
The public hearing resumed at 11.23 am.

Chief Inspector Glynnis Lapham, Internal Witness Support Unit, NSW Police Service, took the oath, acknowledged receipt of summons and tabled a submission.
Chief Inspector Lapham made an opening statement and then answered questions. Questioning concluded the witness withdrew.

The public hearing concluded at 12.20 pm.

DELIBERATIVE SESSION

The Committee commenced in deliberative session at 12.25 pm.

1. Confirmation of minutes

Confirmation of the minutes of the meeting held on 28 March 2000, moved by Mr Hatzistergos, seconded Mrs Grusovin.

. . .

3. Protected Disclosures Review

The Director relayed advice received from the Internal Audit Bureau and the Office of the Director of Public Prosecutions in response to correspondence from the Committee.

The Committee tabled submissions to the review by the Inspector of the PIC, the Chair of the Protected Disclosures Act Implementation Steering Committee, and the Premier's Department.

The Committee noted receipt of the following letters relating to the review:

i. Letter from the Acting Ombudsman, dated 3 April 2000, providing information on several topics raised at the last public hearing.

ii. Letter from the Director General, Department of Local Government, dated 10 April 2000, providing statistical information in relation to the review.

iii. Letter from the Director-General, Premier's Department, dated 3 April 2000, concerning the appearance of departmental representatives at the public hearing scheduled for 18 April.

iv. Letter from the Assistant Commissioner of the ICAC, dated 17 April 2000, providing further information on evidence given at the first public hearing for the review.

Resolved on the motion of Mrs Grusovin, seconded Mr Smith, that:

a) the Committee seek information from the Minister for Corrective Services concerning the application of the Act to correctional officers employed by the Department of Corrective Service who are required by regulation to report misconduct by other correctional officers to a more senior officer;

b) the Committee seek comment from the Minister for Police, investigating authorities and other relevant agencies as to whether the reversal of onus provided for in the *Protected Disclosures Act*, where proceedings are taken alleging that detrimental action has occurred over the making of a protected disclosure, should also apply in the same context under the *Police Service Act*;

c) the Committee seek advice from the investigating authorities and relevant interested parties on the other proposals contained in the Police Service submission tabled by Chief Inspector Lapham, specifically,

- that s.20 of the *Protected Disclosures Act* be brought into conformity with s.206 of the *Police Service Act* by widening the definition of detrimental action to include the making of so-called payback complaints, and
- that there should be wider scope for persons who have made protected disclosures to have their identities protected from publication in the media during consequential legal proceedings.

d) that the Committee refer to the correspondence from the Director-General of the Premier's Department, dated 3 April 2000, in its report on the review and include a statement that it considers it to be essential to the Committee inquiry process that public officials should appear before Parliamentary Committees when requested to do so.

. . .

The meeting adjourned at 12.45 pm sine die.

MINUTES

Meeting held 10.00am, Tuesday 28 March 2000

Jubilee Room, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mrs Grusovin (Vice-Chairperson)	Mr Breen
Mr Lynch (Chairperson)	Mr Hatzistergos
Mr Smith	

Apologies: Ms Gardiner

Also in attendance: Ms Helen Minnican, Ms Hilary Parker.

PUBLIC HEARING

Mr Christopher Charles Wheeler, Acting Ombudsman, 580 George Street, Sydney, affirmed and acknowledged receipt of summons. Mr Wheeler tabled the submission from the Office of the Ombudsman.

The Acting Ombudsman made an opening statement.

The Chairman questioned the witness, followed by other Members of the Committee.

The Acting Ombudsman tabled: Review of Internal Reporting Systems, Issues Paper on public officials making protected disclosures to their own CEO concerning another authority, and Paper on the Protected Disclosures Unit. Mr Wheeler also tabled working papers on the review of internal reporting systems to Committee Members only.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

Mr John Gerard Feneley, Assistant Commissioner, Independent Commission Against Corruption, Cnr Cleveland and George Streets, Redfern, took the oath and acknowledged receipt of summons. Mr Feneley tabled the submission from the Independent Commission Against Corruption.

The Assistant Commissioner made an opening statement.

The Chairman questioned the witness, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

Mr Andrew Peter Livingstone Naylor, Solicitor, Police Integrity Commission, took the oath and acknowledged receipt of summons.

Mr Naylor tabled submissions from the Police Integrity Commission dated 1 February 2000 and 27 March 2000.

The Chairman questioned the witness, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

The Committee adjourned at 12.30pm and resumed at 1.35pm

Mr Robert John Sendt, Auditor-General, Audit Office of New South Wales, Level 11, 234 Sussex Street, Sydney affirmed and acknowledged receipt of summons. Mr Thomas Bela Jambrich, Assistant Auditor-General (Performance Audit), Audit Office of New South Wales, Level 11, 234 Sussex Street, Sydney, took the oath and acknowledged receipt of summons.

The Auditor-General tabled a submission and made an opening statement.

The Chairman questioned the witnesses, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew.

Mr Garry Payne, Director- General, Department of Local Government, Rickard Street, Bankstown, took the oath and acknowledged receipt of summons. Mr Fausto Sut, Manager, Investigation and Review Section, Department of Local Government, Rickard Street, Bankstown, took the oath and acknowledged receipt of summons.

The Director-General tabled a submission and made an opening statement.

The Chairman questioned the witnesses, followed by other Members of the Committee.

Mr Payne tabled: Self assessment project for general managers on protected disclosures, and correspondence relating to the internal reporting system for protected disclosures.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew.

The public hearing concluded at 3.00pm

DELIBERATIVE SESSION

Mr Smith withdrew from the meeting. The meeting commenced at 3.05pm.

. . .

Item 3 - Protected Disclosures Review

Resolved on the motion of Mr Breen, seconded Mrs Grusovin, to take evidence on 18 April 2000 from the following witnesses: Chief Inspector Glynnis Lapham, NSW Police Service, and representatives of Premier's Department and Whistleblowers Australia.

Further resolved on the motion of Mr Breen, seconded Mrs Grusovin, to seek advice from the Director of Public Prosecutions on the number of prosecutions initiated for offences under s.20 of the Act (ie detrimental action), and the Internal Audit Bureau on any ongoing problems with the Act, in particular, in relation to contractors wishing to make protected disclosures to the Bureau.

The deliberative session concluded at 3.10pm, *sine die.*

MINUTES

Meeting held 11.00am, Thursday 25 November 1999,
Room 1043, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mrs Grusovin (Vice-Chairperson)	Ms Gardiner
Mr Kerr	Mr Hatzistergos
Mr Lynch (Chairperson)	
Mr Smith	

Apologies: Mr Breen

Also in attendance: Ms Helen Minnican, Ms Tanya Bosch, Ms Hilary Parker.

1. Minutes of the meetings held on 3 and 5 November 1999 and 22 September 1999, as amended, confirmed on the motion of Mr Smith, seconded Mrs Grusovin.

2. *Business arising from the minutes*

   . . .

   Protected Disclosures Review

   Resolved on the motion of Mrs Grusovin, seconded Mr Smith that:

   i) the Chairman write to the Inspector advising him that the Committee does not require him to respond to the table of recommendations and that it will make further enquiries, if necessary, concerning the information he has provided.

   ii) the Secretariat collate responses from all agencies after the due date and provide the Committee with a summary and analysis (to be circulated with a review of legislative amendments since the last report and a briefing paper on developments in whistleblower schemes in other jurisdictions).

. . .

The meeting concluded at 11.15am, *sine die.*

MINUTES

Meeting held 1.30pm, Wednesday 3 November 1999,
Room 814/5, Parliament House

MEMBERS PRESENT

Legislative Assembly	Legislative Council
Mrs Grusovin (Vice-Chairperson)	Mr Breen
Mr Kerr	Ms Gardiner
Mr Lynch (Chairperson)	Mr Hatzistergos

Apologies: Mr Smith

Also in attendance: Ms Helen Minnican, Ms Tanya Bosch, Ms Hilary Parker.
. . .

DELIBERATIVE SESSION

3. Minutes of the meeting held 22 September 1999 confirmed on the motion of Mrs Grusovin, seconded Mr Breen.

. . .

4. General Business

Protected Disclosures Review

The Committee discussed the message received by the Legislative Assembly from the Legislative Council on 27 October 1999 stating that the Council has agreed to refer the review of the Protected Disclosures Act 1999 to the Ombudsman and PIC Committee.

Subject to the Legislative Assembly agreeing to the message from the Legislative Council, the Committee **resolved** on the motion of Mr Kerr, seconded Mrs Grusovin to meet with relevant officers from the following agencies:

i) Office of the Auditor-General (investigative authority under the Act)
ii) Office of the Ombudsman (investigative authority under the Act)
iii) Independent Commission Against Corruption (investigative authority under the Act)
iv) the Police Integrity Commission (investigative authority under the Act)
v) the PIC Inspector (investigative authority under the Act)
iv) Premier's Department (Premier has ministerial responsibility for administering the *Protected Disclosures Act 1994*)

to discuss the review.

The Secretariat undertook to prepare:
a) a review of legislative amendments since the tabling of the Committee's last report; and

b) a briefing paper on developments in whistleblower schemes in other jurisdictions.

. . .

The meeting concluded at 3.30pm, *sine die.*

APPENDIX 2 - LIST OF SUBMISSIONS

1. NSW Premier's Department
2. Office of the Ombudsman
3. The Audit Office
4. Independent Commission Against Corruption
5. Department of Local Government
6. Police Integrity Commission
7. Inspector of the Police Integrity Commission
8. Whistleblowers Australia Inc. (NSW Branch)

9a. NSW Police Service