# REPORT OF THE

# COMMITTEE ON THE

# OFFICE OF THE OMBUDSMAN AND THE

# POLICE INTEGRITY COMMISSION

*REVIEW OF THE PROTECTED DISCLOSURES ACT 1994*

SEPTEMBER 1996
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Mr A P Stewart MP

### *Legislative Council*

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The Hon E B Nile MLC
The Hon P J Staunton MLC (Vice Chairman)

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## FUNCTIONS AND POWERS 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 1974* 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.

This 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 1992*, assented to on 19 May 1992, amended the *Ombudsman Act 1974* 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 1974* 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."

"Public sympathy and concern for the plight of whistleblowers has led many people in Australia to propose the creation of special schemes to recognise and protect whistleblowers. But this option in turn raises other complex issues. It is not possible to extend protection to whistleblowers without considering as well some competing interests. There are, for example, the interests of colleagues, who can be defamed by a whistleblowing allegation; and the interests of employers, who may legitimately wish to protect established lines of authority, and morale and harmony within the organisation. From this interplay of competing interests - of the whistleblower, colleagues, the organisation, and the community - there arise difficult practical legal issues in defining the conditions for whistleblower protection..."[1]

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"This object clause, and the other provisions of the Act, clearly indicate that persons who make protected disclosures should be protected from reprisal or other liability that arises out of their disclosure. In doing so the Act is clearly a step in the right direction and, as a statement of Legislative intention, the Act has been a success.

However, there is still some distance to go before the desired destination is reached. That destination is a legislative and administrative framework, along with an attitude amongst at least the senior ranks of the public sector, which ensures that "whistleblowing" is encouraged, disclosures are properly and effectively dealt with, and "whistleblowers" are protected from direct reprisals or other detrimental action which may be more indirect (for example prejudice in promotional or other employment related opportunities)."[2]

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1. John McMillan, "Whistleblowing" in ed. Noel Preston, Ethics for the Public Sector - Education and Training, Federation Press, Sydney 1994, p.166.

2. NSW Ombudsman, Submission to the Joint Parliamentary Committee, Review of the Protected Disclosures Act 1994, June 1996.

## CHAIRMAN'S FOREWORD

This report is the first to be presented by a Parliamentary Committee under section 32 of the *Protected Disclosures Act 1994* which provides for ongoing review of the Act on a biannual basis. The Act does not specify any terms of reference for the review and the resultant scope of the Committee's inquiry was wide-ranging. The review involved examining anomalies or inconsistencies within the Act, jurisdictional and procedural issues, and difficulties experienced by parties affected by the Act.

On behalf of the Committee I would like to thank the witnesses who appeared before the Committee and those groups and individuals who made submissions to the review. The submissions fell into two fairly distinct categories. One category comprised the investigating authorities and government departments which, in the most part, were forensic in their approach, looking at the scope of the Act, its interpretation and implementation. The other category presented a "whistleblower focus", centering on the protection available to the individual and the question of whether the Act perhaps confines, directs or controls dissent.

Consideration of both perspectives was essential to a balanced review of the operation of the Act. The recommendations contained in the Committee's report are aimed at improving the operation of the Act and remedying those areas of confusion identified during the review. The key recommendations in the report propose the creation of a unit within the Office of the Ombudsman which would monitor the implementation of the Act within the public sector and provide guidance to users of the legislation. The Committee also made recommendations designed to impress upon senior management within public authorities the importance of a protected disclosures scheme to the effective management of their respective organisations.

The bipartisan approach adopted by Committee Members during the review resulted in a consensus report. The Committee fully endorsed the proposals in the report as a strategy intended to increase understanding of the Act, and promote its use as a mechanism through which misconduct in the public sector can be revealed and investigated.

I would particularly like to express my thanks to Committee Members for their concentrated efforts throughout the public hearings and their co-operation in the deliberative meetings involved in drawing together the report.

Special thanks must go to the Committee Secretariat. Project Officer, Ms Helen Minnican did an enormous amount of work researching the issues under investigation, liasing with witnesses, collating evidence and preparing the draft report. She was ably assisted in this work by Assistant Committee Officer, Ms Natasha O'Connor. Invaluable advice was given during the process review by Ms Ronda Miller, Clerk-Assistant (Committees).

Bryce Gaudry MP
**Chairman**

In undertaking this review of the *Protected Disclosures Act 1994* the Committee endeavoured to put forward proposals which would increase the effectiveness of the Act, and promote the achievement of the objectives underpinning it. In doing so, the Committee concluded that there was a need to consider and balance the varying interests of those persons affected by the Act.

The primary objective of the Act is to facilitate the exposure of maladministration, corrupt conduct and serious and substantial waste of public money in the public sector. In its present form the Act creates a scheme for achieving this objective by utilising existing investigative structures and providing protection from reprisals to persons who have made disclosures concerning these forms of misconduct.

Although submissions and evidence to the Committee revealed problems with the operation of particular provisions of the Act, including uncertainty about the definition of a number of terms, the Committee reached the overall conclusion that the present scheme for making and investigating disclosures is broadly appropriate. The Committee supports the present investigating authorities as constituting the bodies most suited to conduct investigations of disclosures because of their experience, expertise and independent status. Therefore, the proposals contained in this report are designed to refine, rather than radically change, the mechanisms available for the investigation of disclosures, and generally to promote confidence in the scheme.

Some confusion about the effect and operation of the Act was evident among both public officials making disclosures, and authorities conducting investigations. The results of surveys undertaken by the ICAC among both these groups shortly after the commencement of the Act confirmed this impression. In the case of the Department of Local Government, the survey results prompted several initiatives aimed at further educating local government employees and department staff about the procedures for making and investigating disclosures, and the protections available under the Act. The Committee also noted educational initiatives undertaken by the investigating authorities such as, for example, the production and distribution of guidelines to the Act.

In the Committee's view, improvement in the general awareness and understanding of the Act within the public sector will, to a large extent, rely on the efforts of the investigating authorities and senior management of public authorities. Consequently, the Committee has made several recommendations aimed at ensuring that members of the Chief Executive Service and Senior Executive Service fully appreciate the relevance of this Act to the effective management of their organisations. These officers should be encouraged to promote a corporate environment supportive of the Act and its objectives. The report contains recommendations relating to the inclusion of specific material on protected disclosures in the codes of conduct and related administrative policies issued by public authorities. The Committee's objective in framing this proposal was to create a management environment in which internal reporting systems and support structures provide mechanisms for the proper

investigation of protected disclosures.

To guarantee that the Act is observed within the public sector and that guidance is available on its provisions, the Committee has recommended the establishment of a central unit called the Protected Disclosures Unit (PDU). The functions of the proposed Unit include monitoring the investigation of disclosures by public authorities and providing advice to public officials wishing to make disclosures. The Committee has recommended that the proposed PDU should be located within the Office of the Ombudsman and funded to the extent necessary to secure its viable operation.

Other major recommendations concerning the protection provided by the Act acknowledge the particular difficulties confronting persons who make disclosures and the need to increase confidence in these protective provisions.

Several jurisdictional questions were considered by the Committee and recommendations have been made on the application of the Act to local government, police officers, contractors and elected representatives. The Committee, however, was not convinced that in all cases it was appropriate to seek to expand the coverage of the legislation to areas that were not originally envisaged as coming within the scope of the Act.

This report concentrates on the substantive policy issues arising from the review which the Committee regards as matters of priority. There were also a number of questions of a technical legal nature relating to the interpretation of the Act, originally raised in submissions to the Committee, on which evidence was not received. It was evident that the issues raised were open to various interpretations and needed to be resolved. In these circumstances, the Committee decided to forward relevant sections of the Ombudsman's submission to the Premier, as the Minister responsible for administering the Act, for his consideration and response to the Committee (see Recommendation 24 & Appendix 1 for a full outline of the issues).

Finally, the Committee's report is the first step in the ongoing review of the Act. It is the view of the Committee that, for maximum benefit to be gained from this process, the Parliamentary committee reviewing the Act requires access to a comprehensive body of quantitative information. The latter would provide an indication of the extent to which the Act has been understood and utilised within the public sector. To this end, several recommendations have been made relating to the collection by public authorities and investigating authorities of statistical data on protected disclosures. The Committee has proposed that the Protected Disclosures Unit should act as a central coordinator for the collation of such statistics and that it should publish an annual report on the operation of the Act. With continued oversight and review the Committee is hopeful that the objective of the Act, to facilitate the disclosure of misconduct, will be more strongly supported and adopted throughout the public sector.

# CHAPTER 1 INTRODUCTION - CONDUCT OF INQUIRY

## 1.1 Announcement and call for submissions

***Legislation*** - The Protected Disclosures Act 1994 was assented to on 18 December, 1994 and commenced on 1 March, 1995. The object of the Act is to encourage and facilitate disclosures, 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;
b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and
c) providing for those disclosures to be properly investigated and dealt with (s.3)

Section 32 provides for a review of the Act by a Parliamentary Joint Committee as soon as possible twelve months after the date of assent and at two yearly periods afterwards. The first review of the Act was referred to the Committee on the Office of the Ombudsman and the Police Integrity Commission by both Houses of Parliament. (see Legislative Assembly Votes and Proceedings 16/4/96 and Legislative Council Minutes 18/4/96)

***Call for Submissions*** - The review was advertised in the major metropolitan newspapers on 4 May, 1996. The closing date for submissions was 31 May, 1996 but the Committee accepted several submissions after this date. In addition to publicly advertising for submissions, the Committee also wrote to each Minister requesting that they draw the review to the attention of the departments and authorities within their portfolios. The request indicated that the Committee was seeking to ascertain the full extent to which the Act is understood and utilised within Government bodies.

## 1.2 Submissions received

In total the Committee received twenty-three submissions, a list of which can be found at Appendix 2. Key submissions were received from the Office of the Ombudsman, the Independent Commission Against Corruption and the NSW Audit Office. As a result of the Committee's correspondence with the Ministers a number of submissions and responses were received from departments and agencies with direct experience of the Act. The Committee later took evidence from senior officials within certain of these departments who had identified specific issues of importance to the review, for example, the Community Services Commission and the Department of Local Government.

Drawing on the submissions received, the Committee compiled a summary of issues which was distributed to all individuals who were to give evidence to the Committee, as a means of assisting them to prepare for public hearings. The summary, which included an annexure of issues identified by the Office of the Ombudsman, was intended as a prepatory document and not a definitive list of the issues to be examined by the Committee. It was tabled during the

public hearings and witnesses were invited by the Committee to formally respond to it. (See Appendix 3 for the issues summary and the responses supplied).

***Scope of the review*** - Although the Protected Disclosures Act does not specify terms of reference or objectives for the review, the Joint Committee considered that it should examine:

- any unintended effects of the legislation;
- unclear provisions and definitions;
- anomalies or inconsistencies within the Act;
- difficulties encountered with the legislation by the three investigating authorities under the Act i.e. the Auditor-General, the ICAC and the Ombudsman;
- the use made of the protected disclosure system to date and its effectiveness (including an examination of statistics and outcomes); and
- the effectiveness of the referral system.

These subject areas reflect the Committee's focus on procedural and jurisdictional issues, as distinct from actual disclosures made under the Act, and serves as a guide to the general direction taken in the Review. Details of particular disclosures were examined by the Committee only where they identified or illustrated particular procedural or jurisdictional issues.

## 1.3 Public Hearings

The Committee held public hearings for the review from 2nd until 4th July, 1996 and heard evidence from the following officials, individuals, and authors of key submissions:

***Tuesday 2nd July***

| | |
|---|---|
| John Hatton | |
| Dr William De Maria | Department of Social Work and Social Policy<br>University of Queensland |
| Cynthia Kardell<br>Robert May<br>Graham Wilson | Representatives of the NSW Branch of<br>Whistleblowers Australia Inc |
| Dr Simon Longstaff<br>Executive Director | St James Ethics Centre |
| Sue Thompson<br>Principal Policy Analyst<br>Julie Heysmand<br>Senior Policy Analyst | NSW Police Ministry |

| | |
|---|---|
| Chief Inspector Caroline Smith<br>Commander<br>Internal Witness Support Unit | NSW Police Service |

***Wednesday 3rd July***

| | |
|---|---|
| David Bennett QC<br>President | Bar Association of NSW |
| Tim Rogers<br>Acting Director-General | Department of Local Government |
| Fausto Sut, Manager<br>Janet Ryan<br>Senior Investigation Officer | Investigations and Review Branch<br>Department of Local Government |
| Councillor Peter Woods<br>President<br>David Clark, Legal Officer | Local Government and Shires Association of NSW |
| William Middleton<br>Managing Director<br>Stephen Vidovic<br>Director of Audit | Internal Audit Bureau |

***Thursday 4th July***

| | |
|---|---|
| Anthony Harris<br>Auditor-General of NSW<br>Dennis Streater<br>Director of Audit | NSW Audit Office |
| Irene Moss, Ombudsman<br>Chris Wheeler<br>Deputy Ombudsman<br>Kimber Swan<br>Senior Investigation Officer (Legal) | Office of the Ombudsman |
| Roger West, Commissioner<br>Joanne Quilty<br>Manager, Policy Unit | Community Services Commission |
| Barry O'Keefe AM QC<br>Commissioner | The Independent Commission Against Corruption |

## PART A - INVESTIGATION AUTHORITIES

# CHAPTER 2 - A PROTECTED DISCLOSURES UNIT (PDU)

## 2.1 THE CASE FOR A PUBLIC INTEREST DISCLOSURE AGENCY (PIDA )

The suggestion that a Public Interest Disclosure Agency (PIDA) should be created under legislation was first put to the Committee in a submission from the NSW Branch of Whistleblowers Australia Inc. The submission recommended a PIDA as a means of developing "a positive and effective public profile for whistleblowing". The PIDA would have "the clear unequivocal objective of protecting the whistleblower from reprisals" and in the view of Whistleblowers Australia would guarantee that the investigative process remained impartial and would be the primary function of the investigative authority.

The group claimed that this "one-stop shop"model, being external to the investigating authorities, would create "a more constructive use of resources in properly investigating complaints". It would overcome the problem they perceived of investigating authorities improperly performing their functions because of insufficient independence and detachment from the organisations under investigation.

Whistleblowers Australia suggested the following objectives and functions for the proposed PIDA:

> *"2. In exercising its functions the encouragement and facilitation of public interest disclosures and the protection and support of whistleblowing should be paramount.*
>
> *3. The PIDA could have the following functions (this is not exhaustive):*
>
> *(a) to accept for referral any disclosure made under this Act;*
>
> *(b) to instruct, advise and assist the person making the disclosure consistent with the provisions of this and any other Act;*
>
> *(c) to assess the nature and content of the disclosure against legislative criteria to determine whether it satisfies the applicable requirements for referral for investigation to either:*
>
> *(i) the Commission,*
>
> *(ii) the Ombudsman,*
>
> *(iii) the Auditor-General,*
>
> *(iv) or the Minister.*
>
> *(d) to undertake where required by the informant to refer the disclosure to the appropriate authority without disclosure of information that might identify or tend to identify the person making the protected*

*disclosure;*

*(e) to communicate to the informant all or any correspondence or information received on their behalf;*

*(f) to monitor the investigative process undertaken by the authority;*

*(g) to provide a counselling and risk management service;*

*(h) to obtain prior written consent from the informant to any decision or course of action taken on their behalf by the Agency;*

*(I) to instruct, advise and assist any public authority, public official or other person in relation to the protection of persons from reprisals under this Act whilst the complaint is being processed.*

*(j) to make representations to the Minister or his representative in the event that public safety and or resources are threatened.*

*(k) to make representations to the relevant Joint Parliamentary Committees as to the efficacy and propriety of decisions taken by the Authorities in relation to the handling of complaints."*

The PIDA model was supported by Dr De Maria who claimed in his opening statement to the Committee that:

> ***Dr De Maria:*** *" ... To me, one of the failures of your Act is the fact that you do not have an independent authority. It seems to me that you need a new model. It is all very well to put the administration of this Act in the hands of organisations, which up until now do not seem to have a corruption taint about them, such as ICAC and the Auditor General and the Ombudsman. The worry, to me, about putting the Act in the hands of existing organisations is they have been set up under different models . . .*
>
> *The most powerful and exciting example of an independent authority is enshrined in the Commission of the Government report which has come out of Western Australia just recently. The interesting thing about this is that it provides for awesome powers for an independent authority. I suspect politics will overtake that. At the moment there is a proposal for an independent whistleblower authority with awesome powers, Royal Commission type powers. An example is that it will have powers to take over police investigations."*[3]

In view of his advocacy of a new independent agency the Chairman raised with Dr De Maria the original objective of the Act, that is to enhance and augment established procedures for

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[3] For details of the Commission on Government's (COG) recommendation see Commission on Government Western Australia, Report No.2 - Part 1, December 1995 pp.6-15 and 128-199. The COG recommended the establishment of a Commission for the Investigation, Exposure and Prevention of Improper Conduct (CIEPIC) under its own act which would be responsible for the investigation, exposure and prevention of corrupt conduct. COG also recommended the introduction of a Public Interest Disclosures Act. The new Commission would contain a Public Interest Disclosures Advice Unit designed to provide advice and counselling to any person regarding the Public Interest Disclosures Act. It was further recommended that the CIEPIC should receive disclosures, conduct investigations, and monitor and assist public sector agencies in their efforts to devise internal disclosure procedures.

making disclosures.

> ***Chairman:*** *"This legislation was initially brought in, in a context of not expanding the number of authorities involved, and you very strongly advocate that a separate authority be set up. Mr Hatton, in his previous submission, supported the concept of the Ombudsman's Act being amended to have a particular authority set up within its ambit. You also talked about the Western Australian example of an extremely powerful body with overriding powers of investigation.*
>
> *What would you see as the most effective system in terms of a set up, to protect whistleblowers, to facilitate substantial change in culture, and what costs would you see associated with such a body?*
>
> ***Dr de Maria:*** *To answer the last question first, it would be costly. To answer the first question, I would defer to the Western Australian model, powerful authority with take over powers. The problem with that, of course, is that once these authorities get the powers, they can become too powerful and yes, certainly that is a dark side and you would have to design some sort of curtailment of that power, which would mean there would be constant review of operations, not just policy, but constant parliamentary review, at the operational level of the authority.*
>
> *I would put a sunset clause in: let the independent authority run for two years as a demonstration project, to see whether a powerful authority does capture the trust of the potential whistleblower community. If it does, it can probably go out of business as it is run into the Ombudsman's area, after it has been demonstrated."*

The Deputy Ombudsman referred to four basic models for a PIDA during the public hearings and elaborated upon these in the Ombudsman's supplementary submission.

> ***"Possible Models for a PIDA***
> Possible models for a PIDA could include:
> (a) Model 1 - the present system with, in effect, 3 separate agencies (ie the Auditor-General, the ICAC and the Ombudsman);
> (b) Model 2 - a single PIDA which has primary responsibility either for all disclosures made or all disclosures made external to public authorities - a one stop shop;
> (c) Model 3 - the PIDA is the single channel through which all protected disclosures external to authorities are made. The PIDA assesses the disclosure to determine whether it is protected (and if necessary seeks further information from the "whistleblower"), refers the disclosure to the appropriate body or bodies for investigation or other action, co-ordinates and monitors agency responses to disclosures, directly investigates where necessary in the public interest, monitors agency treatment of "whistleblowers" and reports to Parliament on an annual basis;
> (d) Model 4 - all public authorities and officials are obliged, by statute, to notify the PIDA of all protected disclosures received and the action they intend to take. The PIDA assesses the disclosures to determine whether they are protected, co-ordinates between agencies to ensure proper co-ordination and

prevent duplication, monitors agency responses to disclosures, directly investigates or refers matters to the Auditor-General or the ICAC for action where necessary, monitors agency treatment of "whistleblowers", and reports to Parliament on an annual basis.

***Functions of PIDA under Models 3 and 4***

The functions of the PIDA in models 3 and 4, whether it be the first port of call or the compulsory notified agency, would be largely the same. Essential tasks which would be undertaken include:

1. Receipt and registration of the disclosure.
2. Assessing the disclosure - this may involve interviews with "whistleblower" or preliminary inquiries to the "whistleblower".
3. Co-ordination with the body or bodies from whom and/or to whom the disclosure was referred about the progress and disposition of the investigation of the disclosure. This role will differ between Models 3 and 4. The co-ordination function would involve the PIDA co-ordinating and preventing duplication where "whistleblowers" go to more than one body in Model 4 or where the issues affect more than one body in Model 3.
4. Monitoring the progress of investigations by the body or bodies to whom the disclosure was made or is referred. One option here is the "monitored investigation" which is a "half-way house" between PIDA doing the investigation itself and oversighting it.
5. The PIDA could also decide to directly investigate the disclosure where this would be in the public interest or refer the matter to the ICAC or the Auditor-General for their direct involvement if appropriate.
6. Following any direct investigation or preliminary inquiries there would have to be communication with "whistleblower" and the body about whom the disclosure was made. This would involve consultation with the body about whom the disclosure was made concerning a draft statement of facts and proposed findings and recommendations. Further consultation would also have to be undertaken with respect to the responsible Minister.
7. Education, support and advice. The PIDA would also have the on-going responsibility for the following:
   (a) advice to "whistleblowers" and agencies;
   (b) educational-workshops, seminars, conferences, publicity;
   (c) auditing internal reporting procedures;
   (d) centrally co-ordinating information of relevance for the next review of the Act - due in 2 years time;
   (e) provision of support and referral to appropriate support organisations. This role would be akin to a customer service manager/client manager. This view represents a change to the position outlined by the Ombudsman in her evidence to the Joint Parliamentary Committee. However, following the Ombudsman's discussions with her staff who have been dealing with protected disclosures, it has become apparent that there is a need for a member of PIDA to fulfil a

role similar to that of support person and adviser. This would not be a departure from our traditional role as umpire, rather would provide the complainant with advice and non-partisan support.

8. Reporting to Parliament.

The work of the PIDA under Models 3 and 4 could end up being very similar to the work which the Office of the Ombudsman performs in its oversight role of Police Service investigations under the *Police Service Act*. Further, the notion of a specialised agency within the Office of the Ombudsman would be consistent with the management of the Office which has separate Police and General Teams and specialised units in the areas of Freedom of Information, Witness Protection, Aboriginal Complaints and Prisons."

In response to a question on notice the Ombudsman provided an estimate of costings for the various PIDA options. The cost of a separate PIDA was not estimated because it was regarded by the Office as an unrealistic and impractical option involving prohibitive costs. A figure of $282,000 was cited as the estimated cost of either Model 3 or 4.

Comments by the Deputy Ombudsman reinforced the Committee's assessment that the cost of creating and maintaining a new independent investigative and advisory agency, or PIDA, would not be viable.

> ***Mr Wheeler:*** *"If there was one agency with absolute responsibility, it would do the lot. I think that option would be huge.*
>
> ***Chairman:*** *A continuous Royal Commission.*
>
> ***Mr Wheeler:*** *Basically."*

According to the ICAC Commissioner, the establishment of a separate agency also was not justified in terms of workload. He claimed:

> ***Mr O'Keefe:*** *. . .Can I then turn to the number of matters that fall within protected disclosures legislation as the figures that we have been able to glean tell us; 177 for us, 39 for the Ombudsman and fewer than 10 for the Auditor-General - under 300 in a 15-month period if you take the whole of the period of the Act. That is fewer than 25 a month. Now to create a separate bureaucracy for that is a very cost-intensive activity and it is for those reasons that, in our submission in reply, we do not adopt that view and in fact would counsel against it..."*

Other witnesses to the Committee did not recognise any need for a new, separate protected disclosures agency. The Acting-Director General of the Department of Local Government felt that members of the public easily identified the appropriate avenues for disclosure through the Ombudsman, ICAC, Auditor-General and public authorities such as the Department of Local Government. Nor did he perceive a need, in the case of the Local Government Department, for an agency to assist persons making disclosures to obtain feedback on the handling of their disclosure.

***Chairman:*** *"Yesterday we heard some evidence where people felt that there ought to be one focusing authority, rather than a multiplicity, so that people have certainty and a point of entry into protected disclosure. What is your view of that? Obviously you are looking now at a fourth entity and the public are confronted by more, rather than less, authorities.*

***Mr Rogers:*** *The argument has been around for some time about how many investigative agencies do you have. The Ombudsman's powers have been extended into local government. As it has gone down the track, the ICAC came in with powers in local government. We have had powers in local government historically for quite some time.*

*In terms of the public looking for a point, then they often go to all three. I am not sure that the public has difficulty identifying where somebody has to go to make some complaint about its council. They complain to the Minister in great numbers. They complain to the Ombudsman and the ICAC.*

***Chairman:*** *We certainly got that, but what we also got were the complaints were like hitting a brick wall. There was not a bounce back of information or assistance in terms of those people. They felt they were not facilitated through the process and therefore sought a single entity that would give them more information, more assistance.*

***Mr Rogers:*** *In terms of the ones that we receive, the only ones that we would pass on, the complainant would certainly be told where the complaint had been passed. We do not have a jurisdictional issue if it is about the council. The options for us would be to say that this is a matter which you should first attempt to resolve with the council, and quite a lot of our issues come to us without necessarily having been back to the council. Quite a lot are referred back to the council, as are ones from the other two authorities, as far as I am aware and we, on occasions, pass to the ICAC, in which case the complainant would know it had gone to the ICAC and on fewer occasions we would advise people the matter is under investigation by the Ombudsman and we would refer the application there."*

The Auditor-General responded to the PIDA proposal by stating that instead of directing public officials to a particular body to make a disclosure, he would prefer an environment in which a public official could make a disclosure to any relevant public authority or investigating body and still receive protection. He discussed this view with the Chairman:

***Chairman:*** *"That might be a good point to pick up some of the concerns that have flowed through from public officials in the work place about the operation of the Act and their call for perhaps some central investigating agency, which had both the role of advice and investigation, rather than the more diffused situation that occurs at the moment. According to witnesses this has caused confusion as to where to go and perhaps confusion as to the operation of the Act, and they would see perhaps the setting up of a separate organisation. What are your views regarding that?*

***Mr Harris:*** *It is a rational option and one can understand its source. It probably goes a different way to the way that I might see protected disclosures going, which is to say that you can make a disclosure to anyone who has some relevance and so long as it meets some basic tests, like it is not manifestly incorrect and unreasonable, it is not vexatiously motivated, or it is not done with ill will, then it is protected. If an officer wishes to complain to the PEO, or to the Department of Health, or to their area of employment, or to the manager of the local hospital, or to the Ombudsman, or any other investigating agency, then that ought to be*

*protected.*

*So rather than seeking to channel complaints in a particular direction, to seek to provide an atmosphere where people who have a reasonable point to make, can make it without fear of suffering."*

The Ombudsman only saw a need for a PIDA if a system was introduced in which additional investigation authorities were created and disclosures could be made on a broad basis to any relevant and appropriate body. She argued that:

***Ms Moss**: ". . .However, in view of what has been discussed recently, I feel that there is an alternative and that alternative is that if the feeling is that disclosures are appropriate to be made to any relevant and appropriate body, then indeed if we are going to expand that list so anybody who is appropriate can be an investigating authority, we would feel that there should be set up along with that, a body that has been suggested, like PIDA, who would then monitor the responses to these disclosures.*

*It would make sure they would not be any duck shoving of disclosures between these bodies. It would monitor the treatment of whistleblowers, can intervene to investigate directly, or refer the matters directly to appropriate bodies, such as ICAC or the Auditor General and can recommend prosecution by the DPP, so we feel that if anyone who is appropriate can be an investigating authority, that can be made subject to another body, such as PIDA."*

## 2.2 VARIATIONS ON THE PIDA MODEL A PROTECTED DISCLOSURES UNIT (PDU)

The Committee examined several variations of the PIDA proposal during the review. Mr Hatton, for example, did not support the formation of a new agency, proposing instead that the independent oversight and investigative functions of a PIDA could be accommodated efficiently and at less cost if they were vested in a separate unit within the Office of the Ombudsman. He told the Committee:

***Mr Hatton:** "Whistleblowers Incorporated came forward with the idea that there must be a public interest disclosures agency, and I strongly agree. But do we set up another agency? I say no. I think it ought to be an arm of the Ombudsman's Office and I will talk about that later. Much time and money can be saved in that regard.*

*...*

*You will certainly run into trouble in terms of agencies seeking additional money from budgets whenever you expand this Act to include them as investigation agencies under the Act. If you set up a special arm of the Ombudsman's Office to deal with whistleblowers, that is going to save a lot of unnecessary investigation. It is going to involve mediation. It is going to mean that the whistleblower, in a safe and non-threatening environment, can get sound advice and support, counselling, and all the things that go with common sense and a logical approach to problem solving. "*

Mr Hatton saw the advisory role of a Protected Disclosures Unit (PDU) as one of its core functions:

***Mr Hatton:*** *"...So why do I emphasise the setting up of a public interest disclosure agency when we've already got all these other organisations? You are going to have a Police Integrity Commission; we've already ICAC; we've already the Ombudsman's Office; we've the Auditor General. Of course if we include the others in the Act, you have then got agencies to do with DOCS and you have the Local Government Department, and so on.*

*The establishment of a public interest disclosures agency is going to save an enormous amount of money, time and stress. It will ensure that the investigation is honest and on track. It will give the support and counselling to the whistleblower and the family. It will give legal advice. It will inform and advise both sides. It will maintain an on-going critical environment which tests the system. Remember that many employees are in isolated and small units. They need particular help, as much as those who are being punished by a large agency.*

*It will provide a safe environment. This is one of the key things that comes out of my investigations with Police. Police didn't know where to go. There was nowhere they could go. They knew Internal Affairs was a sham. They couldn't sit down in a room and talk to their union because the union had other issues and it may be in conflict with the union's aims. They need a place where they can go and talk to a person and know that that person is going to give them sound advice, counselling and assistance.*

*Imagine how many complaints will be headed off? How many complaints could be mediated? How much time could be saved at ICAC, Ombudsman, Local Government Department and all these other agencies if they could contact the Ombudsman's special agency, specialising in the complex issues, and get the advice. The advice is for both sides."*

In the following exchange with the Chairman, Mr Hatton emphasised that the establishment of a PDU within the Office of the Ombudsman was consistent with the original objectives of the Act which included the enhancement and augmentation of established procedures for making such disclosures.

***Chairman:*** *"Just flowing on, when the Act was constructed, it was done in a context of not expanding the investigative agencies. When the Act was put together and passed through the Parliament, it was within a context of not expanding agencies, not creating another agency specifically.*

***Mr Hatton:*** *Yes.*

***Chairman:*** *To a degree, you are accepting that and saying that the Ombudsman's Office should be the specific focus?*

***Mr Hatton:*** *Yes.*

***Chairman:*** *So that the whistleblower and the community know there is an independent discussion point that they can approach.*

***Mr Hatton:*** *Yes. I don't think it should be legislated to make it compulsory for these people to go to that arm of the Ombudsman's Office. But the fact that it is there and is widely known will save an enormous amount of time of the other agencies. The Ombudsman has already, in my view, built up certain skills in dealing with whistleblowers and has a pretty positive*

*record, in my view. Therefore, I am not suggesting a great change here.*

*I am suggesting, however, that perhaps the Ombudsman's budget might be enhanced to set up this special arm to deal with whistleblowing."*

When presented with Mr Hatton's proposal for the creation of a PDU within the Ombudsman's Office, the representatives of Whistleblowers Australia agreed that a protected disclosures unit would be an acceptable way of achieving the assistance they originally associated with a separate PIDA.

***Mr Lynch:*** *"In terms of the establishment of a separate agency, John Hatton suggested today making it part of the Ombudsman's Office. Another suggestion is that it be a separate body altogether. Do any of the three of you have a view on that?*

***Mr May:*** *I would certainly support it, because that is one of the things I have already mentioned, that I felt I had nowhere to go for advice. That is one of the things that lead me to Whistleblowers Australia.*

. . .

***Chairman:*** *This would be, what John Hatton was suggesting was a clearly defined cell, if I could put it that way, within the Ombudsman's Office which dealt directly with protected disclosures, which was firstly a sounding board, but then an advice area as well.*

***Mr Wilson:*** *I certainly would be happy with that. At the moment there is an amorphous mass out there. It is either your management, PEO, Premier's Department, Premier, your ministry, whatever it may be, and it is very hard to get a handle on which is the best approach to take, especially when you are under threat and everything is happening at once.*

. . .

***Mr May:*** *I would also support going for the Ombudsman as well. I believe they have the expertise and from a financial point of view, it is probably the best way to go. Setting up a separate organisation is probably too expensive.*

***Mr Fraser:*** *Ms Kardell, would you be happy with that?*

***Ms Kardell:*** *Whistleblowers took a vote at their last annual general meeting and it was the organisation's belief that there should be established a separate agency. We called it PIDA, so our platform is for a separate PIDA. We recognise there are financial constraints and we already have a number of investigatory bodies and I think, on balance, they can be made to work better than they presently do and the Ombudsman's Office does seem to be a reasonable place to put a PIDA, for some of the reasons that Mr May has said.*

*They have a reasonable track record. They also have a reasonably well developed service mentality and seem to be aware of the need to respond to people in particular ways, which I think is something that could be built upon, so whilst I cannot speak for the organisation, can I make this statement: we are for a PIDA as a group. My personal view is that the Ombudsman's Office, if that were practical for all other reasons, would be a practical place to put it for the purpose of a whistleblower, and it could provide all the sorts of things that are essential to making the system work."*

The proposal for a PDU with an advisory role, located in the Office of the Ombudsman, also received support from the President of the Local Government and Shires Association:

> ***Chairman:*** *"There have been submissions that have emphasised the need to set up a singular authority or at least a sounding board area so that the public and counsellors are quite aware where they may go to achieve some facilitation with their protected disclosure. It has been suggested that that might occur within the Ombudsman's Office, but for many people there is still a lack of understanding about how to proceed with the protected disclosure. Do you have any comment on that or any observation as to whether there are difficulties experienced by counsellors or council employees in making protected disclosures?*
>
> ***Mr Woods:*** *We would see no difficulty. We have been endeavouring to give some advice ourselves in that regard on the two occasions where it was sought, but to have an agency being able to give objective advice would seem to be reasonable if it is necessary. People need to have objective advice given to them. I suppose as the employee organisation for local government in the State we need to be in a position of being able to provide advice to the council in these circumstances, so it would seem to be that if there are individual employees who are seeking to take a matter which may be considered by the council itself, then it is probably most appropriate that we do not see a potential conflict situation with us giving advice to both parties because it may be we would be giving advice to overcome the difficulty from a detached position as far as the body corporate is concerned.*
>
> *Yes, so I would imagine the Ombudsman's Office would be appropriate. I think also, perhaps, the trade unions operating in the area need to be given appropriate briefings and so on so that if they are asked advice from their members they are able to provide such advice too."*

Essentially, the PDU proposal gives effect to a role already informally performed by the Office of the Ombudsman. Since the commencement of the Act the Office has been involved in providing advice and guidance to public authorities and officials about the implementation of appropriate internal reporting and investigation procedures. In consultation with the Audit Office and ICAC, the Ombudsman's Office drafted protected disclosure guidelines which were widely distributed throughout the public sector and local government. The Deputy Ombudsman described the nature of the Office's cooperative approach to the Committee:

> ***Mr Kinross:*** *"You laughed when I said that you are a coordinating authority in addition to your duties under the Act. I think, if I am not mistaken, that was certainly the view in the original Committee, of which I was a member, as to why you wouldn't have a formalised role over a PIDA structure, but do you see your role as in fact doing that?*
>
> ***Ms Moss:*** *I would be comfortable. We will probably do that now.*
>
> ***Mr Kinross:*** *Informally?*
>
> ***Mr Wheeler:*** *Informally, and we work with the ICAC and Audit Office and we have produced a common document. When we came out with our documents we went through the*

*other agencies and got their views. We are just about to reinstate the steering Committee[4] set up originally for the implementation of the Act. It will be meeting again tomorrow, looking at ways to improve awareness.*

***Mr Kinross:*** *Whose steering Committee was this?*

***Mr Wheeler:*** *When the Act was first brought in, the Committee was set up with the investigating authorities and the Premier's Department, to come up with ideas to ensure proper implementation. We are getting it going again, to work on implementation. We are also running a series of workshops on the Act. We are starting with councils in late July, early August, and we will be taking a series of workshops on the road. There will be representatives of each investigating authority, the Cabinet Office and possibly the Department of Local Government, which will be there as a panel, giving advice and answering questions in relation to the various issues that relate to the Act.*

*All three agencies have been involved. We do not see ourselves as having a coordinating role as such, but we try to work with the other bodies."*

**Costs** - The resources used by the Ombudsman's Office to date in this area indicated that dealing with protected disclosures is expensive and the costs involved are a significant argument against establishing a separate PIDA. The Ombudsman advised the Committee that the Office's operations in relation to protected disclosures were resource intensive and had decreased resources available for other areas.

***Ms Moss:*** *"We are finding it resource intensive. In fact, we had hoped earlier on, when the Act was enacted, that we would be allocated one extra person to deal with protected disclosures, but that did not come about, but certainly, what we have to do is we have to siphon off resources from other areas.*

*At the moment the first port of call is my deputy, so we will not have it lower than that, so all initial calls go to the Deputy Ombudsman. We feel that these issues are that important. Then when it progresses, we then allocate it to an investigator to handle, to follow through, do all the investigation work, but yes, we have found that the other work probably has suffered because of this."*

In response to a question on notice from the Chairman, the Ombudsman provided a costing of the resources used by the Office to deal with protected disclosures. The Ombudsman estimated the cost of performing her functions under the Protected Disclosures Act 1994 and related activities to be $190,000 for the 16 month period since the commencement of the Act.

In arriving at any estimate of the potential costs involved in forming a PDU in the Office, the Deputy Ombudsman drew attention to the high level of staffing required for such a function due to the sensitivity of the matters being disclosed and the need to ensure confidentiality for

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[4] The Steering Committee comprises representatives of the ICAC, Ombudsman, Auditor-General, Public Employment Office, Department of Local Government and Cabinet Office.

the person making the protected disclosure.

> ***Chairman:*** *"In terms of us going to the review, we ought to do that with an idea of what impact is going to flow out of any recommendation that we make.*
>
> ***Mr Wheeler:*** *It is already pulling money and resources away from the other general areas of the Office's jurisdiction. Going back one point to the idea of one agency, one of the reasons why we deal with these things at a fairly senior level, firstly the sensitivity of the information that is there quite often; secondly, the sensitivity of the circumstances of the whistleblower and to be able to try to guarantee the anonymity, if you like, to ensure that the matter will not be disclosed back to the agency, that they will be given proper advice as to what is likely to happen, both by us and the agency and in terms of sometimes the actual sensitivity of the information itself. That needs to be considered if you are thinking about making any person in any position of authority, the recipient of all protected disclosure.*
>
> *You would want to build something into the Act which says what the levels are of reporting and the levels of confidentiality and what advice they should be given if they go to the wrong place. You could lose the independence you had in the investigation."*

**Whistleblower support and counselling** - Although the Ombudsman accepted the possibility of a formal advisory and monitoring role for a Protected Disclosures Unit within her Office she originally opposed any extension of this role into the area of support and counselling for public officials who had made protected disclosures.

> ***Chairman:*** *"There was the feeling that protected disclosures sounded somewhat esoteric and does not really indicate what the Act is about. Going to your point on which agency and how many agencies, obviously when the Act was put together, it was done in a context of not proliferating agencies. If you did have the principal agency within the Office of the Ombudsman, would you see it operating perhaps as the PIDA model, therefore not only supporting, but conducting investigations, or referring on to the other agencies?*
>
> ***Ms Moss:*** *We do not have any objections to the concept of PIDA. I think our main concern would be the means to carry out what Parliament would want PIDA to do. A great deal would depend on the details, what Parliament would expect PIDA to do. I think that one thing that needs to be remembered also is the concept of an Ombudsman, that the Ombudsman is a seeker of the truth. It has not in the past been involved in special support, say for people who have been hurt by their experiences from the work place, or whatever.*
>
> *I think that I would, to some extent, endorse the comments of Mr Harris, where he says to some extent to expect an external agency to act as a support in terms of counselling and that sort of thing, is to not necessarily resolve the problem at the source. The source of your problem really is the managers having the agency, dealing with whistleblowers appropriately and to remedy the problems properly, to even admit their mistakes and try to fix up the problems themselves.*
>
> *By the time the person has to go outside to seek counselling help, then a great deal of the damage is already done and if that role is expected, say of someone within the Ombudsman's Office, it would actually change our role somewhat. I can see that role can perhaps be taken up by other people. There are other people who could be resourced to provide that support,*

*but indeed there are many objectives that I understand that have been set out for PIDA that the Ombudsman could carry out.*

*It could act to audit. It could monitor. It could refer matters to the appropriate agencies and keep an eye on how they are being done.*

*It could act to avoid that sort of duck shoving amongst agencies. It could step in and investigate where it is not done properly. It could carry out that part of the role.*

***Mr Wheeler:*** *It could also monitor the treatment of whistleblowers by agencies, but that is different to being a champion, as such, of one side or the other. It is looking at it from an independent view, and saying: Has the Act been implemented correctly? Has the spirit of the Act been achieved."*

The Ombudsman subsequently modified her position on this issue in further correspondence with the Committee on "Model 4" for a PIDA, explaining that discussions with staff after the public hearings had led her to conclude that "there is a need for a member of a PIDA to fulfil a role similar to that of support person and adviser". The Ombudsman regarded the proposed role to be compatible with the Office's "traditional role as umpire" and would be a source of "advice and non-partisan support" for the complainant.

Ideally, Dr Longstaff hoped that the internal cultures of public authorities would change so that such counselling and support services were not necessary.

***Chairman:*** *Do you think government has a special obligation to establish an agency to provide support services to public officials who are making or intend to make protected disclosures?*

***Dr Longstaff:*** *I think, in general, government has not only an obligation but an interest to ensure that those people who want to make disclosures are able to do so in a way which does not bring retribution upon their heads. I think we all know that the life of a whistleblower is still hazardous and unpleasant for virtually all of them. I do not think there are any exceptions to that rule as it stands at the moment. That means that the public and government looking to manage its affairs properly are deprived of important information which can assist them in terms of bettering their performance, avoiding cases of corruption and generally going about their business in a sensible and proper way.*

*So I think to that extent it is not just a responsibility, it is an interest that there be some kind of assistance. Whether or not a particular agency ought to be brought into existence to assist such people separate to those which exist at the moment I am not so certain. I have an open mind on that question and that is in part because I would think that the ideal situation to achieve is one in which the internal cultures of all of government agencies and businesses is such that, as a normal part of their business, they have open channels for constructive communication and criticism flowing in both directions, top down and bottom up, and that there should be a series of systems and procedures in place which reinforce the possibility of that.*

*That might seem like a bit of naive optimism on my part to think that that can be achieved because some would argue that human nature is such that any criticism will be reacted to in*

*an adverse way. I would prefer to be optimistic about that because I do not think we have done enough serious thinking within the private sector or the public sector about how to create such conditions. There is an amount of information and there are also techniques available which can achieve that result."*

# CHAPTER 3 - THE CASE FOR ADDITIONAL INVESTIGATING AUTHORITIES

The Committee received three submissions recommending that the Act be extended to include further investigating authorities. These submissions are discussed below. A common concern of all three bodies was that public officials making disclosures to their organisation should receive protection. The Internal Audit Bureau submission raises another issue of the proposed application of the Act to the private sector. This issue is discussed in Chapter 12.

## 3.1 DEPARTMENT OF LOCAL GOVERNMENT

The Department of Local Government proposed that it should be made an investigating authority under the Act, based on the argument that "given the Act's inclusion of the local government sector, the Department's omission as an investigating authority would result in confusions within local councils and misunderstandings about statutory protection, given the Department's longstanding and traditional role of receiving complaints/disclosures about local government administration from the 'industry' and in particular complaints/disclosures about corruption, maladministration, and serious and substantial waste."

The Department's submission outlines its investigative powers under the *Local Government Act 1993* and the sanctions which may be imposed by the Minister and the Department in certain circumstances. As part of its oversight role the Minister and/or Department investigated complaints "not only with a view to their resolution but also to determine whether the complaint is indicative of a deficiency in the legislation or the performance of a particular council." The Department viewed this as part of its role in the ongoing review of the Local Government Act and Regulations and the identification of administrative areas needing more effective control procedures.

In its submission the Department argued that:

> "The preferred option, in essence, is that the Protected Disclosures Act be amended to provide that the Department of Local Government be included as an investigating authority under the Act in order that a disclosure by an employee of a local government authority or any other individual having public official functions related to local government may be made to it...
>
> It is considered that such an amendment would enable the objects of the legislation to be achieved in the local government sector by enhancing operational effectiveness and "user friendliness."

There were no cost implications envisaged by the Department should its proposal be adopted, and estimates for the cost of protected disclosure investigations were not submitted.

The Acting-Director General also stressed the Department's separateness from local government. He told the Chairman:

***Mr Rogers:*** *"... We are not the employers of councils. Councils are independent statutory authorities, constituted quite independently under the Act as totally independent for those purposes ...*

*We do get complaints from within council about the activities of senior officers. We get complaints from councillors about the activities of council officers. It is quite a common area of complaint. The issue really is we are there and receiving complaints now and we have no link, which I think would stop people making the complaint to us".*

Of a total of 916 complaints received by the Department in 1994-5, covering 1194 matters spread over 114 councils, 77 complaints related to issues concerning pecuniary or conflict of interest, 77 related to allegations of corruption, 99 concerned maladministration and 53 alleged misuse or misappropriation of funds. The Department emphasised that this meant that more than half of the complaints it received related to categories of conduct subject to the *Protected Disclosures Act 1994*.

However, it remains unclear to the Committee exactly what portion of these complaints were protected disclosures. The number of disclosures referred from investigating authorities was small: the Department of Local Government has acted upon 2 referrals from the Ombudsman under section 25 of the Act and has conducted enquiries and reported back to the ICAC on two matters. The terms "complaints" and "disclosures" were used on an interchangeable basis by the Department and consequently it was difficult for the Committee to ascertain how many of the matters reported to the Department fell into the category of protected disclosures. In his opening statement, the Acting-Director General made reference to the way in which it had dealt with "probably the only protected disclosure case we have investigated so far". In this case the Department had referred the complainant to the Ombudsman who then sent the matter back to the Department for investigation.

## 3.2 COMMUNITY SERVICES COMMISSION

The submission from the Community Services Commission (CSC) gave this description of its functions under the *Community Services (Complaints, Appeals and Monitoring) Act 1993*:

> "- investigate complaints about unreasonable conduct by the Department of Community Services, the NSW Home Care Service, the Ageing & Disability Department, and funded non-government service providers
> - review the situation of a child, young person, or a person with a disability in care
> - monitor and inquire into major issues affecting consumers and service providers
> - coordinate a Community visitor scheme to 797 "visitable" services providing residential care to children, young people and people with a disability
> - report directly to the Minister for Community Services."

With the establishment of the Community Services Commission in April 1994 responsibility for the investigation of most complaints about the provision of services by the Community Services Department, Ageing and Disability Department and the Home Care Service was transferred from the Ombudsman's Office to the Community Services Commission - section

121 of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* excluded such complaints from the Ombudsman's jurisdiction. The Commission was uncertain as to whether this created an anomaly resulting in disclosures of maladministration within these departments, which would previously have fallen under the Ombudsman's jurisdiction and have received protection under the Protected Disclosures Act, being no longer protected. The Commission, therefore, recommended that it should be included under the *Protected Disclosures Act 1994* as an investigating authority.

## 3.3 INTERNAL AUDIT BUREAU (IAB)

The Managing Director of the Internal Audit Bureau, Mr Bill Middleton, wrote to the Committee about his concerns that the Act did not appear to protect public officials who made disclosures to IAB auditors. The latter are contracted to public authorities and do not appear to fall within any of the specified persons in section 8 to whom disclosures must be made in order to meet the criteria for protection. Advice sought by the IAB supported Mr Middleton's concerns.

Among the state agencies contracted to the IAB, Mr Middleton, advised that:

> "...there is a common expectation and need by these agencies, to nominate the IAB as an alternative body to receive disclosures and complaints. This requirement is consistent with the generally accepted view that internal audit, because of its independent role, is ideally placed to receive internal disclosures."

Consequently, he recommended that the Act should protect public officials making disclosures to IAB auditors. It was suggested that this could be achieved by expanding the definition of investigating authority under the Act to include the IAB or alternatively expanding section 8 to include contract internal auditors as persons to whom disclosures could be made.

During his evidence to the Committee the Internal Audit Bureau conceded that there were potential problems with the proposal that it be granted investigating authority status under the Act. These included possible conflict of interest situations. The following discussion between the Committee and Mr Middleton clarified that the central issue was really much more specific and related to the question of whether contracting agencies providing services to the public sector should be able to receive or make disclosures (see chapter 11 for an examination of this issue):

> ***Chairman:*** *Looking at it and the position that you are in, do you see any other avenue apart from you becoming an investigation agency, that would provide the same outcome?*
>
> ***Mr Middleton:*** *Yes, I think in our submission we have suggested that there basically needs to be a broader definition of the people who you can report to, like that of a public official. I think it does need to bring into account people employed by agencies, because as I mentioned earlier, there is probably 20 or 30 organisations who use large accounting firms for their internal audit. Those agencies need to be covered as well, so it is a broader issue than the*

*bureau. It is the whole issue of contract internal audit services. That is where the expansion we believe is required, to cover not just people reporting to officials of the organisation. I believe it needs to be expanded to reporting to outside people employed by the agencies in whatever capacity.*

***Mr Lynch:*** *So any of the big six accounting firms that are doing auditing work?*

***Mr Middleton:*** *Yes. I know of one organisation that is not only having - they have an accounting firm doing the internal audit and as such they are also doing investigations, so there is not only the potential to have people report to them, they are doing investigations for them as well which is the typical role of an internal auditor. That falls into their gamut, but I would imagine those people making statements either voluntarily or not to these people would be at some risk.*

. . .

***Mr Lynch:*** *It is possible there is an internal auditing policy in place, but the survey results we have would suggest those internal reporting policies are not as extensive as they might be.*

***Mr Middleton:*** *I think it goes beyond the internal audit role. A scenario could be, say, at public works where they engage or out source perhaps design work or project management work. If you had a situation where someone was managing a building project and, of course, plenty of things can go wrong by way of corruption because there is a lot of purchasing, if a staff member complained to that project manager about an issue related to corruption or mismanagement, again that public servant would not be covered if that information was passed on.*

***Chairman:*** *Taking up the role of an outside investigative agency, would that not come in conflict with that because your direct line of responsibility to the chief executive officer suddenly is subverted and you are really going off in another direction? It appears to me to have some conflict.*

***Mr Middleton:*** *I think you may be right. As a solution that is not the best solution for the whole issue and the whole issue is outside agencies receiving the complaints. . ."*

**The case against additional investigating authorities -** With the establishment of the Police Integrity Commission (PIC) and the Inspector of the PIC there are five investigating authorities under the Act to which persons may make protected disclosures. The Ombudsman and ICAC Commissioner strongly argued that the creation of further additional investigating authorities was not desirable as it would lead to confusion, duplication of effort and coordination problems. In her opening address to the Committee the Ombudsman stated:

***Ms Moss:*** *...The third point that I would like to make is that as a point of principle, we feel that there should be no proliferation in the number of investigating authorities. In terms of practical consequences, increasing the numbers of investigating authorities would lead to confusion and problems of duplication and coordination, things which are clearly not consistent with the Act's aims and objectives.*

*Other reasons which I would put forward are that with the present investigating authorities, the three key bodies, and about to be added the Police Integrity Commission and the*

*Inspector ... they actually are all guaranteed independence by statute. They are in a fairly unique position of independence where the heads of these organisations can only be removed from office on addresses of both Houses of Parliament. They are also quite specifically accountable to Parliament through a joint Parliamentary Committee.*

. . .

*We feel that the three bodies primarily concerned are the people who have the specialist investigators in the three categories, which the Act focuses on, corruption, maladministration and serious and substantial waste. They are indeed the specialists in those areas and we feel that to add to that list could very well confuse matters by multiplication of these bodies."*

In her supplementary submission the Ombudsman reiterated the independence of the investigating authorities as one of their essential features. The submission asserts:

> "The most important reason which ought to be considered very carefully is that the Ombudsman, the ICAC, the Auditor-General, the PIC and the PIC Inspector are all uniquely independent organisations or persons whose independence is guaranteed by statute. This unique independence lies in the fact that the heads of these organisations can only be removed from office on address of both Houses of Parliament. However, this independence is balanced by the accountability of these organisations to the Legislature. The tension is appropriate and the balance of great value.
>
> In my view, as a matter of principle, a pre-requisite for investigating authorities under the *Protected Disclosures Act* is that they must be independent from the executive and yet accountable to the Legislature. Any organisations which do not bear these hallmarks ought not to be added to the list of investigating authorities.
>
> The principle of independence comes down to this. The heads of the ICAC and the PIC, the Ombudsman, the Auditor-General and the Inspector of the PIC can only be removed from office upon the address of both Houses of Parliament. This statutorily guaranteed independence is, in my opinion, a proper criteria for designation as an investigating authority. If this principle is not used as the dominant criteria for designation, what principle is to replace it? If the Department of Local Government gets designated, why not the Community Services Commission. If the Commission is designated, why not the Anti-Discrimination Board. If the ADB, why not the Judicial Commission and so on."

In a comment to the Chairman, the Community Services Commissioner acknowledged that the Commission's responsibility to report to the Minister could be perceived as a problem in:

> ***Mr West:*** *... That is, of course, different from the Ombudsman where there is a parliamentary Committee and so on and there is also the interesting situation where we report to the Minister that is responsible also for the services that are being provided. Some people see that as a problem and a flaw. Other people see that as a potentially constructive loop where the accountability system is built into the portfolio, and obviously there are views both ways. . ."*

The Ombudsman argued that as the investigating authorities are specialist investigators with a proven track record in the three areas of conduct covered by the Act there is no need to multiply the number of investigating authorities beyond the recent inclusion of the PIC and the PIC Inspector.

The ICAC Commissioner's supplementary submission draws the same conclusion. In his evidence the Commissioner stated:

> ***Mr O'Keefe:*** *"...There is a submission that suggests that there be set up yet another agency. When the Police Integrity Commission is set up there will already be four agencies that receive protected disclosures.*
>
> *When there were three, the argument was that is too much, too many and there is confusion. You now add another layer or you give like protection to some of the agencies that are referred to in the 52 issues and you finish up with about 10 if they all get it. I think it is nine actually if they all get that far. Forget about costs for the moment, just think about the confusion. Every time you add a layer to the process, you do three things. You cause confusion, you cause delay and you add to the cost, all of which in the climate of public expenditure at the moment and in the climate of accountability are undesirable consequences. . ."*

A major source of opposition to the Local Government Department's proposal came from the Local Government and Shires Association which felt that the existing avenues to the Ombudsman and ICAC were sufficient and that local government should be encouraged to deal with complaints properly to overcome the need to make disclosures externally. Councillor Woods discussed the issue with the Committee in the following extracts:

> ***Mr Woods:*** *" ... I mean, the last thing we would want to see is the Department of Local Government running around with briefcases like it was the image some time ago. We have gone beyond that. We have moved into a new Act. I think the previous Government with the support of the current Government and with the support of local government worked cooperatively to get a new Act in place that still has a little bit of fine-tuning to go, but is substantially putting in place the mechanism for changing the whole environment of local government. On that basis it is worthy to set up mechanisms where they can be self-regulating.*
>
> *Sure, there still must be a mechanism outside of people who are aggrieved by that internal process, and I think that has to be the same in any organisation, be it local government, State Parliament or wherever, so I would not argue against that. But what I am saying is that should be the bottom line. We should not be encouraging a growth industry, and investigating procedures by the Department of Local Government and what have you. We should be encouraging a climate of self-regulation where people are confident that if there are matters of concern they can be dealt with...*
>
> ***Mr Fraser:*** *The Department of Local Government is saying that it should have the power to investigate complaints made under the Protected Disclosures Act. What we are trying to get is your opinion of that rather than having local government look at themselves.*
>
> ***Mr Gallacher:*** *You currently investigate your matters in your council?*

***Mr Woods:*** *Yes. I go back to the threshold point. I believe that this should be a responsibility for each local government to address, but as I said before, if there is dissatisfaction with the outcome of that, then I believe there are mechanisms in place where redress can be sought. But I think it is far preferable to do that than to have in the first instance an external body from, say, the department, to do it.*

. . .

***Mr Clark:*** *I think it is fair to say that the department would not bring anything more to a situation under the Protected Disclosures Act than is already available under either the Ombudsman Act or the ICAC legislation.*

***Chairman:*** *The Department approached it from the perspective that it processes about 1,200 of those issues a year, then sends them off and they come back. The department believes that it has both the expertise and the resources to actually undergo the investigatory phase rather than have it across to the Ombudsman or to the ICAC or under a further proposal, to the Auditor-General. So it is from that perspective. You might like to comment on that, perhaps.*

***Mr Woods:*** *I would only reaffirm what we said previously. We do not see that is an appropriate role and we are quite happy to see if it reaches the stage where the Ombudsman or the ICAC need to be involved, we are quite happy for that to occur because it would mean that it is a matter of some substance and we do not want to cover up any of that if it cannot be sorted out within the council itself..."*

In the case of the Community Services Commission, the Commissioner recognised that there were options other than becoming an investigation authority which could be considered.

***Chairman:*** *Obviously in your submission you are proposing that the commission become an investigatory authority. How would that fit with your current roles and functions and whether you would see any significant difference between the powers, functions and status of your position and that of the current investigating authorities?*

***Mr West:*** *The suggestion we have made that we become an investigatory authority is only one suggestion as a resolution and there may be other ways of solving this problem and we well recognise that. . .*

Moreover, on the basis of evidence from the Ombudsman the Committee suspects that the issues raised by the Community Services Commission probably relate more to provisions within its own Act and as a result fall outside the ambit of the Committee's review of the *Protected Disclosures Act 1994*. According to the Ombudsman, confusion does arise about the relationship between the Ombudsman and the Commission and this has implications for the investigation of disclosures.

***Chairman:*** *Where you have a body set up like the Community Services Commission and that section withdrawn from the purview of the Ombudsman's Office, what sort of complexity does that throw up?*

***Ms Moss:*** *Just generally, our complaint handling and relationships?*

***Chairman:*** *Or perhaps in the protected disclosures aspect of it.*

***Ms Moss:*** *I am not aware that we have problems.*

***Mr Wheeler:*** *In terms of the Community Services Commission there is a confusion, if you like, in our relationship. We can investigate the Commission itself. We can take up any matter within its jurisdiction on our own motion. There is a provision in their Act that says that if there is a complaint made to them by a recipient of community service, it cannot be made to us.*

*I am not 100 per cent sure what that means and how broad it is. The sorts of matters that can be complained of to the Community Services Commission are not massively broad, so that is a problem in that particular Act.*

Consequently, the Committee considers that the implications of the relevant provisions of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* should be examined and clarified.

The Auditor-General viewed the case for additional investigating authorities from a different perspective. He suggested that one solution to the problem of achieving protection for disclosures was to replace the term "investigating authority" with "appropriate authority". This would enable persons making disclosures to approach any authority they felt appropriate rather than the particular investigating authorities currently specified in the Act.

***Chairman:*** *You mentioned before the local government area. Both the Department of Local Government and the Community Services Commissioner have indicated that they ought to be investigating authorities. I understand you might have a differing view and I am wondering if you can expand on that?*

***Mr Harris:*** *I think there my be different views within the organisation and Mr Streater might have some comments on this. They are investigating agencies under one sense of the term, not necessarily for the purpose of the Protected Disclosures Act, but ordinary people would understand their responsibilities and roles. Not allowing employees to lay information with them which is protected, does seem to distort their role and perhaps is leading to results which are not reasonable.*

*I have personally no particular problem and this fits again with my earlier thesis, that I think anybody should be able to lay information with the relevant authority and not be penalised for that. It fits within that ambit, that if it is relevant to the Community Services Commission, they should be able to go to it, or him, or if it is relevant to the Department of Local Government, they should be able to go to it.*

***Mr Lynch:*** *Is the consequence of what you said earlier to get rid of the term investigating authority in the Protected Disclosures Act and simply protect anyone who makes a disclosure?*

***Mr Harris:*** *I suppose one would change investigating authority to appropriate authority.*

***Mr Lynch:*** *Rather than restricting the places they can go and limiting it, it makes it easier for people.*

***Mr Harris:*** *Yes.*

***Chairman:*** *And then focus them to the appropriate authority?*

***Mr Harris:*** *It could be then be a matter for the complainant to determine, given their limited knowledge, where they believe the complaint could be best be located. It may be that they have a particular confidence in one agency, which they do not have in another. That is already evident in the Act, because it says that you may go to your manager, but if you are not confident about that, you can go to the investigating authority. You would allow that discretion to remain.*

*There is no particular reason, for example, why the Department of Local Government should not have some purview, given its specialty nature, for complaints relating to local government. There is no particular reason why that should not be so.*

***Mr Streater:*** *Also there are internal reporting arrangements, whereby a public official can make a complaint to their own employer and so the fear of reprisal there is covered, so it is consistent with making a complaint to the Department of Health, or the Public Employment Office, the same arrangement applies.*

***Chairman:*** *I think the Department of Local Government felt that if the matter came to it, it has an investigative function as you said, but in the case of protected disclosures, it then furnished them and sent them back and had no further role. I think it felt somewhat thwarted in that, given its responsibility.*

***Mr Lynch:*** *And more importantly, the complainant does not get any protection.*

***Mr Harris:*** *Yes. The Department of Health supplies, as you might know, some part of the internal audit functions for area health services and one would normally expect people should be able to go to the Department of Health to say, look at this issue, there may be a problem, but it is not protected either."*

However, Mr Harris acknowledged that his approach was not without difficulties, especially in practical terms:

***Chairman:*** *Just on that issue of local government and the department taking up the role of the investigative agency, do you see any difficulty there and a conflict with the fact that the department is in fact responsible directly to the Minister, and there may be some cases of difficulty in carrying through its full role?*

***Mr Harris:*** *It may. But that is not, according to my thesis, a reason that would rule it out from being an investigative authority. It is merely a reason to suggest that the complainant should decide where the complainant thinks it would be best examined. It may be that the complainant would give it to an investigating agency, which may be one of the three existing, or may be one of the new ones if you go that way, and if it is not handled well or covered up, it may be, but I do not know how you legislate away that issue, unless you get all complaints from all sources to come to one point.*

. . .

***Mr Kinross:*** *Just on that issue, the concern I have again is that, unlike the Ombudsman,*

*Auditor General and the ICAC, they are directly accountable to a Minister.*

***Mr Harris:*** *That is right.*

***Mr Kinross:*** *That is the concern.*

***Mr Harris:*** *I am not saying there are no reasons for concern, that in some issues that agency will not be the appropriate agency. You would be right. How you anticipate that in advance, I do not know, and whether you say because of that potential, or because it is going to happen, then nothing should go to it. I do not know that is the right response either.*

***Mr Lynch:*** *Especially when there are something like 1,000 complaints a year going to the department.*

***Mr Harris:*** *Yes, but if you go that route for the Department of Local Government, you must do it for the Department of Health and all these other agencies.*

***Mr Lynch:*** *Getting rid of the concept of the investigative agency in the Act altogether, which is logically the conclusion of what you said.*

***Mr Harris:*** *Yes."*

The Auditor-General reiterated this view in his submission on the issues summary, in which he supported proposals to include the Department of Local Government or Community Services Commission as investigating authorities under the Protected Disclosures Act. The Auditor-General felt that if the role of the investigating authorities was broadened to include other agencies then the term "appropriate authority" should be used. Overall, the Audit Office was "sympathetic to the view that a public official who makes a complaint to any relevant agency should be protected, provided the complaint complies with certain criteria".

The Deputy Ombudsman stressed the impracticalities of the Auditor-General's approach to Mr Lynch:

***Mr Lynch:*** *Is not the confusion the fact that there are specified agencies? Once you take away a specification, you have got to go to agency A, B, C or D. When you get to the stage that you make a disclosure to anybody in authority, does not that get rid of the confusion?*

***Mr Wheeler:*** *Except the definition of anyone in authority - that is where it gets tricky. If it is sent to someone who has absolutely no role or jurisdiction is it still a protected disclosure?*

***Mr Lynch:*** *If you are disclosing maladministration or corruption, why should it not it be?*

***Mr Wheeler:*** *If you have a huge number of organisations and if you think about the number of organisations in this State that have some sort of supervisory role over other bodies, the question becomes which is the appropriate one, how do you know if it is within the jurisdiction of that particular body, how do you know you can look at it. As the Ombudsman was saying there are some bodies who cannot look at certain matters.*

***Mr Lynch:*** *If they cannot, they should refer it.*

***Mr Wheeler:*** *And it gets referred again.*

Another argument against extending the Act to include the Department of Local Government as an investigating authority is that, although the existing procedures for investigating disclosures may be circuitous and difficult, they do constitute a mechanism through which investigating authorities can receive and investigate protected disclosures. Options other than legislative amendments also seemed available to resolve the Department's difficulties.

***Chairman:*** *Is it not possible under the Act, or with some statutory provisions, you can provide that protection without being an investigative body?*

***Mr Rogers:*** *It is extremely difficult to construct, given the statutory protection is held inside the Protected Disclosures Act. We do it by referring the complainant somewhere else and having it referred back to us, which is an extremely ungainly way of handling a complaint. We could do it by having councils nominate us as somewhere to take a protected disclosure. That removes the onus of dealing with the thing from the council.*

**Conclusion**

On the basis of the evidence and submissions before it, the Committee concluded that it would be desirable to have a Protected Disclosures Unit located in the Office of the Ombudsman with an advisory and monitoring role in relation to the Act.

It was evident to the Committee 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.

It is not recommended that the PDU should have an investigative function. Such a function is best performed by the investigating authorities and other public authorities which have received disclosures either directly or by referral. Giving the recommended Unit a separate investigative role would have significant resource implications. However, under the model proposed the Unit has a monitoring role which would enable the Ombudsman to report to the relevant Minister and, if necessary, to Parliament should it be dissatisfied with the performance of a public authority in the handling of a protected disclosure.

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.

Locating the Protected Disclosures Unit within the Office of the Ombudsman would prove

more cost-effective and more practical than the creation of a completely separate agency with full investigative powers. In practice the Office of the Ombudsman has been performing an advisory role since the commencement of the Act and has adopted a cooperative approach with other investigating authorities and relevant bodies in relation to the implementation of the Act, the conduct of investigations and educational and training initiatives.

The Committee fully supports the view that the existing investigating authorities, namely the Office of the Ombudsman, the ICAC and the NSW Audit Office, are best placed to receive and investigate protected disclosures. Not only are these three bodies recognised as independent statutory offices accountable to Parliament but they also possess an unrivalled expertise in the investigation of the most serious forms of misconduct.

The Committee also is not in a position to assess the extent to which public officials are making disclosures to bodies other than the Ombudsman, ICAC and Auditor-General. Should further material be available for the next parliamentary Committee review of the Act it may be possible to better assess the need for adding to the number of investigating authorities.

In the interim, the Committee feels that the authorities currently listed under the Act as responsible for the investigation of disclosures are appropriate and believes that arrangements can be made by other agencies with the investigatory bodies to ensure that disclosures are adequately investigated. Combined with the focus provided by a specific PDU within the Ombudsman's Office the Committee is of the view that the operation of the Act should improve considerably.

**Recommendations 1-2 - Protected Disclosures Unit**

1. 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:

   - ✦ to provide advice to persons who intend to make, or have made, a protected disclosure;
   - ✦ to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, legal interpretations and definitions;
   - ✦ to monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;
   - ✦ 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 act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
   - ✦ to publish an annual report containing statistics on protected disclosures for the public sector in New South Wales and identifying any systemic issues or other problems with the operation of the Act;
   - ✦ to coordinate education and training programs in consultation with the 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.

2. 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.

## CHAPTER 4 APPEAL MECHANISMS AND FEEDBACK

The varying practices of the investigating authorities with regard to feedback during investigations of protected disclosures, or advice on decisions made in relation to an investigation, were highlighted by Whistleblowers Australia Inc. as a source of frustration for anyone making a disclosure. Dissatisfaction with the lack of any appeal mechanism in relation to final decisions by the investigating authorities was linked to the practice of not giving reasons for those decisions. The representatives highlighted this as a particular feature of their dealings with the ICAC which unlike the Ombudsman's Office is not required to provide reasons for its decisions (see section 15 of the Ombudsman Act 1974 - no comparable provision is included in the ICAC Act).

The experience of representatives from Whistleblowers Australia Inc. was described to the Chairman:

> ***Chairman:*** *"...Within the submission you refer to the issue of whether a public official, who is subject to detrimental action because they made a disclosure and the matter was not investigated, should have the right of an appeal. Given that investigative agencies are in the best position to take an objective view of the matters raised in a protected disclosure, why should there be a right of appeal beyond there?*
>
> ***Ms Kardell:*** *Because the investigative agencies do not have any requirement to tell you why they have not investigated anything. As it stands, if I were to go to the ICAC, which I have, and ask them to look in my matter, they could simply tell me after a six month period that they have decided not to go any further with it. They have no obligation to give me reasons or explanations. So I am left wondering whether for the lack of something from me, because at this point I am still believing that I have made a public interest disclosure and it is able to be proved.*
>
> *Without that feedback, you are left in a vacuum and if you are someone who has suffered reprisals as a result of having made that disclosure, I think you would understand that is a most unsatisfactory position to be in. For two reasons, that you have got no feedback, no reasons, no avenues to appeal, and you are also suffering reprisals."*

This lack of feedback was seen as a factor which exacerbated the situation of a person who had made a disclosure and experienced delays for example, if finalisation of their case was deferred pending the outcome of related court proceedings.

Whistleblowers Australia Inc. linked the issue of feedback with the approach of the investigation authorities to the provision of service: an argument strongly rejected by the ICAC Commissioner.

> ***Chairman:*** *"I am wondering whether the actual to and from that you would like, in terms of information, could hinder investigation or whether you think it is just not even considered in that regard?*
>
> ***Ms Kardell:*** *Hinder their efforts?*

***Chairman:*** *Yes.*

***Ms Kardell:*** *No, I do not think it could. I think what I am trying to get at is that I believe that the investigative authorities are a service organisation. They are providing a service. They do not appear to have that mentality or that practice. I feel that it could be induced if there was some sort of legislated requirement that they provide a service to the people who give them the complaints in the first place.*

*In my experience, I do not know of anybody who has received anything other than a letter stating that they would not be proceeding with the matter any further. The Act does not require them to do any more than that so you can understand that they would not necessarily feel obliged to do any more.*

*My complaint with that is that it is inadequate and I believe inappropriate, given the nature of what they are doing and what society hopes to flow from it. If there were a requirement, then there would be a change of policy in their approach to a whistleblower and a change in the way in which they deal with enquires from the whistleblower, and probably how they report the whole matter. I think that it would be a far more worthwhile process, both in terms of reporting to a Parliamentary Committee at the end of the day, and also dealing with the whistleblower. Those sorts of service ideas, in my experience, infuse the actual investigation with a fuller sense, if you like, a better attention to detail because they are more accountable."*

The Commissioner of the ICAC explained the Commission's approach to providing feedback to public officials during the course of an investigation into a disclosure:

***Chairman:*** *"If an inquiry runs for a six-month period, firstly, do you think that is too long a period of time in which to conduct the inquiry, and, secondly, what would be the normal contact with the complainant over that six-month period?*

***Mr O'Keefe:*** *The answer to your question is it depends on the nature of the inquiry, where you have got to go. One of the things you may have to do is get information from other agencies. I have instituted a system whereby after 21 days, if we have not got the information from an agency, we write to them again and the time shortens down until somebody rings up the head of the department, like me, and says, "Why aren't you providing us with this material". You are dependent often on people outside the range of command, short of getting into summonses which in the end are, strictly construed, less productive than a cooperative approach. The answer to the question is, of course, we try to do it as shortly as we can but six months may not be too short in some cases.*

***Chairman:*** *The protected disclosure, the person themselves waiting patiently for that to occur, is there ongoing contact?*

***Mr O'Keefe:*** *No there is not. We do not update people on the course of our investigations. The cost of doing that is very high. I have a limited budget. I have only got from Treasury this year $13.070 million and I have to make that go over 386,500 public servants. That is about $35 a head. It does not give you much leeway. You have to make your place run efficiently. There are times when the nature of the matter is such that the complainant may ring the office handling it and there is colloquy between them. Sometimes the nature of the matter is such that there will be contact made. Perhaps the officer divines that the*

*complainant is in a high emotional state. Then, as much to monitor the complainant as to inform, there will be contact made. That is not a common case though."*

Therefore, the Commissioner did not consider regular feedback to complainants feasible because of the budgetary repercussions of such a requirement. He also opposed the suggestion that feedback on an ICAC investigation of a disclosure could be provided through an external agency. In the Commissioner's view providing such information to an external agency is incompatible with the investigatory role of the ICAC and almost guaranteed the failure of an investigation.

***Chairman:*** *"Among the plethora of reasons there would be complainants that come into that category and they are obviously on tenterhooks. Coming from that focus there has been this emphasis on perhaps needing an agency of some sort or a sounding board where there might be a flow to and fro about progress or about the processes that are going on. Do you see that as being something that could be serviced, given the ICAC's approach?*

***Mr O'Keefe:*** *Inside our organisation?*

***Chairman:*** *No, perhaps outside in contact?*

***Mr O'Keefe:*** *I think it cannot be. There is no way I am going to reveal to an outside agency confidential matters concerning an investigation unless, of course, you want to blow the investigation. The best way of blowing it is spread the field of people who have the knowledge of what is being investigated. That is the way to blow an investigation and that is the way also ultimately to track down who the complainant is. No one says a name but inept investigation is the very best way of pointing out who the complainant is."*

If the ICAC was required to give reasons for a final decision on whether or not to investigate a protected disclosure, the Commissioner argued that the flow-on affect to other areas of the Commission's operations would have significant budgetary repercussions.

***Mr Lynch:*** *"I understood you to say the major reason you would not provide reasons for not continuing and not proceeding with an investigation was that if you did you would encourage lengthy correspondence from a complainant.*

***Mr O'Keefe:*** *That is one reason. There are other reasons. If we provide them for people who make protected disclosures then that means we will have to provide them for each of the persons who are complainants under section 10. If they are the subject of a report under section 11 why should they be in a different position? Now there are 7,000 people or more who are going to get correspondence that details reasons which will not only provoke correspondence but will really impose a fairly significant burden on the organisation. It would have a marked budgetary effect.*

***Mr Lynch:*** *So it is primarily the amount of work that would be generated?*

***Mr O'Keefe:*** *In my view that is what it is. Others in the organisation take different views but that is my view."*

The Commissioner argued further that the introduction of an appeal mechanism would deny him the discretion to determine the ICAC's investigation priorities:

> ***Chairman:*** *"What about an appeal mechanism?*
>
> ***Mr O'Keefe:*** *With great respect, Mr Chairman, is there to be an appeal when you decide to do something but no appeal when you decide not to investigate or is there to be an appeal when you decide not to investigate as well, so you do not have a discretion, somebody else exercises the discretion for you, which means you do not control your budget, somebody else does?"*

Other witnesses to the Committee placed the issues of "giving reasons" and an appeal mechanism in a wider context of administrative practice and administrative appeal. For example:

> ***Mr Lynch:*** *"One of the series of suggestions from whistleblowers yesterday dealt with investigative bodies and how they respond to complaints. Some of the things which were suggested that there ought be, if an investigative body in response to a complaint decides not to investigate, that reasons be given to the whistleblower for that decision. Alternatively there might be some board so the whistleblower could appeal to a body somewhere against a decision not to prosecute or investigate. Would you like to comment on any of those suggestions?*
>
> ***Mr Bennett:*** *On the first one, certainly it is a hallmark of good administration, that where a decision is made which affects a member of the public, reasons should be provided. That is slowly filtering into government as a general requirement. It, of course, exists in relation to a large number of Commonwealth decisions and there is talk of it coming in, in New South Wales, which we would all welcome.*
>
> *So far as an appeal is concerned, I see that really as part of the general problem of administrative appeal. It is highly desirable that administrative appeal mechanisms be available where decisions are challenged. One always has the avenue of costs orders where people use it vexatiously, or it should not be used. If there is open government or government which makes correct decisions, it seems to me fairly implicit in that, that there should be processes enabling decisions, within reason, to be tested appropriately."*

The responses of the other investigating authorities to the issues of feedback and giving reasons for final decisions indicated an overall preparedness to undertake such practices. In the case of the Auditor-General there was support for a mandatory obligation upon investigating authorities to provide reasons for their decisions.

> ***Chairman:*** *Do you, as an agency, give reasons at this time?*
>
> ***Mr Harris:*** *Well, in some cases where I have been involved, where it has been decided that the complaint was not a complaint under the Protected Disclosures Act, we have worked reasonably closely with the complainant, because the issue was serious but still not waste, and I suppose this comes back to the problem of why we get so few eligible complaints, we have worked with the complainant to satisfy the complainant that we have done what is necessary to meet the seriousness of the allegations. I am not so sure what happens to those*

*that I do not see.*

***Mr Streater:*** *Generally we provide an explanation of why the allegation does not meet the requirements of the Act, or what we intend to do with the allegation. In one particular case just recently we have been in contact with the informant as to the action that we have taken and are planning to take in regard to the complaint.*

***Mr Harris:*** *I do not mind an obligation making that mandatory, putting discipline into the process.*

. . .

***Chairman:*** *In fact, that issue of report back and contact is very important to the whistleblowers.*

***Mr Harris:*** *Very.*

***Chairman:*** *They feel they are swimming in a morass of actions without any real feedback.*

***Mr Harris:*** *Yes, and I am happy to have an imposition on us to say to the complainant this is what we will do and this is why we will do it, and if we are going to do things - I have had, I think, three meetings with one person who made a protected disclosure, in an issue we did not think was significant on substantial waste, but we satisfied, I think we satisfied that person, that (a), we listened (b) we took him seriously (c) we looked at the matters thoroughly as part of the normal financial audit and (d) we told him what our responses were to the issues to be raised and I think he is happy. I am not sure".*

Similarly, the Ombudsman supported the practice of giving reasons as an essential component in the Office's philosophy and also as a means of discouraging conspiracy theories. The Deputy Ombudsman outlined the processes used by the Office to provide feedback to a person who has made a disclosure:

***Mr Wheeler:*** *"When a whistleblower approaches the Office, by phone in particular, initially, they are put on to me, primarily. I do the initial discussion with them, explain what we can and cannot do, what other alternatives there might be for them and then if we receive a written complaint, that also is brought to my attention and a decision is made as to how that matter will be dealt with.*

*Very often when a complaint is received, there is an initial meeting with the whistleblower, to discuss just what are the bases of their concerns, to get any documentation that we can get from them to expand on the information they have supplied. They will be notified in writing of what the Office proposes to do in relation to their complaint, and during the process, we will keep them informed of what is going on, which is the normal situation in relation to all complainants. We give them information during the course of an investigation and we give them information at the end.*

*In each case, if a decision is made either to decline, to discontinue, or there is a report at the end, they are given the reasons why that is being done. That is done in writing.*

***Chairman:*** *That is a matter of development procedures, rather than legislated action?*

***Mr Wheeler:*** *It is the procedure of the Office with all complaints.*

***Chairman:*** *And in terms of the responses we have had to date, that contrasts somewhat to the model of the ICAC in dealing with the complaints. I do not know if you have had any discussions about that.*

***Ms Moss:*** *Legislatively they do not have to give reasons.*

***Mr Wheeler:*** *That is under their own Act. We are required to give reasons under the Ombudsman's Act.*

***Chairman:*** *It is a legislative difference and therefore a difficulty with dealing with this Act.*

***Mr Lynch:*** *There would be no reason why ICAC could not give reasons.*

***Mr Wheeler:*** *No legal reason.*

***Ms Moss:*** *No."*

However, with regard to the issue of a formal appeal mechanism opinion varied. The Auditor-General commented that adequate avenues existed for a person making a disclosure to express dissatisfaction with the decision of an investigating body.

***Chairman:*** *"A lot of the evidence that we have taken from people who have made disclosures under the Act, and have not had them processed in their view, well enough, feel there ought to be some sort of appeal mechanism operating, either perhaps judicial or quasi judicial, or perhaps a peer review. Do you have a view on that?*

***Mr Harris:*** *I do, perhaps anticipating some questions you may ask later, think that there is no difficulty in imposing obligations on an agency to prepare and provide reasons why they have done what they have done, or decided to do what they have decided to do. That does not worry me. Perhaps it is important to the complainant anyway to understand the issues.*

*The complainant probably never will always have the same view as the agency, investigating agency, if you like, because they do not fully comprehend the pressures facing those agencies, just as the agency does not fully appreciate the pressures facing the individual.*

*The individual does have another recourse, which is a very successful appeal mechanism, which is to go outside the government arena to either journalists or to members of Parliament and others, in order to express their disquiet about what is happening and that, I should think, is as good as an appeal mechanism, is a useful appeal mechanism. That member or journalist can decide how much publicity should be given to the complainant's judgment."*

One option suggested as an alternative to the expense of a judicial appeal mechanism was a process of peer review:

***Chairman:*** *"Pursuing that particular line, within the provisions of the ICAC Act and the operation of the ICAC, it is not a practice to give reasons for not investigating, or*

*discontinuing investigations, so how does that sit with this appeal, because many of the actual complaints were made against information to ICAC, without any contact back, or explanation back to the person making the disclosure?*

***Mr Bennett:*** *The problem lies in the availability of the alternatives. One cannot appeal against the refusal of the police to investigate. If I go to the police and complain about some other person's conduct against me and the police decline to take it any further, I cannot appeal to a tribunal against the police decision not to do that. Obviously there are practical difficulties with having appeals in that area.*

*The difficulty here is we are dealing with something rather more important. We are dealing with the issue of corruption in government, the issue of serious misconduct in government and I would have thought there is a case there for a person who has a complaint being entitled to have it tested at least one level higher. It need not necessarily be a judicial determination or even quasi judicial.*

*One way, obviously, is a way which partially exists, going from ICAC to the Ombudsman, but one simply needs one person who can have a second look and who will hear the case and makes a decision on it, having seen the reasons.*

***Mr Lynch:*** *Similar to an authorised review officer in Commonwealth departments?*

***Mr Bennett:*** *Yes. One does not need to have a full panoply of an appeal to the Supreme Court with three Queens Counsel on each side to achieve the same result. There is a case for saying some sort of review mechanism where the decision is final. It would have all sorts of effects."*

Despite raising no objections to judicial review, the Office of the Ombudsman drew a distinction between the principle of merit review and its relationship to the decision-making process applied by the Office. The Deputy Ombudsman emphasised that decisions are made by investigating authorities in light of resources, investigation priorities and other considerations. These factors would not be weighed in a merit appeal on a particular matter and by implication could impinge significantly upon the independence, effectiveness and discretionary powers of the Ombudsman.

***Chairman:*** *"In terms of the whole process, there is a feeling that there ought to be some appeal mechanism available to the determination by one of the investigating authorities, either in a judicial or semi-judicial or peer assessment process. How does that sit with the current practice and how would you view it in terms of an amendment?*

***Ms Moss:*** *I am comfortable with judicial review. I am not comfortable with the concept of an appeal of decisions made by the investigating authorities, either the Auditor General, ICAC or mine, because I think the appeal first of all would have an effect on resourcing issues, but more importantly, I think it would severely affect the independence and the discretion of the investigating authorities in making their decisions in the area.*

*I think that the way the accountability mechanisms work at the moment, is that we are accountable to Parliament through a Joint Parliamentary Committee and that our decision to investigate a particular matter should not be subject to appeal, although that matter*

*should be subject to judicial review to make sure we have gone through the process correctly.*

*At the moment there is a particular section in our Act that places us in a situation where we can be judicially reviewed, to ensure we have not acted illegally or outside our jurisdiction, that we have gone correctly through the process, but not on the decision, as such, as to whether we investigate or not investigate a particular matter.*

***Mr Wheeler:*** *If I could add to that a little bit. Decisions are made by the investigating authority at the moment in the light of the overall public interest, the matters that are before the body in question, the focus they might have at that point in time, and where they want to put their resources, whereas a merit appeal on the merits of an individual decision on a complaint, is made not with that environment being considered. It is a merit appeal on the particular matter, without considering the whole environment in which the agencies are operating."*

## Conclusion

### *Appeal Mechanisms*

The Committee did not support the amendment of the Act to include an appeal mechanism as recommended by Whistleblowers Australia Inc. While it is important that persons making disclosures should be supported and assisted, there are also broader public interest considerations involved.

A merit appeal mechanism poses a risk to the independent discretion of the investigating authorities to determine investigating priorities in light of their resources and operations. For example, it may be that a particular disclosure is well founded in the view of the investigating authority. Nevertheless, it may relate to very minor misconduct and be awarded a lower priority than other matters. Other investigations may be delayed while further information is gained. The Committee concluded that it was not appropriate that investigating agencies be externally directed as to how they should deploy their resources.

In addition, the monitoring role of the proposed Protected Disclosures Unit would facilitate public authorities dealing appropriately with disclosures which appear to be protected disclosures.

### *Feedback*

The Committee accepts the argument presented by the ICAC Commissioner against providing feedback on the progress of an investigation to individuals who have made disclosures. Providing feedback on this basis may pose risks to the integrity of the investigation and compromise the operations of each investigating authority. The Committee believes that decisions about feedback on the progress of an investigation into a disclosure under the Act should be made at the discretion of each investigation authority. This view accords with provisions of the Ombudsman Act 1974 which states that reports to a complainant on the progress of an investigation may be made from time to time at the Ombudsman's discretion (s.29(a)).

***Reasons for final decisions***

However, with regard to final decisions in which investigation authorities decide not to investigate, or continue investigating a disclosure, the Committee feels that it would be appropriate for all investigating authorities to provide reasons for such decisions. The Committee notes that the Ombudsman provides reasons for final decisions on all complaints to the Office in accordance with section 15(1) of the Ombudsman Act 1974 which requires that complainants must be informed in writing of a decision to refuse to investigate or to discontinue investigating a complaint and provided with the reasons for this decision.

The Auditor-General although not required to provide reasons for final decisions in practice generally does so. The ICAC's arguments against providing reasons were largely twofold, centring upon the resource implications of such a requirement and the likelihood that written reasons for final decisions would encourage a continuation of correspondence from the person who made the disclosure.

It is the Committee's view that the practice of the investigating authorities in relation to final decisions on disclosures should be consistent and supportive of the objectives contained in the Act. On the balance of the arguments presented during the Review, the Committee has concluded that all investigating authorities should be required to give reasons for final decisions not to investigate, or to discontinue investigating disclosures under the *Protected Disclosures Act 1994.*

The Committee believes that if investigating authorities provide persons who make disclosures under the PDA with written advice on the considerations leading to the final decision made on their disclosure, public officials will feel greater confidence in the protected disclosures legislation and will be encouraged to use it.

**Recommendation 3**

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.

## PART B - PUBLIC AUTHORITIES

# CHAPTER 5 - THE ROLE OF MANAGEMENT

On the basis of the evidence and submissions put to the Committee it was apparent that the strength and effectiveness of the protected disclosures scheme established under the Act rested to a large extent on the approach taken by officers at senior management level within public authorities. The Committee was concerned with ICAC research conducted several months after the introduction of the Act which showed:

* less than one-half (42%) of the NSW 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; and
* one-third (31%) had no immediate plans to inform staff about the Act.

Such information on the response of public authorities to the introduction of the Act raised serious concerns on the Committee's part about the commitment of public authorities and public officials at senior management level to the principles on which the legislation is based and their willingness to promote these principles.

The Ombudsman made a final comment to the Committee on the need for cultural change in the public service with regard to "whistleblowers" in her supplementary submission, which states:

> "In my view, reforms to the act need to go hand in hand with a change within the pubic service in terms of the attitude which public authorities and officials adopt in relation to 'whistleblowers'. Regrettably, there is an attitude about which sees 'whistleblowers' as like 'the rats underneath the house'. This attitude then informs the reaction given to 'whistleblowers'. In fact, the message which 'whistleblowers' bring to management is full of benefits. The focus of managers should be on these benefits which include:
>
> * the information provided by 'whistleblowers' can be used as necessary information for management;
> * 'whistleblowing' can be a useful management tool;
> * improvements can be effected in public administration as a consequence of certain information coming to light;
> * the 'whistleblower' can be an early warning signal;
> * 'whistleblowing' can promote accountability and can be a symptom of integrity and professionalism."

In order to ensure that officers at this level focus on introducing internal reporting systems into their organisations, and support and protect employees wishing to make disclosures, Mr

Hatton suggested that contractual obligations and sanctions, such as fines or dismissal, should be implemented for members of both the Senior Executive and Chief Executive Services.

Mr Hatton proposed that it is "in the public interest for all SES contracts to contain specific provisions which make all SES personnel and especially CEOs personally liable if they fail to:

1. Institute an effective internal reporting system which encourages, rewards and protects genuine whistleblowers;
2. Act promptly on disclosures - independent investigation;
3. Report promptly on disclosures, respecting confidentiality of source AO, ICAC, Ombudsman, (Public Interest Disclosures Agency);
4. Ensure confidential treatment of disclosures;
5. Ensure whistleblowers are given legal advice, counselling, general support and continuing advice as to actions taken.
6. Notify all employees of rights, procedures, agencies involved and assistance available in the matters of disclosure.

Failure to abide by these principles should be deemed a "breach of contract."

He elaborated upon this recommendation in the following comments to the Chairman:

> ***Chairman:*** *"...Obviously you believe that the current protections provided whistleblowers by the Act are inadequate. Where would you think we could go in terms of strengthening those protections, particularly in light of the enormous emotional and personal cost that whistleblowers face under the current system?*
>
> ***Mr Hatton:*** *I don't believe that you will make this work unless the Act specifically covers people under SES contracts. Whilst ever CEOs or other members of the Senior Executive Service can escape their responsibilities to set a climate in which a whistleblower can report with safety, then the Act will not work.*
>
> ***Chairman:*** *Just picking up on that, when the Legislative Committee met and sat upon the draft legislation, they specifically took information from bureaucracies that led them to believe that to legislate strongly in terms of individual areas would create some difficulty because of the different modes of operation within departments. Do you see that as something that necessarily should be overridden and that specific steps be built in to departments that would give whistleblowers a very clear line of complaint and protection?*
>
> ***Mr Hatton:*** *Yes, Mr Chairman. ... The relevant clause in the SES contract specifies the above principles as intrinsic to sound management. Thus, failure to abide by these principles is deemed to be a breach of contract because that SES person is not managing in a sound and efficient manner.*
>
> ...
>
> *It is totally unacceptable for any CEO to plead ignorance because a key part of their duty is to facilitate lines of communication and free information flow. That includes protection for whistleblowers."*

Put briefly, Mr Hatton believed:

> *"If you do not set up that safe environment, if you do not inform the employees, if you do not make it clear that it is a positive response to whistleblowers, it is a positive management tool, then you have failed as a manager and your contract ceases to exist. It is the core of sound management."*

Mr Hatton's views were shared by several other witnesses, including Dr Simon Longstaff, Executive Director of the St. James Ethics Centre, who regarded adequate internal mechanisms for the reporting of maladministration, corrupt conduct and serious and substantial waste, as an inherent feature of sound management practice. In Dr Longstaff's opinion responsibility for educational initiatives and internal reporting systems belonged to management.

> ***Chairman:*** *"Who would you see as the coordinating body in terms of ensuring that education took place and that down the line from CEOs there was an understanding of obligation and also right?*
>
> ***Dr Longstaff:*** *Well, I think given that the authorities to which protected disclosures can be made are quite disparate at the moment in the sense of the Independent Commission Against Corruption,, the Ombudsman and the Auditor-General, it might not be appropriate to nominate anyone in particular but instead put the onus of responsibility on the heads of the various agencies and State-owned enterprises for them to be responsible, ensuring that this is done as part of their normal management practices. Where there are boards of directors they may also be required to see that this is undertaken."*

Greater acceptance, understanding and fostering of the protected disclosures legislation by management would in Dr Longstaff's opinion ultimately result in reducing the incidence of disclosures and the types of conduct reported under the Act.

> ***Mr Fraser:*** *You indicated that the employer should actually advise employees of the provisions of this Act. Do you see by doing that it may have two outcomes, that you would get more protected disclosures which would make the system work a little better because there are greater numbers, but also that management might be therefore a little more careful in its day-to-day management options so that disclosures are not required on the basis of corruption or overseeing corrupt acts or whatever?*
>
> ***Dr Longstaff:*** *I think both of those outcomes are possible for increasing awareness and both of them are desirable in the sense that we are looking to minimise the incidence of those events which give rise to a complaint, not to minimise the number of complaints but to minimise the incidences and therefore have a much better operating environment for all of the people concerned.*
>
> *I think that management in part has to understand that this is not something that is being brought in against them as some kind of weapon likely to limit their room for manoeuvre. The Act does not require anything more than best practice really in terms of the way in which the culture of an organisation ought to be developed and structured. Part of the advantage to*

*flow from this review may be a better understanding of that point. Agencies may look for some assistance in terms of how they present it. It can be seen as a curse or as an opportunity, and I see it as the latter."*

Dr Longstaff held that ultimately it was a government responsibility to alert organisations within the public sector of the standards and practices it finds acceptable. This could be done by both instruction and the creation of institutional supports.

> ***Chairman:*** *"In terms of that, do you think in legislating or in looking at amendments to the Act that the Committee should be more prescriptive in what is expected of CEOs and the senior executive service and what is expected of all management within government organisations in terms of aiding disclosure?*
>
> ***Dr Longstaff:*** *I think that ultimately governments are held responsible for the actions of those people who work for them and I suppose that ultimately comes to the Executive, to the Ministers. Therefore, they have an interest in ensuring that those agencies and bodies which act in their name in a sense are undertaking practices designed to create an environment, which is serving the public interest.*
>
> *Therefore, I would have thought it was an appropriate thing for them to do to send strong signals throughout any organisation that they control to say that things like reprisals against whistleblowers are totally unacceptable. At the same time, governments can not only do that by issuing instructions, they can demonstrate through their own behaviour the things they think to be important so there is consistency through the system as a whole, and they can put in place various institutional supports which can assist people who find themselves on occasions in the unenviable position of having to make complaints."*

The investigating authorities also regarded cultural change and management support for public officials making protected disclosures as vital to the effectiveness of the Act. Mr Harris told the Chairman that cultural and attitudinal change had to occur and that "the manager must want to improve the organisation and must look for every feasible piece of help to do that, not condemn it when an employee offers the opportunity." He did not believe that the number of protected disclosures generally warranted giving legislative force to any program of management reform. However, in the event that protected disclosures signalled wider systemic problems, Mr Harris indicated that he would support the introduction of statutory provisions.

> ***Chairman:*** *"Should that be by statutory obligation, that those officials take the protected disclosure and treat it, or just as part of the management practices within departments?*
>
> ***Mr Harris:*** *In the main, most people who make comments to their employer are not mistreated and maltreated, I would think. I would think that we are seeing probably only exceptional cases, which are described as being whistleblowers....*
>
> *I think that the size of problem we are looking at is reasonably small, on which basis one ought not look for a legislative solution for that smallish few.*
>
> *However, if it is intractable and if it is as serious as it seems to be, it may be that a*

*legislative requirement is needed until we get a change in culture and a change in attitude, so the concept of having an obligation placed on the employers to respond in an open way to allegations by their employees, may be necessary.*

***Chairman:*** *Mr Hatton suggested, in fact, in perhaps the employment contract of CEOs, there be a stipulation that it is part of their responsibility to ensure that within the chain of command. Therefore, they would have a very definite obligation and would be subject to sanction if it was not carried out. How would you view that?*

***Mr Harris:*** *Yes, that is one solution. It, again, is logical and would appear to be workable. I do agree with the concept of sanctions, because it does concentrate the mind, and the absence of it gives a weighting that allows managers to disregard it."*

The Ombudsman was definitely of the view that Chief Executive Officers should carry responsibility for ensuring that any employee from within their organisation, who had made a protected disclosure, was not subjected to detrimental action. Ms Moss argued that CEOs should not necessarily be "personally liable" as such, but that "a general clause" should be introduced "where it would be important for the CEO to ensure that the culture of the organisation is supportive of protected disclosures being made, and quite obviously how that is performed can be shown up in the statistics, can be shown up in how those matters can be dealt with and would be obviously viewed in how that CEO has performed his or her contract." The number of reprisals would be a performance indicator for the CEO and the more damages paid out by the authority, would reflect on the CEO's management.

The ICAC Commissioner also fully supported the use of contractual obligations for Chief Executive Officers. He preferred that this mechanism should be used in combination with education programs, rather than statutory obligations, to achieve effective internal reporting systems and prevent reprisals being taken against persons who had made disclosures. This was an approach the Commissioner had already advocated in relation to one public authority.

***Chairman:*** *"Mr Hatton suggested that it ought to be part of the contract of SES officers and CEOs that they ensure that there is instituted within their organisation a line of contact in terms of protected disclosures and the assurance that reprisals are not taking place. Do you support that approach, and secondly, do you think it needs to be a statutory requirement for setting up protection and lines of communication within organisations or is the education process going to achieve that?*

***Mr O'Keefe:*** *No, I think you need a combination. Much publicity was given to something that I said before the PJC on the ICAC about the State Rail Authority. What was not published was what followed in the next question and answer, namely, how much that State Rail Authority organisation had done in the last five years to improve the situation. It still left it a very unsatisfactory situation but it was much better than it was. I met with Minister Langton and each of his heads and boards of the proposed four organisations and submitted a proposal that probity considerations, which would include protected disclosures matters, should form part of the agreement between each of the boards and CEOs with the Minister and then between the board and the CEO and the CEO and down the line, so that probity, integrity, including protection of those who fall within the protected disclosures legislation, is everybody's concern; and it is a marker for whether or not they are performing their duties*

*properly when you come to their six, 12 monthly assessments, have they done or failed to do this.*

*That way you cannot have the defence of somebody saying I did not know it was happening. It is each person's job to know what is happening and to ensure that it does not happen. I think that contract concept is a very good one and if used in conjunction with educational programs to foster an appropriate climate, is likely to succeed. I cannot tell you a time frame. Like all educational things, it takes time, but that is the way to go in my view."*

## CHAPTER 6 - INTERNAL REPORTING SYSTEMS

Confidence in the internal reporting system of a public authority was seen by several witnesses as a crucial element in the success of the protected disclosures scheme. In the model proposed by Mr Hatton public officials wishing to make a disclosure should be able to feel confident in the mechanisms for reporting internally within their organisation. Approaches to an external body or an investigating authority would only be necessary where the public official lacked confidence in the internal reporting system of their organisation. He discussed this point with Mr Gallacher:

> ***Mr Gallacher:*** *"Following on from the Hon. Elaine Nile's last point, in terms of police informants, are you suggesting police informants be taken away from the Police Service, the internal witness program, and be administered by your proposed special agency, the Ombudsman's Office, and how do you feel about indemnity for public officials who come forward?*
>
> ***Mr Hatton:*** *It is absolutely vital in any sound management that they have their own internal investigation and reporting mechanism, no matter what sort of an organisation it is, whether it be a tennis club or a multi million dollar government agency. If its ethics and its standard and professionalism are so low nobody inside can trust what is happening in terms of having their own mechanism for imposing, fostering standards and looking after whistleblowers.*
>
> *So, we must strive, even for the Police Service, to have that as the final goal. However, in setting up what I will now call PIDA, the agency within the Ombudsman's Office, that gives a place outside of the suspected culture of the organisation, for that person to go to get initial helpful information. They may not choose to go there. Hopefully, if they have confidence in the witness program, in the police service, or any other internal informants program in any other department, they will go there. Outside you have got a general advice agency."*

However, the Act does not specify any requirement that public officials must make a disclosure internally before they approach an investigating authority. Representatives of Whistleblowers Australia Inc. gave evidence that the investigation authorities had given the impression that they would not investigate a disclosure unless it had already been made internally. Consequently, a number of the representatives had rather reluctantly made their disclosures under an internal reporting system.

> ***Mr Kinross:*** *8.1 gives you alternatives to go to if you are not satisfied with the, "internal management processes" and that is to the investigating authority. I get the impression that none of you have done that and, if so, why?*
>
> ***Mr May:*** *I was assured that they would not investigate it unless I explored the internal processes first.*
>
> ***Chairman:*** *You saw no direct access?*
>
> ***Mr May:*** *No.*
>
> ***Chairman:*** *Only after you had exhausted the process?*

***Mr May:*** *I was given the impression I would be leaving myself open to some sort of disciplinary processes unless I went down the internal path first.*

***Mr Kinross:*** *I think that is something we should flag. The section gives them the choice. They do not have to go. You have (a) the investigating authority; (b) the press; and (c) another officer of the public authority. The investigating authorities believe the only way they should deal with things is if they have gone internally first. The Act does not suggest that. I think it is a logical thing.*

***Mr May:*** *I think it is the interpretation."*

Mr Kinross pursued this point with the Acting Director-General of the Department of Local Government, Mr Rogers. Mr Rogers acknowledged that public officials were not required to exhaust all internal reporting mechanisms before approaching an investigating authority. However, he supported such an approach depending on the nature of the disclosure.

***Mr Kinross:*** *"Section 8, which you did mention in your submission, I do not recall whether it addresses this issue, actually gives the choice open to the complainant. There is no requirement whatsoever in the Act to go one path or another. Common sense might suggest if it went to the wrong one, it would go back, but the complainant may, for genuine and serious reasons, go to the investigating authority rather than the internal management processes first.*

*Indeed, we heard yesterday that this is what some whistleblowers were in fact experiencing. They were being referred back by the Auditor General, the Ombudsman and ICAC to say hold on, we will not investigate this any further until you have exhausted the processes from within.*

***Mr Rogers:*** *And depending on what the situation is, we would take the same view. I think all the investigative agencies are about saying has this been addressed by the organisation. Now, if somebody came to you and said I want to report the general manager of X council, who I think did A, B and C, we would probably not send it back to the council. We would be more inclined to make the preliminary inquiries ourselves. If somebody was talking about the fact that the council turned its sprinklers on, or does something which was perhaps a waste of council resources, the answer is perhaps you should bring it to the notice of the council first.*

*It, to some extent, has to be based on the nature of the complaint. All of us get a lot of complaints about very local issues and matters of local management. It is appropriate that they go back to the council. The whistleblower issues fall into a different category, remembering they are only a proportion of what we deal with. We do get complaints about the internal management of council. Sometimes they are referred back and sometimes not. We take them through ourselves.*

***Mr Kinross:*** *Do you understand section 8 does not require any of that process to occur?*

***Mr Rogers:*** *Yes."*

The President of the Local Government and Shires Association, Councillor Peter Woods, expressed a similar preference for dealing with disclosures internally. However, he recognised the need for an external mechanism in some circumstances.

> ***Mr Fraser:*** *"Further to that, the object of the Act is to encourage and facilitate the disclosure in the public interest of corrupt conduct, maladministration and serious and substantial waste in the public sector by three areas. (b) says protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures. On the basis of that, there are only 2 cases where people have actually inquired and you are saying they should all be handled in-house. Surely the question could be put to you that because people are scared of the reprisals, the complaints are not being made and therefore another body needs to be there, such as the Ombudsman, to actually look at the disclosure in the first place.*
>
> *In other words, it has been put to us by witnesses that their jobs have been placed on the line because of disclosures they have made. With your in-house scenario, surely that would make that a lot easier to get rid of the troublesome employee or to silence them and therefore it never goes any further. So on that basis would you agree that perhaps the Ombudsman's Office, or as the Department [of Local Government] suggested, it should look at disclosures in an effort to make sure that does not happen?*
>
> ***Mr Woods:*** *I think I said earlier that our favoured position was to try to get that proper climate where people can feel confident to have their matters dealt with. But what you raise is very legitimate. I think I also said earlier, yes, I could see a circumstance where it may be necessary for people to seek assistance externally. I think all institutions are in the same position and I am certainly not pleading and believing that if it was not possible for something to be resolved and someone was aggrieved that there should not be access to some other body.*
>
> ***Mr Fraser:*** *Where would you best see that access, the Department of Local Government, the Ombudsman or the ICAC?*
>
> ***Mr Woods:*** *I would tend to feel that the Ombudsman's Office, provided we could see the mechanism set up and that was transparently done and all the rest of it and encouragement within local government itself. One of the fears that I would have with the Department of Local Government is that it could become institutionalised and that you suddenly set this up, here is another new industry to sort of nurture."*

Mr Gallacher sought the view of Councillor Woods on the possibility that where a disclosure was to be investigated by an external body, local council management could retain some involvement in dealing with the matter:

> ***Mr Gallacher:*** *"What I would include is a policy of what is currently referred to as inclusiveness and that is having the respective body being investigated, the management, including the counsellors on this occasion, actually involved in the process, not taking it external from them. They are actually involved in it, and a degree of accountability in terms of that as well. If they are allowing something to fester underneath the surface and they are aware of it, rather than waiting for someone to step in and hopefully take care of it, they have to be involved in it themselves and actually do something about it.*

***Mr Woods:*** *I certainly favour that and I think there should be a dynamic involvement by the council itself.*

...

***Mr Woods:*** *I think the associations collectively have a responsibility to encourage this sort of climate to maximise matters being dealt with there but at the same time, and I take the point of Mr Fraser that there has got to be somewhere beyond if it cannot happen, and it has got to be the onus of the individual to have that access. I would not like to see it institutionalised because I think it destroys what the whole philosophy of the new [Local Government] Act. But at the same time I believe that every individual has got the right to fair and reasonable treatment, and if they do not believe that they have the confidence in their circumstances to achieve that they have to have redress to a body, and I would suggest the Ombudsman's Office provided they can get a few other bits and pieces sorted out might be a reasonable avenue to work from."*

The Auditor-General also saw merit in disclosures being initially received within public authorities under internal reporting systems.

***Mr Kinross:*** *"While you are concerned with possibly allowing, or indeed legislating for a whistleblower to go direct to the internal management processes, ... the colour or tone of the evidence from Whistleblowers Anonymous on Tuesday, gave me the distinct impression they were concerned about the potential for cover ups, and if you have cover ups of information, then is it not better that you immediately go outside, to an outside body, who then has strong power and can think of other ways and means of achieving the truth of the allegation, without necessarily alerting the authority complained of?*

***Mr Harris:*** *It seems to me that this argument takes you down one of two routes. Either it says all complaints should have to go through a specific investigating authority, because you fear cover up, and so that no employee can lodge information with their employer, or the second route is to say that there has to be some legislative mechanism which allows you to distinguish between agencies, which you believe would be more amenable to receiving employees complaints than others.*

*In fact, I think a lot of employees make comments and observations to their employers which are acted upon, and some may be covered up. I think the best way to handle that potentiality is to allow the complainant to come to a view whether they think the matter is going to be covered up, in which case they can go to someone else, but if they do not have that in mind at the time, they can go to their manager, which the current Act allows of course, and if their manager appears not to be taking the matter seriously, then that person can always go to someone else at a subsequent time.*

*The fear is that the evidence may be destroyed or otherwise confused. That may be so. I cannot think of a feasible remedy to that, that does not involve all complaints going to an investigating agency, or some classification of agencies, depending whether you believe they are going to cover them up or not."*

Although the Ombudsman supported the use of internal reporting systems by public officials wishing to make disclosures, her support was conditional upon the adequacy of the available system:

***Ms Moss:*** *I think it is important to remember that each agency should be encouraged to have a very broad internal reporting mechanism, so your primary aim is if they handled it properly, there would be no need for that person to go to any outside external agency at all, so by all means, the great incentive ought to be given to the agencies to accept that disclosure and deal with it properly and in the course of doing that, they would also improve their management techniques.*

*I think in that respect there should not be a problem. There is nothing in fact stopping that person from going to the appropriate reporting channels within that organisation.*

***Mr Lynch:*** *If the appropriate reporting channels exist.*

***Ms Moss:*** *Yes, so I think there ought to be resources that go into making that work and indeed if you made that work, you probably would not get as many problems with respect to detrimental action and reprisals than everything else. The external agencies come into it and those organisations are not dealing with it well. If you had a quite a number of external agencies, you could confuse it even more. You are saying, okay, you have the three bodies that focus on those three categories. They have a track record. They have statutory independence and are responsible to Parliament, through Parliamentary Committees."*

On the issue of the adequacy of internal reporting systems, the Committee remained concerned about the available ICAC data on the portion of public authorities which had implemented internal reporting systems. This data showed:

> "A little over one-third of local councils (36%) had implemented some form of internal reporting system to enable protected disclosures to be made. Seventy per cent of the councils with reporting systems had put them in place directly in response to the Act rather than having amended a pre-existing system.
>
> Almost one-quarter of councils (23%) had not yet given any consideration to establishing formal channels to enable protected disclosures to be made in their organisation."

Under questioning from the Chairman, representatives of the Department of Local Government advised that their only real indication of the extent to which internal reporting systems had been implemented by local councils, had been obtained from the ICAC survey. The Department had not conducted its own survey but had supported the ICAC initiative and had formulated a protected disclosures policy which was being distributed throughout the Department and local government.

The Community Services Commissioner also gave evidence of the need for further implementation and development of internal reporting systems within the public authorities under his jurisdiction.

***Chairman:*** *Given that you have been involved obviously with a number of investigations, have you found within the organisation that there is firstly, complaint handling procedures and lines of accountability and, secondly, an awareness of the Protected Disclosure Act and its provisions?*

***Mr West:*** *In relation to the question of lines of accountability and complaints mechanisms, that differs vastly between the different services, and remember, the funded services are often quite small and there are a couple of thousand of those - it might be 3,000 - it is a significant number. I did not talk about it before, but a fair proportion of our resources goes into informing, educating, training, providing literature about local resolution of complaints and how to set up a complaints system that reflects good practice and how to deal with individual complaints, strategies for dealing with complaints. We strongly promote local complaint resolution.*

*The Department of Community Services and the Home Care Service both have formally established complaint handling mechanisms and many of the funded services have, and it is now a condition of their funding that they should have such a scheme in place. They work with varying degrees of success, I must say, and a lot of it has to do with the support that is given by the management at the top to a system of complaints and a philosophy of being open and welcoming complaints and the opportunity to do something about them. The response on that score is very mixed. So I would say at the moment local complaint handling systems are not yet in any sense satisfactory, but we are noticing improvement.*

*In the community services area I would think that there is very little awareness of the Protected Disclosures Act and one of the reasons would be there has been no attempt to educate people about them. One of the reasons for that is the very one we are talking about, that it probably does not apply to them at least in respect of the things that they can come to our Commission about. Our gateway is not expressed in terms of maladministration, but unreasonable conduct which I suppose you would say is broader.*"

## CHAPTER 7- COUNSELLING AND SUPPORT SERVICES

During the review the Committee took evidence, from persons with direct experience of making a disclosure under the Act, that the amount of counselling and support which they had received was unsatisfactory.

In sharp contrast, the Police Service's Internal Witness Support Unit had implemented a program of assistance to members of the Police Service internally reporting misconduct by other police personnel. The Commander of the Unit, Chief Inspector Caroline Smith, explained the development of the support program and its essential features to the Committee:

> ***Ms Smith:*** *In relation to the internal witness support program as it now exists, we have a new policy document that is awaiting signature of the Police Minister to endorse and publish throughout the organisation. There was a policy that existed called the internal informers policy. A review was conducted of that policy and in January 1995 a number of recommendations came out of that review, one that the policy be managed and coordinated by a separate unit, hence the formation on 1 March 1995 of the Internal Witness Support Unit.*
>
> *The policy was previously managed under the Office of Professional Responsibility which was also responsible for the investigation of the disclosures made by those officers. From 1 March 1995 it has been under the Human Resources Command. I was appointed Commander of that Unit in late December 1995 and from that time I have conducted a complete review of all procedures and put this new policy document together. There were a number of problems identified during that (earlier external review - sic) and we have conducted a review of it ourselves since taking over the Command and we have new procedures and operations of the Unit.*
>
> *The procedure is when a police officer makes a complaint the Office of Internal Affairs is notified as per the Commissioner's Instructions. As a matter of course now our Unit is provided with copies of all internal police complaints. We then do an assessment of those complaints as to people who require the services of the internal witness support program through our unit. We have an assessment criteria. We look at workplace environment. We look at possible victimisation and harassment issues and health and welfare issues. We do a full briefing to the internal witnesses.*
>
> *We also organise appropriate support personnel both in command line and from our Unit. They have a case officer as well. The whole idea of our Unit is to monitor and review them being on the program and that is right through to the finalisation of any court proceedings that may eventuate from the information that they have supplied. So the program as it exists over the last six months has been a great improvement on the previous policy that was in existence because there was no actual unit that managed and coordinated it.*
>
> *We have an ongoing monitoring and review process of these people on the program, so hopefully we will be able to address problems as they happen in command line to reduce stress and those sorts of issues for the internal witnesses. We call them internal witnesses. We do not call them whistleblowers, and that was one of the recommendations that came out of the external review."*

If confidentiality cannot be kept for a particular reason, for instance, an internal reporting system, court or tribunal hearing, the Unit usually informs the internal witness of the procedure that has to take place. If it is inappropriate for the member's support officer and mentor to be selected from command line, because of the nature of the allegations or the officer named in them, the case officer attached to the Internal Witness Support Unit assumes a dual role as case officer/mentor or case officer/support officer so that support is provided wholly and solely from the Unit. Chief Inspector Smith emphasised that the program needed to be flexible to meet the needs of the internal witness and that participation was optional. In addition, the Unit offers a 24 hours on call service. The Unit does not have an investigative role but could monitor the treatment of internal witnesses and the progress of the investigation of their allegations.

The Ombudsman supported the Internal Witness Support Unit as a possible model for other public authorities establishing support and counselling mechanisms. For those public authorities with support procedures already in place the IWSU offered an illustration of how such procedures could be reviewed and modified.

> ***Mr Gallacher:*** *The Police Service has the internal witness support policy and it is something we looked at in some depth. Do you feel that policy in the main is something that could be adopted in other areas of government?*
>
> ***Ms Moss:*** *Yes, in that despite strong feelings in this area about police, because of the Police Royal Commission, that internal witness support model is probably one of the few, if not the only one, that has been fully thought through at this moment. So it is probably one of the best models we have got and in fact, Kim might want to talk a bit more about that particular model.*
>
> ***Mr Swan:*** *I think it is true to say that has been developed because of the peculiar problems that police officers have faced because of police culture....*
>
> . . .
>
> *We have referred a number of matters involving whistleblowers, where we have done reports of recommendations to the Police Service, or referred those matters to the unit, so that they can look at those instances and perhaps refine their procedures in light of those experiences.*
>
> *Perhaps the suggestion would be that the sort of support mechanisms that have been used there could at least be considered by other government authorities, particularly where whistleblowing is a problem, with a view to transplanting at least some of those procedures across to mechanisms.*
>
> *You may not need the highly developed mechanism you have got there, and even have a particular unit, but you might, for example, want someone within a government organisation, who is at least responsible for initially providing a mechanism for support for a whistleblower.*
>
> ***Chairman:*** *So the support is within the organisation? There needs to be an understanding that this person is under stress, under duress, potentially under reprisal and therefore has to be supported internally.*

***Ms Moss:*** *And I think that is in accord with good management principles anyway, that organisations do just that."*

Initial discussions between the Committee and the Ombudsman, Auditor-General and ICAC Commissioner revealed an apparent consensus that it would be inappropriate for investigating authorities to provide counselling and support to persons making disclosures. This type of support was seen as the responsibility of the public authority employing the person making the protected disclosure. When asked by the Chairman if he had contemplated whether there should be funding for that type of support to protected disclosure witnesses, the Auditor-General answered:

***Mr Harris:*** *I am instinctively not very attracted to that. I suppose we are seeing an expressed need for this support, because agencies have so poorly treated their employees. I would rather address that than try to address fixing up the damaged people afterwards and it does not seem to me to be addressing the issue of corruption, or waste, or maladministration, rather it is addressing an employee employer relationship issue, which has gone sour.*

*I am certainly not equipped to do that and you are not asking me to do that. You are asking whether the Government should provide some mechanism. I am not attracted to it..."*

Likewise, the Commissioner of the ICAC drew a distinction between the role of an investigation agency and the responsibility of an employer authority for providing support mechanisms for its employees. In response to a question from Mrs Nile, the Commissioner explained the way in which his officers often dealt with allegations and disclosures:

***Mr O'Keefe:*** *Often what happens is somebody will ring up and they are very upset and they make their complaint and the officer receiving the complaint tries to distill this down to see what is the essence of this complaint. This happens whether it is a protected disclosure or not, but it tends to happen a bit more with protected disclosures. The person is very upset. The officer will speak to that person and I believe in such a way as to calm them down and to assure them that we will process their complaint, in the case of protected disclosures their identity being kept anonymous and as quickly as we can but it is not a professional counselling service.*

However, the Ombudsman later modified her position, arguing that a PIDA should provide support and referral to appropriate support organisations. She described this role as "akin to a customer service manager/client manager". The Ombudsman felt that the Office's experience of protected disclosures made it apparent that there is a need for a member of PIDA to fulfil a role similar to that of "support person and advisor" who would "provide the complainant with advise and non-partisan support". The Committee did not interpret the Ombudsman's latest view to override her comments on managerial responsibility for whistleblower support. Moreover, it assumed that the perceived need for such a role by PIDA had arisen because of a lack of internal support for persons making disclosures.

## CHAPTER 8 - EDUCATION & TRAINING

The responses provided to the Chairman's request to all public authorities to provide information on the extent to which they had responded to the Act suggested that the majority of organisations had undertaken basic, minimal measures in isolation, such as the circulation of pamphlets or brochures, and had not devised programs or initiatives which integrated educational material on the Act with other policies and documents on their organisation's objectives and values.

The Committee was concerned about the number of public authorities surveyed by ICAC, which had formulated education programs about the Act. These concerns were partly allayed by evidence from witnesses of more recent educative measures and a willingness to review and, if necessary, modify education initiatives depending upon their effectiveness.

For instance, the Department of Local Government advised that prior to the introduction of the legislation it brought the *Protected Disclosures Act 1994* to the attention of the Local Government and Shires Association. The Department has reviewed the draft booklet on internal reporting systems prepared by the Audit Office, ICAC and Office of the Ombudsman. Additional advice was provided to councils in the form of a Departmental Circular 95/15 giving information on the essential provisions of the Act, and highlighting the requirement for each Council to have an internal reporting system. It also referred to appropriate procedures for the making of protected disclosures. Departmental officers were nominated in the circular as contact officers for information and assistance on the legislation. Less formal circulars, such as staff magazines also were used by the Department. However, the ICAC survey results, which indicated that only 36% of councils had implemented internal reporting systems for protected disclosures and only 25% had informed their staff about the Act, led the Department to the conclude that "the legislation [had] not met expectations". Consequently, it is proposing to give further information to councils to advance the purposes of the legislation.

More recently, the Department has taken a proactive approach offering an advisory service to councils and liaising with the ICAC about an education program for councils. The Department intends to work with ICAC and the Ombudsman on this program and conduct more face-to-face instruction on the Act. With regard to internal reporting systems the Investigations and Review Branch Manager explained that it could assist councils in adopting internal reporting systems by creating a model which could be adapted, or adopted entirely.

From within local government, initial measures had been taken to advise councils and their staff about the Act through circulars and position papers. In response to questions on the underutilisation of the Act within local government, the President of the Local Government and Shires Association, Councillor Peter Woods, gave the Committee a commitment to distribute further information on the protections contained in the Act.

> ***Mr Fraser:*** *Could that possibly be because they don't understand that the Act is in place and the protection that the Act offers them, and would the Local Government Association therefore be happy to promote this Act and the protection it offers or purports to offer to all*

*councils and employees of councils?*

***Mr Woods:*** *We would be certainly quite happy to further distribute it. We have in fact distributed information about it in the past as I understand.*

. . .

***Mr Fraser:*** *One of the objects of the Act is enhancing and augmenting established procedures. If you were actually to let all employees know about this, perhaps you would find there are more complaints and it is because of the fact that people are fearful of their position or fearful of the procedure in a particular council that is in place and if they knew they had this protection you would perhaps have more than two inquiries and there might be some further disclosures made by employees of local government.*

***Mr Woods:*** *You can rest assured that I will give you a commitment that in fact we will add further advice to all councils relating to this and the conduct of this Committee and we have no difficulty with the Act whatsoever. We have a desire to ensure that local government can be free of unsavoury practices and we want to see efficiency and any areas of corruption out. There is no difficulty about that..."*

Councillor Woods felt that the ICAC survey results in respect of local government should have improved by this stage given the promotional material which had been distributed.

The educative program adopted by the Internal Witness Support Unit of the NSW Police Service seemed to possess the essential characteristics required for a holistic approach to education about an internal disclosure system. A similar approach could be utilised by other public authorities. The Commander of the Unit, Chief Inspector Caroline Smith explained the Unit's approach to the Chairman:

***Ms Smith:*** *I think education and training is most important and we are addressing that at the moment through the Police Academy. We are looking at starting the education in relation to this policy and program and it must not stand out on its own, it has to fit into corruption preventive strategies across the organisation, but looking at it from student police officers right through to executive development level.*

*We also have a marketing project plan which as soon as our policy document is signed we are about to embark on. We have a number of strategies there in relation to getting the message across to the organisation in total, the importance of this policy and where it fits into the overall strategies of the Police Service."*

The NSW Police Service had distributed information on the *Protected Disclosures Act 1994* in the organisation but Chief Inspector Smith felt that the success of the initiative had been reduced " because of the confusion concerning the legislation compared to the requirements under the Police Service Act".

Commissioner O'Keefe's comments on the implications of the ICAC survey results, indicated that the Commission was continuing to examine possible ways to improve awareness and understanding of the Act within public authorities:

***Mrs Nile:*** *So from your point of view you do not feel that the people out there understand their rights in the sense of coming to you. How do you feel about that?*

***Mr O'Keefe:*** *A survey within the public sector suggests that there has not been enough education and exposure of the Act to people who are entitled to fall within the ambit of the Act or who come within the ambit of the Act. One of the projects that we are looking at as an education project is to better that situation. We have a three-pronged attack on corruption. We have investigations, corruption prevention and education. They all integrate. If you educate people to know what their rights are and they feel confident about making disclosure, we will find more things that need to be looked at, but also you create a culture inside the organisation that says, well, look, anybody can complain about me when I do something wrong, so rather than have that I will not do something wrong.*

*It is almost a self-policing mechanism...."*

**Conclusion**

As a result of the Review, the Committee is convinced that the adherence of officers at senior management level in public authorities to the spirit of the Act is crucial to the effectiveness of the protected disclosures scheme in New South Wales.

Witnesses to the Committee reached a general consensus that members of the Chief Executive and Senior Executive Services should play an instrumental role in guaranteeing that the internal reporting mechanisms and cultural outlook of their organisations foster an environment supportive of public officials who make protected disclosures and the appropriate management of investigations.

To assist achieving this environment, the Committee has recommended the introduction of a combination of administrative measures including contractual obligations and standard code obligations. The Committee also resolved that codes of conduct and policy documents specific to public authorities should contain clear instructions to staff on the provisions and requirements of the Act.

Codes, either general or specific to an agency, were considered by the Committee as ideal educative tools for management to use to promote greater understanding and awareness within a public authority of the provisions and meaning of the Act. Codes are usually drafted in consultation with those who are committed to upholding them and can reflect whatever qualities they aspire to achieve. A code can be "prescriptive, imposing obligations that are ethical or moral in character; it can enshrine values, using the language of those to whom the code applies; and there can be flexibility in developing and amending the code. In short, a code is more likely than legislation to have a normative impact on an organisation."[5]

The Committee recognises that the courts would construe the offence provisions under s.20 of the Act strictly in terms of the legislation. Although it is not possible to vary the operation of

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[5] John McMillan, op.cit, in Noel Preston (ed.,), Ethics for the Public Sector, Federation Press, Sydney 1994 p.126

section 20 through non-statutory material, such as codes of conduct and policy statements, the latter can play a useful role in drawing attention to the rights and obligations which exist in the Act.

The Committee feels that these administrative measures should create greater incentives for the senior management of public authorities to recognise the effective handling of protected disclosures as an essential management tool and accountability mechanism. It is proposed that this administrative framework would be reinforced legislatively by an amendment to the *Protected Disclosures Act 1994* to include a statement of the Legislature's intent in enacting that legislation.

**Recommendations 4-7**

**Codes of Conduct**

4. 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.

**Managerial responsibilities**

5. *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.

6. *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.

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.

# PART C - PROTECTIONS

## CHAPTER 9 - GROUNDS FOR CIVIL ACTION

During the review the Committee examined the proposal that the Act should be amended to provide for a civil action for damages where detrimental action has been committed in reprisal for the making of a protected disclosure. As distinct from criminal proceedings, a plaintiff in such proceedings would only be required to meet the civil standard of proof (that is, on the balance of probabilities). The suggestion that such an amendment should be made had the support of the majority of witnesses to the Committee, including the investigating authorities.

Although Mr Bennett QC expressed some concern about multiplicity of litigation he also saw merit in the proposal.

> ***Chairman:*** *"It has been suggested it is not adequate to provide protection to persons who have made protected disclosures, by way of having a criminal offence of detrimental action, because of the difficulties in the way of commencing prosecution action. Do you think it would be desirable to establish some form of statutory ground, or course of action enabling recovery of damages, so that a person who has made a disclosure and alleges subsequent victimisation, can take a civil action against the persons or institutions involved?*
>
> ***Mr Bennett:*** *Certainly I would agree with the first part of what you put to me, that there is something heavy handed about having a criminal sanction and no civil sanction. My only concern about the civil sanction is that, in the category of complaints which are not justified, you are likely to find a significant number of people who are eager to have recourse to the courts, and I am just concerned you may get from some people, a multiplicity of litigation.*
>
> *I suppose there are other protections against that and once the conduct is regarded as serious enough for a criminal sanction, it does seem surprising that there is no civil sanction. The civil sanction, of course, would have the further advantage that the burden of proof would be, on the balance of probabilities, [rather than] beyond a reason doubt, which would make it easier. In a sense it also provides, I suppose, a way of achieving what may be the result you want to achieve in some cases.*
>
> *Suppose you have a case where a whistleblower makes a number of complaints, some justified, some which turn out to be unjustified. The attitude which the employing organisation takes, obviously normally a government department or government related department, is well, we have difficulty working with you, because you are a person who may well be - we fully accept you made legitimate complaints and you are entitled to do so but we have difficulty working with you. You have been disbelieved on the other matters, and having made those against us, and there are difficulties in personalities and people working together, it is probably convenient in such a case that there be a provision under which public or departmental funds are used to compensate the person for loss of employment, rather than to have the unhappy relationship continuing.*

*One can see from that point of view as well that there may be an attraction in having a civil remedy. The remedy of forcing people to stay together and work in an environment where they are not happy working together, is obviously not conducive to an efficient public service.*

*I would have thought that very long answer to your question comes down to yes.*

***Chairman:*** *You need to create a tool.*

***Mr Bennett:*** *You need to create a tool, yes."*

None of the three investigating authorities objected to the introduction of grounds for civil action, however, they were not united on the related issue of punitive damages. In her response to the issues paper the Ombudsman argued:

> "There does not appear to be any good reason why persons subject to detrimental action should not be able to claim damages. If 'whistleblowers' suffer loss or damage as a consequence of being subjected to detrimental action then they should be appropriately compensated....
>
> There is the potential for claims for compensation to head down the track of claims for massive awards of punitive damages. We believe that punitive damages should be available as an incentive against those who would take detrimental action and that a sliding scale be available to distinguish between the truly malicious and vindictive and the merely incompetent or stupid. However, such awards should be capped with maximum level of payment so as to avoid massive punitive claims and awards."

The Auditor-General also held no objections to amending the Act to create a statutory basis:

> ***Chairman:*** *"In terms of detrimental action, it has been suggested perhaps there should also be passage of a separate civil action and creation of a tort. How would you feel about that?*
>
> ***Mr Harris:*** *That would overcome the issue of reversing the onus of proof in a criminal arena and in some senses it is the major issue facing the complainant, and where there are sufficient penalties imposed on a person or organisation, by way of compensation, that in itself is a salutary lesson, so I am relaxed about that, yes."*

Likewise, the ICAC Commissioner held no objections to the creation of grounds for civil action. However, he clearly opposed any extension of this proposal into the area of punitive damages.

> ***Chairman:*** *"What about the other proposition that perhaps we should create a civil action tort to allow civil action?*
>
> ***Mr O'Keefe:*** *I see no difficulty with that...However, you may consider the tribunal which deals with it. Many of the issues that arise in protected disclosures matters are essentially industrial or have a high industrial component. We have adopted as a policy that where ...proceedings in the Industrial Court are on foot we do not further progress our inquiries*

*until that is concluded. Otherwise you have two lots of people treading on the same ground....*

. . .

***Mr O'Keefe:*** *...It is a pretty heavy-handed way of dealing with it but I notice in one of the submissions it talked about compensation and damages as if they were different elements. Compensation was one thing and damages was something over and above compensation. If that was meant to imply some punitive damages or exemplary damages then I would not support that. You are on the way then to creating a new industry."*

Mr O'Keefe further clarified his position in later evidence:

***Mr O'Keefe:*** *. . . The question of exemplary damages where the act committed is malicious applies in trespass to a person, it applies in trespass to land I think still. It applies in defamation where there is malice proved. So if that were an element it would not be inconsistent with the law in other areas, but you will recall that in that consideration it was combined with a reversal of onus. Just imagine exemplary damages with the reversal of onus, sort of 5 million, as it were, unless you proved to the contrary. Not a goer, I think."*

**Conclusion**

Some of the views put to the Committee expressed doubts about the effectiveness of the legislation to protect persons who make disclosures. At present, this protection consists of providing for a criminal offence where persons suffer reprisals after having made a disclosure. There are certain difficulties within this approach.

Firstly, it is difficult to prove the commission of the offence to the criminal standard of "beyond a reasonable doubt". Secondly, even if the victim of the reprisal action reports that he or she has been subject to such action, there must be uncertainty about the extent to which the matter will be pursued by investigative and prosecution authorities. Finally, prosecutions of those responsible for reprisal action will not compensate the victim for any loss suffered.

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.

**Recommendation 8 - Protections**

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

## CHAPTER 10 - SECTION 20 - OFFENCE OF DETRIMENTAL ACTION (REVERSING THE ONUS)

With the exception of the Commissioner for the ICAC, the investigating authorities were receptive to the proposal that, in relation to the offence provision at section 20 of the Act, the onus of proving that detrimental action was not taken substantially in reprisal for making a protected disclosure should rest with the defendant, rather than the prosecution. In the Ombudsman's view the proposed reversal of onus was an acceptable suggestion:

> ***Chairman:*** *"Just on that issue of detrimental action, you may have heard in earlier questions about the reversal of the onus of proof, how does that sit with the Ombudsman's Office?*
>
> ***Ms Moss:*** *I am comfortable with a reversal. At the moment we feel that the burden which appears to be placed on the whistleblower to prove beyond reasonable doubt that an agency has committed detrimental action, is actually a bit too onerous. We feel that perhaps how you handle it is that the whistleblower shows that there has been detrimental action, then the burden can be reversed so that the agency then has to show that the detrimental action was not occasioned by the desire to instigate reprisals, so I think it can be handled that way.*
>
> ***Chairman:*** *I think Mr Bennett yesterday differed very strongly on that and also perhaps the Auditor General today made the point that it is easier perhaps for authorities to hide the real issue. That would make it a fairly difficult issue to follow through.*
>
> ***Mr Wheeler:*** *When I was listening to Mr Bennett yesterday from the audience, I got the impression that he was focusing mainly on the civil standard, where I think he is quite correct, probably the onus is not vital. But if we are dealing with a criminal offence of detrimental action, then the onus of proving beyond reasonable doubt is, I think, very significant and the authorities are more likely to have the resources and the lawyers and whatever to be able to prove this, if it is the case, than a whistleblower who has to do it out of their own pocket and against their own employer, or ex-employer. But against their employer, theoretically, is something that is a big ask."*

The Office's view was that "the prosecutor should prove all elements of the offence other than the defendant having the burden of proving that there was some other reason for the action taken against the 'whistleblower'".

The Auditor-General felt that the lack of any grounds for civil action under the Act contributed towards his support for reversing the onus. However, he doubted that reversing the onus of proof in relation to any offences under section 20 would be successful.

> ***Chairman:*** *"Going to section 20 of the Act which at the moment places the onus on the prosecution to establish that detrimental action was taken substantially in reprisal for the making of a protected disclosure, there has been some suggestion it would be more appropriate to reverse that onus of proof and put that upon the employer. Would you like to comment on that?*

***Mr Harris:*** *I am actually relaxed about the reversal and I also think in the end that would not be successful in any event. In the main, I should think that a cunning employer, or adroit employer, will penalise a person, not from acts of commission, but acts of omission, which are much more difficult to identify and to pursue, so rather than demote the officer, we just will not promote the officer and the officer takes on characteristics which suggest that the officer does not have a future in the organisation.*

*That is much harder to identify as retribution and would, I think, be suitable in these circumstances, because so much power lies with the employer, to have a reversal of the onus.*

. . .

***Mr Harris:*** *I do understand it is a criminal matter, although it is associated with civil relief as well. There is no separate provision, as far as I understand, allowing relief to the employee, so perhaps because of that matter I was able to contemplate it."*

The ICAC Commissioner on the other hand had serious doubts about the merit of the proposal:

***Chairman:*** *"Within the submissions you would have seen, there is a view that in terms of detrimental action that is taken as a reprisal there ought to be perhaps a reversal of the onus of proof.*

***Mr O'Keefe:*** *Yes, I have dealt with that in the supplementary submission. It may be that I was too long a barrister and a judge. I just have that fundamental worry about reversal of onus in our system...."*

The Commissioner's original submission had noted the existence of a provision within the ICAC Act which shifted the onus on the employer to prove that action taken against an employee assisting the Commission was in fact taken for another reason other than this. However, Mr O'Keefe stated that it would be inappropriate to reverse the onus in any case of allegations against non-employers. Although raising the question of whether onus should be shifted under s.20 of the Protected Disclosures Act in a similar way to s.94 of the ICAC Act, the Commission suggested that there may be other ways of dealing with reprisals:

"If a public authority does become aware that detrimental action may have been taken against one of its employees in reprisal for making a protected disclosure it is open to the authority to investigate the matter and, if appropriate, it may take disciplinary action against the person responsible. . ."

Mr Bennett also disagreed with the proposal to reverse the onus of proof:

***Mr Kinross:*** *"Do you believe that section 20 should have the onus of proof reversed, and do you believe that subsection (2) in relation to detrimental action is sufficiently widely worded to allow a disaffected whistleblower to be covered because of any reprisal by the employer?*

***Mr Bennett:*** *The answer to your first question is I do not think the onus of proof should be reversed. . ."*

He presented the advantages and disadvantages of the proposal to the Committee,

> ***Mr Bennett:*** *"The problem you get with onus of proof is this: if you have a person who has been a whistleblower and that person is then, for example, sacked and no reason is given, there is obviously a real problem in relation to a prosecution, because the prosecution cannot prove that the reason related to the whistleblowing. You may or may not get there by inference, but you might have some difficulty.*
>
> *If, of course, you put the onus of proof on the employer, there is a desirable effect and an undesirable effect. The desirable effect is that the employer is obliged to give reasons and therefore the employer is forced to say well, you are really dismissed for all of these other reasons having no relation to your whistleblowing and the issue is, is that true, or not, and that is obviously desirable.*
>
> *What is undesirable is that you reverse the onus of proof. So the aim, it seems to me, is to achieve a way in which the employer can be obliged, without privilege against self incrimination, to give reasons, but once the employer has given reasons, or the person charged has been given reasons, then the onus goes back to the prosecution.*

Mr Bennett did suggest a possible intermediate position:

> *"In other words, my suggestion is it should be a little like the defence of alibi in criminal cases. One has now to give notice of an alibi, but after you have given notice, the onus lies where it always did. If you do not give notice at all of an alibi, you cannot suddenly raise it at the last minute. That seems to me the sort of provision that needs to be looked at with this problem.*
>
> *You do create the situation that the employer cannot defend it on the grounds that the employee was dismissed for other reasons, without giving some sort of notice, but once that notice is given, the onus of proof remains. I use the word, employer, but of course it is wider than that..."*

Mr Bennett considered that reversing the onus of proof would not achieve any results in real terms. In his opinion the onus of proof was not relevant to the outcome of proceedings: the outcome would depend upon a number of factors including the weight of the evidence for the case put. He advised the Committee:

> ***Mr Bennett:*** *... you have to bear in mind that onus does not really make that much difference, unless there is no evidence on an issue. If you have evidence on both sides of an issue and the court has to be satisfied on the balance of probabilities, it does not matter very much who has the onus, because it is very, very rare where you are going to have a case that is so finely balanced between the two sides that the judge says the onus decides it.*
>
> *If you look at a motor accident case for example, where two vehicles are damaged and each sues, or there is an action or cross-action, have you ever seen an action where both action and cross-action are dismissed because it is so finely balanced as to which driver should be believed that the court does not go one way or the other, and says that neither satisfies it. I have never seen that happen. Onus is not really a matter of believing one side or the other in*

*a difficult situation.*

*The importance of onus is if there is no evidence on one side. If the employee says I was the whistleblower and I was dismissed and the employer says I say nothing, can you draw the inference or can you not? Then the questions of onus may be very important.*

*I do not know that onus solves the problem, but I would have thought, as I indicated at the beginning, the way to deal with the problem of the employer who stands mute and says prove it for that reason, is to have some provision corresponding to the alibi provisions, requiring notice to be given of other reasons for dismissal, if you take out an action against the whistleblower within a certain period of time, you are obliged to give a notice or you are not allowed to say that is the reason, unless you give the notice. It seems to me that is way of dealing with the problem.*

***Precedents*** - During his evidence on this question the Deputy Ombudsman pointed to a number of legislative provisions within the investigating authority acts which serve as precedents for a similar amendment to section 20.

***Mr Wheeler:*** *"If I could make one more point about the reversal of onus, we have put a statement about that in our submission, where we have referred to our Act. The Ombudsman's Act has been amended to include such provision in the Act to protect people who are witnesses, or who make complaints. The ICAC Act has been amended similarly and I think the Police Integrity Commission Act has a similar provision. It is something that is in place in various pieces of legislation."*

The provisions referred to by the Deputy Ombudsman are:

*Ombudsman Act 1974*

"(5) An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Ombudsman is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

(6) In any proceedings for an offence against subsection (5), it lies on the employer to prove that any employee shown to have been dismissed or prejudiced for some reason other than the reasons mentioned in subsection (5)."

*ICAC Act 1988*

"94. (1) An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

(2) In this section, a reference to a person assisting the Commission is a reference to a person who:
(a) has appeared, is appearing or is to appear as a witness before the Commission, or
(b) has complied with or proposes to comply with a requirement under section 21 or 22, or
(c) has assisted, is assisting or is to assist the Commission in some other manner.
(3) In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced for some reason other than the reasons mentioned in subsection (1)."

Similarly, Section 114 of the *Police Integrity Commission Act 1996* provides:

"(1) **Offence** (cf ICAC Act s 94(1))

An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

(2) **Meaning of assisting the Commission** (cf RC (PS) Act s 26(2))
In this section, a reference to a person assisting the Commission is a reference to a person who:
(a) has appeared, is appearing or is to appear as a witness before the Commission, or
(b) has complied with or proposes to comply with a requirement under section 25 or 26, or
(c) has assisted, is assisting or is to assist the Commission in some other manner.

(3) **Onus on employer** (cf ICAC Act s. 94(2))
In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reason mention in subsection (1)."

Section 113 subsections (1) and (3)of the PIC Act 1996 also state:

"(1) **Offence** (cf ICAC Act s. 93)
A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of:

(a) his or her assisting the Commission, or
(b) Any evidence given by him or her before the Commission, is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both."

"(3) **Onus on employer** (cf. ICAC Act s.94(2))
In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (1)."

In response to a question from Mr Lynch the Ombudsman undertook to supply a comment on the merits of Mr Bennett's suggestion that a mechanism similar to the alibi defence in criminal trials could be introduced. The Ombudsman interpreted this to mean that "the defendant to a detrimental action prosecution [would] be required to give notice of its defence to the prosecution if the defendant intends to rely on the allegation that the detrimental action suffered by the 'whistleblower' was caused by or for reasons which were not substantially in reprisal for the making of a disclosure." The Ombudsman supported such a proposal as a "step forward from the current position".

**Conclusion**
The Committee noted the view that the offence provision at section 20 of the Act was of limited effectiveness, and so of doubtful value in providing protection to persons who have made protected disclosures. Proving that the offence had been committed would involve proving to the criminal standard of proof (i.e. beyond a reasonable doubt) that detrimental action took place substantially in reprisal for the making of a protected disclosure. It may well be difficult in many cases to establish to this standard that an offence has occurred.

The suggestion was put to the Committee that the offence should be revised to make it more capable of being invoked. The most obvious way this can be done is to place the onus on a defendant authority, where detrimental action has been taken against a person who has made a protected disclosure, to prove that the action was not taken as a reprisal. While some expert evidence before the Committee expressed doubt as to the effectiveness of this approach, the Committee concluded that it at least would increase the perceived capacity of the provision to boost confidence of whistleblowers in the efficacy of the protections available under the Act.

**Recommendation 9 - Protections**
9. 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.

## CHAPTER 11 - PROSECUTIONS

The *Protected Disclosures Act 1994* provides that "detrimental action" taken against a person "substantially in reprisal" for that person having made a protected disclosure is an offence carrying a maximum penalty of $5,000 or imprisonment for 12 months, or both (s.20). However, the Act does not invest any particular body with responsibility for prosecuting offences under this section.

In her supplementary submission, the Ombudsman recommended to the Committee that the Director of Public Prosecutions should be given "the special brief to perform prosecutions for the offence of detrimental action with sufficient resources as required". The Ombudsman disagreed with the suggestion made by the NSW Audit Office that the ICAC should have this prosecutorial role arguing that: "The ICAC is an inquisitorial investigating authority and it would, in our view, be inconsistent with this role for the ICAC to assume an adversarial prosecutorial function." The same argument applied to her own Office.

The ICAC asserted that as the Ombudsman has jurisdiction to investigate allegations of detrimental action arising from disclosures made or referred to her, then for efficiency reasons, the Ombudsman's Office should investigate any allegations of detrimental action on the initial disclosure (submission see 2.8 p.10).

The Committee canvassed this issue with several witnesses during the course of the review. Mr Bennett emphasised that the responsibility for conducting prosecutions in relation to offences under section 20 should not belong to the person who made the protected disclosure.

> ***Mr Kinross:*** *"How then do you achieve justice for the whistleblower who says: I have $100,000 in legal proceedings just in the civil issue, where I have been fighting my employer in the Industrial Commission and I have no money to take the employer to court under section 20 for the criminal matter?*
>
> ***Mr Bennett:*** *That should not be done by the person. That would normally be done, I would have thought, by the prosecution authorities. It is a criminal offence."*

He only supported a prosecution role for a separate agency provided there were sufficient cases to warrant the establishment of such a body.

Representatives of the Department of Local Government conceded that this could be a role for another body but did not advocate such a role for the Department:

> ***Mr Lynch:*** *"In the final page of your submission you talk about the department being the appropriate organisation to deal with complaints of detrimental action. Do you see that extending far enough for the department to actually move to prosecutions under section 20?*
>
> ***Mr Rogers:*** *No, I would not see us becoming a prosecuting authority in that sense. We have actually had one where there was a possibility that the complaint had become contaminated and was going to result in detrimental action, and we actually intervened directly with the organisation concerned and said: Are you aware this could be, and we*

*actually do not think you should do it. On a discussion basis, we actually had the action stayed.*

***Mr Lynch:*** *That is the sort of role that this submission envisages you have?*

***Mr Rogers:*** *I do not think we would want to become a prosecuting body. I was listening to my predecessor about the issue of back and forward prosecuting. We are prosecuting for pecuniary interests.*

***Mr Lynch:*** *We should be looking for another body to conduct that role?*

***Mr Rogers:*** *If you are looking for a body to conduct it, yes."*

There was no unanimity of views in the evidence presented to the Committee on what arrangements should apply to the initiation of prosecutions under section 20. To date there have been no recorded prosecutions taken under section 20 and the Committee cannot be sure that the uncertainty regarding responsibility for initiating prosecutions has not contributed to this situation.

**Conclusion**

The Committee noted the practical difficulties in the way of initiating criminal proceedings with respect to the offence provision at section 20 of the Act. Criminal proceedings require the assembly of evidence and the initiation of prosecution action. But in the circumstances where the section 20 offence is likely to be committed, which are somewhat remote from the usual context in which criminal conduct occurs, there may be particular difficulties in launching prosecutions. Often the victim of reprisal may not report the details of what has occurred. Outside the context of the Act, detrimental action is not criminal and so may not be recognised as constituting an offence. The outcome may be that the offence is not prosecuted and those responsible go unpunished.

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 any evidence that tends to suggest that the offence may have been committed.

**Recommendation 10 - Prosecutions**

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).

# PART D - JURISDICTIONAL ISSUES

## CHAPTER 12 - CONTRACTORS AND THE PRIVATE SECTOR

### 12.1 CONTRACTORS - THE CASE OF THE INTERNAL AUDIT BUREAU

The submission of the Internal Audit Bureau outlined the specific problems experienced by auditors who are contracted to provide internal audit services to public authorities and may have matters of maladministration, corrupt conduct or serious and substantial waste disclosed to them during the internal audit process.

The Managing Director of the Internal Audit Bureau explained to the Chairman the difficulties posed for any public official wishing to make a disclosure to an internal auditor with the IAB:

> ***Chairman:*** *"Following that, what difficulties have you become aware of for employees of contract agencies and non-government organisations providing services and functions traditionally carried out by public officials when they are wishing to make a disclosure of the type covered by the Protected Disclosures Act?*
>
> ***Mr Middleton:*** *In response to the drive by the ICAC to have fraud and corruption prevention strategies in place, we embarked on assisting our agencies with that sort of thing. So we were performing risk assessments, putting together reporting strategies for organisations and also helping them with investigations. There is a 10-point plan set out by the Premier's Department and the Auditor-General on how to have a full prevention strategy prepared. We have been doing that for our customers.*
>
> *In response to that, we also set up a hot line service. So in other words, in the reporting mechanisms for a particular agency, when we put their strategy together we said someone making a report could do that to the chief executive officer, perhaps a senior officer nominated within the department and the Internal Audit Bureau as the internal auditors of these organisations. Having set that up, we did speak to the ICAC and they informed us that the problem with the Act was that a disclosure must be made to a public officer or an officer of the public authority. So the Internal Audit Bureau being a contracted agency did not fit into that category.*
>
> *Therefore, any public servant reporting to the Bureau immediately was not protected. So we have a situation where there are some 50 organisations that could potentially report corrupt conduct to one of my officers or even a contractor working for my organisation and they potentially would not be covered by the Act. That obviously creates a problem."*

Part of this problem related to the obvious uncertainty as to whether internal auditors from the Internal Audit Bureau would be included in the definition of public official.

> ***Mr Kinross:*** *"Section 26 I thought would protect you. Are you not a public official because*

*you are an individual who is acting in a public official capacity whose conduct may be investigated by the Auditor-General?*

***Mr Middleton:*** *Certainly we could be investigated by the Auditor-General.*

***Mr Kinross:*** *I think you are protected because under section 26 you can refer any complaint that comes to your attention to the Auditor-General.*

***Mr Middleton:*** *That may or may not be right. Our advice from the Premier's Department and the ICAC was that we were not interpreted that way basically, when you look at section 8 and who you can report to and that is the fundamental clause we were concerned about. I think the point is if there is any doubt any one who wants to make a disclosure has a problem."*

Although the Internal Audit Bureau was fundamentally concerned about the lack of certainty regarding the protections available to public officials who disclose matters to them it also identified potential difficulties for the internal auditor receiving the disclosure.

***Mr Lynch:*** *"The issue is not as has been suggested for your protection but the protection of people who make the complaints to you.*

***Mr Middleton:*** *Fundamentally. There is an issue that my officers may be sued if they report an individual to another agency from information they receive.*

***Chairman:*** *They may be subject to defamation action as well.*

***Mr Middleton:*** *That is correct. That is a concern as well, but our fundamental concern is if you want the Act to work properly it has to give protection. Even around this table we need clarification. That is enough reason to do something about it.*

***Chairman:*** *But it goes to that issue of where the actual disclosure accrues protection, and at what part of the chain.*

***Mr Middleton:*** *Yes, but our understanding is if the first person reported to is a public official as defined, they are protected but if it is not they are not protected. So it is that first time that issue is raised, that is when the point of protection or not protection is made.*

***Chairman:*** *But what you are saying, given the contracting out and the approach that has been taken by the Government, your web is getting wider and wider where the first point of call might be made?*

***Mr Middleton:*** *Yes. In looking for a solution I do not know what the wording would be, but I think you need to add another point to section 8 where organisations that are engaged perhaps by the public authority, anything reported to anyone engaged by them either under contract or whatever can be included in that.*

***Chairman:*** *Perhaps it fits within a contractual obligation that goes out and travels with it?*

***Mr Middleton:*** *Yes."*

It was the view of the Internal Audit Bureau that confidentiality agreements between the internal auditor, as distinct from an external auditor, and the public authority meant that any disclosure would be notified to the Chief Executive Officer who would have responsibility for dealing with the matter.

> ***Mr Kinross:*** *I am a bit lost. If State Rail contracts you to undertake an audit and it is part of that audit that it says, we want you to sign this agreement, which agreement specifically also requests that you not reveal anything in the course that might ultimately involve matters such as corruption except back to them, where do you then regard your duty if in fact you seek the provisions of this Act, to pass on that disclosure or regard yourselves as being bound by this confidentiality agreement?*
>
> ***Mr Middleton:*** *Our role in that case as temporary internal auditors is again with the chief executive officer. By reporting to the chief executive officer whose responsibility it is to report to the ICAC if there is an issue of corruption, I believe we would discharge our responsibilities by reporting that issue to the chief executive officer and saying, there is potential corrupt conduct here, or whatever, and your obligation needs to report it to the ICAC.*
>
> *Once we have discharged that, I believe it becomes the chief executive officer's responsibility, the same as any internal auditor's responsibility would be discharged once the chief executive officer has been informed. The CEOs I deal with would be aware that they need to report to the ICAC and when we report investigations we remind them of their obligations to report. We do not see a problem with that in terms of having discharged our role as the internal auditor. To then take that matter further we would probably have to get the chief executive officer's permission.*
>
> ***Mr Kinross:*** *Where this comes from the private enterprise which has been in existence for some time under the Corporations Law where an auditor has to report not to mention any accounting standards involved a breach of any statute, any illegality to what was then the CAC, presumably the AFC now. That makes it clear it has to go to an outside agency, it seems to me, in spite of what private agreement may be dealt with between the auditor and the employer.*
>
> ***Mr Middleton:*** *I think the section you are talking about relates to the external auditor. It is not quite the right analogy given that we are internal auditors with an obligation to report to the chief executive officer or the audit committee or the board, wherever that responsibility is, but we have no authority basically to report outside the agency except in our role as internal auditors. The Auditor-General's Office does have access to all our working papers and is always given access to them. Then that external auditor, once seeing that issue would perhaps take that up with the other agencies."*

Discussions between Mr Middleton and Mr Kinross further highlighted the complications which seemed to arise for internal auditors from the Internal Audit Bureau because of the requirement that a protected disclosure must be made voluntarily.

> ***Mr Kinross****: My concern is that it seems especially in the case of the internal auditor and section 9 that you are not protected on one reading of subsections (2) and (3) of section 9, because it is your duty to do the job and therefore it is not voluntary, but if you came across*

*it other than under a duty under the Act you would get protection. Is that your reading of that section?*

***Mr Middleton**: Yes, the issue being whether it is voluntary or not?*

***Mr Kinross**: You say, I have to report to the chief executive and that is where my duty finishes. I would have thought you also have a duty probably as a public servant - are you under the Public Sector Management Act?*

***Mr Middleton**: Yes.*

***Mr Kinross**: Probably to report corrupt conduct as well, which means your duty does not finish with reporting to the chief executive officer of the State Rail Authority. But if you do that under your duty you say you are not going to report it to an outside agency and yet if you try to weave out from that duty somehow to make it voluntary you are protected. I am wondering whether you read your responsibility or duty like that?*

***Mr Middleton**: In terms of the Act I am not sure where that would stand. From the way we operate I guess we have, whether it is voluntary, whether we should take that matter further I believe our next step would be, if I believed there was not any action being taken, to report as an individual basically to the Auditor-General or the ICAC on that issue and that would have to be a judgement decision on my part."*

Mr Middleton agreed with the Chairman's view that the situation required clarification especially as the Bureau had already dealt with one situation under the existing scheme which raised serious doubts about the protections which would be given to a public official who makes a disclosure to the IAB.

***Chairman:** "In terms of the operation [of the Act] and your day-to-day operation, we should be looking to provide some certainty in those areas of the Act that apply to yourself and others operating in the same sphere.*

***Mr Middleton:** Yes, that is right, because I am aware now of at least one instance where a public servant has made a disclosure to one of my officers, and then through me, and certainly wanted to keep the issue totally confidential. My concern was for the risk that person was taking. I have been able to deal with the issue by approaching the organisation directly and we have been able to manage it but that is only because I have known that this person will not be, if push comes to shove, protected by the Act. Until that is iron clad, the Act will have a lesser impact.*

***Mr Kinross:** How will they not be protected, because of this contracting out issue?*

***Mr Middleton:** Yes."*

Mr Harris undertook to consider a possible definition of the term "public official" which might overcome this problem and responded by letter on 17 July, 1996. He concluded that:

"...where a private entity or person has assumed relevant responsibilities pursuant to a contractual relationship with a Government agency. A disclosure made to that entity

by a public official should be protected as the disclosure would have been protected, if the entity was a public authority.

For this purpose, a relevant responsibility is a function that if not undertaken by a private contractor would be undertaken by the public authority."

In the Audit Office's view this approach would seem to cover disclosures made by a public official to an agent of the Auditor-General assisting in the annual financial audit or to an internal auditor who is not an employee. It also would provide cover to consultants examining the matter which is subject to disclosure, for example, a consulting actuary or environmental consultant.

## 12.2 GENERAL

The problems for Internal Audit Bureau auditors receiving disclosures from public officials led to discussion about the potential difficulties for private sector contractors, engaged by public authorities to supply services which would otherwise have been provided by those authorities, who wish to make disclosures.

The Chairman raised this question with Mr Middleton who stated that the position of contractors generally required clarification in relation to the Protected Disclosures Act 1994.

> ***Chairman:*** *"In terms of your internal audit function and your contact out with contractors, how wide should the ambit of this Act go in making a protected disclosure, purely in the public sector, out in the contracting area or beyond?*
>
> ***Mr Middleton:*** *It must extend to anyone engaged by a public sector organisation, because if you are looking for a limit I think that is where you would have to take it. It is the engagement of anyone, be it temporary - I mean, you have the issue of temporary staff, people coming in from an employment agency to fill in a temporary secretarial role. They might receive a complaint over the phone. Whether they know what to do with it is another issue, but basically anyone engaged either as a temporary employee, a contractor by a public sector agency I believe needs to be covered by the Act as someone receiving a complaint.*
>
> ***Mr Kinross:*** *I am thinking of issue 8 which I do not know whether you received the issues. Does that extend then to if in fact you contract out to the private sector? You want it complete down the chain to ultimately someone who is doing a function for the end user being a public sector agency?*
>
> ***Mr Middleton:*** *Yes. For example, we employ private sector people and organisations to help us carry out our audits and that can apply to anywhere down the line, people administering grants for the Department of Community Services, for example, private sector organisations basically carrying out programs for the Department of Community Services. I would imagine the complaints that could come in about how those funds are being used would be enormous, but who do you complain to? That complaint could hit anywhere, us, the Auditor-General or the agency that is actually carrying it out, even though they are a private sector agency."*

According to the Auditor-General, the coverage of the Act should be extended to include protection for making disclosures not only to contractors to public authorities but also to any person with a statutory or common law responsibility to a public authority. He advised the Chairman:

> ***Chairman:*** *How far would you see the net in terms of protected disclosure going out from the public sector?*
>
> ***Mr Harris:*** *To anyone who has a responsibility with respect to that agency in the matter, about which the complainant is complaining, and that responsibility can be a legislative responsibility, or it can be a contractual responsibility, or common law responsibility, I suppose, if I were a lawyer."*

On the question of a possible definition of contractor which did not invoke the employee test the Auditor-General suggested defining the relationship as contractual although the employee test did seem essential. Allied issues such as extending protection in situations where a Government body has a licensing function were considered to have some merit but the Auditor-General concluded that there were "strong arguments against extending protection to disclosures which cannot be investigated by the investigating authorities under their current powers".

Dr Longstaff told the Committee that he believed the Act should be extended to at least cover those sections of the private sector who deal with government and would have important information to disclose.

> ***Mr Kinross:*** *The irony, and perhaps others see it differently, is that in New South Wales this Act is designed to give protection to public officials only. You assist them. There is no extension to the private sector, but you also are getting financial assistance from the private sector. That leads me to ask do you think that this Act, which is a policy choice, should be extended to the private sector?*
>
> ***Dr Longstaff:*** *I think at the very least there are good public policy reasons for extending protection to people in the private sector who have reasons to make disclosures which affect the role of government. The link between government and the private sector now is blurring. We have seen that over a number of years. There are people in the private sector who are contractors or others who may very well have important information which they can disclose and they should be protected. I do not see anything particularly controversial or difficult about that. At the very least I think that is where things should go.*
>
> *Beyond that, there is an area of debate to do with whether or not this should be another area where government extends its net in terms of governing the relationship between employer and employee...*
>
> *Whether this Act should extend immediately to include those, as I say, I have an open view on it, but I am quite certain in my own mind that the very least that should be done is to extend protection to those in the private sector who have some dealing with government and have relevant concerns that they wish to raise."*

Other witnesses, such as Whistleblowers Australia Inc. and Dr De Maria sought wide-reaching amendments to the Act to extend the protected disclosures scheme not only to contractors engaged to provide services on behalf of public authorities, but to the private sector as a whole. In his opening statement Dr De Maria argued:

> ***Dr de Maria:*** *"...No private protection: that, to me, is again a flaw, but it is a wide ranging omission in most of the Acts. That is a bit of a worry. That means there is a code of conduct, or levels of probity, or conduct built up in the public service which are not practised in the private sector. These days, the ways things are done, you are talking about public and private. We have this big grey area in the middle, which I suspect is a prosecution-free zone with respect to these laws. Contractors who are working for governments, the corporatised government entities now working in the marketplace, that is a big shadow area which I would really encourage you to take into consideration. If you do not, you will give the community the impression that there is such a thing as public sector wrongdoing and there is such thing as private sector wrongdoing."*
>
> *We have laws to respond to this (private sector wrongdoing), but not the same sorts of laws. We need to know that the private sector wrongdoer will be caught. They usually have very powerful resources and can put a whole army of lawyers between himself or herself and the investigators, the authorities. I think there is a big argument to be put to extend whistleblower protection into the private sector."*

Although the Committee recognised that private sector agencies entering into contractual arrangements with public authorities presented a particular difficulty with regard to the application of the *Protected Disclosures Act 1994* it did not conclude that extension of the Act to the private sector as a whole was desirable or practical. In arriving at this conclusion the Committee paid close attention to the following section of the opening statement by the Commissioner of the ICAC, Mr O'Keefe:

> ***Mr O'Keefe:*** *" ...There is one other matter that I would like to deal with and that is the extension of the legislation to private sector employees, that is a private sector employee making a complaint about the private sector. I merely ask that the Committee take into account the ramifications of that and the application of an unheard of restriction on the private sector in Australia. This Act is about public officials. How you define those, how you might extend that to cover licensed people or people performing governmental functions under contract is different from the matter that I am now addressing, and you will see in our written submission that I accept that there is an inequity if you have a public official doing operation X, he is subject to the Act as is his agency, but if you have the same function being performed by a person under contract, even though interfacing with the public sector, the employee is not. That is not a rational situation. That is one situation. However, it is quite different to say that whistleblower legislation should apply across the board. The economic consequences of that in terms of funding of an agency, the economic effect of that on business and the employment effects of that on business in this State, that is whether they go to Queensland, Victoria or New South Wales, really needs to be considered before that holus bolus extension of the Act is taken up.*
>
> *It is really, with great respect, a different Act we are talking about and you may have entirely different qualifications and protections or consequences if you extend it to the private sector. Its employment contract consequence is a matter that needs to be considered. It is outside*

*our ambit, in a sense, because we are only concerned with the private sector at the ICAC when it interfaces with the public sector. This is not such an interface. This is just straight private sector with no public sector involvement whatsoever and it is, with great respect, beyond the ambit of an amending piece of legislation. This is not amendment; this is a new Act if you do that.... "*

Mr Kinross supported the Commissioner's views and pursued the issue during evidence from Mr O'Keefe:

***Mr Kinross:*** *"I want to ask you a question which is not strictly relevant, but you suggested the answer and that goes back to the potential expansion of the Act to the private sector. I will tell you why I do not think that will happen. I think it is outside the review of this Act. It is a new Act. Secondly, no government would ever do it without substantial consultation and third, a government is concerned about those economic consequences. But my concern is with a bit of your answer. If it is sufficiently bad for discrimination against, especially women, to be made an offence across all persons in the private sector, why is it not similarly for corruption, maladministration or waste across all sectors?*

***Mr O'Keefe:*** *With great respect, why should the Auditor-General be able to look at waste in a private company? If I have my own company, who can tell me how I should spend my money in the company and why should the Auditor-General be coming to me and saying you should do it my way and not your way. And do not be under any misapprehension, once the power is there it will be exercised. With maladministration, "Don't you have your son working for you during the university holidays in your company. You would be better off to have somebody who needs the money and who would work harder in any event". Not on.*

Regardless of any possible repercussions of private sector corruption in the public sector, Mr O'Keefe maintained that any proposal to extend the coverage of the Act to the private sector did not fall within the ambit of the Committee's review. Should such a proposal be adopted it would have serious flow-on effects for the jurisdiction of the independent investigatory bodies and the extent of the resulting drain on resources would make them ineffective:

***Mr O'Keefe:*** *"I understand and I can see the argument. However, once that step is taken, the next step is that the jurisdiction of the ICAC is extended so that does not only apply to public officials but it applies to the private sector - not just when they are in contact with the public sector but when they are dealing with one another. Now the budget that you need for that is enormous. If you take step one and step two is going to follow, then all you do in the end is dilute the value to the public sector of the organisation that is there. It is an enormous question, and I adopt with respect what you said. I hinted that it really is not a question of reviewing this Act if you are going to do that, it is a new Act and a new ball game. You would really have to have Australia-wide legislation to the same effect, as you have with anti-discrimination."*

However, Mr O'Keefe supported a limited extension of the Act to cover contract agencies engaged by public authorities to perform "a function that would, but for the contract, be performed by a public official". He described that as a "surrogacy" situation, representative of the interface between the private and public sectors.

The Commissioner's supplementary submission strongly opposed any extension of the application of the Act to the private sector in general on the grounds that it would be a major extension of the ambit of the Act and would have a major effect on the number of complaints and hence costs. In the specific case of the Internal Audit Bureau he argued that as disclosures could be made to the Auditor-General there was no real need to amend the Act to include the IAB as an investigating authority.

**Conclusion**

During the review the Committee was advised of specific difficulties experienced by the Internal Audit Bureau which, while engaged by public authorities to provide internal auditing services, had received disclosures from public officials.

The Committee was concerned to ensure that public officials making disclosures to the Internal Audit Bureau should be able to obtain the same protections as public officials making disclosures to the investigating authorities or the relevant public authority. In the Committee's view receipt of disclosures by the Internal Audit Bureau, acting as an agent of the Auditor General, was an extension of the role already played by the Audit Office of NSW. It concluded that where public authorities engage the Internal Audit Bureau to provide independent auditing services, disclosures made to the Bureau's auditors should be protected.

The case of the Internal Audit Bureau prompted discussion between the witnesses and the Committee on the merits of amending the Act to extend its jurisdiction to the private sector generally. While the Committee recognises that it is desirable to make provision in the Act for persons who have a government contract and wish to make a protected disclosure, it does not support a further extension to the private sector as a whole. Such a proposal is a major departure from the Act which requires protected disclosures to be made by public officials. It would have enormous consequences for the operations of the investigative authorities and could threaten their viability.

However, the Committee regarded the position of persons dealing under government contract with a public authority and supplying services on behalf of, or to, public authorities in a different light. It would be possible that such persons could be subject to detrimental action, for example, through the termination of their contract, should they wish to make a disclosure to an investigating authority. Due to the nature of their relationship with the contracting public authority, the Committee also felt that these individuals or bodies may be in a position to furnish information on maladministration, corrupt conduct or serious and substantial waste in the public sector.

**Recommendations 11 and 12 - Contract agencies**

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

12. 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.

## CHAPTER 13 - THE AUDITOR-GENERAL AND LOCAL GOVERNMENT

Prior to the Committee's review of the Act, the Auditor-General commented in his Annual Report to Parliament that he was unable to investigate disclosures concerning "serious and substantial waste" in Local Government. His submission to the Committee explained that this occurs because the *Protected Disclosures Act 1994* reflects each authority's jurisdiction under its original act, in his case the *Public Finance and Audit Act 1983*, and an investigating authority is not able to investigate a public authority unless it may otherwise examine the public authority's conduct or activities. Under the Public Finance and Audit Act the Auditor-General is able to audit local government only in certain very limited circumstances. The Auditor-General found it unsatisfactory that as a consequence of this he could not investigate disclosures of serious and substantial waste within local government.

To remedy this situation, the Auditor-General recommended that his jurisdiction under the Protected Disclosures Act should be extended to include Local Government thus enabling him to investigate disclosures alleging serious and substantial waste within that sector. The Audit Office's submission recommended "that any amendments to the Act [should] provide for a disclosure of serious and substantial waste concerning Local Government to be subject to audit by the Auditor-General in terms of the Public Finance and Audit Act as the investigating authority."

Mrs Nile sought the views of the President of the Local Government and Shires Association on the Auditor-General's proposal:

> ***Mrs Nile:*** *"Why are you not happy with the Auditor-General? In the past we have had problems in councils with job quotes, favouritism and so on, so what is your reason for not being happy with the Auditor-General?*
>
> ***Mr Woods:*** *We would see that as another bureaucratic variable that is totally unnecessary. There is full accountability by local government and if, for example, there was extreme maladministration or, indeed, corruption, there is the ability for two other bodies to deal with it, namely the Office of the Ombudsman or the ICAC itself. What is the point of setting in place another bureaucratic structure which, once again, could become a self-fulfilling prophesy as well?*

Mr Woods went on to tell the Chairman that he perceived no need for a further mechanism whereby local councillors or local council officials could disclose matters of serious and substantial waste.

> ***Chairman*** *: "What of the serious and substantial waste aspect of protected disclosure where councils might be wasteful in their use of public moneys and a bureaucrat or councillor believes that ought to be reported?*
>
> ***Mr Woods:*** *Council as a whole is being wasteful?*
>
> ***Chairman:*** *Yes.*

***Mr Woods:*** *There is an opportunity in disclosure to the Ombudsman or if it is a corrupt waste of money to the ICAC. It would have to be pretty substantial. I cannot think of too many councils that have the money to waste at the present time."*

The Chairman raised the matter that expenditure by local councils could be determined as a matter of policy and questioned what avenues were available to examine a policy which may be perceived to result in serious and substantial waste.

***Chairman:*** *"So it might be a policy matter?*

***Mr Woods:*** *A policy matter?*

***Chairman:*** *I mean their waste. They may be spending money in a way that someone considers to be wasteful but it might be pursuing a council policy.*

***Mr Woods:*** *Then there are two courses of action. One on the serious maladministration side through the Office of the Ombudsman or if there is a corrupt undertone then they have the ICAC. I don't think you need to have the Auditor-General pursuing it.*

***Mr Lynch:*** *Or alternatively, if it is a waste as a matter of policy where council has resolved to do something there is sanction at the next election.*

***Mr Woods:*** *Indeed. Someone's idea of waste may be quite different from someone else. It might be a political thing. You know what happens. People running around, "this is shocking, the rates going up". "We promise no rate increase in the next election if you vote for us". What is that, is that a political issue or is it one that could be construed as maladministration or what have you? I think there are a lot of issues that are political issues that are then construed by others with an entirely different intent."*

The Chairman also questioned the Acting Director-General of the Department of Local Government on this issue, however, the Department did not have a particular view to offer and thought it should be a matter for the Auditor-General to comment upon. Mr Rogers spoke to the Chairman on the matter:

***Chairman:*** *"Section 12 of the present Act does not apply to local government, because of the jurisdiction of the investigating Act and it has been recommended that the Auditor General's jurisdiction to investigate protected disclosures should be extended to include disclosures which show, or tend to show, serious and substantial waste of public money by local councils. Given your preferred position, do you consider this extension to be appropriate and necessary, and what implications do you perceive with such a proposal?*

***Mr Rogers:*** *Can I perhaps take that in the reverse order? Even if the Auditor General's role were extended, that would not affect the proposition that we are putting as the principal receiver of complaints across the breadth of local government. We would believe it more appropriate that we be scheduled in addition to any other action taken. Even if the Auditor General's role were extended, that would merely apply to maladministration and would not pick up the other heads of consideration.*

*I really am not in the position to give a formal opinion to the Committee on the extension of*

*the role of the Auditor General. I know it is an issue which has been discussed. The present arrangements are such that the Auditor General can be the auditor of certain councils, where there has been a default in the audit arrangement, or where the Auditor General is the auditor by contract. Beyond that, I do not think I can offer an opinion whether it can be extended, or not. That is a matter on which the Auditor General would make a proposal."*

The Auditor-General later outlined the problems with the existing system for examining disclosures about serious and substantial waste in local councils and gave a justification for his proposal:

***Mr Anderson:*** *The Public Finance and Audit Act does not provide for local government to be the subject of an audit.*

***Mr Harris:*** *That is right.*

***Mr Anderson:*** *How many complaints would you receive from local government? Why you, and why is not the ICAC and Ombudsman capable of doing what you are suggesting that you should be allowed to do?*

***Mr Harris:*** *There are a couple of answers to that question, with respect to protected disclosures. One is my understanding, and I have read the Department of Local Government's submission on this matter, and I think it errs by applying incorrectly some retrospective vision.*

*My understanding from the Minister at the time and indeed from the current Minister and the department, is that they did not know when the legislation was introduced that the auditor would not be able to examine substantial waste for local government. They did not know that. They were not advised of that. It was an issue that came from on high, as it were and it came from on high, I suppose, because we do not audit local governments, where we have not won the tender.*

*I can understand the view that says, okay if you are not the auditor, then you cannot examine substantial waste. The difficulty is that when we do receive complaints from local government, they are not protected in our hands but I am told that if we pass them on, to say the Ombudsman or the ICAC, they are protected. The difficulty is ICAC and the Ombudsman are not always equipped to investigate and handle the complaint as well as we are equipped and to overcome that, in a recent case, we are providing seconded resources to the Ombudsman's Office to enable her to examine the issue with the degree of financial audit scrutiny that it deserves.*

*That is a bit messy and probably not even necessary. . . "*

Under further questioning Mr Harris discussed his proposal in the wider context of auditing local government. Although this discussion generally relates to matters outside the jurisdiction of the Committee it is produced in full because of the Committee's view that the audit problems perceived by the Auditor-General with local government reinforce the need for a clear, effective mechanism to investigate disclosures about serious and substantial waste in local government.

***Mr Lynch:*** *"Your comments about local government and extending the power of the Public Finance and Audit Act seem to me to relate more to that Act than the Protected Disclosures Act, but I am wondering whether there has been suggestion made to amend that Act to extend your power. Is that being pursued anywhere else?*

***Mr Harris:*** *Yes, it is. I see from the local government submission that they are relaxed about amending the Protected Disclosures Act to allow me to examine local government substantial waste disclosures. I am happy with that.*

*On the secondary issue, we have started a discussion with this Government that for the same reasons that in Queensland, Victoria and Tasmania the Auditor General is the auditor of record for local government and that may be applicable in New South Wales. The principle reason is I do not think that an agency should appoint the external auditor to look at the agency. I do not think the auditee should appoint the auditor and it does not happen in the private sector, at least in theory.*

*Management accounts are audited by an auditor appointed by the shareholders, not management, not the directors.*

***Mr Kinross:*** *In the technical sense, that is not right, is it?*

***Mr Harris:*** *In the technical sense.*

***Mr Kinross:*** *Management accounts are not audited externally but financial accounts are.*

***Mr Harris:*** *Management's financial accounts are, that is what I mean."*

A number of Committee members expressed concern that the minimal number of local councils audited in accordance with the Auditor-General's jurisdiction under the *Public Finance and Audit Act 1983* had significant implications for the investigation of serious and substantial waste under the *Protected Disclosures Act 1994*. They discussed their views in the following exchange with Mr Harris:

***Mr Kinross:*** *How many local government councils would you in fact, through tender, audit?*

***Mr Harris:*** *One.*

***Mr Kinross:*** *Do you know why that is?*

***Mr Harris:*** *Yes, because when we won that tender I said to the staff, you may have a glass of water to celebrate because we cannot afford any more; because the costs allowed by councils to do the audits are, in my view, inadequate for the task and so I will not tender any more; because I do not believe that the auditee is interested in the audit and is interested in paying any money for the audit.*

***Mr Kinross:*** *This is quite serious. Can I just come back a step in terms of private enterprise? I get the impression you are cheaper in the main and than certainly the big six accounting firms.*

***Mr Harris:*** *Yes, we are. I think I would describe ourselves as being as cheap, or as dear.*

***Mr Anderson:*** *How come the other councils use the big six?*

***Mr Harris:*** *Because they do not use the big six in the main, they use second tier in the main, second, third and fourth tier firms. They have an advantage which I do not have. They can augment their audit fee with non-audit income. This is typical of what they do. They will go in and offer a subsidised rate on the basis that non-audit tasks will be met and will remedy the loss on the audit.*

***Chairman:*** *You are not saying though, I wanted to clarify that, that the cost of the audit that you tender for, would include a full and comprehensive audit?*

***Mr Harris:*** *If one relied only on the audit costs, one would be struggling to do an adequate audit in many circumstances.*

***Chairman:*** *You, as Auditor General, have some oversight in that?*

***Mr Harris:*** *No. I have raised the issue with the Australian Securities Commission because this is a Commonwealth matter in the main. If you are talking about local government, I have raised it with Government. If you are talking about the private sector, I have raised it with the Australian Securities Commission. Having the auditee appoint the auditor seems to me a basic issue about accountability. The auditor is dependent on the auditee for income and appointment.*

*In the private sector, in theory, the shareholders appoint the external auditor, but there are still problems there and I have raised that with the ASC but they are outside my responsibilities. Strictly they are both outside my responsibilities.*

***Mr Kinross:*** *Thinking like Machiavelli, do you think that a reason why local councils may not appoint you, apart from financial reasons, is because there is some way that the information that comes to your attention in fact might ring alarm bells will then flow through to the Government, who may act, whereas if you are dealing with a private organisation, that is one further step removed?*

***Mr Harris:*** *Yes. The answer to that simply is yes. It is augmented by the fact that I have an obligation to inform Parliament about the things Parliament needs to know, whereas private sector auditors do not. I some time get calls from a Minister saying: Can you do this. I say: Yes, I can do that but if I see while I am doing that there is a matter I have to put to Parliament, I will have to report. And the Minister will say: I will come back to you.*

***Mr Kinross:*** *Do they?*

***Mr Harris:*** *In the main, no. Why would you, I mean, in the sense why take the risk.*

***Chairman:*** *It is a significant issue, really, I think, in terms of your relationship with local government, that your view is that the amount required to do a full and comprehensive audit is perhaps more than has been tendered for.*

***Mr Harris:*** *That is certainly so for me, who would not have the capacity, or the desire, or the interest to provide non-audit work to the extent that the private sector does.*

***Mr Kinross:*** *How far have you tested the market on that issue of the matter of the cost of the audit of local councils?*

***Mr Harris:*** *We have probably put in 7, 8 or 9 tenders.*

***Mr Lynch:*** *Without naming them, are they metropolitan or country?*

***Mr Harris:*** *Metropolitan only, because country would be far too expensive for us in terms of accommodation and travel. To give you an on the record example, the audit fee we now receive from Sydney Council is half that we applied earlier. We said to them, okay, we can do this on the basis that your internal audit will play a very dominant role in helping us do the external audit, but there was no slack at all, and really it is so finely priced, if that is the word.*

*Basically we wanted to win the audit because we have always done Sydney Council, and it was a matter of moment to us. At the expiry of this contract, I would not recommend that we tender again.*

***Mr Lynch:*** *How would you solve this problem? Presumably you do not want to audit every council in New South Wales?*

***Mr Harris:*** *The matter was met when the district health services were reconfigured a couple of years ago. We audited none of those. The then Government decided that we should be the auditor and we, in the main, had contracted out those audits.*

*Because they went to tender for the first time under that circumstance, there was a saving. You will not find that saving in local government, because they have been to tender many times. So it would not be my desire to audit more than a handful of local governments, in order to know what we are doing, but the rest we would tender out. Because I am paying, because I would be paying them, not the council, there would be a difference in reporting relationship between us. They would then be working for me, not council.*

***Mr Kinross:*** *I am a bit worried about the extent to which, because the audit fee has been cut down vis-a-vis Sydney Council and their knowledge that you are in fact, because you specifically stated so, relying on their internal audit mechanism, that itself gives some comfort if there are problems in the system to keep it in and hence, under the Protected Disclosures Act, less likely to be revealed.*

***Mr Harris:*** *What is more likely the fault of the approach we have taken, is that other audits will subsidise the loss of Sydney Council. That is more likely to be the issue.*

***Mr Lynch:*** *Otherwise you would be signing off on an audit you would not be happy with?*

***Mr Harris:*** *That is right.*

***Mr Lynch:*** *That is be a real moral hazard.*

***Mr Harris:*** *This is the last thing we do.*

***Chairman:*** *It is important it has an override in terms of protected disclosure. "*

**Conclusion**

In his submission to the Committee the Auditor-General recommended that consideration should be given to extending his jurisdiction under the Protected Disclosures Act to include local government.

The Committee recognises that the Auditor-General's proposal would constitute a significant extension of his jurisdiction. However, it considers there is 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 seems 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 is not investigated.

Another factor influencing the Committee's decision is that it feels 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 Committee's view this undermines the effectiveness of the Act in relation to protected disclosures about serious and substantial waste in local government.

**Recommendation 13 - 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 by Parliament to the *Public Finance and Audit Act 1983.*

## CHAPTER 14 - NSW POLICE SERVICE

Submissions from the NSW Police Ministry and the Office of the Ombudsman highlighted the application of the Act to police officers as a particular area requiring consideration by the Committee and clarification.

The Ombudsman's submission described the problem:

> "A further complication in relation to internal disclosures by police officers is that such disclosures are only protected under the *Protected Disclosures Act 1994* if they are made voluntarily. In this regard clause 30 of the *Police Service Regulation 1990* requires police officers to report criminal offences or 'other misconduct' engaged in by other police officers. In determining whether each disclosure is in fact protected under the Act it is necessary in each case to determine whether the disclosure is of conduct which constitutes a criminal offence or 'other misconduct'".

The Ombudsman's submission gives a fuller account of her views on the problem in Issue 5 of her submission. The submission recommends that public officials (primarily police officers) should be able to make protected disclosures under the *Protected Disclosures Act 1994* directly to her about the conduct of other police officers when exercising the function of a police officer with respect to crime and/or the preservation of the peace.

These problems were elaborated upon further by witnesses from the Ministry and the NSW Police Service who pinpointed the definition of "public official" and the operation of clause 30 of the Police Service Regulation 1990 as the particular sources of confusion.

> ***Chairman:*** *"...The ministry's submission expresses concern that a police officer making a disclosure about the misconduct of another police officer in accordance with the requirements of the Police Service regulation 1995 will not receive the protection obtained through the Protected Disclosures Act 1994 which requires a disclosure to be made voluntarily. What are the implications of this anomaly for police officers making such complaints?*
>
> ***Ms Thompson:*** *I think there is probably two things I would like to say in relation to that. One is the definition of the public official within the Protected Disclosures Act is open to some interpretation, I think, in relation to its application to members of the Police Service. Within the Police Service you have both sworn members and unsworn members. The unsworn members are employed under the Public Sector Management Act and so definitely fall within the definition of public official.*
>
> *In relation to the sworn officers, they are employed under the Police Service Act and you would have to rely on that part of the definition of public official that relates to occupying an official function to apply that definition to a police officer. I might contrast it to the definition in the ICAC legislation where, in its definition of public official, it actually refers to a member of the Police Service.*
>
> *As a point of clarity in relation to the extent that the Protected Disclosures Act applies to*

*sworn members of the Police Service, I think there is probably something that can be done to improve the clarity there. The anomaly arises from the requirement under clause 30 of the Police Service Regulation 1990 that any sworn member of the Police Service report criminal conduct or other misconduct to a senior officer. That is then followed in clause 32 by some protections.*

*Both of those were in force well before the protective disclosures legislation and I think to some extent that is why some of the anomalies that we have experienced have occurred. Clause 30 does not apply to the non-sworn members of the Police Service. Clause 30 requires disclosure to a senior officer. Therefore, if disclosure is made to one of the other investigating agencies without it first being made to a senior police officer, there is a chance that the officer could be subject to disciplinary proceedings. That being the way it is set out as a mandating clause, it can then be argued that any disclosure made by a police officer is in fact not a voluntary disclosure but a disclosure that is made because of the effect of clause 30.*

*There are some exceptions in clause 30 and the most recent amendment to clause 30 has been in relation to the Royal Commission. There was some concern that if an officer wanted to go to the royal commission to make a disclosure which he did not want to make to senior officers in the Police Service, the very existence of the regulation discouraged that, so one of the exemptions that is now provided under the regulation is if a disclosure has already been made to the Royal Commission.*

*Another exemption is if the conduct that is being reported has been made the subject of a complaint under part 8A. An officer who is reporting under clause 30 may well not have the protection of the Protected Disclosures Act because it is not a voluntary disclosure. It could also be the case that if the officer determines to make the report direct to the Ombudsman, as he or she is perfectly entitled to do under the Police Service Act, then there would be some argument as to whether clause 30 could apply anyway because of the exemption, and therefore, depending on what is being revealed, they could then come within the protective disclosures legislation. So the same conduct being reported by the same person depending on where they actually report it to could result in different protections applying."*

Discussions between Mr Lynch and Ms Thompson indicated that the commencement of the *Police Integrity Commission Act 1996* also holds significant implications for police officers wishing to make protected disclosures.

***Mr Lynch:*** *"The submission from the Ministry for Police talks about potential confusion and conflict between the protective disclosures legislation and police regulations. Has anyone had a look at the Police Integrity Commission Act, because I suspect there may be some provisions in that new legislation which also prefers protection upon people and there might be yet another level of confusion?*

***Ms Thompson:*** *We were actually very much involved in the drafting of that legislation. We are currently working with the Ombudsman's Office particularly in relation to the commencement of the provisions in the cognate legislation which relate to part 8A. I do not think there are going to be further anomalies because the PIC legislation and cognate legislation really dovetail into the procedures that are already there for the Police Service. I think what is going to be required is a further amendment to the regulation so that disclosures that are made to the Police Integrity Commission do not fall under clause 30."*

The Ministry's submission explained that attempts had been made to address this anomaly during the last session of Parliament through the introduction by the Minister for Police of a Bill that included provisions to amend the Police Service Act 1990 to provide protection for police and to create an offence similar to that provided for under section 20 of the *Protected Disclosures Act 1994*. However, the bill lapsed with the prorogation of Parliament.[6] Ms Thompson discussed the importance of the section 20 offence provision with the Committee:

> ***Mr Gallacher:*** *"Would you like to comment in terms of the policy implications of what I raised in the first two points, firstly the continued number of internal witnesses who become victims themselves in terms of the charging process, departmental, as well as the other aspect of what is the Police Service going to do with witnesses who come forward and identify corruption and profess their own sins? What is the view there?*
>
> ***Ms Thompson:*** *Two things. I think one of the things that is in the Protected Disclosures Act that the Police Service Act lacks is a criminal sanction, an offence sanction which provides*

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6 ***Police Service Further Amendment Bill 1995*** - introduced in the Legislative Assembly on 13 December, 1995 to protect police officers who make allegations concerning police misconduct from reprisals. The bill proposed the insertion of a new section 206A in the *Police Service Act 1990* which would make it an offence for a police officer to take certain detrimental action against a police officer who has raised allegations of police misconduct. The explanatory note to the bill stated that a police officer would only be protected from reprisal if:

"(a) the allegations were made because the police officer had a duty to raise any such allegations (including a duty imposed by a Royal Commission or a duty arising under the Police Service Act 1990 or the regulations made under that Act), or
(b) the allegations were made in accordance with a formal system of reporting allegations set out in an Act (for example, Part 8A of the *Police Service Act 1990,* the *Ombudsman Act 1974* or the *Independent Commission Against Corruption Act 1988*").

In relation to protections against reprisals the Bill provided for a criminal offence created in the proposed section 206A(3) which states that:

> "A police officer who takes detrimental action against another police officer (including a former police officer) that is substantially in reprisal for the other police officer making an allegation to which this sections applies is guilty of an offence."

The offence carried a maximum penalty of $5,000 or imprisonment for twelve months or both. Detrimental action was defined as 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 proceedings."

*for anybody that disadvantages a person who comes forward. In fact, it was proposed to put a similar provision into the Police Service Act to add that extra layer of protection to people who come forward. That was in a bill introduced last year but with the proroguing of Parliament it has not been introduced but is likely to be brought forward in the next session in a miscellaneous bill in the event that it is not taken up with what is being done here. . ."*

Mr Lynch followed the implications of clause 30 with the Ombudsman and Deputy Ombudsman who claimed that the requirements of the Police Service Act Regulation may not necessarily exclude a police officer from making a protected disclosure. The position is one which obviously requires clarification.

***Mr Lynch:*** *"Police regulation 30, do you think that needs to be amended?*

***Ms Moss:*** *No. We are of the view that obviously police officers should be able to make protected disclosures. Would the existence of 30 and 31 mean they cannot make protected disclosures; our view is not necessarily so. Again, that is not entirely clear.*

***Mr Wheeler:*** *We have identified certain circumstances where we believe a police officer can make a protected disclosure. Cl.30 says that they are required to make disclosures about allegations that constitute a criminal offence, or other misconduct. Other misconduct is totally undefined really, as far as I can see. Whether that fits the definition of maladministration or corrupt conduct is tricky. That definition is about allegations, not show or tends to show.*

*The Protected Disclosures Act requirement is to be more than an allegation. The anonymous disclosure, in my view you are not confined to section 30 if you make an anonymous disclosure. Therefore if you are not complying with clause 30, you are not doing something under an obligation, therefore it is voluntary, therefore that would be a protected disclosure if it fits the definition.*

*If someone comes direct to us and doesn't make an allegation under clause 30, that is a protected disclosure, because they are not under an obligation to come to us.*

*Where there might be a breach of clause 30, then I do not know that it would be a wise move for the Commissioner to take any action if the disclosure has been made. Certainly if they made a disclosure internally, and to us at the same time, it would be a protected disclosure.*

*In the overall picture, it is a mess. It needs to be clarified. The police should know. Maybe both should apply. Maybe that should be an exception to the rules that has to be made. You can see the problems we have in trying to work it out."*

Mr Gallacher raised the issue with the Commissioner of the ICAC who argued that police officers should be able to access the same protections available to any public official making a disclosure:

***Mr Gallacher:*** *"One of the things we have looked at in the past couple of days has been the unique situation that New South Wales police find themselves in respect of clause 30 of the Police Service Regulation 1990 as opposed to the protected disclosures legislation under the banner of public official. Do you have a view about that?*

***Mr O'Keefe:*** *I do not see why police officers should not be in the same position as every other public sector employee. The climate of public opinion seems to me at present as good as you will ever get to achieve such an outcome. At present in the Police Service if a complaint is made by somebody, even if justified, they finish up the losers. I cannot judge whether that is right or not, but having everybody in the same situation, the same law applying to everybody is both non-discriminatory and likely to give a better result than the present situation."*

Ms Sue Thompson expressed a similar view arguing that the protection and offence provisions under both the *Protected Disclosures Act 1994* and clause 30 of the Police Service Regulation 1990 should be consistent.

***Mr Kinross:*** *"Do you think that because the Police Service is the first step of the protector for the citizen of liberty, property and so forth or supposed to be, not to mention the oath that they swear, that they in fact should be removed from this Act and have their own system for making protected disclosures? In other words should they be treated differently especially in light of Ms Thompson's ambiguity in not knowing where we are at with the inconsistency between clause 30, sworn and unsworn and other provisions? Should we look at the Police Service totally differently?*

***Ms Thompson:*** *It would certainly overcome a lot of the ambiguities. What you have got is a Police Service that is currently operating under two different sorts of provisions because it is a mixed service. From what the Royal Commission has already said to date, that is a situation that is obviously going to continue and expand, so the problems that we have are going to get worse, not better.*

*But looking at it from another perspective, there is no reason that public servants and police officers should be treated any differently from any other public servant and therefore should be dealt with under the Protected Disclosures Act. From a personal point of view I would like to see some position whereby the protection continues to be applied through the protected disclosures legislation but that the program that is being run by the Police Service is run in conjunction with that.*

*I mean, most of what they are doing now fits neatly with the protections that are provided under the Protected Disclosures Act. There is just ambiguities and if they could be overcome and that program could be run as it is being run now, not just for sworn officers but for unsworn officers as well, for members who come under the Public Sector Management Act, then I think we would be in a win win situation."*

The Ombudsman's suggestion that disclosures could be made by police officers simultaneously under both clause 30 of the Police Service Regulation 1990 and one of the investigating authorities did not seem to provide a complete solution to the problem:

***Chairman:*** *"The Ombudsman suggested that a police officer might firstly make a report under the Police Service Act or Police Service regulation in terms of misconduct and simultaneously make a protected disclosure to the Ombudsman in terms of corruption or maladministration. Do you see merit in that and also do you see that protection would apply over the issue within the Police Service?*

***Ms Smith:*** *The protection would be above and beyond, yes, so far as the Protected Disclosures Act is concerned. Were you meaning they would make the same type of complaint to the Police Service and then send a copy to the Ombudsman?*

***Chairman:*** *Yes, simultaneously.*

***Ms Smith:*** *It is quite often the case where complainants send letters to a number of people and you have got five identical complaints going to a number of areas. The Protected Disclosures Act no doubt would then come in so far as the disclosure to the Ombudsman's Office and the other would come under the Police Service Act, so I guess we would need to clarify where or who would be or which legislation."*

**Conclusion**

The Committee's inquiries revealed a considerable amount of confusion among both members of the Police Service and investigating authorities about the application of the *Protected Disclosures Act 1994* to members of the NSW Police Service.

At present a police officer has an obligation to report misconduct under clause 30 of the Police Service Regulation 1990. The Committee also believes that it was intended by the Legislature that the *Protected Disclosures Act 1994* should provide an additional avenue for police officers to make disclosures, on a voluntary rather compulsory basis. Recent amendments to the Act by the Police Legislation Amendment Act 1996 designate the Police Integrity Commission as an investigating authority under the Act to which a public official may make a disclosure "that shows or tends to show, corrupt conduct, maladministration or serious and substantial waste of public money by a police officer".

However, a lack of clarity about the definition of "public official" contained in section 4 of the *Protected Disclosures Act 1994* raises doubts about the application of the Act to police officers, who as sworn members of the Police Service may not necessarily be covered by the definition. The NSW Police Ministry and the Office of the Ombudsman both made submissions to this effect. The Ministry considered that it was not adequate to rely on coverage of police officers under the Act to depend upon the reference within the "public official" definition to "any other individual having public official functions or acting a public official capacity, whose conduct and activities may be investigated by an investigating authority". The Ministry suggested that the definition could be broadened to include a specific reference to "a member of the Police Service" as is the case in the definition of public official contained in the ICAC Act.

Another source of confusion relates to the types of conduct which a police officer has a duty to report under statute as distinct from the categories of conduct which can be disclosed under the PDA. The bill refers to "allegations of misconduct" whereas the PDA concerns disclosures which "show or tends to show" maladministration, corrupt conduct or serious and substantial waste of public money".

The Committee discussed the relationship between clause 30 of the Police Service Regulation 1990 and the Protected Disclosures Act 1994 with representatives of the Police Ministry and

the Police Service and determined that meeting an obligation under clause 30 would not necessarily preclude an officer from making a disclosure under the PDA. The Ombudsman suggested to the Committee that a police officer could undertake to furnish information under both pieces of legislation simultaneously.

In the current situation police officers do not receive protections against reprisals for misconduct allegations under the *Police Service Act 1990* and their ability to obtain the protections available under the *Protected Disclosures Act 1994* is unclear.

In conclusion, the Committee agreed that regardless of which avenue a police officer chose to report misconduct, the protections provided under sections 20 and 21 of the Act should be available to the officer. Accordingly, it is recommended that the Protected Disclosures Act should be amended to clarify that this is the case. This may require amendment to the Police Service Act 1990 to give a police officer the option of being able to make a voluntary disclosure to one of the investigating authorities about conduct which shows, or tends to show, maladministration, corrupt conduct or serious or substantial waste of public money.

The Police Ministry has advised the Committee that new legislation is being prepared for introduction into Parliament and that the new Bill, while similar to the previous Police Service Further Amendment Bill 1995, has been drafted with cognizance of the issues affecting police officers in relation to making disclosures under the *Protected Disclosures Act 1994.*

**Recommendation 14 - Police Service**

14. 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.

# CHAPTER 15 - ELECTED REPRESENTATIVES

## *15.1 Local Government Councillors*

### *15.1.1 Background*

In order to determine whether it was intended that the Protected Disclosures Act 1994 should apply to local government councillors, it is necessary to follow the developments which let to the adoption of the current definition.

**Whistleblowers Protection Bill 1992 (No. 2)** was referred to a legislation committee in November 1992, which reported on 30 June, 1993. The legislation Committee considered the definition of "public official" during its review of the Bill and recommended:

> *"**Recommendation 9***
> *The Committee, therefore, recommends that the definition of "public official" in clause 4 of the Bill should be re-examined for the purposes of clarification. A new definition of "public official" should encompass persons who contract, directly or indirectly, with the Government."*

Several submissions to the Committee argued that the definition provided in the earlier Bill was confusing and unclear. The Local Government Association submitted that the definition was in terms of a person who may be investigated whereas "public official" in Part 2 referred to a person who may make a disclosure. The Association also thought it would be difficult for persons using the Act to understand that reference to the three investigating Acts was necessary in order to ascertain who is a public official, and to gain access to the Acts. Submissions concerning ambiguity of the definition were also made by the Hunter Water Corporation and the Minister for Education and Youth Affairs.

The ICAC was critical that the Bill only protected public officials and did not offer private contractors with the government some protections. The Commission argued that extending the protections available in the Act to private contractors with the government would greatly assist the objectives of the Bill. The Ombudsman made a similar submission but the Deputy Ombudsman later gave evidence against including contractors in the definition. He concluded that the "better view is that it is not intended and was never intended to encompass someone such as a contractor carrying out public service under some sort of contract."

The Committee concluded the definition was one of the "most important" in the Bill and that it should be "as clear, concise and consistent as possible." It also considered that private contractors should be covered by the Bill.

**Protected Disclosures Bill 1994 - original definition** - The definition of "public official" contained in the first print of the Protected Disclosures Bill 1994 stated:

> *"Public official" means any individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority.*

The explanatory memorandum to the Bill, as introduced into Parliament, stated that public official was "defined so that it may include, for example, the Governor, a public servant or a Minister of the Crown".

**Amendments in Committee of the Whole - 2R debate** - The then Opposition moved an amendment that the definition of "public official" in the Bill should be replaced with the following:

> "Public official" means a person employed under the Public Sector Management Act 1988, an employee of a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority;" (Hansard - LA 15/11/94 p.5013)

During the second reading debate prior to proposing this amendment, Mr Whelan commented:

> "I note that "public official" is defined in the bill to include the Governor, a public servant or a Minister of the Crown. As honourable members know, they are covered by the Independent Commission Against Corruption Act. Those are matters to which I take objection." (Hansard - LA 15/11/94 p.5012)

In Committee of the Whole, he stated that the proposed definition "like the previous definition, will further define what a public official does and will include those involved in local government authorities."(Hansard p. 5036) Mr Hatton supported the amendment claiming that it was "important to have a wide definition of "public official" in order to ensure that people in the senior executive service, heads of departments and people under contract in local government are protected."

Debate ranged between Mr Hatton and Mr Hartcher, then Minister for the Environment, on the need for a wide definition of "public official". According to Mr Hartcher, the Government rejected the proposed definition because it was "extraordinarily wide" and "goes outside the scope of the legislation, which was designed to protect disclosures by public servants". He concluded that the proposed amendment was"ludicrous and it defeats the whole purpose of the legislation, which is to protect people employed in the public service".(p.5036)

Mr Hatton responded that the definition of public official should be wide and raised the question of extending the Act to cover the health area:

> "It is important for people in the senior executive service, for heads of departments, for people on area health boards and for people acting in an official capacity - in this case it is limited to people employed under the Public Sector Management Act or an employee of a local government authority - to be embraced by the Act."

Mr Whelan referred to the comprehensive definition of public official and public authority in

the *ICAC Act 1988* which included local government officers. He noted that under section 11 of the ICAC Act these "local government officers" had a responsibility to report possible corrupt conduct and claimed that the protected disclosures legislation should also extend to "local government." (p.5037) These comments by Mr Whelan suggest that the Opposition's overriding concern in widening the definition of "public official" was to ensure that local government employees making disclosures could access the protections available under the Act. No specific reference was made to the need for protection for local government councillors.

**Committee Inquiry** - In its submission to the Committee the Department of Local Government recounted that in November 1994 during debate on the Protected Disclosures Bill, the Parliament amended the definition of "public official" in the Bill to specifically include "an employee of a local government authority or any other individual having public official functions or acting in an official capacity . . .". This amendment has been held to bring elected members of local councils as well as employees of local government under the definition.

### *15.1.2 Evidence to the Committee*

It became apparent from the evidence taken by the Committee that witnesses regarded the application of the Act to local councillors as a largely unintended effect of the legislation. According to the ICAC Commissioner, application of the Act to local government councillors was inappropriate and unecessary:

> ***Mr O'Keefe**: ... The second point is the fact that it is an unintended effect of the legislation the fact that it applies to local government councillors. The problem we saw was that officials are quite different from councillors. Officials do not have the response and responsibility to an electorate. They are not answerable in the same way as councillors are, any more than Members of Parliament can be equated with public servants. They are really different categories and the control of them is in the chamber, be it council or Legislative Chamber and through the political process. If a councillor makes a disclosure in the council, they get protection from defamation and the like. The question that is raised here is whether or not they should be able to make protected disclosures about their fellow councillors, in effect, outside the council chamber. That is, combine the administrative and the elective or political process. We thought they should not be able to. . ."*

Similarly, the Department of Local Government also pointed out that it often was not appropriate for a councillor to use the mechanism of an internal reporting system to make a complaint about the activities of a council. In its response to the issues summary it concluded that the application of the Act to councillors should be maintained but that "not all forms of reprisals are applicable."

Councillor Peter Woods, President of the NSW Local Government and Shires Association, agreed that the application of the Act to councillors required clarification. Further evidence

from the Association indicated the need for protection when making a disclosure was greater for the council employee than a councillor:

> ***Chairman***: *There is obviously a difference between an employee of the council and a councillor in what is available to them when they make a protected disclosure. Do you see a difference in, say, the mechanism of protection available to either of those particular people?*
>
> ***Mr Clark***: *Regardless of the situation that Councillor Woods has already explained, there is a need for greater protection for the staff member, because the elected councillor is in a slightly different situation, volunteers for the position, is elected to the position by the public, is in a different relationship to the body corporate, which is the council, than is the employee. The employee is under a different set of constraints, does not have access to public redress through the council meeting that is readily available to the councillor.*
>
> *The employee, if he or she comes to the council meeting, does so by going through a greater number of steps than does the councillor who attends the meeting as of right and has audience and the right to speak at the meeting as of right. So for that reason alone, I think the employee is in a different position and needs a greater degree of protection.*

In his supplementary submission the Auditor-General commented that application of the Act to councillors had "the potential for political abuse" and that the Act "is really about protection concerning allegations by employees of the public sector and not elected representatives." The Ombudsman questioned whether the protection against reprisals specified at s.20(2)(c)-20(2)(e), including disciplinary protceedings, dismissal, prejudice in employment and discrimination,were relevant to elected representatives.

**Conclusion** - The evidence presented to the Committee regarded the extension of the protections available under the PDA to elected officials as an unintended consequence of the definition of "public official" in the Act. There would seem, however, to be some doubt as to whether this is the effect of the definition.

The definition is clearly intended to apply to employees under the Public Sector management Act or employees of a local government authority. The additional reference to persons "having public official functions or acting in a public official capacity" seems intended to be confined to employees able to be investigated by an investigating authority, and not to elected office holders who can be so investigated but are not officials.

The term "public official" seems distinct from "public office-holder". In order for the PDA apply to elected officials, it would have been necessary to explicitly state this intention. It cannot be inferred from a provision in the Act which seems equally, if not more, capable of other interpretations. The confusion in this area appears to arise from unduly emphasising the "liability to be investigated" aspect of the defintion of public official rather than considering

the totality of the definition which is directed at covering employees.

Another possible source of confusion with the definition of "public official" is that it is applied to those who make protected disclosures as well as those who are the subject of them. The resultant confusion is particularly relevant in respect of the application of the Act to elected State and local government representatives.

Evidence to the Committee highlighted the distinction between the positions of employees and elected representatives, with employees making disclosures being seen as more susceptible to detrimental action and without the same protections as are available to Members of Parliament and local government councillors. In the circumstances, it is questionable whether the protections of the Act need to be available to State and local government elected representatives.

Having regard to the definition of "public official" taken as a whole, and the comments made in the second reading debate and committee stage on the Bill when the definition was amended, it seems that it was not intended that the protections of the Act should apply to Members of Parliament and local government councillors.

Presumably, it would then follow that a similar interpretation applies in respect of those "public officials" about whom disclosures may be made. However, while it may be inappropriate for elected representatives to be able to receive the protections offered by the Act, it seems desirable that their conduct could be the subject of a disclosure, where there is currently a jurisdiction under the investigating authority Act. Relevantly, the ICAC Act 1988 permits the ICAC to investigate the conduct of the Governor, a Minister of the Crown or a Member of the Legislative Assembly or Legislative Council.

**Recommendation 15 - 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.

### *15.2 Protections for persons receiving disclosures under section 19*

During the course of the public hearings for the review the issue arose of whether a Member of Parliament, or other person who receives a disclosure from a public official under section 19 of the Act might be liable to an action in defamation if that Member or individual chose to

publish the information. On 3 July, 1996 the Committee received a letter from Mr John Turner MP, Member for Myall Lakes, which raised a particular issue about the protections available to Members of Parliament, journalists and other persons receiving disclosures under the Act (section 19 of the Act enables a public official to make a disclosure to a Member of Parliament or a journalist in limited circumstances).

Mr Turner highlighted that although a person making a protected disclosure receives the protection available under section 21, a member of Parliament, journalist or other person to whom a disclosure may be made would not appear to receive the same protection. He wrote:

> "It appears to me that even if a person has protection under Section 21 the Member of Parliament or journalist or any other person to whom they publish any information whilst under the protection, does not have any protection.
>
> Even if a Member of Parliament was able to utilize the information under Parliamentary privilege the mere fact that the protected person had published the information to the Member of Parliament could in my mind be sufficient to possibly take defamation action against the member of Parliament, journallist or other persons mentioned in section 21(3)."

Mr Turner proposed that the Committee should consider extending the protection of the Act, perhaps with some limits, to the persons mentioned in s.21(3).

Mr Hatton also raised defamation as an area of particular relevance to the *Protected Disclosures Act 1994*. He discussed its significance in relation to local government councillors with the Committee and concluded that the forums available to councillors to make disclosures were adequate and provided qualified privilege:

> ***Mr Fraser**: With regard to local government councillors, you said you felt they should be at the mercy of whoever wants to have a crack at them. What about the case of where you have a councillor who may be newly elected to council, which only covers some maladministration within the council, surely he should be afforded some sort of protection in the system for exposing a rort within the system.*
>
> ***Mr Hatton**: I think they could go to PIDA and get the free legal advice, independent counselling - when I say counselling, I do not mean for problems - how they approach the subject and what agencies and what help is available to them.*
>
> *On the question of defamation, which is a key in this whole question, . . .which is very important in memos that pass between councillors and council staff, or councillors and councillors, and staff and staff, or whether it be councillors or any other agency. In the case of a councillor speaking in a council meeting, they are covered by qualified privilege and can answer that. However, they are not covered by qualified privilege outside that forum.*

*I think you have to look at this whole question in regard to the amendment to the Defamation Act and that is something I have pushed for years, as you know, as a member of the Parliament. Defamation really does cause very serious problems in terms of revealing waste, mismanagement and even corruption. It has to be addressed by defamation, rather than protection.*

*Except where you are talking about public servants and internal memos and the commencement of a process of whistleblowing, I think you can have defamation protection there in the legislation. As regards elected officials, it is very difficult and that's why I have backed away from the elected officials.*

***Mr Fraser**: Surely an elected official who may uncover, say in a works depot, a process of rorting the system and they find it hard to get it through management of council, surely that public official should be given some public assistance, the same as any other whistleblower would be given.*

***Mr Hatton**: I think you will find the laws of defamation do cover a councillor quite adequately.*

***Mr Fraser**: Away from defamation.*

***Mr Hatton**: You are asking for protection. That person, by virtue of their election to the position, can raise the matter in a forum of qualified privilege and say that there is a fiddle going on in the works depot, to deal with tenders in large machinery and so on. That person has a duty to communicate. As I understand the defamation law, he is communicating in a forum where there is a duty to receive that information, and even if the information is inaccurate but reasonably properly based, that person is protected by defamation law."*

In order that the Committee could properly consider Mr Turner's proposal the Committee sought advice from the Crown Solicitor as to whether a member of Parliament who receives a disclosure from a public official under section 19 of the Protected Disclosures Act 1994 might be liable to an action in defamation if that Member published the information.

The Crown Solicitor's advice dealt with several key issues about this section. It concluded that depending on the circumstances of the publication, the Member of Parliament may be able to claim a defence of absolute privilege, qualified privilege, truth, or freedom of communication."

*Absolute privilege* - It confirmed that where a Member of Parliament publishes the information received in Parliament he or she will be protected by parliamentary privilege. In the event that a Member of Parliament publishes material outside of Parliament the advice referred the following relevant sections of the Defamation Act: section 17A(1) - which provides that there is a defence of absolute provlelege for a publication to or by the

Ombudsman; section 17K - which provides for a defence of absolute privilege for a publication to, or by the ICAC, or to the ICAC Commissioner or one of his officers. Other relevant defences of absolute privelege include publications to the Privacy Committee (s.17B) and the Police Integrity Commission (s.17S).

*Qualified Privilege* - Another situation examined by the Crown Solicitor was that in which a Member of Parliament believes it is more appropriate to publish the disclosure information to another party, such as the relevant Minister or some other agency. He concluded that "it would be within the scope of s.22(1)(a) [of the *Defamation Act 1974*]for a Member of Parliament to publish material relating to corrupt conduct, maladministration or serious and substantial waste of public money to the relevant Minister or appropriate agency." The question of whether any other person or body would also fall within the scope of this section of the *Defamation Act* would "have to be determined on the facts of the particular case".

Section 22 provides:

> "(1) Where, in respect of matter published to any person:
>
> (a) the recipient has an interest or apparent interest in having information on some subject;
> (b) the matter is published to the recipient in the course of giving to him information on that subject; and
> (c) the conduct of the publisher in publishing that the matter is reasonable in the circumstances,
>
> there is a defence of qualified privilege for that publication.
>
> (2) For the purposes of subsection (1), a person has an apparent interest in having information on some subject if, but only if, at the time of the publication in question, the publisher believes on reasonable grounds that the person has that interest.
>
> (3) Where matter is published for reward in circumstances in which there would be a qualified privilege under subsection (1) for the publication if it were not for reward, there is a defence of qualified privilege for that publication notwithstanding that it is not for reward."

However, it was noted that the qualified privilege defence would be defeated by a finding of express malice.

The Crown Solicitor's advice also noted the potential availabilityof other defences to defamation proceedings, such as that of truth and the implied constitutional protection of free speech.

The comments which were made by witnesses on this issue support the Crown Solicitor's advice. The Auditor-General, for example, felt that both journalists and Members of

Parliament already possessesd sufficient protections against actions in defamation for publishing a disclosure and gave his views in the following extract:

> ***Chairman***: *In fact yesterday one of our colleagues brought forward to the Committee concern as to whether or not the current Act affords any protection to either the member of the Parliament or the journalist, particularly against defamation, in terms of issuing and forwarding that complaint.*
>
> ***Mr Harris***: *Journalists typically and members of Parliament more than typically are able to meet those limitations, are they not. Members of Parliament gain protection in other ways and journalists are generally adroit about those matters.*
>
> ***Chairman***: *There were concerns that the Act, may in fact not offer that.*
>
> ***Mr Harris***: *I understand that. I understand that members of Parliament may be subject to the normal defamations laws in espousing a complainant's case, but if they do it in a particular way they will not. If they do in Parliament they would not be.*
>
> ***Chairman***: *Given the circumstances we are in at the moment that is not available until 17 September, so a member of Parliament can dutifully carry forward the complaint and to that degree is exposed.*
>
> ***Mr Harris***: *That's true. A member of Parliament is always entitled to write to the government and ask for the government's response, which is what an appeal mechanism would be.*
>
> ***Mr Lynch***: *And certainly covered by qualified privilege if it was done in that way, I would have thought.*

**Conclusion**

The Committee concluded that if a Member of Parliament published the material to an investigation agency, the relevant Minister or some other agency with apparent relevant responsibilities, then there would be a defence of qualified privilege for that publication in the event of any defamation proceedings. Qualified privilege as dealt with at s.22(1) of the *Defamation Act 1974* provides as follows:

> "22(1) Where, in respect of matter published to any persons:
>
> (a) the recipient has an interest or apparent interest in having information on some subject;
>
> (b) the matter is published to the recipient in the course of giving to him information on that subject; and
>
> (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances,
>
> there is a defence of qualified privilege for that publication."

It would seem clear that if a Member of Parliament is acting reasonably and without malice in passing information contained in a disclosure to the responsible authorities that no question of liability to an action in defamation can arise. If the Member of Parliament chose to publish the material in proceedings of the Parliament he or she would not be subject to defamation action as parliamentary privelege would apply.

Therefore, the Committee has not recommended that the Act should be amended to include any explicit protection against actions in defamation to Members of Parliament or other persons receiving disclosures under section 19 of the Act.

# PART E - OTHER ISSUES

## CHAPTER 16 - STATISTICS, REPORTING & ONGOING REVIEW

*16.1* ***Public Authorities (ICAC research project)*** - The most comprehensive statistical data available to the Committee on the impact of the *Protected Disclosures Act 1994* upon public authorities was supplied by the ICAC. The Commission had conducted a 3 phase study which included surveys of public authorities and public officials who had made disclosures. The surveys were undertaken in October 1995, seven months after the commencement of the Act, and on the basis of the results the ICAC made the following observations:

"**Key Findings**

- Eight per cent of local councils had not heard of the Act prior to the survey.
- Two per cent of public sector agencies had not heard of the Act prior to the survey.
- Almost two-thirds of local councils (63%) had not implemented internal reporting systems for protected disclosures.
- Almost one-half of government agencies (48%) had not implemented internal reporting systems for protected disclosures.
- Three-quarters of local councils had not informed their staff about the Act.
- One-half of government agencies had not informed their staff about the Act.
- Almost one-third of local councils (31%) did not expect the Act to have any impact on their ogranisation.
- One-fifth of local councils (21%) expected the Act would have a positive impact on their organisation.
- One in six government agencies (17%) did not expect the Act to have any impact on their organisation.
- A little over one-third of government agencies (36%) expected the Act would have a positive impact on their organisation.
- The difficulties some organisations experienced in their attempts to interpret and implement the Act were:
  - (i) resource constraints making implementation and training difficult;
  - (ii) difficulties in understanding and interpreting the Act and making it comprehensible for staff;
  - (iii) identifying areas of overlap with other legislation and trying to understand where the Act sits in relation to other Acts;
  - (iv) determining how to undertake the cultural change required to make the Act work.

The Committee attempted to supplement this statistical material with more current information from public authorities. The Chairman wrote to all Ministers requesting them to draw the review of the Act to the attention of the public authorities within their portfolios and indicating that the Committee was seeking to ascertain the full extent to which the Act had been understood and utilised within Government bodies. The nature and extent of the public authority responses reinforced the Committee's impression that on the whole public

authorities do not systematically record information about any disclosures they had received, either directly or indirectly, for example, by referral.

Consequently, the Committee conducted its review in the absence of any current comprehensive, accurate statistical data on the impact of the Act on the New South Wales public sector. Without a central body of statistical material the Committee felt unable to readily draw conclusions about the response of public authorities to the Act. In particular, it could not accurately report on:

- the number of protected disclosures made under the Act to public authorities
- the portion of disclosures made to public authorities which were protected disclosures and the number of these subject to full investigation
- the outcomes of protected disclosures made to public authorities
- the cost of dealing with protected disclosures
- trends in the types of disclosures being made
- systemic problems

*16.2 Investigating Authorities* - Although the investigating authorities each supply information on protected disclosures in their annual reports the Committee found it difficult to draw any comparisons or conclusions about the respective performance of each investigating authority.

On the basis of annual report information the Committee was aware of the number of disclosures reported by the Ombudsman, ICAC and the Auditor-General but comparisons between the performances of the investigating authorities was not possible because of the differing reporting categories and periods used by each body. It was not clear for example, whether all of the investigating authorities included oral disclosures in their statistics.

For example, the Ombudsman's submission advises that during the period from the commencement of the Act on 1 March, 1995 until 7 June, 1996 the Office received 39 formal written protected disclosures of which 33 were in the Ombudsman's jurisdiction - three of those outside jurisdiction were referred to another body. The Ombudsman observed that the number of protected disclosures made or referred to the Office had been increasing since the commencement of the Act by 40 per cent each quarter. Of the 39 protected disclosures received, 7 had been formally investigated, 22 were subject to informal investigation or preliminary inquiry, 4 were declined at the outset and 6 were outside jurisdiction. It is important to note that these figures do not include any anonymous police internal complaints which the Office felt could be classed as protected disclosures. The statistics also only relate to the General Area of the Office's operations. From 1 March, 1995 until 7 June, 1996 the Office had given detailed advice to over 70 public officials contemplating making a disclosure or needing assistance on the implementation of the Act on behalf of their public authority.

The Auditor-General's Report for 1995 (vol.3, part 1,p.31) records ten protected disclosures received by the NSW Audit Office, of which were anonymous, 1 not protected, 1 not

investigated after preliminary inquiries and several still subject to investigation. One protected disclosure had been finalised. The Auditor-General also gave an qualitative assessment of protected disclosures received by his Office noting in his submission that their substance/significance was not remarkable.

In sharp contrast the ICAC reported a total of 177 protected disclosures for the period 1 March 1995 to 29 February 1996 - a breakdown of the action taken in response to the 177 protected disclosures is attached. During evidence the Commissioner of the ICAC made these comments on the number of protected disclosures received by the Commission:

> ***Mr O'Keefe:*** *... As you would know, Chairman, and I suppose other members of the Committee would know, except for parliamentary references, matters that come to the Independent Commission Against Corruption, be they via section 10, which are complaints by the public, or section 11 which are reports from heads of agencies, there is a discretion in the Commission as to whether or not to further examine the matter, be that a formal investigation or further inquiries. If one looks at the period 1994-95 and takes the complaints we received from the public under section 10 which are not protected disclosures, some 47 per cent of those are made the subject of further inquiry, that is initial inquiry or formal investigation.*
>
> *If one looks at the period from the beginning of the Act in 1995 to the end of the financial year, 30 June, 1995, the percentage is 89 per cent of protected disclosures were either the subject of inquiry or investigation. I hasten to add that the number involved there was small, it was only 47. If, however, you come to the full year, 1995-1996, initial inquiry and investigation for non-protected disclosures accounted for just a little under 25 per cent. It was 24.7 per cent in fact. If you take the same categories for protected disclosures, and now the number is much more, the number is now 177 for the period I am looking at, 41.2 per cent of those have that additional attention given to them. Now it is not quite twice, but it is getting up to close to twice. . . ."*

According to Commissioner O'Keefe, these figures refute criticism of the ICAC's handling of protected disclosures by strongly suggesting that the Commission gives them serious consideration. He also claimed that "the effect of the Act has been truly to divert resources from other matters into these particular matters, whether they be serious or not serious." As Commissioner he was responsible for determining the level of attention given to matters.

***16.3 Auditor-General and special audit reporting requirements*** - Special audit reporting requirements under the *Public Finance and Audit Act 1983* (PFA Act) present particular problems for the Auditor-General in relation to his role as an investigating authority.

The *Public Finance and Audit Act 1983* makes no provision for specific reporting requirements for reports on investigations into disclosures of serious and substantial waste. In the absence of any specific arrangements, section 38C of the *Public Finance and Audit Act 1983* applies. Under this section the Auditor-General must report to the Head of the authority, the responsible Minister and the Treasurer on the result of any special audit and any matters which the Auditor-General judges call for special notice. A report cannot be made unless the Head of the authority, and the responsible Minister, have been given a summary of the

findings and proposed recommendations at least 28 days beforehand.

Section 38E(1) of the PFA Act requires any report under section 38C to be presented to the Legislative Assembly during sitting as soon as practicable after the report has been made. The application of these reporting requirements to his protected disclosures jurisdiction have been described by the Auditor-General as "onerous" and unsuitable for reporting purposes under the Protected Disclosures Act.

The Auditor-General recommended that with regard to audits of protected disclosures:

- the proposed report should be forwarded to the Head of the Authority and relevant Minister for comment within fourteen working days;
- the report, which is to reflect any comment provided by the Head of the authority or the Minister, should be forwarded to the Head of the authority and the Treasurer;
- there should not be a requirement for the report to be presented to the Legislative Assembly unless the Auditor-General considers the matter is of such importance as to warrant a report to the LA;
- where no report is presented, a summary of the report is to be included in the Auditor-General's next report to Parliament under section 52 of the PFA Act.

The Committee feels that the current reporting requirements are unsatisfactory and impractical, and believes that consideration should be given to the recommendation made by the Auditor-General. However, this recommendation while affecting the Audit Office's reporting requirements in relation to protected disclosures would appear to involve the need for amendments to the *Public Finance and Audit Act 1983* instead of the *Protected Disclosures Act 1994.* This would put the proposals beyond the scope of this review. The Committee notes that the Auditor-General has raised this issue with the Director-General of Cabinet Office by letter on 29 September, 1995.

***16.4 Central collation and assessment of statistics*** - The majority of witnesses agreed with the necessity for comprehensive statistical data based on information supplied by public authorities in accordance with reporting obligations. For example, Dr De Maria considered that one department should "compulsorily take statistics from all departments in the public sector once a year".

Of the investigating authorities, the Auditor-General and the Ombudsman supported comprehensive annual reporting obligations for public authorities in relation to the Act. The Auditor-General responded that such a requirement would be consistent with open government and accountability principles:

> ***Chairman:*** *In terms of that, when the Legislation Committee looked at the Act back in 1992, they suggested that there ought to be some comprehensive annual reporting obligations upon*

*public authorities, and in trying to avail ourselves of statistics, it has been made difficult because that is not there in all cases, but I am wondering how you feel about reporting obligations being placed on public authorities in terms of the Act?*

***Mr Harris:*** *Quite relaxed. Well, in the sense that again, consistent with my view, all of this should be open anyway. I think anyone should be able to go in to the department and say how many complaints have you received and how have you classified them and how have you proceeded with them. I think all that should be open information, so requiring it to be published is only a small step from that."*

Providing the statistical reporting did not undermine the operation of the Act, the Ombudsman supported reporting requirements:

> "The reporting of suitably anonymised information about all complaints/disclosures would be useful in terms of raising awareness and as performance indicators. However, some agencies are of a size which could lead to the identification of a 'whistleblower' from even anonymised reports. The issue for resolution here is the balance between the benefits of reporting and the object of protecting the identity of 'whistleblowers'.
>
> In our view, and consistent with good administrative practice relating to accountability and transparency, there should be a presumption that public authorities are required to report on disclosures in details unless to do so would breach the Act or lessen or reduce the objects of the Act with respect to the protection of 'whistleblowers' or the investigation of corrupt conduct, maladministration or serious and substantial waste."

## ACTION TAKEN BY ICAC IN RESPONSE TO PROTECTED DISCLOSURES & OUTCOMES
## (1/3/95 -29/2/96)

| Action taken | No. | Breakdown | | Findings | | Outcomes | |
|---|---|---|---|---|---|---|---|
| **Immediate closure**: response limited to examining material, assessment and written report to Operations Review Committee (ORC) | 81 | 36 | referred for information | | | | |
| | | 28 | referred for investigation & report | 2 | sustained in part or full - departmental procedures to be reviewed | | |
| | | | | 1 | not sustained | | |
| | | | | 4 | unable to substantiate allegations | | |
| | | | | 21 | reports not yet received | | |
| | | 17 | referred to ORC | | | | |

| Action taken | No. | Breakdown | | Findings | | Outcomes | |
|---|---|---|---|---|---|---|---|
| **Initial enquiries** - ICAC investigate further e.g. obtain information from the complainant & agency subject to complaint | 63 | 28 | current matters | | | | |
| | | 35 | closed following completion of enquires | 2 | other agencies already investigating | | |
| | | | | 23 | referred for information | 10 | no substance to allegations |
| | | | | | | 8 | allegations substantiated in whole or part (ICAC offered advice/assistance for systems & procedures review) |
| | | | | 10 | referred to other agencies for investigation & report | 7 | agencies to take some action incl. Procedure reviews & disciplining employees. |
| | | | | | | 1 | No substance to allegation. |
| | | | | | | 2 | Awaiting final reports |
| **Investigations** - matter subject to more extensive work or relates to a current investigation | 33 | 27 | current investigations e.g. Aboriginal Land Councils, Glebe Morgue, State Rail Authority. | | | | |
| | | 6 | yet to be completed - referred to other agencies for more information | 1 | agency undertook to review systems | | |
| | | | | 1 | complainant declined to provide further information - investigation terminated | | |
| **TOTAL** | **177** | | | | | | |

The Commissioner of the ICAC disagreed with any statistical reporting proposal arguing in his supplementary submission that statistics may be open to misinterpretation and that much can depend on the quality of the disclosure which is not within the control of the investigating authorities.

The Department of Local Government kept complaint statistics which included categories for maladministration and corruption, however, it did not record details of the number of protected disclosures received or investigated. The Committee, therefore, was not in a position to make a correlation between the protected disclosures received by the Department and the nature of the conduct which may have been revealed through these disclosures. The Department's statistics on complaint handling seemed largely aimed at meeting its obligations in relation to reporting matters to the ICAC or the Ombudsman and did not focus specifically on the protected disclosures as a separate facet of its statistical reporting on complaints.

> ***Chairman:*** *"According to the ICAC submission to the inquiry, your 1200 complaints are about 22.7 per cent, I think, of their protected disclosures. Do you keep statistical data about the outcomes, or what happens in terms of disclosures that you forward on to ICAC?*
>
> ***Mr Sut:*** *Not as such. We keep statistics on the number of complaints that we have received, but not on outcomes, or how many we refer on to the Commission or the Ombudsman.*
>
> ***Chairman:*** *In terms of local government and its operation, there is not feedback?*
>
> ***Mr Rogers:*** *There are extensive arrangements with both the Ombudsman and ICAC. It is not uncommon for the three of us to receive the same complaint. It is not uncommon for us to receive a complaint which involves a section 11 report by us to the ICAC and the three agencies in fact discuss and transfer complaints between them, and if one is investigating, the other two usually do not, so that only one agency undertakes the relevant investigation.*
>
> *We have complaints referred by both the other two organisations and we in turn refer complaints to then, depending on what the situation is. We have quite a broad range of statistics, including what sort of areas the complaints are about and those sorts of issues, but there is no simple compendium of outcomes. If we refer it to the ICAC, we will not find out necessarily what the result has been until the ICAC has completed its work on it. The feedback can take some time in that sense.*
>
> ***Chairman:*** *Are those statistics within your annual report, or just internal?*
>
> ***Mr Rogers:*** *There is a summary of the statistics in the annual report and obviously we have others internally, but there is a full summary of complaints handing in the annual report.*
>
> ***Mr Sut:*** *It lists the number of complaints and also lists the categories of those complaints we receive. Whilst we will not categorise the complaint as a protected disclosure, we do have categories for maladministration and corruption.*
>
> ***Chairman:*** *That is under section 11 of the reports that you send to the ICAC on an annual basis?*

***Mr Sut:*** *The arrangement is I provide a monthly schedule of all our complaints to the Commission and we would note which matters we consider are section 11, merely by that notation. If it is considered by ICAC to be a section 11, we still continue on with assessing that complaint, unless we get notification from the commission that they believe it is a matter which they want to take up. We do not specify in the annual report how many section 11 matters we have referred."*

**Conclusion**

The *Protected Disclosure Act 1994* provides no requirement upon public authorities and investigating authorities to produce statistical information on protected disclosures which they have received and investigated.

In performing this review the Committee 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 of protected disclosures which had been made to public authorities, the number of disclosures which had been investigated by public authorities and the outcomes of those investigations. Inquiries made by the Committee to the public authorities through their relevant Ministers failed to acquire such information as departments and agencies mostly responded in a general way detailing educative, policy and administrative measures taken in response to the introduction of the legislation.

Consequently, the Committee conducted the review largely in a quantitative vacuum. Apart from a four-phased study conducted by the ICAC, which included surveys of public authorities and persons who had made disclosures, the Committee had no data on activity in relation to the Act within the public sector. The Committee noted that the phase of the ICAC which surveyed public authorities had been conducted in October 1995 and was not up to date.

The investigating authorities each report on this area of their jurisdiction in their annual reports to Parliament. The Committee, therefore, found statistical information on their respective activities in this area easy to access. However, difficulties arose when the Committee endeavoured to draw comparisons between the investigating authorities. Differences between the classification systems of each body meant that it was impossible to compare performances and identify problem areas or systemic issues, for example, some recorded oral disclosures in their statistics while others did not.

In order that this situation is remedied when the next review of the Act is undertaken the Committee made the following recommendations for the collection and collation of statistical information on the operation of the Act.

**Recommendations 16-21**

**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*.

*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:

- 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.

## CHAPTER 17 - DEFINITIONS

A lack of clarity about several of the definitions in the Act was raised in a number of submissions and it became apparent to the Committee that a significant amount of confusion existed about the meaning of numerous key words used in the Act. Examples of terms the meaning of which witnesses identified as uncertain included: corrupt conduct, maladministration, serious and substantial waste, frivolous, vexatious, public official and disclosure.

The Ombudsman highlighted this problem in her opening address to the Committee stating that "the Act is complex and in many places ambiguous and it needs to be made far more user friendly to potential whistleblowers and to public sector agencies." Although Ms Moss felt that this was not a startling revelation she did consider that "protection, lack of clarity and uncertainty, has a direct impact on the perception of the Act's effectiveness in delivering protection to whistleblowers."

In contrast, representatives of the NSW branch of Whistleblowers Australia Inc did not perceive a need to clarify existing definitions in the Act but did see a case for extending the list of definitions.

**17.1** ***Serious and substantial waste*** - The Auditor-General's submission to the Committee recommended that if Section 4 of that Act is to define the term "serious and substantial waste" then consideration should be given to the working definition currently used by the Audit Office:

> *"Serious and substantial waste refers to any uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in significant loss/wastage of public funds/resources."*

In his response to the issues summary the Auditor-General qualified this suggestion stating that the working definition "does not advance the matter much".

Other witnesses to the Committee also felt that further description of the term would be of limited assistance:

> ***Chairman:*** *There has been quite a deal of discussion as to whether the definitions in this Act are far too broad and I take serious and substantial waste as one of them. Do you think that needs honing down in any way, to make it clearer in terms of the application of the Act?*
>
> ***Mr Bennett:*** *That is the definition?*
>
> ***Mr Kinross:*** *There is not a definition. That is the problem. Should we define?*
>
> ***Chairman:*** *Should it be defined, or should it remain broad?*

***Mr Bennett:*** *This is paragraph 8(1)(c). I am not aware of what the ambiguity is. It is obviously a very general phrase. It would be hard to define it more than the words themselves. They do not strike me immediately as words requiring definition, but if there are specific ambiguities about it, I would like to consider those.*

***Mr Kinross:*** *The ambiguity is the common law. That is the criticism from whistleblowers, they want as much certainty before they take legal proceedings as to what the Act means, and to ascertain that meaning. The best thing you can go on are the words in the Act itself.*

***Mr Bennett:*** *I see, serious and substantial. It is hard to imagine a substantial waste of public money that is not serious. I am not quite sure what the word serious adds to it. How would one define it, in terms of amount? It would be very difficult to provide any real definition.*

***Chairman:*** *You believe it does not create difficulties then?*

***Mr Bennett:*** *I do not see a problem with it specifically."*

The Auditor-General, Mr Tony Harris, concurred with Mr Bennett and gave evidence supportive of a "case by case" interpretation of the term rather than a general definition which would specify monetary or financial limits within any proposed definition:

***Mr Lynch:*** *"In your submission, one of the issues you raised was the definition of serious and substantial waste.*

***Mr Harris:*** *Yes.*

***Mr Lynch:*** *I have got two comments on the submission. One is the definition that you posit does not seem to advance it terribly far.*

***Mr Harris:*** *I think it replaces substantial with significant.*

***Mr Lynch:*** *The second comment I was going to make is that David Bennett generally made the point that the words can stand by themselves, unless you are prepared to specify monetary or financial limits, which must be extremely limited and probably counter productive.*

***Mr Harris:*** *I think that's right. We are going to be reporting, perhaps within a month, on the first one that we will have done under the special audit reporting provisions that we are obliged to follow, and the amount will be in present value terms between $5 million and $6 million.*

*In terms of the whole of government accounts, that is not very significant or substantial, $60 billion worth of net assets. For an organisation who had a million dollars worth of revenues, that is very substantial. So it actually depends in some circumstances on the organisations to which the complaint relates and its functions, but as well the eye of the public, I suppose, has a view about what they think is a reasonable amount of money. Half a million dollars a year, I suppose, for most people would be a reasonable amount of money, although it would take something like $50,000 to do the exercise and report on.*

***Mr Kinross:*** *Without revealing anything, can you categorise how does it clearly constitute waste?*

***Mr Harris:*** *I do not even think that we came to that conclusion, that it was substantial waste. I think we let the figures speak for themselves. We treated it as a protected disclosure because we thought that the lessons in it were not confined to the one organisation, and were not even confined to the one organisation and its related organisations, but the lessons in it were much more widely applicable and I suppose this is interesting too.*

*If someone complains to us that the Inspector at Central Station was not there on a particular day and somebody went through and a dollar was missed, that is obviously not substantial, but if it illustrates something more systemic, then of course can be substantial. From that point of view, I suppose we justify it as well as the half a million dollars in its own right."*

The question of incorporating financial limits into a definition was discussed with the Deputy Ombudsman, Mr Chris Wheeler:

***Mr Wheeler:*** *"If it is systemic you build it into your accounting. I think the answer is in the examples, saying in the following circumstances it might be X or Y. I cannot think of a definition, unless you are going to come out and say it has to be more than $200,000. If it is a small agency, maybe the answer is significant* ***or*** *substantial. In some circumstances it is very significant, but it might not be all that substantial.*

***Chairman:*** *Is it not often the case it is the conscience test to do with the person? You inherently know it is wrong, so you act from that perception. You are not acting with your accounting table in front of you.*

***Mr Wheeler:*** *Maybe the definition should be changed, that the person honestly perceives it to be serious and substantial."*

Ultimately, the Deputy Ombudsman did not believe it was possible to arrive at a formulation which would define "serious and substantial waste", however, he did believe that the Act should contain some examples as a guideline to the meaning of this term. He told Mr Lynch:

***Mr Wheeler:*** *"I accept the view put forward yesterday that the terms are fairly descriptive. However, it does not help potential whistleblowers very much who ring up and say how do we know if it is serious or substantial. If they are off by a dollar here or there, it has significant implications for them. I personally cannot think of a formulation that would define it. Certainly I think it would be useful to have some examples put into the legislation of the sorts of things that might be.*

*There are certain things you can probably say in terms of going to the lower end of the business. For example, you could argue it would have to be more than the cost of investigating it. The Auditor General said it cost $200,000 to do a special audit. Surely you would assume serious and substantial waste would be above that.*

***Mr Lynch:*** *That is not going to help the whistleblower.*

***Mr Kinross:*** *Nor if it is systemic."*

To a large extent decisions about whether a disclosure falls within the definition of matters to be investigated under the Act are decided by the investigation authorities in consultation with each other. The Committee notes that the cooperative approach adopted by the investigating authorities on such decisions should eliminate any problems arising from definitional ambiguities, and prevent disclosures not being investigated because they fail to meet strict definitional requirements. The Ombudsman and Deputy Ombudsman explained this consultative approach to the Committee during public hearings:

> ***Mr Kinross:*** *"Have also the activities of waste, corruption, maladministration, been too restrictive, vis-a-vis each respective office, so that you have regarded yourself as saying, I do not know whether we in fact should do this, because it really has a principal element of corruption and therefore it ought to be ICAC?*
>
> ***Mr Wheeler:*** *We liaise closely on these matters.*
>
> ***Ms Moss:*** *We meet and discuss particular matters and we actually decided that the Auditor General was the most appropriate body to deal with it, and indeed the Auditor General did deal with that particular matter.*
>
> ***Mr Wheeler:*** *That is the large SRA inquiry. If there is any doubt in our minds, if there is a serious and substantial waste or a component of corruption, generally we are in touch with the other body.*
>
> ***Mr Kinross:*** *There is no deficiency in this Act that would require remedy for those types of fuzzy around the edges, in respect of financials?*
>
> ***Ms Moss:*** *No. In fact, in that particular matter we said if the Auditor General had to look at issues concerning our jurisdiction, we would be happy to assist him in that inquiry and contribute there, but he would be the one responsible for issuing the final report, so in a way the three of us do have a cooperative approach and avoid duplication.*
>
> ***Mr Wheeler:*** *It is not possible to define those three terms so they are exclusive of each other. There will always be an overlapping of our roles. Better to liaise, cooperate, work out who has an interest, or if it is primarily one, work out the categories of conduct."*

**17.2** ***Public Official*** - The definition of this term as provided in the Act has particular implications for police officers wishing to make a protected disclosure - a fuller discussion of the application of the Act to the Police Service is given at Chapter 14.

One suggestion made by the NSW Police Ministry was that the application of the Act to members of the Police Service could be clarified by extending the definition of "public official" under the Act to include a specific reference to this group as is the case in the ICAC Act definition of "public official".

Some members of the Committee, however, were unconvinced that such amendment was necessary. Mr Kinross discussed the issue in the following exchange with Ms Sue Thompson,

Senior Policy Advisor, the Police Ministry:

> ***Mr Kinross:*** *Ms Thompson, about this definitional type problem, I read public official as including, forgetting the Public Management Act an alternate which is any individual having public official functions or acting in a public official capacity whose conduct and activities may be investigated by an investigating authority. Are you suggesting because of the reuse of the words, "public official functions" and "public official capacity" that that again is caught by clause 30?*
>
> ***Ms Thompson:*** *No, my point was simply to say that while you are catching the unsworn officers definitely by reference to the Act under which they are employed, to catch the sworn members of the Police Service within the jurisdiction of that Act you are having to rely on that whole phrase of public functions and public office. If you compare that to the definition of public official in the ICAC Act, it is a much clearer definition. It puts it perfectly plainly and beyond doubt that it applies to the sworn members of the Police Service and the unsworn members of the Police Service.*
>
> ...
>
> ***Mr Kinross:*** *Public official means a person employed under the Public Sector Management Act 1988, an employee of a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority. I am putting it in the third tier, the policeman may well fall into that third tier and you do not therefore need to have the rider, who are employed under the Public Sector Management Act.*
>
> ***Ms Thompson:*** *Yes, I am agreeing with you. That is the category that we are having to use to apply that Act to sworn members of the Police Service because they are not employed under the Public Sector Management Act. All I am suggesting to you is that that definition could perhaps be made clearer.*
>
> ***Mr Kinross:*** *I do not deny that, but I still think they are public officials who can get the protection of the Protected Disclosures Act."*

**Conclusion**

The Committee received submissions suggesting that several terms within the Act required clarification. On closer examination, the Committee concluded that most of the terms referred to did not require clarification through amendments to the Act. Confusion about the meaning of terms such as "vexatious" and "frivolous" would be more appropriately dealt with in guidelines to the Act and other educative material.

While terms such as "frivolous" and "vexatious" have a reasonably fixed meaning at law and are probably best explained in guidelines to the Act, the Committee was concerned that the meaning of key terms such as "serious and substantial waste" remain unclear and that like the terms "maladministration" and "corrupt conduct" it requires some definition. On the basis of the evidence it had taken the Committee considered that the Auditor-General's working definition of "serious and substantial waste" was unsuitable for inclusion in the Act. Instead the Committee proposes that the working definition provided by the Auditor-General, in conjunction with some illustrative examples, should be used in the guidelines to clarify the meaning of the term. The Committee feels that elucidation of all three terms in guideline

publications is essential to a better understanding of the purpose of the Act.

Expanding the definition of "public official" within the Act to include a specific reference to a member of the Police Service would help resolve any uncertainty that might exist about the application of the Act to Police personnel.

**Recommendation 22 - Definitions**

22. *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.

## CHAPTER 18 - DEEDS OF RELEASE

Whistleblowers Australia Inc. raised the question of deeds of release which were sometimes signed by public officials who had made a disclosure as part of a settlement with their employer. On this point, their submission states that:

> "Whistleblowers' experience has been that the employer makes any settlement of arrears and entitlements conditional upon the whistleblower undertaking to desist from any further legal and public action.
>
> This is wrong and contrary to the public interest. It permits the employer to avoid public scrutiny and accountability and has the effect of continuing the very culture complained of."

Ms Kardell explained the point further in evidence:

> ***Ms Kardell:*** *"That comes as a result of being asked to sign a deed of release. A whistleblower usually gets to some point in time where the employer wants to either get shot of you, or pay you off, or yes, either of those two things. Your survival becomes contingent upon keeping your mouth shut. That, to me is anathema....".*

Generally, members of Whistleblower Australia found this practice coercive and contrary to the public interest. Ms Kardell related the experience of two whistleblowers who had entered into such agreements:

> ***Mr Kinross:*** *"What you are recommending is contrary to what those two people have done, is it not?*
>
> ***Ms Kardell:*** *That is quite correct. Indeed, if you were to ask Miss Pinson, and there is some consideration or some discussion about whether she might actually come at a later date, she did not want to sign that document. She fought against it and she felt that it was contrary to the public interest. That it also was anathema to her. That personally she had great difficulty doing it but she went ahead and did that because she had no livelihood and no money.*
>
> ***Mr Kinross:*** *What about Vince Neary? Have any of you any knowledge on that because he was a member of your committee at one stage, wasn't he?*
>
> ***Ms Kardell:*** *Yes, he was. I understand that he feels the same way. But as I said, if you have an either/or situation, you are either going to eat tomorrow and be quiet about it, or you are not.*
>
> ***Chairman:*** *So it is a form of coercion?*
>
> ***Ms Kardell:*** *It is coercive."*

Consequently, Whistleblowers Inc. asserted that "any settlement of arrears and entitlements made conditional on the Whistleblower's future silence is unlawful and contrary to the public interest."

Although it would seem that sections 20 and 21 of the Act should apply in such circumstances, Whistleblowers Australia argued that the practical difficulties of legally seeking these protections were too onerous for the protections of the Act to be fully utilised.:

> ***Mr Kinross:*** *"That now leads to section 20 and section 21. I would put to you, . . . that 20 and 21 does give you, I think, on any reasonable reading of those words, protection for being forced to sign a deed. 20(2) says: "Detrimental action means injury, loss, intimidation, disadvantage, dismissal or prejudice in employment disciplinary proceedings."*
>
> *Then 21 goes on to talk about the protected disclosure in fact including, despite any duty of secrecy or confidentiality. I am not attacking you. I read those sections as protecting you. You tell me why they do not protect you.*
>
> ***Mr May:*** *Who polices it anyway?*
>
> ***Ms Kardell:*** *I agree with you that injury and loss, from a legal perspective, would be indeed that which you have suffered as a result of something . . .. That allows you then to take a legal action in a Local Court. That gets us into a whole new area of where the onus lies and who should do what, and whether this is subsequent to an authority having already taken action to deal with the disciplinary and misconduct issues, or whether you would actually have to deal with those issues yourself as a whistleblower first before you got to the next point of being able to say: "I am making a claim in these terms." So that gets us into another area all together but it does not address the real issue which is that you should not be asked in the first place. It should be unlawful for an employer to coerce you on the basis of what is reasonably yours anyway.*
>
> *Again, I am not disagreeing with you that that does not give you some avenue but it does not address the issue because you are addressing the messenger, not the message. You need to address the point at which these things start. As Mr Hatton said, you address the CEOs, the SES, the structures, the handling of complaints and you chase the message. You do not make the messenger both the person that brings you the news and the person who bears the entire responsibility for not only addressing the issue, fighting it through the system and then subsequently they have to then mount their own action to get some redress at the end of it. At that time they are bankrupt.*
>
> ***Mr Kinross:*** *The difficulty I have on this issue is that it goes back to Dr De Maria, that we all have a concern for the whistleblower, but every one is complaining and we are not hearing any tangible examples by which we are being shown sections of the Act have worked. I mean worked in terms of not just your impression or your perception of having worked but being tested to do so.*
>
> *What I am preliminary making a statement is that if you believe in the legal system, someone*

*has to test this*[7]*.... "*

The ICAC Commissioner's response to this issue clearly shows his disapproval of "deed of release" agreements:

> ***Mr Kinross:*** *"Following on from the settlement, because Mr Anderson and I had a discussion with whistleblowers about this issue and, indeed, it is in their submission, what do you think about the morality of entering into a confidential deed and then the extent to which that is used as a reason that the whistleblower can no longer cooperate with the investigating authority?*
>
> ***Mr O'Keefe:*** *I have dealt with that in the supplementary submission. The view I have expressed in that is that it ought not be permitted. That encourages the covering up of the very evil that this Act seeks to expose. It is not appropriate in my view."*

The ICAC's supplementary submission asserted that it is not in the public interest for such requirements to be imposed as this would "allow the buying of silence and could prevent exposure of the wrong the subject of the disclosure."

The Deputy Ombudsman claimed in his evidence that regardless of the existence of a deed of release between a public official and a public authority, an investigating authority was not bound by such an agreement and could continue to investigate a protected disclosure in the public interest.

> ***Mr Kinross:*** *"Regarding 21, on Tuesday with Whistleblowers Anonymous, I actually put this question to them. Did not Ms Pinson and Mr Neary, by signing a deed of release by which they could not disclose whatever they could not disclose, breach the public good, or themselves create some problems that Whistleblowers Anonymous themselves were arguing against?*
>
> ***Mr Wheeler:*** *I am aware apparently there was some provision in the agreement signed. From our perspective, any complaints that may or may not have been made by those people to us, or anybody else who had signed such an agreement, would not be affected by such an agreement. The fact they signed some agreement to say they would drop any complaint or they would not raise it any further is of very little interest to us in relation to a public interest matter.*
>
> *If we believe a matter warrants an investigation in the public interest, the fact that the complainant may not want to take it any further is not a consideration.*
>
> ***Chairman:*** *It overrides their personal involvement?*

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[7] Inquiries to the Judicial Commission and the NSW Bureau of Crime Statistics and Research revealed that that have not been any recorded prosecutions for offences under s.20 resulting in sentencing. This seems to result from the fact the *Protected Disclosures Act 1994* has not been included in current sentencing databases.

***Mr Wheeler:*** *That is right."*

The discussion between Mr Kinross and Mr Wheeler continued on this issue with Mr Kinross referring to the effect of section 21 (2) in relation to deeds of release. Subsection 21(2) states that the protections against actions under section 21 still have effect "despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person." In conclusion, the Deputy Ombudsman restated that the existence of such confidentiality agreements would not prevent the Office of the Ombudsman from investigating a protected disclosure in the public interest.

> ***Mr Kinross:*** *"That is what I am interested in. What is your power? These types of whistleblowing activities are in the public interest. They reveal systemic corruption, waste or maladministration. The classic way organisations and those with greater resources behave is to silence the critic and you silence with a very powerful incentive, selfishness, by paying them off. You want to continue with the investigation and they do not because they have been paid off. If it is voluntary, how is it lost? How do you see your role after they have signed a confidentiality agreement?*
>
> ***Mr Wheeler:*** *If I thought there was a confidentiality agreement which specifically said somebody would have to withdraw their complaint to the Ombudsman, I would be recommending to the Ombudsman that we would have to have a chat to that public authority. If it is non-disclosure clause you often get in commercial contracts, that would not prevent the Office, if it felt it was in the public interest, requiring information that we might still need.*
>
> *That contract, if you like, would not stand in the way of a statutory obligation to answer a question. The whistleblowers that have been into our Office, who have been forced to sign these agreements and then have received the payment, if they are required or asked to give information, I would think most of them would not rely on that, that they would be more than happy to, if it was legal."*

This point was reiterated in the Ombudsman's supplementary submission which argued against settlement provisions requiring a public official who had made a protected disclosure to refrain from taking any further action as a condition for settling the matter:

> "Disclosures about corrupt conduct, maladministration and serious and substantial waste are in the public interest and the fact that the 'whistleblower' and the agency have reached a private agreement does not make the matter any the less in the public interest. The public interest component remains despite any settlement and, if necessary, would in our view, over-ride a settlement.
>
> It should be noted that any agreement to settle a matter is not binding on any investigating authority to which a matter may have been referred and nor should it be."

**Conclusion - Finding 1**

The Committee examined the issues raised by agreements or settlements between public authorities and public officials, who may have made a potential disclosure, by which the official agrees to refrain from further pursuing or acting on the disclosure. The Committee considered that such issues were probably beyond the scope of its present review. Nevertheless, it concluded that such agreements or settlements may be at variance with the objectives of the *Protected Disclosures Act 1994* which are basically aimed at promoting and facilitating the exposure of misconduct. However, it also notes the view of the investigating authorities that they would still investigate a disclosure if it was in the public interest to do so, despite any such agreement or settlement.

# CHAPTER 19 - ANONYMOUS DISCLOSURES

A full description of the anonymous complaints issue, from the viewpoint of the "parties" to a disclosure, was given by the Ombudsman in her submission:

> "This issue can be considered from the different perspectives of the various 'parties' to a disclosure, ie:
> (1) the interests of the recipient of the disclosure;
> (2) the interests of the public authority and/or public official(s) the subject of the disclosure; and
> (3) the interests of the person making the disclosures.
>
> In terms of the interests of the recipients of disclosures (be they investigating authorities, public authorities or public officials to whom disclosures have or are made), as the disclosure must *"show or tend to show"* corrupt conduct, maladministration or serious and substantial waste of public money, the identity of the person making the disclosure should therefore not be essential for the proper investigation of such a disclosure. It may be different if a mere allegation was sufficient to obtain protection under the Act, however this is not the case given that protection only extends to disclosures which *"show or tend to show"* any of the three relevant categories of conduct.
>
> In terms of the interests of public authorities and officials the subject of disclosures, the extension of protection to anonymous complaints should not unreasonably prejudice such public authorities or officials given the confidentiality requirements set out in section 22 of the Act in relation to information identifying persons who make protected disclosures.
>
> In terms of the interests of persons making disclosures, their need for protection should be a little different whether they made their disclosure anonymously, or they identified themselves in the disclosure and the person or body to whom the disclosure has been made has kept their identity confidential. In both circumstances the public authority or public official the subject of the disclosure has not been informed of the identity of the person making the disclosure. In both circumstances the authority or official may attempt to identify the person who made the disclosure, or may make assumptions as to who is most likely to have made such a disclosure. In either circumstance the person making the disclosure should be able to rely on the protection provided by the Act. At least in theory they should be able to achieve this by either proving to the satisfaction of the recipient of their disclosure that they are in fact the author, or proving this fact to the satisfaction of a relevant court or tribunal where the defences provided by the Act are raised. In either case such persons would fall within the exemption in clause 12 of Schedule 1[8] to the *Ombudsman Act* enabling them to

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[8] This provides:

make a complaint to the Ombudsman alleging "*detrimental action*" as defined in the *Protected Disclosures Act. (emphasis added)* Until the issue is clarified, the Ombudsman will adopt a broad interpretation and assume that anonymous disclosures can be protected disclosures under the Act."

The Ombudsman recommended that the Act should be amended to put beyond doubt that anonymous disclosures can be protected disclosures under the Act.

The Audit Office informed the Committee in its submission that it had received several anonymous complaints and does not specifically refer to anonymous disclosures or impose an obligation on a person to identify himself/herself in a disclosure. Unless there was evidence that the anonymous author was not a public official the Audit Office would regard an anonymous disclosure as protected. Its practice is to examine the substance of the anonymous complaint regardless of the status of the disclosure under the Act. The Chairman followed up this point with the Auditor-General during public hearings:

> ***Chairman:*** *In your submission you state that the Audit Office treats anonymous disclosures as protected unless it is evident that the anonymous author is not a public official and that the substance of the anonymous complaint is examined regardless of the status of the disclosure under the Act. What difficulties has your Office had in dealing with anonymous disclosures and how do you assess whether they are made frivolously, or vexatiously, without having the name of the author?*
>
> ***Mr Harris:*** *The major problem is we cannot contact the complainant to obtain details which the complainant may think we have, but we do not have, or additional matters to help us in our inquiries, in our audit. That is the main issue.*
>
> *The second issue, yes, we cannot determine all the time whether the person is a public officer and we may make a wrong decision there, but I do not think that is all that important, because if the issue was important enough, we will still do the audit whatever the source, and so in some senses it does not matter to us whether it is a public official or a private official, it is the issue itself that carries the weight.*
>
> *We did actually start on one audit, which we thought was a protected disclosure until a reasonably fresh reading of the letter showed that it was not, but we still went ahead with the investigation anyway, because of the merit of the issue.*
>
> . . .
>
> ***Chairman:*** *It is the trip to an investigation that is important to you, rather than the actual*

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"12. Conduct of a public authority relating to:

(a) the appointment or employment of a person as an officer or employee, and

(b) matters affecting a person as an officer or employee,

unless the conduct arises from the making of a protected disclosure (within the meaning of the Protected Disclosures Act 1994) to the Ombudsman or to another person who has referred the disclosure to the Ombudsman under Part 4 of that Act for investigation or other action."

*fact that it is an anonymous disclosure?*

***Mr Harris:*** *Yes. So let us say someone did make a disclosure that was entirely vexatious, and let us say in other respects it would have been a protected disclosure, that does not worry us, we will still go and look at it. It means the person may not have protection, but the issue still warrants examination."*

Evidence from the Deputy Ombudsman clarified that a public official making a disclosure could obtain the protections provided under sections 20 and 21 of the Act in the event that the person was later identified:

***Chairman:*** *How can you give protection to an anonymous discloser?*

***Mr Wheeler:*** *It depends on whether later, if the agency identifies who it is, or the person later decides he will own up to it, he can prove it is his...*

*Whoever they pick, whether it is the right one or the wrong one, should have some way of getting protection. Under our Act, they can come to us if they had made a complaint to us originally. If a complaint has been made to us originally and there is detrimental action, they can come to us and complain, whether or not they made it.*

***Ms Moss:*** *We have not had any problems with anonymous mischievous complaints.*

***Mr Lynch:*** *Almost by definition if you have anonymous complaints, because the person is frightened to be identified, almost by definition that is the sort of case where you would offer protection, where the authority complained about it can identify the complainant. It is almost conducive to corruption to say that the anonymous informant should not have any protection.*

***Ms Moss:*** *We feel the disclosure should be the important thing."*

Again, the primary focus of the Office of the Ombudsman as an investigating authority was on the merits of the disclosure.

In his opening statement to the Committee, Mr Bennett QC, President of the Bar Association also argued that he found certain serious problems with anonymous disclosures and explained his views to the Committee:

***Mr Bennett****: In a sense, if the anonymous discloser is careful about his or her anonymity, that person does not need the Act, because if the disclosure is made totally anonymously, presumably no-one knows who made it, except the person making it, whereas if the disclosure is such that it is obvious, once one starts to look at it, who has made the disclosure, once you investigate it, there is no reason for making it anonymously.*

*It is hard to see why you need the protection of the Act for anonymous disclosure, and there is the danger, apart from procedural fairness danger, there is the danger it is going to encourage people to be anonymous and not rely on the protection which the Act hopefully makes reasonably effective.*

***Chairman:*** *Often I would think a person making an anonymous disclosure does so because they fear the reprisal.*

***Mr Bennett:*** *That is clearly so.*

***Chairman:*** *The investigation often would lift them up as the person making the disclosure anyway.*

. . .

***Mr Bennett:*** *It is a very difficult balancing exercise. The whole of this Act has a very difficult balancing exercise. "*

If processes were introduced making it easier to make an anonymous disclosure Mr Bennett anticipated that this might encourage anonymous disclosures.

***Mr Gallacher:*** *I wanted to explore the aspect of the anonymity of the anonymous complaint area. As you are fully aware, the Police Service has in place the anonymous complaints process. They have widened that to include anonymous telephone complaints on what they refer to as a corruption hot line, which is only open to members of the Service.*

*. . .How do you feel the way the anonymous complaints process has been used to a degree with some success, albeit at a cost? How do you think it would be met by the rest of the public service if it was to be adopted?*

***Mr Bennett:*** *I can see difficulties with it. The real problem is once you make it easier to have the anonymous complaint, you bring in people who might not complain at all and that might be desirable, but on the other hand, people who might complain giving their name, may complain anonymously and that is undesirable. You have the two effects and you have really got to weigh those two effects, which is very hard to do.*

The Commissioner of the ICAC also did not support the protection of anonymous disclosures and stressed to the Committee that in his opinion there were practical problems associated with such disclosures. These problems included difficulties in assessment and investigation, obtaining further information, assessment of frivolous or vexatious disclosures, invoking protections under the Act and providing notifications in accordance with section 27.

The Commissioner's recommended focus was that measures should be taken to ensure that the internal reporting systems used by public authorities and the support given to public officials wishing to make a disclosure should encourage confidence that their disclosure will be dealt with properly and in accordance with the Act. This obviates a major reason for the need to make anonymous disclosures.

***Mr Lynch:*** *I would like to press you on your view about protection to anonymous disclosures. It would seem to me that someone who makes an anonymous disclosure may well be terrified of their identity getting out. They make their anonymous disclosure, investigation properly and correctly occurs and there is a real likelihood that the author of the declaration is identified. If that is the case why should there not be protection towards the disclosure?*

***Mr O'Keefe:*** *How do you know that it is that person? As soon as some detrimental action is taken against someone, you may well have that person saying, I was the unidentified phone caller. Secondly, there is a real difficulty about follow up. Either you reveal everything that the person has told you to the agency that is the subject of the complaint, in which case you may by that very act reveal the person, destroy anonymity or you try to make some judgment about what you can tell or cannot. Unless you know that organisation well, it is very difficult to do.*

...

*How can you reveal the identity of an unknown person? If you do not know who the person is how do you reveal who they are? That is my argument about the Act.*

...

***Mr O'Keefe:*** *... Anonymity in complaint will be encouraged by that, whereas confidence in security of the name not getting out will encourage people to say who they are."*

**Conclusion**

The Committee regards the issue raised by witnesses about the status of anonymous disclosures to be of lesser significance. The Committee noted that the investigating authorities have received anonymous disclosures from public officials and in the case of the Ombudsman had fully investigated an anonymous disclosure. In the event that a public official who has made an anonymous disclosure loses their anonymity, and can prove "ownership" of the disclosure, the protections of the Act would be available to that person.

**Recommendation 23**

23. *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.

**Protected Disclosures Unit**

1. 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:

   - ✦ to provide advice to persons who intend to make, or have made, a protected disclosure;
   - ✦ to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, legal interpretations and definitions;
   - ✦ to monitor the conduct of investigations by public authorities and, if necessary, provide advice or guidance on the investigation process;
   - ✦ 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 act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;
   - ✦ to publish an annual report containing statistics on protected disclosures for the public sector in New South Wales and identifying any systemic issues or other problems with the operation of the Act;
   - ✦ to coordinate education and training programs in consultation with the 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.

2. 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.

**Appeal Mechanisms and Feedback**

3. 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.

**Codes of Conduct**

4. 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.

**Managerial responsibilities**

5. *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.

6. *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.

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.

**Protections**

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

9. 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.

**Prosecutions**

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).

**Contract agencies**

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 a public authority and makes a protected disclosure.

12. 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.

**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.*

**Police Service**

14. 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.

**Elected Representatives**

15. 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.

**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.*

*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.

**Definitions**

22. *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.

23. *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.

24. 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.

## FINDING 1

The Committee examined the issues raised by agreements or settlements between public authorities and public officials, who may have made a potential disclosure, by which the official agrees to refrain from further pursuing or acting on the disclosure. The Committee considered that such issues were probably beyond the scope of its present review. Nevertheless, it concluded that such agreements or settlements may be at variance with the objectives of the *Protected Disclosures Act 1994* which are basically aimed at promoting and facilitating the exposure of misconduct. However, it also notes the view of the investigating authorities that they would still investigate a disclosure if it was in the public interest to do so, despite any such agreement or settlement.

# APPENDICES

**Appendix 1**
Ombudsman's Submission - Summary of issues & recommendations

**Appendix 2**
List of submissions received

**Appendix 3**
Issues Summary & responses received

**Appendix 4**
Minutes

# ANNEXURE 1

## ISSUES NEEDING RESOLUTION OR CLARIFICATION

### A. THE MAKING OF DISCLOSURES:

**ISSUE 1:** Should the protection of the Act, and obligations on investigating authorities under the Act, extend to public officials voluntarily providing information (which meets the requirements for a protected disclosure) to investigating authorities on behalf of their public authority?

**ISSUE 2:** Should the phrase *"made in accordance with the Ombudsman Act 1974"* in section 11(1)(a) of the *Protected Disclosures Act* be interpreted to mean that the disclosure relates to conduct within the jurisdiction of the Ombudsman, or only that a disclosure is made in accordance with the procedural requirements set out in the *Ombudsman Act* (eg in writing)?

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**ISSUE 18**: Should the power of referral of disclosures under Part 4 of the Act be read as subject to the exclusions set out in sections 16-18 of the Act?

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(3) disclosures made in compliance with a statutory obligation (eg. section 11, *ICAC Act* and section 141(4)(c) and (6)(b) of the *Police Service Act 1990)*?

## C. PROTECTION OF 'WHISTLEBLOWERS':

**ISSUE 20**: Should public authorities (and possibly public officials) be put under a statutory obligation to protect public officials who make protected disclosures from detrimental action taken substantially in reprisal for the persons making the protected disclosures?

**ISSUE 21**: Who should be responsible to prosecute for a criminal offence under section 20 of the Act for detrimental action taken substantially in reprisal for the making of a protected disclosure?

**ISSUE 22**: In relation to section 20, should the onus of proof be reversed (at least in part) to place the onus on persons accused of detrimental action to prove that any person who made a protected disclosure who is shown to have been the subject of detrimental action (eg. injured, intimidated or harassed, discriminated against, disadvantaged or adversely treated in relation to employment, dismissed from or prejudiced in employment, or made subject to disciplinary proceedings), was subjected to such action for some reason other than substantial reprisal for the public official making a protected disclosure.

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# ANNEXURE 2

## RECOMMENDATIONS

**Recommendation 1:** The Act should be amended to provide for the selective application of the provisions of the Act, depending on the circumstances of a protected disclosure. If a disclosure is volunteered by a public official or made voluntarily in response to a request from an investigating authority, then only the protections in sections 20 and 21 should apply and the obligations on investigating authorities set out in sections 22 and 27 should not apply.

**Recommendation 2:** The Act should be amended to put beyond doubt that the phrase "*made in accordance with the Ombudsman Act 1974*" in section 11(1)(a) of the Act means that the disclosure need only be made in accordance with the procedural requirements set out in the Ombudsman Act (eg. in writing).

**Recommendation 3:** The Act should be amended to put beyond doubt that the phrases "*made in accordance with the Independent Commission Against Commission Act 1988*" and "*made in accordance with the Public Finance and Audit Act* 1983" in sections 10(a) and 12(1)(a) of the Act mean that a disclosure need only be made in accordance with any procedural requirements that may be set out in those Acts.

**Recommendation 4:** Some guidance should be incorporated into the Act as to the meaning of "*serious and substantial waste*", wherever appearing in the Act.

**Recommendation 5:** Public officials (primarily police officers) should be able to make protected disclosures under the *Protected Disclosures Act* directly to the Ombudsman about the conduct of other police officers when exercising the function of a police officer with respect to crime and/or the preservation of the peace.

**Recommendation 6:** The Act should be amended to put beyond doubt that anonymous disclosures can be protected disclosures under the Act.

**Recommendation 7:** 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*".

**Recommendation 8:** 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.

**Recommendation 9:** Section 8(1) of the Act should be amended to clarify that the Act does not apply in circumstances where it is clear that there was no intention to complain or to make the particular disclosure.

**Recommendation 10:** 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.

**Recommendation 11:** Given that there will be circumstances where a person wishing to make a protected disclosure will inadvertently fail to provide information which is sufficient to "*show or tend to show*" any of the three categories of conduct, it would be beneficial to clarify the Act to provide that further information may be provided by such persons at or near the time the disclosure is made, provided the information is supplied while the assessment is being carried out as to whether the disclosure is protected under the Act.

**Recommendation 12:** In relation to elected representatives at both State and Local Government levels, the protections provided by the Act should be restricted to the protection against actions, etc set out in section 21 of the Act, the protections in section 17P of the *Defamation Act* and the exemption in clause 20(d) of the *Freedom of Information Act*.

**Recommendation 13:** The Act should be amended to incorporate criteria on the basis of which disclosures from public officials external to investigating authorities concerning the conduct of investigating authorities should be assessed so as to avoid *de facto* appeals.

**Recommendation 14:** The Act should be amended so that the same terminology is used in sections 9(3) and 14(2) to describe internal reporting systems.

**Recommendation 15:** The Act should be amended to provide guidance as to the nature and scope of the information that should be provided to "whistleblowers" in notifications under section 27 of the Act and/or at the conclusion of any investigation of the protected disclosure.

**Recommendation 16:** The Act should be amended to extend the jurisdiction of the Auditor-General to investigate disclosures which show or tend to show serious and substantial waste of public money to cover the conduct of local councils.

**Recommendation 17:** Section 25 of the Act should be amended to put beyond doubt that an investigating authority has a discretion under section 25(2) not to refer a disclosure to the public authority that is the employer of the person making the disclosure if the disclosure is outside the jurisdiction of the investigating authority and that public authority is the only body that could appropriately deal with the matter concerned.

**Recommendation 18:** The Act should be amended to put beyond doubt whether the power of referral in Part 4 is subject to the exclusions set out in section 16-18 of the Act.

**Recommendation 19:** That the Act be amended to expand the exceptions to the confidentiality requirement in section 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.

**Recommendation 20:** Consideration should be given to amending the Act to require public authorities and officials to take positive steps to protect "whistleblowers". Alternatively, the Act could be amended to provide for a section setting out the Legislature's intention that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that *bona fide* "whistleblowers" are protected from both direct and indirect "*detrimental action*".

**Recommendation 21:** Consideration should be given to specifying a party with responsibility for the prosecution of persons for an offence under section 20.

**Recommendation 22:** That section 20 of the *Protected Disclosures Act* be amended by incorporating provisions similar to section 37(5)-(6) of the *Ombudsman Act*, which would have the effect of partially reversing the onus of proof in the determination of whether detrimental action has been taken substantially in reprisal for a public official making a protected disclosure.

**Recommendation 23**: Consideration should be given to providing for a mechanism which allows a "whistleblower" to establish that they made a protected disclosure to the Ombudsman yet preserves the privilege of the Ombudsman from having to appear in court.

**Recommendation 24**: Consideration should be given to clarifying the way in which the protections under the Act apply to disclosures about matters such as corrupt conduct, maladministration or serious and substantial waste which are mixed with disclosures about other matters.

**Recommendation 25**: 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:

- making an appropriate amendment to expand the confidentiality exemption in clause 13 of Schedule 1 to the *FOI Act*; or
- 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.

| SUBMISSION TABLE | | | |
|---|---|---|---|
| **No.** | **DATE** | **NAME/ORGANISATION** | **ADDRESS** |
| 1 | 23.5.96 | The ICAC | Cnr Cleveland & George Sts Redfern 2016 |
| 2 | 24.5.96 | Audit Office of NSW | Level 11, 234 Sussex St Sydney 2000 |
| 3 | 27.5.96 | Internal Audit Bureau | Level 2, 507 Kent St Sydney 2000 |
| 4 | 30.5.96 | Nick Seremelis | 26 Horns Ave Gymea Bay 2227 |
| 5 | 30.5.96 | Susan Lovrovich | PO Box 373 Ashfield 2131 |
| 6 | 5.6.96 | Minister for Mineral Resources & Fisheries | Level 12, 1 Francis St Darlinghurst 2010 |
| 7 | 5.6.96 | Lesley Pinson, National Director Whistleblowers Australia Inc | 55 Imperial Avenue Bondi 2026 |
| 8 | 6.6.96 | Whistleblowers Australia Inc | PO Box M44 Marrickville South 2204 |
| 9 | 7.6.96 | Robert May | 379 Tizzana Road Ebenezer 2756 |
| 10 | 10.6.96 | Cynthia Kardell | 94 Copeland Road Beecroft 2119 |
| 11 | 12.6.96 | Minister for Local Government | Level 2, 151 Macquarie St Sydney 2000 |
| 12 | 11.6.96 | Dept of Community Services | Level 14, 99 Bathurst St Sydney 2000 |
| 13 | 12.6.96 | Public Employment Office | 1 Farrer Place, Level 32 Governor Macquarie Tower Sydney 2000 |
| 14 | 11.6.96 | Dept of Ageing & Disability | Level 14, 99 Bathurst St Sydney 2000 |
| 15 | 11.6.96 | Dept of Juvenile Justice | Level 14, 99 Bathurst St Sydney 2000 |
| 16 | 11.6.96 | Community Services Commission | Level 14, 99 Bathurst St Sydney 2000 |
| 17 | 13.6.96 | Minister for Education & Training | Level 2, 35 Bridge St Sydney 2000 |
| 18 | 7.6.96 | NSW Ombudsman | Level 3, 580 George St Sydney 2000 |
| 19 | 17.6.96 | State Rail Authority of NSW | Roden Cutler House Level 1, 24 Campbell St Sydney 2000 |
| 20 | 14.6.96 | The Hon Elisabeth Kirkby MLC | Parliament House Sydney 2000 |
| 21 | 18.6.96 | Ministry for Police | Level 19 Police Headquarters, Avery Bldg 14-24 College St Darlinghurst 2010 |
| 22 | 2.7.96 | Mr John Hatton | 8 Watt Street Huskisson 2540 |
| 23 | 4.7.96 | Mr Tony Brown | 22 Kitchener Parade Newcastle 2300 |

# REVIEW OF THE PROTECTED DISCLOSURE ACT 1994

## ISSUES SUMMARY

**Review requirement** -Section 32 of the Protected Disclosures Act 1994 requires a Parliamentary Joint Committee to conduct a review of the Act as soon as practicable after one year from the date of assent. Further reviews are to occur after the expiry of each following two-year period. The Committee must report to both Houses of Parliament as soon as practicable after the completion of each review. The Joint Committee on the Office of the Ombudsman was designated the review committee on 16 April, 1996.

**Terms of reference** - The Act does not specify terms of reference or any objectives for the review. During initial discussions on the scope of the review the Joint Committee considered that it should examine:

- any unintended effects of the legislation;
- unclear provisions and definitions;
- anomalies or inconsistencies within the Act;
- difficulties encountered with the legislation by the three investigating authorities under the Act i.e. the Auditor-General, the ICAC and the Ombudsman;
- the use made of the disclosure system to date and its effectiveness (including an examination of statistics and outcomes); and
- the effectiveness of the referral system.

This list reflects the Committee's focus on procedural and jurisdictional issues as distinct from actual disclosures made under the Act and serves as a guide to the general direction of the Committee's enquiries. Details of particular disclosures will only be examined by the Committee where they may identify or illustrate particular procedural or jurisdictional problems.

Several submissions have raised a number of specific questions relevant to the review. A summary of these particular issues follows and has been supplied to those individuals and organisations giving evidence to the Committee as a means of assisting them to prepare for public hearings. The summary is not intended as a complete list of inquiry topics as the Committee would welcome evidence from witnesses on any matters relevant to the operation of Protected Disclosures Act 1994.

## DEFINITIONS

1. Difficulties in defining the terms "corrupt conduct", "maladministration", "serious and substantial waste", "frivolous", "vexatious" and "public official".

2. Possible definitions for the term "serious and substantial waste".

3. Possible definitions for the term "disclosure".

## JURISDICTIONAL ISSUES

4. ***Local government*** - Local government is excluded from the Auditor-General's jurisdiction under the Public Finance and Audit Act 1983 and as a result he is unable to investigate disclosures made under the Protected Disclosures Act 1994 of serious and substantial waste within local government. Should the Auditor-General's jurisdiction in relation to protected disclosures be extended to include local government?

5. Should the Department of Local Government be included as an investigating authority under the Act in order that a disclosure by an employee of a local government authority, or any other individual having public official functions related to local government, may be made to it?

6. ***Community Services*** - Does the Protected Disclosures Act 1994 currently provide protection to public officials making disclosures about conduct amounting to maladministration in the Department of Community Services, the Ageing and Disability Department and the Home Care Service of NSW?

7. Should the Community Services Commission and the Community Services Appeal Tribunal be included within the definition of "investigating authority" under the Act?

8. ***Contract agencies*** - In the light of the increasing tendency to contract out to non-government organisations, functions traditionally carried out by public officials, should the coverage of this legislation be extended to employees of those organisations?

9. ***Internal Audit Bureau*** - It has been suggested that disclosures made by public officials to Internal Audit Bureau auditors, contracted to state and local government agencies, are not "protected disclosures" and that the IAB should be nominated as an alternative body to receive disclosures. Consideration of whether internal auditors should be able to receive internal disclosures.

10. ***Police Service*** - Concerns have been expressed about the incompatibility of provisions found in the Protected Disclosures Act 1994 and the Police Service Regulation 1995 which create difficulties for any police officer wishing to make a disclosure about the misconduct of another police officer. Therefore, should the coverage of the Act should be extended to apply to police officers?

11. ***Private Sector*** - Should the application of the Act be extended to include disclosures made by private sector employees concerning misconduct in both the public and private sectors?

12. ***Preliminary inquiries*** - Concerns have been expressed that public officials providing information to investigating authorities voluntarily in the course of preliminary inquiries, investigations or other inquiries may be making protected disclosures.

## MAKING A DISCLOSURE

13. Should a requirement be introduced for disclosures to be made in writing?

14. Difficulties concerning the different requirements within each investigation act as to the form in which disclosures must be made to each investigating authority. The Ombudsman Act 1974, for example, specifies that complaints must be in writing whereas the ICAC Act 1988 contains no such requirements.

15. Lack of clarity about whether a disclosure is protected when first made even if it is originally made to the wrong investigating authority before being referred to an appropriate investigating authority or public authority.

16. ***Anonymous disclosures*** - The status to be afforded anonymous disclosures and the difficulties associated with anonymous disclosures.

17. ***Local government councillors*** - Questions concerning the appropriateness of the application of the Act to local government councillors.

18. The adequacy and appropriateness of methods currently available to councillors to make a disclosure.

## DEALING WITH DISCLOSURES

19. Questions concerning the status of disclosures relating to matters which have been partially investigated or resolved on a previous occasion.

20. ***Special audits*** - Implications of the requirement that investigations of protected disclosures by the Auditor-General must be special audits in terms of section 38B of the Public Finance and Audit Act 1983.

21. ***Responding to a disclosure*** - Should investigating authorities, public authorities or public authority officers be required to acknowledge receipt of disclosures, outline the action they propose in relation to the disclosure and indicate a time frame for dealing with the disclosure?

22. ***Mediation*** - Should the Act include mediation and alternative dispute resolution techniques, as an option to investigation, for dealing with disclosures made to an investigating authority?

23. Should a legislative provision be introduced which states that the Act does not affect an investigating authority's discretion to decide whether or not to investigate a matter?

## REPORTING REQUIREMENTS

24. Concerns that existing reporting requirements in relation to investigations of serious and substantial waste are onerous and that provision should be made for specific reporting arrangements for such disclosure investigations.

25. ***Annual Report entries*** - Should investigating authorities, public authorities or public authority officers be required to provide in their annual reports statistical details and performance information concerning disclosures they have received, investigations conducted and outcomes?

## FUNDING

26. The adequacy of current funding to investigating authorities for the investigation of protected disclosures.

## EDUCATION & UTILISATION

27. To what extent are the provisions of the Act understood and utilised within Government departments and agencies?

## ADEQUACY OF PROTECTIONS UNDER THE ACT

28. Is it appropriate that the onus is on the public official to prove that a disclosure is a "protected disclosure" and that detrimental action has occurred?

29. Should public authorities, and possibly public officials, have a statutory obligation to protect persons who have made protected disclosures?

30. ***Local government employees*** - Inability of local government public officials to receive the same protections afforded under the Act, through the Public Sector Management Act and the Government and Related Employees Tribunal Act, to State Government public officials.

31. ***Local government councillors*** - What mechanisms of protection are appropriate to a councillor, as an elected member, in contrast to a local government employee?

32. Protections available to public officials who supply information pursuant to a duty e.g. public officials providing information to the ICAC in accordance with section 11 of the ICAC Act 1988.

33. What limitations should be placed on the extent of information which may be disclosed without committing an offence?

34. Should the protections under the Act be limited to disclosures based on information which public officials acquire in the course of their duties as public officials, as distinct from matters arising in the course of their private lives?

## INTERNAL REPORTING SYSTEMS

35. The nature and adequacy of internal reporting systems adopted by public authorities for the making of disclosures.

36. Access of public officials in isolated or small units to a Disclosure Officer and the importance of protected disclosure as a mechanism for fraud prevention.

37. Concerns regarding the accuracy and description of conduct used by public authorities in their internal information brochures for staff on the protected disclosures system.

## DETRIMENTAL ACTION

38. ***Prosecutions re detrimental action*** - Who should investigate and prosecute allegations

of detrimental action? Should such allegations be referred to the ICAC for investigation as corrupt conduct and should the ICAC be given responsibility for initiating prosecution where there appears to be a case to answer?

39. Should public authorities have a statutory duty to investigate allegations of detrimental action and if appropriate take disciplinary action against the person responsible?

40. Appropriate penalties for detrimental action.

41. Legislative provision for grounds on which public officials subject to detrimental action may claim damages and compensation.

42. The issue of whether a public official who is subject to detrimental action because they made a disclosure, and the latter was not investigated, should have a right of appeal.

43. Concerns regarding delays in responding to claims of detrimental action and protective measures available in such circumstances.

44. Is there a need for legislative provisions enabling investigating authorities to issue injunctive type orders forbidding reprisals against a public official who has made a protected disclosure pending investigation of their original complaint. Should such injunctive orders include orders preventing dismissal.

45. Should a person who has made a disclosure be able to take legal action to obtain compensation for any losses.

46. Should financial assistance to obtain legal representation be provided to a person who has made a disclosure at any subsequent inquiry proceedings?

## SETTLEMENT PROVISIONS

47. Whether it is in the public interest that departments and agencies are able to require public officials who have made public interest disclosures to refrain from taking any further action as a condition for settling the matter.

## SUPPORT FOR PUBLIC OFFICIALS MAKING DISCLOSURES

48. Whether, in the public interest, the Act should contain a statement that its provisions should be interpreted in a manner which is favourable to public officials who have made disclosures.

49. Whether there should be an explicit obligation on investigating authorities to protect the interests of public officials who have made disclosures.

50. Whether there should be a specific agency to deal with disclosures which would be more able to take action on behalf of persons who make disclosures.

51. The avenues of legal action for persons who have made disclosures to obtain compensation.

## OTHER MATTERS

52. Concerns have been expressed that disclosures which are genuine only in the opinion of the person making the disclosure, but are not objectively genuine, do not attract the protections afforded by the Act.

**A list of issues raised in the Ombudsman's submission to the Committee is attached for information.**

# ANNEXURE 1

## ISSUES NEEDING RESOLUTION OR CLARIFICATION

### A. THE MAKING OF DISCLOSURES:

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THE AUDIT OFFICE
OF NEW SOUTH WALES

CONTACT NAME

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YOUR REFERENCE

Ms H Minnican
Secretariat
The Joint Committee on the Office of the Ombudsman
Parliament House
Macquarie Street
SYDNEY NSW 2000

RECEIVED 20/8/96

20 August 1996

Dear Ms Minnican

**Review of the Protected Disclosures Act**

***Issues Summary***

As requested please find attached written comment to the issues raised in the paper Issues Summary.

As you would appreciate some of the issues go to matters of a legal nature and as such the response of The Audit Office is qualified to the extent that these matters have not been tested in a court of law. Also the substance of the issues raised is not entirely clear and in other cases responses are best provided by, for example, the Ombudsman's Office as they more directly relate to the role of the Ombudsman.

I trust nonetheless the responses of the Audit Office are of assistance to the Committee. Should you have any questions on the matters canvassed please do not hesitate to contact Denis Streater on 9:285:0075.

For ease of reference I have attached also copies of earlier correspondence to you and the Committee on issues relevant to the Committee's inquiry.

Yours sincerely

A C Harris
AUDITOR-GENERAL

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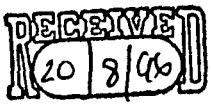
## DEFINITIONS




1. A suggested definition "*serious and substantial waste*", one which does not advance the matter much, has been recommended by The Audit Office as follows

   *Serious and substantial waste refers to any uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in significant loss wastage of public finds/resources.*

   In addressing any complaint of serious and substantial waste regard will be had to the dollar value, the potential for savings, the public interest.

   Definitions of frivolous and vexatious are matters of judgement and are meant to cover other than bona fide disclosures. The terms frivolous and vexatious should be defined by their ordinary meaning.

   Consideration might be given to specifically confirming in the legislation that councillors and board members are public officials.

2. Previously covered in 1 above.

3. Suggested definition of the term "*disclosure*".

   *A disclosure is an allegation by a public official of corruption, maladministration, or serious and substantial waste concerning a public authority to an authority or person designated to receive a disclosure in accordance with the Act. A disclosure must be in writing and may be made by an anonymous person.*

   What constitutes a disclosure, whether a disclosure must be in writing, whether anonymous disclosures are covered by the PD Act are matters which could be covered by amendment to the legislation.

**ISSUES OF JURISDICTION**

4. The Auditor-General's jurisdiction in regard to an investigation of serious and substantial waste should, in the opinion of The Audit Office, be extended to Local Government.

5. The Audit Office supports the proposal that the Department of Local Government be designated an investigating authority in terms of the PD Act. If the Committee decides to broaden the role of the investigating authority to other agencies then perhaps the term "*appropriate authority*" is a better one.

6. Yes, provided the disclosure is made in accordance with the PD Act.

   An allegation, however to the Community Services Commissioner (CSC) by a public official of the Department of Community Services is not afforded protection under the PD Act.

7. The Audit Office supports the proposal that the Community Services Commissioner (CSC) be designated an investigating (or appropriate) authority in terms of the PD Act.

   The Audit Office is sympathetic to the view that a public official who makes a complaint to any relevant agency should be protected, provided the compliant complies with certain criteria.

8. This matter has been covered widely in the Auditor-General's letter to Ms H Minnican of 17 July 1996. For ease of reference a copy is attached.

9. The Audit Office supports the proposal that the Internal Audit Bureau be designated an investigating authority in terms of the PD Act.

   The Audit Office is of the opinion that internal auditors should be nominated within the context of internal reporting systems as persons to whom disclosures can be made and that any firm contracted as internal auditor to a public authority be designated an investigating authority in terms of the PD Act.

10. The Audit Office would support a proposal that police officers be afforded protection under the PD Act.

    The issue whether a police officer who has evidence of maladministration, serious and substantial waste or corrupt conduct should have different entitlements in terms of making a disclosure from any other public official is an interesting one.

    The Audit Office is of the view any inconsistencies not based on principle between the PD Act and the Police Service Regulation 1995 should be removed.

11. The Audit Office does not supports this position in the context of the PD Act. The issue of protection is not relevant to private persons.

12 The Audit Office is of the view that providing information or responding to enquiries by public officials as employees in the course of an investigation by an investigating authority should be afforded the protection of the PD Act provided the information complies with other requirements of the PD Act.

## MAKING A DISCLOSURE

13. The Audit Office has recommended that the PD Act require disclosures be in writing.

14. As per number 13. It would seem logical that there be consistency across investigating authorities of the form in which allegations should be made.

15. Section 8(1) says: *"to be protected by the Act must be made by a public official to an investigating authority."*

    There is no distinction as to which investigating authority the complaint should be made. The Audit Office holds no concerns in this regard and has adopted the position that protection applies.

*Anonymous Disclosures*

16. It is not clear whether the PD Act applies to anonymous disclosures. It can be difficult to examine anonymous disclosures and to decide for example, whether the disclosures is made vexatiously and generally meets all the requirements of the PD Act.

    The Audit Office is of the view that anonymous disclosures, assuming there is sufficient information on which to investigate, should be protected in case the complainant is identified subsequently.

    The Audit Office assesses the substance of all allegations notwithstanding that the disclosure is anonymous.

17. Councillors fall within the definition of a *public official.*

    The PD Act provides protection to Councillors who make disclosures in accordance with the PD Act.

    The concern is that this arrangement has the potential for political abuse. The thinking is that the PD Act is really about protection concerning allegations by employees of the public sector and not elected representatives.

    Notwithstanding The Audit Office recommends no change.

18. The intended question is not understood.

The issue seems to be whether it is appropriate for protection provided under sections 20 and 21 of the PD Act to extend to elected representatives of either State or Local government level.

The conduct of Local Government Councillors may be investigated by both the Ombudsman and ICAC. Members of Parliament may be investigated by ICAC. It would appear the protection provided by the PD Act extends to Members of Parliament and Councillors.

It is doubtful whether detrimental action as per section 20 (2) of the PD Act is relevant to these groupings but recommends no change.

**DEALING WITH DISCLOSURES**

19. The Audit Office is of the view that these matters should be protected or that protection should continue notwithstanding the matter has been partially investigated or resolved on a previous occasion.

20. Special Audits: this issue has been discussed in the Auditor-General's letter to the Clerk to the Committee. A copy of that correspondence is attached.

21. The Audit Office supports a response to the complainant in the following terms: acknowledgment of receipt of the allegation, the action to be taken and in what timeframe and finally the conclusion of the investigation when it is known.

    The Committee might like to consider whether a legislative deadline should be established for an investigating authority to complete an investigation and report to the claimants

22. This may be difficult in circumstances where the complainant wishes the complaint to be confidential. Also the allegation is not so much about a disagreement or difference of opinion but an allegation.

23. Yes although the matter may be covered by section 38B(1A) of the Public Finance and Audit Act which states the Auditor-General **may** conduct an audit. ...

## REPORTING REQUIREMENTS

24. The Protected Disclosures Act makes no specific provision for reporting of investigations to the complainant, the agency, the relevant Minister or Parliament.

    The provisions of the Public Finance and Audit Act apply to the reporting of an audit of serious and substantial waste and as commented earlier are considered onerous.

    The Audit Office supports the proposal to simplify the reporting arrangements for protected disclosures.

25. The Audit Office supports this position.

## FUNDING

26. The Audit Office is of the view that, in the main, investigations of serious and substantial waste should be funded by Parliament.

    In the absence of that, there is a case that investigation costs should be met by the agency about which the complaint concerns.

## EDUCATION AND UTILISATION

27 The Audit Office does not have information in regard to this matter but reference is made below to the findings of the ICAC.

The Interim Report of ICAC indicate some disturbing findings in regard to this issue, for example:

- almost two thirds of Local Councils (63%) had not implemented internal reporting systems for protected disclosures
- almost one half (48%) had not implemented internal reporting systems
- 75% of Local Councils had not informed staff about the PD Act
- 50% of agencies had not informed staff about the PD Act

The difficulties some agencies were experiencing in interpretation and implementation were:

- resource constraints affecting implementation and training
- difficulties in interpretation of the PD Act
- dealing with cultural change
- identifying where the PD Act fits in regard to other Acts

**ADEQUACY OF PROTECTION UNDER THE ACT**

28. The Audit Office is of the view that this should not be the case and that protection should arise automatically where the PD Act has been complied with. It should be up to a Court of law to decide protection does not arise.

    The Audit Office is of the view that the onus should not be on the public official to establish that detrimental action has occurred. It is considered that the onus should rest with the employer to establish that detrimental action has not occurred.

    The Audit Office sees a role for ICAC to investigate any such allegations with a referral to the Director of Public Prosecutions where a bona fide case is established that detrimental action has taken place.

29. The Audit office supports the view that the Chief Executive of a public authority should have a statutory obligation to implement an administrative procedure whereby protection is provided to persons who have made a protected disclosure.

30. Local Government public officials are not subject to the Public Sector Management Act and GREAT Act as other public servants.

    The Audit Office is of the view that Local Government public officials should receive protection under the PD Act.

31. The same mechanisms for protection could be available for a Local Government Councillor as for any other public official notwithstanding that councillors are elected representatives. Item 17 also refers.

32. The Audit Office view is that protection should extend to any public official (especially employees) who, in good faith, provides information concerning maladministration, corruption and serious and substantial waste.

    It is understood ICAC has sought amendments to the ICAC Act to make it a offence to take action against those who assist ICAC with its enquiries.

33. The Audit Office view is that the PD Act should be amended to override the provisions of any other Act which makes it an offence for an official to divulge information (to an investigating authority) relevant to that agency.

34. The Audit Office's view is that any information from a public official which shows or tends to show corruption, serious and substantial waste or maladministration should be protected regardless of the source of the information, that is official capacity or private capacity.

## INTERNAL REPORTING SYSTEMS

35 The Audit Office is of the view that an internal reporting system should exist in written form, be adequate for the purpose, and be advertised within the public authority. Agencies should be encouraged to implement appropriate training for personnel in regard to the provisions of the PD Act and how to make disclosures. The system should be auditable and subject to periodical audit and or quality assurance review.

36. All public officials, regardless of location or size of the organisation, should have access to administrative arrangements for dealing with allegations under the PD Act.

    The nexus between a protected disclosure and fraud prevention is not clear. Clearly disclosures under the PD Act refer to an alleged occurrence while fraud prevention is as the title implies, a preventive measure. In any event many agencies as a matter of good administrative practice, have introduced fraud control guidelines.

**DETRIMENTAL ACTION**

38. The Audit Office supports this position and has recommended to the Committee that this action be taken.

39. The Audit Office is of the view that detrimental action may constitute corrupt conduct and therefore should be investigated by ICAC, which should initiate prosecution through the Director of Public Prosecution where circumstances warrant.

    The question arises as to whether a public authority as the employer, should investigate allegations of detrimental action within itself when it failed to prevent the (alleged) detrimental action in the first place. The prospect that an external agency such as ICAC would investigate detrimental action may encourage agencies to take stronger preventative measures.

    Criminal prosecution may carry more weight than disciplinary action in attempting to dissuade the taking of detrimental action by persons within an agency.

40. In the case of a successful criminal prosecution a fine is appropriate. Fines could range up to $10,000. The Act currently provides $5000 or 12 months imprisonment. Other penalties in the case of disciplinary action may include demotion, dismissal or a fine.

41. The Audit Office supports a legislative provision by which a protected complainant may claim compensation and punitive damages for detrimental action as a result of making a protected disclosure.

42. This is taken to mean that the complainant should have a right of appeal that the allegation was not investigated. The decision to investigate/not investigate should remain the prerogative of the investigating agency. The complainant has a defacto right of appeal to a journalist/Member of Parliament (section 8 and 19 PD Act).

43. The Audit Office has no experience in this matter. The general issue of detrimental action and which agency should investigate detrimental action has been commented on earlier. A mechanism might be considered whereby the CEO of the agency (taking the detrimental action) is placed on notice of the alleged detrimental action and the possible consequences.

    Each agency should be encouraged to establish within its internal reporting system a minimum time period in which to investigate detrimental action and identify a mechanism to for the protection of the claimant.

44. The Audit Office is of the view that this would strengthen the protection of claimants and supports the position in principle.

45. Discussed earlier. The PD Act should make provision for the claimant to seek compensation for damages.

46. The Audit Office agrees in principle that financial assistance should be provided to the public official who has made a disclosure in terms of the PD Act. An avenue for this assistance might be an application for legal aid.

**SETTLEMENT PROVISIONS**

47. The Audit Office does not support this position. The settlement of the matter should occur between the investigating authority and the public authority. In this sense the position of the complainant should be incidental, rather than central, to the allegation and investigation.

## SUPPORT FOR PUBLIC OFFICIALS MAKING DISCLOSURES

48. The Audit Office supports this position and any other attempts to provide greater protection to the public official making a complaint.

49. The Audit Office supports this position.

50. The Audit Office is of the view that allegations continue to be handled by investigating authorities until it is demonstrated that the current arrangements are inadequate.

51. The Audit Office does not have a view on how compensation should be settled or by whom or by which agency or whether a separate agency should be established.

    The Audit Office is of the view that consideration be given to allowing genuine (good faith) complainants to seek Legal Aid funding which should not be means tested.

## OTHER MATTERS

52. The Audit Office supports continuation of protection for any disclosure made in accordance with the PD Act and in good faith that shows or tends to show corruption, maladministration, or serious and substantial waste.

    This view is expressed notwithstanding that the investigation has been declined or discontinued by the investigating authority at its discretion notwithstanding that the allegation is not objectively genuine.

## Issues Raised By The Ombudsman

### THE MAKING OF DISCLOSURES

1. This is taken to question whether information provided by a public official to an investigating authority as a result of a complaint is or is not a protected disclosure.

   The view of The Audit Office is that that protection should be extended to persons making voluntarily disclosures to an investigating authority. Another consideration is whether say a disclosure in court proceedings or an inquiry should come within the meaning of the Act.

2. & 3.
   The Audit Office interprets this to mean a procedural requirement only. The Audit Office considers any allegation of corrupt conduct, waste or maladministration made to any of the investigating bodies should be protected provided it meets the criteria set out in the PD Act and need not be *"made in accordance with the Public Finance and Audit Act"* etc.

4. Covered previously.

5. The Audit Office view is that a public official, primarily a police officer, should be able to make a protected disclosure under the PD Act to the Ombudsman about the conduct of other police officers provided that the type of conduct is covered by the PD Act.

6. Covered previously.

7/8. The Audit Office sees merit in defining the term "government policy" as meaning the government's policy objectives. This is not the same as policy means or mechanisms. It should refer only to the policies as enumerated by elected officials. That is, the policies of agencies should always be reviewable.

9. This may raise practical difficulties. The operation of the PD Act depends an actual allegation to an investigating authority. The question may be misinterpreted.

10. Any disclosure by a public official of corruption, waste, or maladministration deserves protection no matter what the source provided it meets the requirements of the PD Act notwithstanding the information comes to hand in a private capacity of the public official.

11. "*Must show or tend to show*". The Audit Office does not have a difficulty with the terminology. It is clear that an investigating authority may reach a judgement on the veracity and substance of a disclosure for the purpose of the PD Act at various stages throughout a preliminary assessment or investigation. Provided the disclosure was made in good faith and meets the requirements of the Act, protection should arise automatically.

12. Agreed but it is difficult to imagine the circumstances in which an elected official would need the protection of sections 20 and 21 of the Act.

13. Section 13 of the PD Act enables the Ombudsman to investigate the ICAC re an allegation of corruption or maladministration or, in the case of the Auditor-General, waste. Also ICAC is able to investigate the Ombudsman re maladministration.

    The concern is that this mechanism will be used as a *de facto* appeals mechanism for decisions made by an investigating body.

    The Audit Office view is that amendment of the section might be more difficult in practical terms than the ever present risk that the section will be abused.

    Clearly each case must be considered on its merits. Closer attention should be given by investigating agencies as to whether the allegation meets the requirements of the PD Act and particularly as to the substance and the motivation of the complaint and whether there was any potential conflict of interest or whether the decision of the investigating authority was unreasonably based.

    The difficulty in assessing the bona fide of this type of complaint parallels the difficulty of deciding whether a routine allegation was frivolous or vexatious or made to avoid disciplinary action.

**DEALING WITH DISCLOSURES**

14. Agreed

15. Covered previously under 21.

16. Covered previously.

17. This is a legal point. The Audit Office's view is that the obligation seems qualified (Section 25(2)) but an investigating probably has the discretion. The matter needs to be clarified.

18. Sections 16-18 refer to disclosures on frivolous, vexatious grounds, questioning the merits of government policy, disclosures aimed at avoiding disciplinary action.

    The Audit Office view is that the powers of referral should not be subject to the exclusions of section 16-18 of the PD Act.

19. Agreed. The issue here is that confidentiality should be exempted in circumstances of:

- a disclosure made in accordance with an internal reporting procedure
- disclosures to a person assigned to investigate
- disclosures made in accordance with a statutory obligation eg ICAC Act

20. The Audit Office supports the principle of the suggestion. Discussed previously under issue 29.

21. The Audit Office has recommended to the Committee that ICAC should investigate allegations of detrimental action and refer any prima facie to the Director of Public Prosecutions for possible initiation of criminal proceedings.

22. The Audit Office has no objection in principle to the suggestion for the reason that it provides stronger support to the complainant..

    This proposal represents a significant departure from precedent in that the aggrieved person, normally in any action in law, has the onus of initiating remedial action and proving a case. In effect an agency would have to establish that it took the action it did for some other (proper) reason than a reprisal for the public official making a protected disclosure.

    It is appropriate that the burden of proof in terms of the offence be shared by prosecution and defence.

    If it is able to be established that the "whistleblower" made a protected disclosure under the Act and that the "whistleblower" suffered "detrimental action", the public authority should be obliged to prove that the "detrimental action" was not substantially in reprisal for the making of the protected disclosure.

    The complainant would need to establish that he/she was suffered some detrimental action such as dismissal or failure to be promoted. This would be a similar provision to those proposed to be incorporated into: the *Ombudsman Act 1974* (proposed section 37(4)-(7); the *Police Integrity Commission Bill 1996* (proposed section 114(3)); and into the *ICAC Act* (proposed section 94).

23. The Audit Office supports the intent of the suggestion given that there are circumstances in which a disclosure may be made to avoid disciplinary action.

24. The Audit Office doubts the proposition subject to the comment that to the extent the disclosure relates to corruption, maladministration and/or serious and substantial waste, those parts of the allegation relating to the PD Act are protected.

    If other allegations are included in the disclosure then the disclosure is outside the scope of the PD Act. The concern is however that partial protection may inhibit a public official coming forward with an allegation.

25. The PD Act amended the *FOI Act* by including a further exemption clause relating to documents referring to the matters of a protected disclosure.

    Concerns are held that confirmation by an investigating authority that a protected disclosure has been made may tend to identify the complainant particularly in a small unit or organisation.

    It is suggested that an appropriate exemption clause be provided to the FOI Act to expand the confidentiality exemption OR and like Western Australia, where agencies are able to determine an application and neither confirm or deny the existence of a document. The Audit Office has no problem with the suggestion.

Department of Local Government

Our Reference: AF95/0026

Your Reference:

Contact: Janette Ryan
(02) 9793 0647

30 AUG 1996

Ms. Helen Minnican,
Project Officer,
The Joint Committee on the Office of the
Ombudsman,
Room 813,
Parliament House,
Macquarie Street,
SYDNEY. NSW. 2000.

RECEIVED 3/9/96

Dear Ms. Minnican,

I refer to your request for comments on the Issues Summary in respect of the Review of the Protected Disclosure Act 1994.

A schedule has been prepared setting out briefly the comments of the Department, and is attached hereunder. I trust this will be of assistance to the Committee.

Yours sincerely

**Garry Payne**
**Director General.**

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New South Wales Government

## REVIEW OF THE PROTECTED DISCLOSURE ACT 1994

## ISSUES SUMMARY

## COMMENTS BY THE DEPARTMENT OF LOCAL GOVERNMENT

| Issue | Comment |
|---|---|
| 1 | The definitions of 'corrupt conduct', 'maladministration', 'serious and substantial waste' bring particular difficulties to ICAC, Ombudsman and Auditor General respectively because the terms are tied to jurisdictions. The DLG is in a position to take a broad approach to the categories.<br>The terms 'frivolous' and 'vexatious' in assessing a disclosure would be carefully assessed conclusions as it reflects personally on the discloser.<br>The term 'public official' is a new term in LG administration but can be accommodated. The inclusion of elected members within the definition may well enhance the purposes of the Act, given the fear of some of the forms of reprisals contained in the Act. |
| 2 | The working definition provided by the Auditor General appears to be sufficient. |
| 3 | A statement containing information concerning corrupt conduct etc..... |
| 4 | The Department is not in the position to give a formal opinion to the Committee on the extension of the role of the Auditor General. However, even if the Auditor General's role were extended, that would not affect the submission of the Department that the Department be included as an investigating authority under the Act, to receive complaints across the breadth of local government. |
| 5 | Yes. The Department is strongly of this opinion. Please refer to the Department's submission to the Committee. |
| 6 | Not applicable to DLG. |
| 7 | Not applicable to DLG. |
| 8 | No. Not at this stage. The emphasis should be on the organisation managing the contract. However, the legislation should cover corporatised government bodies that are still government owned. |
| 9 | Internal auditors could be nominated by councils as nominated persons in their Internal Reporting Systems. This should be a matter for individual councils to determine. Where the function is contracted out, at this stage, no. |
| 10 | Not applicable to DLG. |
| 11 | Yes. |
| 12 | The provision of information in such circumstances may fall within the PDA, however difficulties may arise for the investigating authority. The preferred option would be for the process to be separate. Irrespective of whether or not it falls within the Act, any form of reprisal should not be condoned or |

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|---|---|
| | accepted. |
| 13 | Written complaints preferred but discretion should be applied where a written complaint may be difficult, eg language or literacy. |
| 14 | The requirement should be uniform, and the Department prefers written disclosures. |
| 15 | The investigating agency should be able to refer to the appropriate investigating authority without loss of statutory protection. |
| 16 | Disclosers should identify themselves to be afforded protection. |
| 17 | Maintain inclusion; but not all forms of reprisals are applicable. |
| 18 | It would be appropriate to ensure a Council's Internal Reporting System caters for councillors. The Department has prepared draft models for councils to consider. Councillors may also make a disclosure to ICAC or the Ombudsman.<br>Disclosures by councillors may be enhanced if the Department was included as an investigating authority. |
| 19 | If the subject matter of the disclosure has already been acted upon, this would be conveyed to the discloser. The disclosure nevertheless should be protected. |
| 20 | Not applicable to local government. |
| 21 | This is seen as good management practice but should not be detailed as legislation. |
| 22 | Options should be available but it may not be necessary for explicit inclusion. |
| 23 | In order to ensure clarity, yes. |
| 24 | The Department has no view on this issue. |
| 25 | This may create difficulties in view of the confidentiality issues and would require further subcategorisation of complaints. Investigatory bodies already report on their roles. |
| 26 | This is not an issue for the Department. The Department would require no additional resourcing if it was included as an investigating authority; it would continue its investigative function and protection would be afforded. |
| 27 | Current surveys indicate that councils have not utilised the provisions of the Act, although educational projects are underway to enhance councils' responses. |
| 28 | Yes |
| 29 | Yes |
| 30 | Please refer to the Department's submission on this matter. |
| 31 | The LGA requires Councils to supplement the Act with various Codes e.g. Meeting Practice, Conduct etc. Reprisals under s20(2)(a) and (b) can be dealt with by reference to these codes. Given the nature of their appointment, other forms of protection appear inappropriate for councillors. |
| 32 | Should not be an issue under PDA. |
| 33 | The current requirement appears adequate. |
| 34 | No |
| 35 | The Department has prepared draft models of Internal Reporting Systems appropriate for local government for use at seminars and workshops. |

| | |
|---|---|
| 36 | These points have been highlighted in recent local government seminars and workshops. Cultural change is important in addressing such issues. |
| 37 | The Department has prepared information sheets for the use of councils in human resource management, and for the benefit of council staff and elected members. The information sheets are 'reader-friendly' to facilitate disclosures and to assist management reform. |
| 38 | Discretion should be available to the investigating authorities as to whether or not reprisals should be investigated and if so whether the matter should be referred to prosecution authorities. |
| 39 | Allegations of detrimental action primarily should be addressed by the public authority to whom the disclosure was made. |
| 40 | Discretion, depending on the nature of the reprisal. |
| 41 | These matters may be pursued at common law or in the Industrial Court. |
| 42 | An appropriate review mechanisms should be provided as part of the complaints handling arrangements in each body. No separate avenue is required. |
| 43 | This is seen as a matter of good management practice, rather than requiring legislation. |
| 44 | The Department does not have a view on the need for such action. |
| 45 | Yes |
| 46 | No specific requirements other than current rights. |
| 47 | No. The difficulty is determining what is in the public interest versus the organisation's interest. |
| 48 | Yes. The Act should be interpreted broadly to facilitate its purposes. |
| 49 | Yes |
| 50 | No. Duplication. |
| 51 | It depends on the circumstance e.g. at Common law or the Industrial Commission. |
| 52 | The disclosure should be accepted and protection available, if it is made in good faith, i.e. in the belief that it is substantially true. |

Annexure 1

| | |
|---|---|
| 1 | Yes, this strengthens existing arrangements. |
| 2 | This matter is best addressed by the Ombudsman, but a broad interpretation appears appropriate. |
| 3 | This matter is best addressed by ICAC but a broad interpretation appears appropriate. |
| 4 | Yes |
| 5 | Not applicable to local government administration. |
| 6 | No. |
| 7 | No, it is suggested that the provisions be left as they are, and allow interpretation. |

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|---|---|
| 8 | No. Interpretation of existing provisions is appropriate. |
| 9 | No, this is too broad. |
| 10 | No, but the disclosure should be about a public official or public authority. |
| 11 | At the time it is made. |
| 12 | In terms of councillors; see the Department's submission. |
| 13 | Yes |
| 14 | Yes. A council's Internal Reporting Policy may not necessarily be included in a code of conduct and may be a separate policy. |
| 15 | The notification should also include the reasons for the action taken or proposed to be taken. |
| 16 | Please refer to the Department's submission. Also please refer to answer to Q.4. |
| 17 | Yes. The referral must be an appropriate one. |
| 18 | No. |
| 19 | In all cases, No. |
| 20 | Public authorities should have a statutory obligation to put in place mechanisms to deal with reprisals that occur within their organisations and to exercise all powers which are available to the public authorities to deal with reprisals. |
| 21 | Discretion should be available to the public authorities or investigating authorities as to whether or not reprisals should be formally investigated and if so whether the matter should be referred to prosecution authorities. |
| 22 | No |
| 23 | Yes |
| 24 | Should the disclosure contain material not subject to the PDA, this should not contaminate the disclosure nor relieve the authority of the confidentiality requirements. The obligation should be on the authority to at least deal with the information falling within the PDA. |
| 25 | Section 28(3) FOI Act may be applicable in such circumstances. |

# INDEX

# RESPONSE TO JPC ISSUES PAPER

# RESPONSE TO JPC ISSUES PAPER

## INTRODUCTION

As an introduction there are 4 key points I wish to raise.

1) The Act as presently drafted does not ensure real and effective protection.

The major area of change which is needed is to enhance the protections which are available to potential "whistleblowers" - without "whistleblowers" perceiving and knowing that they are going to get solid protection, the Act will not achieve its objects.

Details of problems with the Act's protections include:

- The Act creates a criminal offence of "detrimental action" but does not specify a prosecuting authority with responsibility for enforcing it;
- In the absence of a specified prosecuting authority, the "whistleblower" is left with the substantial burden of carrying the prosecution and paying for it;
- The "whistleblower" would also have to prove all elements of the offence of "detrimental action" and to the criminal standard of "beyond a reasonable doubt";
- It is unclear what steps, if any, a public authority is required to take to protect a "whistleblower";
- There is no positive obligation to take steps to protect the "whistleblower" only the negative incentive that the "whistleblower" should not be "punished" because to do so is a criminal offence;
- Such a negative incentive is unlikely to be effective because the threat of a criminal prosecution is a weak one - the individual "whistleblower" has the burden of proving the charge and paying for the prosecution;
- The focus of the Act's protections is largely on protection after a "whistleblower" has been badly treated - the Act's protections should focus on protections which aim to prevent the "whistleblower" having to defend themselves by themselves.

As one of our witnesses in a protected disclosure matter said to us:

> "you'd get a lot more protected disclosures if people thought they would actually be protected"

We have to encourage the genuine and concerned "whistleblower" to believe that they will be taken seriously and that they will be protected.

The protections afforded "whistleblowers" have to be real and effective.

2) **The Act is complex and in many places ambiguous. It needs to be made more user friendly to both potential whistleblowers and to public sector agencies.**

This is not a startling revelation. However, some of the complexity, lack of clarity and uncertainty has, in my view, a direct impact on the perception about the Act's effectiveness in delivering protection to "whistleblowers".

The Act is a useful and important statement of Parliament's intentions about the seriousness of "whistleblowing" on matters of public interest. However, the intention of Parliament could be made clearer by a number of amendments which I have outlined in detail in my submissions to this Committee.

Such clarifications would, in addition to bringing practical benefits in terms of the operation of the Act, assist in encouraging and protecting whistleblowers and providing for the investigation of corrupt conduct, maladministration and serious and substantial waste.

3) **As a point of principle, there should be no proliferation in the number of investigating authorities. In terms of practical consequences, increasing the numbers of investigating authorities would lead to confusion and problems of duplication and co-ordination - things which are clearly not consistent with the Act's aims and objectives.**

There are also key reasons for the present investigating authorities which will soon also include the PIC and the Inspector of the PIC not to be further expanded.

(a) Unique Independence of the existing investigating authorities.

The most important reason which ought be considered very carefully is that the Ombudsman, the ICAC, the Auditor-General, the PIC and the PIC Inspector are all uniquely independent organisations or persons whose independence is guaranteed by statute. This unique independence lies in the fact that the heads of these organisations can only be removed from office on address of both Houses of Parliament. However, this independence is balanced by the accountability of these organisations to the Legislature. The tension is appropriate and the balance of great value.

In my view, as a matter of principle, a pre-requisite for investigating authorities under the *Protected Disclosures Act* is that they must be independent from the executive and yet accountable to the Legislature. Any organisations which do not bear these hallmarks ought not to be added to the list of investigating authorities.

The principle of independence comes down to this. The heads of the ICAC and the PIC, the Ombudsman, the Auditor General and the Inspector of the PIC can only be removed from office upon the address of both Houses of Parliament. This statutorily guaranteed independence is, in my opinion, a proper criteria for designation as an investigating authority. If this principle is not used as the dominant criteria for designation, what principle is to replace it? If the Department of Local Government gets designated, why not the Community Services Commission. If the Commission is designated, why not the Anti-Discrimination Board. If the ADB, why not the Judicial Commission and so on.

(b) Track record and expertise

In my view, the original investigating authorities under the Act - ICAC, the Ombudsman and the Auditor-General - all have reputations and track records as experienced and specialist investigators in the 3 areas, the subject of the Protected Disclosures Act. They have all been around for some time investigating corruption, maladministration and serious and substantial waste and are widely known in the community. When this level of community knowledge and confidence in our organisations is matched with enhanced protections for whistleblowers, it is my view that we will be taking significant steps towards achieving the objects of the Act.

(c) Specialists

I have said that the current existing investigating bodies - the ICAC, the Ombudsman and the Auditor-General - are specialists. they are specialists in investigating corrupt conduct, maladministration or serious and substantial waste. The importance of the specialist experience becomes notable when you consider that the three areas of disclosure the Act is seeking to encourage and investigate complaints about the three areas of conduct in which the specialists have their experience. Between them, the ICAC, the Ombudsman and the Auditor-General cover the field.

(d) Confusion

It would not be appropriate in my view, to confuse matters by multiplying the number of investigating authorities beyond the recent inclusion of the PIC and the PIC Inspector. Other bodies who might be suggested to augment the number of investigating authorities, such as the Department of Local Government, the Community Services Commission or Tribunal, the HCCC, the Judicial Commission etc, are, I am sure, fine organisations staffed with people of integrity. However, this is not the issue.

4) **Final comment on the need for a change in public service culture as far as "whistleblowers" are concerned**

In my view, reforms to the act need to go hand in hand with a change within the public service in terms of the attitude which public authorities and officials adopt in relation to "whistleblowers". Regrettably, there is an attitude about which sees "whistleblowers" as like "the rats underneath the house". This attitude then informs the reaction given to "whistleblowers". In fact, the message which "whistleblowers" bring to management is full of benefits. The focus of managers should be on these benefits which include:

- the information provided by "whistleblowers" can be used as necessary information for management;
- "whistleblowing" can be a useful management tool;
- improvements can be effected in public administration as a consequence of certain information coming to light;
- the "whistleblower" can be an early warning signal;

- "whistleblowing" can promote accountability and can be a symptom of integrity and professionalism

It is entirely appropriate that any education program about the Act or development of internal reporting mechanisms be used as opportunities to highlight the positive aspects of the legislation. The genuine and concerned "whistleblower" should be seen as bringing management an opportunity for improvement and not some "rat under the house".

# RESPONSE TO JPC ISSUES PAPER

## DEFINITIONS:

**ISSUE 1: Difficulties in defining the terms *"corrupt conduct", "maladministration", "serious and substantial waste", "frivolous", "vexatious"* and *"public official".***

The question of the definition of the terms "*serious and substantial waste*" is referred to in the discussion on Issue 4 in our Submission to the JPC.

The definition of the terms "*frivolous*" and "*vexatious*" is referred to on pages 21 and 22 of the "*Ombudsman's Protected Disclosures Guidelines*"

The terms "*corrupt conduct*" and "*maladministration*" are defined in very broad terms in the *ICAC Act* and the *Protected Disclosures Act* respectively. If any further guidance is required it would be best if this was provided by way of examples rather than by narrowing the terms of the existing definitions.

The term "*public official*" should be defined very broadly, as it is in the Act at present given that it is defined to include "*any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority*".

**ISSUE 2: Possible definitions for the term *"serious and substantial waste".***

This question is dealt with in Issue 4 of our Submission to the JPC where we say:

> ***"ISSUE 4:*** *Should the phrase "serious and substantial waste" of public money in sections 3(1), 8(1)(c), 9(3), 14, 25(1) and 26(1) of the Act be defined in the Protected Disclosures Act?*
>
> ***Discussion:*** *It is particularly important that some guidance is provided in the Act as to the interpretation of this term given that this is vital for determining whether such a disclosure is protected under the Act.*
>
> *In the absence of a statutory definition, the Auditor-General provides the following working definition:*

*"Serious and substantial waste refers to any uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in significant loss/wastage of public funds/resources.*

*In addressing any complaint of serious and substantial waste regard will be had, for example, to the dollar value, the potential for savings, the public interest etc."*

***Recommendation 4:** Some guidance should be incorporated into the Act as to the meaning of "serious and substantial waste", wherever appearing in the Act."*

**ISSUE 3: Possible definitions for the term *"disclosure"*.**

This question is dealt with in Issues 1, 2, 3, 5, 6, 8, 10 and 11 of our Submission to the JPC.

## JURISDICTIONAL ISSUES

**ISSUE 4: Local government - Local government is excluded from the Auditor-General's jurisdiction under the Public Finance and Audit Act 1983 and as a result he is unable to investigate disclosures made under the Protected Disclosures Act 1994 of serious and substantial waste within local government. Should the Auditor-General's jurisdiction in relation to protected disclosures be extended to include local government?**

This issue is related to the other matters which are concerned with increasing the number of *"investigating authorities"*. See in particular our comments under issue 7 below and the discussion of the matter under Issue 16 in our Submission to the JPC.

The Auditor-General is an independent *"investigating authority"* with expertise and experience in handling protected disclosures about serious and substantial waste. The Auditor-General also has expertise and experience in matters of public sector finance and accounting.

There would seem to be no principled reason to prevent the Auditor-General from having jurisdiction to investigate protected disclosures about serious and substantial waste in local government. In fact, there is a good case for the Auditor-General to have this jurisdiction due to the Auditor-General's particular experience and expertise. Further, the Auditor-General ought to have this jurisdiction rather than the Department

of Local Government because the Auditor-General has statutory independence in that he is not subject to direction by executive government and can only be removed on an address of both Houses of Parliament. This is to be contrasted with the investigators which the Director-General appoints under section 430 of the *Local Government Act* who may be appointed and removed at the discretion of the Director-General and likewise the Director-General who may be removed under the terms of the *Public Sector Management Act 1988.*

In summary, the Act should be amended to provide for the Auditor-General having jurisdiction to investigate protected disclosures about serious and substantial waste in local government.

**ISSUE 5: Should the Department of Local Government be included as an investigating authority under the Act in order that a disclosure by an employee of a local government authority, or any other individual having public official functions related to local government, may be made to it?**

See our discussions above in relation to issue 4 and our discussion below under issue 7.

In short, our view is that jurisdiction over protected disclosures relating to local government ought to lie with the independent "*investigating authorities*". This view is subject to the enlargement of the Auditor-General's jurisdiction over disclosures about substantial and serious waste in local government.

We have a good working relationship with the Department of Local Government and our comments in this regard should not be taken as indicating any lack of confidence in the integrity and ability of the staff of that Department. Our view is based on principle. Further growth in the number of "*investigating authorities*" will lead co-ordination and duplication problems. It may also lead to confusion amongst potential "whistleblowers". I reiterate our view that the experienced, specialist investigating and statutorily independent "*investigating authorities*" are the appropriate bodies to handle protected disclosures made external to a public authority.

**ISSUE 6: Community Services - Does the Protected Disclosures Act 1994 currently provide protection to public officials making disclosures about conduct amounting to maladministration in the Department of Community Services, the Ageing and Disability Department and the Home Care Service of NSW?**

The Department of Community Services, the Ageing and Disability Department and the Home Care Service of NSW fall within the definition of "*public authority*" in the

*Protected Disclosures Act.* Therefore, the Act applies and provides protection to public officials within these public authorities when they make disclosures about conduct amounting to maladministration. This is the case notwithstanding the existence of provisions relating to the protection of complainants against retribution under the terms of the *Community Services (Complaints, Appeals and Monitoring) Act 1993.*

Section 117 of the *Community Services (Complaints, Appeals and Monitoring) Act* provides:

> *"(1) A person who takes or threatens to take detrimental action against another person because that other person:*
> *(a) makes, or proposes to make, a complaint to a service provider, Community Visitor or the Commission; or*
> *(b) brings, or proposes to bring, proceedings before the Tribunal; or*
> *(c) provides, or proposes to provide, information, documents or evidence to a Community Visitor or the Commission or the Tribunal,*
> *is guilty of an offence.*
>
> *Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.*
>
> *(2) It is a defence to a prosecution for an offence under this section if it is proved:*
> *(a) that the action referred to in subsection (1) on which the prosecution was based was taken or proposed in bad faith; or*
> *(b) that any material allegation was known by the person making it to be false.*
>
> *(3) In this section, "detrimental action" means action causing, comprising or involving any of the following:*
> *(a) injury, damage or loss;*
> *(b) intimidation or harassment;*
> *(c) discrimination, disadvantage or adverse treatment in relation to employment;*
> *(d) dismissal from, or prejudice in, employment;*
> *(e) prejudice in the provision of a community service;*
> *(f) disciplinary proceedings."*

As a matter of statutory interpretation and logic, it is our view that the operation of the *Protected Disclosures Act* is not limited in any way by any of the provisions in *Community Services (Complaints, Appeals and Monitoring) Act.* Therefore, "whistleblowers" in these public authorities have the protections afforded by the *Protected Disclosures Act* as well as those in the *Community Services (Complaints, Appeals and Monitoring) Act.*

However, the *Protected Disclosures Act* is of a far greater scope than the the *Community Services (Complaints, Appeals and Monitoring) Act*. In this regard, reference should be made to section 5 of the *Community Services (Complaints, Appeals and Monitoring)* which provides for limitations on the Commission and the Tribunal with respect to its decisions and recommendations. Another benefit of the application of the *Protected Disclosures Act* with respect to disclosures by public officials from these public authorities is the involvement of the independent specialist investigating authorities such as the Ombudsman, the ICAC and the Auditor-General in the investigation of any complaints.

**ISSUE 7: Should the Community Services Commission and the Community Services Appeal Tribunal be included within the definition of "*investigating authority*" under the Act?**

The Ombudsman does not support the expansion of the definition of "*investigating authority*" beyond the five organisations currently listed under the definition of "*investigating authority*", those being:

(a) the Auditor-General;
(b) the ICAC;
(c) the NSW Ombudsman;
(d) the Police Integrity Commission; and
(e) the Police Integrity Commission Inspector

This view is based on the following considerations:

(1) Each of the investigating agencies is headed by a public official who has statutorily guaranteed independence and is backed by an Act of the Parliament;
(2) Whilst each of the investigating authorities has statutorily guaranteed independence, each investigating authority is subject to scrutiny by a Parliamentary Committee (the Public Accounts Committee in relation the Auditor-General, the ICAC Committee in relation to the ICAC, the Joint Committee on the Office of the Ombudsman and Police Integrity Commission in relation to the other investigating authorities);
(3) The public officials who head the investigating authorities can only be removed by the Governor on the address of both Houses of the Parliament and this further reinforces their independence - this is to be contrasted with the provisions for the removal of, for example, the Community Services Commissioner (section 78(4) of the *Community Services (Complaints, Appeals and Monitoring) Act*), the Health Care Complaints Commissioner (section 77(3) of the *Health Care Complaints Act 1993*) ...

and Department of Local Government investigators and the Director-General of Local Government (section 430 of the *Local Government Act* and the *Public Sector Management Act* respectively);

(4) The existing investigating authorities have primary responsibility for the three areas of conduct specifically referred to in the Act, ie.:
(a) Auditor-General for serious and substantial waste of public money;
(b) the ICAC, PIC and PIC Inspector share responsibility in relation to corrupt conduct; and
(c) the Ombudsman in relation to maladministration.

(5) The investigating authorities, other then the newly created PIC and PIC Inspector, are experienced and specialist investigators within these three areas of conduct;

(6) As a matter of principle, investigating authorities ought to be limited to those bodies which are not only independent but are also experienced and specialist investigative bodies;

(7) If the definition is expanded to include specialist agencies such as the Community Services Commission and the Community Services Appeal Tribunal, then equal arguments can be made for the inclusion of such other bodies as the HCCC, Department of Local Government, the Judicial Commission, Anti-Discrimination Board, and possibly the Legal Services Commission;

(8) The greater the number of investigating authorities, the more difficulty and complication in ensuring coordination and avoiding unnecessary duplication;

(9) In relation to the Community Services Commission it is relevant to note that the *Community Services (Complaints, Appeals and Monitoring) Act* already contains a provision for the protection of complainants against retribution (section 117 - a copy of which is set out under issue 6 above) and is limited in its decisions and recommendations by section 5 of the Act. Rather than expanding the number of investigating authorities to include diverse bodies such as the Community Services Commission, the Community Services Appeal Tribunal, the HCCC ( a body which is, subject to certain exclusions, subject to Ministerial control and direction as set out in section 81 of the *Health Care Complaints Act* and whose recommendations are limited by operation of section 91 of that Act - copies of which are annexed as Annexure 1), Department of Local Government, the Judicial Commission, Anti-Discrimination Board, and the Legal Services Commission, it may be preferable for further measures of protection to be given to persons who make complaints to these organisations (where such provisions do not already exist).

**ISSUE 8: Contract agencies - In the light of the increasing tendency to contract out to non-government organisations, functions traditionally carried out by public officials, should the coverage of this legislation be extended to employees of those organisations?**

This issue is not a new issue but is one which needs to be provided for. At present, there are provisions for public "watchdog" organisations to investigate complaints against private companies performing public services. For example, the Ombudsman has jurisdiction over the State's private prison in Junee.

The long title and objects section of the *Protected Disclosures Act* make it clear that the disclosure of corrupt conduct, maladministration and serious and substantial waste in the "public sector" is in the public interest. If private companies or individuals are being funded with public money to perform functions or provide services which the government has determined ought to be performed or provided, then it must also be in the public interest that performance and provision is effected without corruption, maladministration or serious and substantial waste. Further, disclosures about these matters would also be in the public interest. In other words, the determining criteria for providing for investigation of the activities of private contractors is the fact that the public money is involved and that what have traditionally been seen as public services are being performed. It would be consistent with principles of good public administration for private contractors delivering such public services, which are funded by taxpayers, to be accountable to taxpayers via the means of investigation by public "watchdog" organisations.

Options to provide protections "whistleblowing" employees of private companies contracted to the government, and the investigation of their complaints, range from broadening the definition of "*public authority*" and "*public official*" to include private contractors, to extending the *Act* to cover the private sector. We comment below on the expense and complexity involved in the latter option. Extending the definitions of "*public authority*" and "*public official*" to include employers and employees engaged in providing services funded by public money would seem to be consistent with the aims and object of the *Act*.

**ISSUE 9: Internal Audit Bureau - It has been suggested that disclosures made by public officials to Internal Audit Bureau auditors, contracted to state and local government agencies, are not *"protected disclosures"* and that the IAB should be nominated as an alternative body to receive disclosures. Consideration of whether internal auditors should be able to receive internal disclosures.**

As we have said above, we are not in favour of the expansion and fragmentation of investigating authorities which would occur in the event that the IAB was to become an investigating authority. See our comments in relation to Issue 7 above.

The issue about public officials disclosing matters to internal auditors, including the IAB auditors, should be seen as relating to the internal reporting procedures of public authorities and local councils and not about disclosures to investigating authorities.

In our view, it is appropriate for internal auditors to become another avenue for the internal disclosure of protected disclosure matters.

**ISSUE 10: Police Service - Concerns have been expressed about the incompatibility of provisions found in the Protected Disclosures Act 1994 and the Police Service Regulation 1995 which create difficulties for any police officer wishing to make a disclosure about the misconduct of another police officer. Therefore, should the coverage of the Act be extended to apply to police officers?**

This question is discussed in relation to Issue 5 in our Submission to the JPC where we say:

> *"While not beyond doubt, the phrase "made in accordance with the Ombudsman Act 1974" in section 11(1)(a) of the Protected Disclosures Act has been interpreted by the Crown Solicitor and the Solicitor General to mean only that a disclosure must be made in accordance with the procedural requirements set out in the Ombudsman Act. Public officials (primarily police officers) should therefore be able to make protected disclosures under the Act to the Ombudsman about the conduct of police officers when exercising the functions of a police officer with respect to crime and the preservation of the peace, even through such conduct may not be made the subject of a complaint under the Ombudsman Act (per clause 13 of Schedule 1 to that Act).*
>
> *A police officer can make a protected disclosure to the Commissioner of Police, or to another officer in accordance with an internal procedure established by the Police Service for the reporting of allegations of corrupt conduct,*

*maladministration, or serious and substantial waste of public money. However, any such disclosure must be made voluntarily and not in the exercise of a duty imposed on the police officer by or under the Police Service Act 1990, which presumably would include clauses 30 and 31 of the Police Service Regulation 1990.*

*In this regard, clause 30 of the Regulation places an obligation on police officers to report criminal offences and other misconduct. The clause provides:*

> *"(1) If:*
>
> *(a) an allegation is made to a police officer that another police officer has 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 police officer sincerely believes that another police officer has engaged in any conduct of that kind, the officer is required to report the conduct or alleged conduct by the other officer to a senior police officer (being a police officer who is more senior in rank than the officer making the report)."*

Clause 31 of the Regulation provides:

> *"A senior police officer to whom conduct (or alleged conduct) by a police officer is reported as referred to in clause 30 is required to report it promptly to the Officer-in-Charge of the Internal Affairs Branch if the senior police officer believes that conduct (or alleged conduct):*
>
> *(a) constitutes or would constitute a criminal offence by the officer; or*
>
> *(b) would provide sufficient grounds for preferring a departmental charge against the officer".*

*There is of course nothing to prevent a police officer from complying with the requirements of clauses 30 and 31 of the Police Service Regulation and at the same time separately making a voluntary disclosure of corrupt conduct, maladministration or serious and substantial waste of public money directly to the ICAC, to the Ombudsman or to the Auditor General (as appropriate).*

*Our recent thinking is that an anonymous internal police complaint made directly to the Ombudsman or referred by the Police Service would be made voluntarily as it would not have been made pursuant to the obligation in clauses 30 or 31 of Regulation."*

Our recommendation in relation to this matter is that:

> *"Public officials (primarily police officers) should be able to make protected disclosures under the Protected Disclosures Act directly to the Ombudsman about the conduct of other police officers when exercising the function of a police officer with respect to crime and/or the preservation of the peace."*

**ISSUE 11: Private Sector - Should the application of the Act be extended to include disclosures made by private sector employees concerning misconduct in both the public and private sectors?**

The difficulties involved in extending the protection of the *Act* to the private sector would be immense in terms of complication and expense.

There are also sound reasons in principle why this should not occur. The *Act*, amongst others, provides a measure of accountability of public authorities and public officials. Such statutorily provided accountability is, in part, necessary due to the different natures of the public and private sectors. Users of public services often cannot "vote with their feet" and choose another supplier as would be the case in the private sphere. Further, notwithstanding the steps taken in recent years to bring the discipline of the market into public sector activity, there are many important areas of public sector activity where market disciplines will never reach or do so in only the weakest of manners.

In the private sector, shareholders are not likely to stand for serious and substantial waste. Private sector maladministration is something which those risking their capital can either choose to accept or reject. In addition, there are bodies such as the Stock Exchanges, the Australian Securities Commission, the ACCC and the Department of Fair Trading to act on matters of concern. Further, the Commonwealth's unfair dismissal laws may provide a certain degree of protection against arbitrary or capricious dismissals. The reference to some of these bodies and Commonwealth laws also raises questions about state and federal issues. A further example concerns the impact which the provision of "whistleblower" protection may have upon corporations law and the recently arrived at consensus as to the uniformity of these laws.

The *Act* focuses on the accountability of users and managers of public funds. An expansion of the *Act* to cover the private sector would mark a significant change in focus of the *Act* and a significant intrusion into the private sector.

There are many difficulties involved in the extension of the *Act* to the private sector. If it is considered that this issue is worthy of further consideration, peak bodies within the private sector ought to be consulted as to their views.

However, it may be appropriate to extend the protections of the *Act* to private individuals making complaints against public officials and public authorities. If this was to be contemplated, it would only be relevant in relation to protections against actions set out in sections 21 of the *Act* (eg. in relation to defamation). In this regard it is relevant to note that protection in relation to defamation is already available to private individuals who make complaints to the Ombudsman and ICAC.

**ISSUE 12: Preliminary Inquiries - Concerns have been expressed that public officials providing information to investigating authorities voluntarily in the course of preliminary inquiries, investigating or other inquiries may be making protected disclosures.**

This question is considered in relation to Issue 1 in our Submission to the JPC.

## MAKING A DISCLOSURE

**ISSUE 13: Should a requirement be introduced for disclosures to be made in writing?**

There are considerable benefits that would flow from a requirement that disclosures should be in writing, particularly the evidentiary considerations should it be necessary to prove in a court or tribunal that a disclosure was made.

Given the requirement to "*show or tend to show*" one of the three categories of conduct in any disclosure, in practical terms if a disclosure is not initially made in writing, it is essential that it immediately be reduced to writing (if only to be able to demonstrate that sufficient evidence or information has in fact been provided).

**ISSUE 14: Difficulties concerning the different requirements within each investigation act as to the form in which disclosures must be made to each investigating authority. The Ombudsman Act 1974, for example, specifies that complaints must be in writing whereas the ICAC Act 1988 contains no such requirement.**

This question dealt with in relation to Issues 2 and 3 of our Submission to the JPC where we discussed the issues and made recommendations as follows:

*"ISSUE 2: Should the phrase "made in accordance with the Ombudsman Act 1974" in section 11(1)(a) of the Protected Disclosures Act be interpreted to mean that the disclosure relates to conduct within the jurisdiction of the Ombudsman, or only that a disclosure is made in accordance with the procedural requirements set out in the Ombudsman Act (eg in writing)?*

***Discussion:*** *It is important to avoid over-complexity in the interpretation and implementation of the Act and to ensure that unnecessary hurdles are not placed in the way of potential "whistleblowers".*

***Recommendation 2:*** *The Act should be amended to put beyond doubt that the phrase "made in accordance with the Ombudsman Act 1974" in section 11(1)(a) of the Act means that the disclosure need only be made in accordance with the procedural requirements set out in the Ombudsman Act (eg. in writing).*

*ISSUE 3: Should the phrases "made in accordance with the Independent Commission Against Corruption Act 1988" and "made in accordance with the Public Finance and Audit Act 1983" in sections 10(a) and 12(1)(a) of the Act be interpreted to refer to jurisdiction or procedural requirements (if any)?*

***Discussion:*** *It is important to avoid over-complexity in the interpretation and implementation of the Act and to ensure that unnecessary hurdles are not placed in the way of potential "whistleblowers"*

***Recommendation 3:*** *The Act should be amended to put beyond doubt that the phrases "made in accordance with the Independent Commission Against Commission Act 1988" and "made in accordance with the Public Finance and Audit Act 1983" in sections 10(a) and 12(1)(a) of the Act mean that a disclosure need only be made in accordance with any procedural requirements that may be set out in those Acts."*

It should be noted that the issues here are of a procedural nature and do not lead to substantive change to the legislation.

**ISSUE 15: Lack of clarity about whether a disclosure is protected when first made even if it is originally made to the wrong authority before being referred to an appropriate investigating authority or public authority.**

Our advice from the Crown Solicitor and Solicitor General indicates that a disclosure is protected when first made even if it is originally made to the wrong investigating authority before being referred to a appropriate investigating authority or public authority.

This issue is discussed on page 24 of the *Ombudsman's Protected Disclosures Guidelines* where we said:

> ***"10. Can disclosures be referred to other bodies?***
>
> ***When are disclosures likely to be referred to another person or body?***
>
> *The Ombudsman and the ICAC regularly liaise to coordinate their activities and prevent duplication. This could result in disclosures being referred from one body to the other where this is appropriate.*
>
> *The Act empowers investigating authorities and public officials to refer any disclosures concerning an allegation of corrupt conduct, maladministration or serious and substantial waste made to them by a public official in certain circumstances (sections 15, 25 and 26).*
>
> *Investigating authorities may refer disclosures to another investigating authority or to a public official or public authority considered by the investigating authority to be appropriate in the circumstances for investigation or other action. An investigating authority must refer such a disclosure if:*
>
> *(a) it is not authorised to investigate the matter concerned under the relevant investigation Act; and*
>
> *(b) it is of the opinion that another investigating authority or some public official or public authority may appropriately deal with the matter concerned" (section 25 (2)).*
>
> *A public official to whom a disclosure is made may refer disclosures to an investigating authority or to another public official or a public authority*

*considered by the public official to be appropriate in the circumstances for investigation or other action (section 26 (1)).*

*Where such a referral is made, the referring authority or official may communicate to the authority or official to whom the referral is made any information the authority or public official has obtained during the investigation (if any) of the matter concerned (sections 25 (4) and 26 (2)).*

*A referral by an investigating authority may be made before or after the matter concerned has been investigated and whether or not an investigation of the matter is complete or any findings have been made by the investigated authority (section 25 (3)).*

*A protected disclosure is still protected even if it is referred to another authority or public official (section 15).*

*Are referred disclosures still protected?*

*A disclosure is protected by the Act if it is made:*

- *to an investigating authority and it is referred by the investigating authority to another investigating authority or to a public official or public authority considered by the investigating authority to be appropriate in the circumstances, for investigation or other action (section 25); or*

- *to a public official and it is referred by that public official to an investigating authority, another public official or a public authority considered by the public official to be appropriate in the circumstances, for investigation or other action (section 26).*

*Section 15 indicates that a disclosure referred by one investigating authority to another investigating authority, a public official or a public authority, or by a public official to an investigating authority, another public official or a public authority, will still be protected if the disclosure shows or tends to show corrupt conduct, maladministration, or serious and substantial waste of public money, and complies with other requirements of the Act.*

*Given the clear terms of section 15, which refers to disclosures which an investigating authority is not authorised to investigate under its legislation, it*

*can be assumed that a disclosure can be protected no matter which investigating authority it is initially sent to, provided:*

- *the disclosure shows or tends to show either corrupt conduct, maladministration or serious and substantial waste of public money; and*

- *it is made to one of the investigating authorities (or to an appropriate public official) and is then referred to an investigating authority, public official or public authority which has jurisdiction to investigate or otherwise deal with the matter.*

*The person making a disclosure is protected if the disclosure is made (or appropriately referred) in accordance with the Act no matter what action is then taken in relation to the disclosure, for example, whether declined, the investigation is discontinued, the disclosure is referred to some other body for appropriate action, and so on."*

**ISSUE 16: Anonymous disclosures - The status to be afforded anonymous disclosures and the difficulties associated with anonymous disclosures.**

In short, our view is that anonymous disclosures ought to be permitted under the Act. We discussed this question at Issue 6 in our Submission to the JPC where we said and recommended the following:

*"**Discussion:** The Act does not specifically refer to anonymous disclosures or impose any obligation on a person to identify themselves in a disclosure. Further, there is no obligation under the Protected Disclosures Act, ICAC Act, or Public Finance and Audit Act for a complaint or disclosure to be in writing. However, for a complaint to be made in accordance with the Ombudsman Act it must be in writing (although this does not require the identity of the complainant to be disclosed).*

*Whether anonymous disclosures are protected would be important in two circumstances:*

*(1) where an authority, or officers of an authority, identify the source of the disclosure from the contents of the disclosure or where they do so as the result of inquiries for that purpose; or*

*(2) where a person claims authorship at some time after the making of the anonymous disclosure, for example for the purpose of making a protected disclosure to a MP or journalist.*

*If an anonymous disclosure is, by its terms, clearly made by a public official then it can be strongly argued that its should be protected under the Act, particularly given that the Act emphasises the protection of "disclosures". Such an interpretation would be particularly important where an agency or its officers have gone out of their way to identify the source of the disclosure.*

*Where a person claims to be the author of an anonymous complaint at some stage after the complaint is made, a relevant question would be whether that person is able to prove, for example to the satisfaction of a court in relation to any proceedings under section 20, or GREAT in relation to an appeal, that the person was in fact the source of the complaint. The answer to this question must be left for the determination by the courts and GREAT.*

*While it could be argued that extending protection to anonymous disclosures has a potential to create mischief, we believe that in practice it will not have this effect. The NSW Ombudsman has long accepted anonymous complaints, provided sufficient information is provided in the complaint, and particularly where the allegations concern a significant public interest issue or a serious abuse of power. The Police Service Act 1990 even contains statutory provisions relating to anonymous complaints (see section s 125(2) and 141(3) of that Act).*

*This issue can be considered from the different perspectives of the various "parties" to a disclosures, ie:*

*(1) the interests of the recipient of the disclosure;*

*(2) the interests of the public authority and/or public official(s) the subject of the disclosure; and*

*(3) the interests of the person making the disclosures.*

*In terms of the interests of the recipients of disclosures (be they investigating authorities, public authorities or public officials to whom disclosures have or are made), as the disclosures must "show or tend to show" corrupt conduct, maladministration or serious and substantial waste of public money, the identity of the person making the disclosure should therefore not be essential for the proper investigation of such a disclosure. It may be different if a mere allegation was sufficient to obtain protection under the Act, however this is not the case*

*given that protection only extends to disclosures which "show or tend to show" any of the three relevant categories of conduct.*

*In terms of the interests of public authorities and officials the subject of disclosures, the extension of protection to anonymous complaints should not unreasonably prejudice such public authorities or officials given the confidentiality requirements set out in section 22 of the Act in relation to information identifying persons who make protected disclosures.*

*In terms of the interests of persons making disclosures, their need for protection should be little different whether they made their disclosure anonymously, or they identified themselves in the disclosure and the person or body to whom the disclosure has been made has kept their identity confidential. In both circumstances the public authority or public official the subject of the disclosure has not been informed of the identity of the person making the disclosure. In both circumstances the authority or official may attempt to identify the person who made the disclosure, or may make assumptions as to who is most likely to have made such a disclosure. In either circumstance the person making the disclosure should be able to rely on the protection provided by the Act. At least in theory they should be able to achieve this by either proving to the satisfaction of the recipient of their disclosure that they are in fact the author, or proving this fact to the satisfaction of a relevant court or tribunal where the defences provided by the Act are raised. In either case such persons would fall within the exemption in clause 12 of Schedule 1 to the Ombudsman Act enabling them to make a complaint to the Ombudsman alleging "detrimental action" as defined in the Protected Disclosures Act.*

*Until the issue is clarified, the Ombudsman will adopt a broad interpretation and assume that anonymous disclosures can be protected disclosures under the Act.*

***Recommendation 6:** The Act should be amended to put beyond doubt that anonymous disclosures can be protected disclosures under the Act."*

**ISSUE 17: Local government councillors - Questions concerning the appropriateness of the application of the Act to local government councillors.**

This question is discussed in relation to Issue 12 in our Submission to the JPC where we said the following:

*"Discussion: The definition of "public official" in section 4 of the Act is particularly broad and includes "any ... individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority".*

*As the conduct and activities of Local Government councillors may be investigated by both the Ombudsman or ICAC, and as the conduct and activities of State Members of Parliament may be investigated by the ICAC, it would appear that the protections provided by the Act currently extend to elected representatives at both State and Local Government levels.*

*While the protection against actions provided in section 21 of the Act (as well as the provisions of section 17P of the Defamation Act 1974 and the exemption in clause 20(d) of the Freedom of Information Act 1989) may be relevant to elected representatives who have made disclosures in accordance with the Act, the relevance of the protection against reprisals in section 20(2) is open to question. In particular, paragraphs (c), (d) and (e) would not appear to be relevant to elected representative. Further, it may be difficult in practice to distinguish "intimidation or harassment" (see paragraph (b)) from normal political activity!*

*Recommendation 12: In relation to elected representatives at both State and Local Government levels, the protections provided by the Act should be restricted to the protection against actions, etc set out in section 21 of the Act, the protections in section 17P of the Defamation Act and the exemption in clause 20(d) of the Freedom of Information Act."*

**ISSUE 18: The adequacy and appropriateness of methods currently available to councillors to make a disclosure.**

Our view is that available methods are adequate and acceptable. Whilst it may not be appropriate in certain circumstances for councillors to make disclosures to the general manager or in accordance with an internal reporting system, it is always open for councillors to make disclosures externally to one of the investigating authorities.

## DEALING WITH DISCLOSURES

**ISSUE 19: Questions concerning the status of disclosures relating to matters which have been partially investigated or resolved on a previous occasion.**

This issue should be irrelevant. "Whistleblowers" should not be expected to know whether a complaint/disclosure has been made or dealt with previously by the public authority or investigating agency.

**ISSUE 20: Special audits - Implications of the requirement that investigations of protected disclosures by the Auditor-General must be special audits in terms of section 38B of the Public Finance and Audit Act 1983.**

We offer no comment on this matter on the basis that it is more appropriate for the Auditor-General to respond to this issue.

**ISSUE 21: Responding to a disclosure - Should investigating authorities, public authorities or public authority officers be required to acknowledge receipt of disclosures, outline the action they propose in relation to the disclosure and indicate a time frame for dealing with the disclosure?**

As a matter of principle, investigating authorities must retain their discretion to assess and deal with matters in accordance with their empowering Acts.

While it is often appropriate for investigating authorities or public officials to acknowledge receipt of disclosures and to indicate what action is intended or proposed, this should not be an absolute requirement as there are circumstances where it may not be appropriate to telegraph intentions.

**ISSUE 22: Mediation - Should the Act include mediation and alternative dispute resolution techniques, as an option to investigation, for dealing with disclosures made to an investigating authority?**

The Act places no obligation on any of those persons or bodies to investigate disclosures.

There is no requirement for the Act to specifically refer to mediation or alternative dispute resolution techniques. These options are open to investigating authorities (where the relevant statute so provides), public authorities or public officials who receive protected disclosures. However, in our view there can rarely, if ever, be circumstances

where complaints about corruption or serious and substantial waste could be mediated or the subject of alternative dispute resolution techniques. Such techniques may be more useful in cases of maladministration where the maladministration has lead to unintended or unforseen consequences of a relatively minor nature. The distinction that needs to be borne in mind is that where the conduct complained of is criminally or morally culpable, then alternative dispute resolution is clearly inappropriate whereas if the conduct lacks moral or criminal culpability then such an approach could be appropriate.

**ISSUE 23: Should a legislative provision be introduced which states that the Act does not affect an investigating authority's discretion to decide whether or not to investigate a matter?**

Such a provision is not required as clearly the Act does not affect or limit an investigating authorities discretion to decide whether or not to investigate a matter. Such discretions are provided in the legislation establishing/empowering each investigating authority and section 5(2) of the *Protected Disclosures Act* specifically provides that *"nothing in this Act otherwise limits or affects the operation of any Act or the exercise of the functions conferred or imposed on an investigating authority or any other person or body under it".*

**ISSUE 24: Concerns that existing reporting requirements in relation to investigations of serious and substantial waste are onerous and that provision should be made for specific reporting arrangements for such disclosure investigations.**

We offer no comment on this matter on the basis that it is more appropriate for the Auditor-General to respond to this issue.

## REPORTING REQUIREMENTS

**ISSUE 25: Annual Report entries - Should investigating authorities, public authorities or public authority officers be required to provide in their annual reports statistical details and performance information concerning disclosures they have received, investigations conducted and outcomes?**

The reporting of suitably anonymised information about all complaints/disclosures would be useful in terms of raising awareness and as performance indicators. However, some agencies are of a size which could lead to the identification of a "whistleblower" from even anonymised reports. The issue for resolution here is the balance between the benefits of reporting and the object of protecting the identity of "whistleblowers".

In our view, and consistent with good administrative practice relating to accountability and transparency, there should be a presumption that public authorities are required to report on disclosures in detail unless to do so would breach the *Act* or lessen or reduce the objects of the *Act* with respect to the protection of "whistleblowers" or the investigation of corrupt conduct, maladministration or serious and substantial waste.

## FUNDING

**ISSUE 26: The adequacy of current funding to investigating authorities for the investigation of protected disclosures.**

As indicated in our Submission to the JPC, the numbers of protected disclosures being made to this Office are increasing at a rate of approximately 40% each quarter. It is also relevant to consider that, at this early stage in the life of the *Act*, it appears that dealing with protected disclosures is far more resource intensive than dealing with an equivalent number of normal complaints. In these circumstances a strong argument can be made out for increasing funding to deal with such matters.

## EDUCATION & UTILISATION

**ISSUE 27: To what extent are the provisions of the Act understood and utilised within Government departments and agencies?**

From the requests for advice made to this Office, clearly not enough.

## ADEQUACY OF PROTECTIONS UNDER THE ACT

**ISSUE 28: Is it appropriate that the onus is on the public official to prove that a disclosure is a "protected disclosure" and that detrimental action has occurred?**

This question is discussed at 3.4.1 and under Issue 21 in our Submission to the JPC.

In summary our position is that it is inappropriate for individuals to bear the cost and burden of prosecuting the criminal offence of "*detrimental action*". Consideration should be given to specifying the responsible prosecuting authority. Further, in relation to the onus of proof, it is our view that the prosecutor should prove all elements of the offence other than the defendant having the burden of proving that there was some other reason for the action taken against the "whistleblower".

In relation to the defences provided to a "whistleblower" by section 21 of the *Act* and prosecutions for the offence of "*detrimental action*", a "whistleblower" or prosecutor would have to prove that a protected disclosure was in fact made in order to get the benefit of the defences or the prove the offence. If the "whistleblower" made a protected disclosure to an "*investigating authority*" such as the Ombudsman, the "facts" of the disclosure having been made to the Ombudsman and the Ombudsman's decision to treat the disclosure as a protected disclosure under the terms of the *Act*, are matters which need to be proved in a court. However, the Ombudsman currently enjoys the statutory protection of not being competent or compellable in legal proceedings.

We discussed this matter under Issue 23 in our earlier submission to the JPC. In our discussion we recommended that consideration be given to providing for a mechanism which allows a "whistleblower" to establish that they made a protected disclosure to the Ombudsman yet preserves the privilege of the Ombudsman from having to appear in court. One mechanism which could be employed with respect to all of the investigating authorities is the provision of a certificate under the hand of the head of the investigating authority which certifies:

(a) that the person made a disclosure to the investigating authority; and

(b) the investigating authority dealt with the disclosure as if it were a protected disclosure made in accordance with the Act.

The certificate would not serve to establish as a matter of law that the person did make a protected disclosure, that would be decided by the Court, but rather that the investigating authority received a disclosure from the person and that it, the investigating authority, treated it as a protected disclosure.

**ISSUE 29: Should public authorities, and possibly public officials, have statutory obligation to protect persons who have made protected disclosures?**

This question is discussed in relation to Issue 20 in our Submission to the JPC where we said:

> *"**Discussion:** In our view, good administrative practice would dictate that CEOs and other senior public officials be responsible to ensure that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action". The Act is, however, silent as to steps which a public authority or official should take to ensure the "whistleblower" is protected. Rather, section 20 imposes criminal liability upon a person who takes detrimental action against a person who has made a protected disclosure, which is taken substantially in reprisal for that person making the protected disclosure. Whilst this sanction is*

*an incentive for public authorities and officials to not take detrimental action, it falls short of encouraging or obliging public authorities and officials to take positive steps to protect whistleblowers.*

*Obliging a public authority or official to take positive steps in relation to preventing the occurrence of detrimental action is problematic in that the public authority or official may be the body or person responsible for the detrimental action.*

*If it is considered to be impractical to cast a positive duty on public authorities or officials, consideration could be given to adopting the "legislative intention" mechanism used in the Freedom of Information Act. In section 5(3) of the FOI Act the Legislature has set out its intention with respect to how the Act should be interpreted and applied and also its intention that the discretions contained in the Act should be exercised in a manner which is consistent with the objects of the Act. The Protected Disclosures Act could be amended in a like manner with the Legislature setting out its intention or expectation that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action".*

*Recommendation 20: Consideration should be given to amending the Act to require public authorities and officials to take positive steps to protect "whistleblowers". Alternatively, the Act could be amended to provide for a section setting out the Legislature's intention that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action"."*

**ISSUE 30: Local government employees - Inability of local government public officials to receive the same protections afforded under the Act, through the Public Sector Management Act and the Government and Related Employees Tribunal Act, to State Government public officials.**

There are no equivalent bodies in relation to local government employees. Such industrial issues are not matters upon which it is appropriate for this Office to comment in this context.

**ISSUE 31: Local government councillors - What mechanisms of protection are appropriate to a councillor, as an elected member, in contrast to a local government employee?**

This question is considered in relation to Issue 12 in our Submission to the JPC and under issue 17 earlier in this document where we said:

> *"Discussion: The definition of "public official" in section 4 of the Act is particularly broad and includes "any ... individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority".*
>
> *As the conduct and activities of Local Government councillors may be investigated by both the Ombudsman or ICAC, and as the conduct and activities of State Members of Parliament may be investigated by the ICAC, it would appear that the protections provided by the Act currently extend to elected representatives at both State and Local Government levels.*
>
> *While the protection against actions provided in section 21 of the Act (as well as the provisions of section 17P of the Defamation Act 1974 and the exemption in clause 20(d) of the Freedom of Information Act 1989) may be relevant to elected representatives who have made disclosures in accordance with the Act, the relevance of the protection against reprisals in section 20(2) is open to question. In particular, paragraphs (c), (d) and (e) would not appear to be relevant to elected representative. Further, it may be difficult in practice to distinguish "intimidation or harassment" (see paragraph (b)) from normal political activity!*
>
> *Recommendation 12: In relation to elected representatives at both State and Local Government levels, the protections provided by the Act should be restricted to the protection against actions, etc set out in section 21 of the Act, the protections in section 17P of the Defamation Act and the exemption in clause 20(d) of the Freedom of Information Act."*

**ISSUE 32: Protections available to public officials who supply information pursuant to a duty eg. public officials providing information to the ICAC in accordance with section 11 of the ICAC Act 1988.**

The obligation on officials to supply information to the ICAC applies to the CEO's of organisations. Such persons should, at least in theory, have little need for the protections in the Act provided under section 20, particularly given the forthcoming

amendments to the *ICAC Act* and the *Ombudsman Act* to protect persons assisting the ICAC and the Ombudsman. The only real cause for concern surrounds General Managers of local councils and their co-operation with the ICAC. We understand that the ICAC is unsure whether the CEO of the local council is the Mayor of the General Manager and this ought to be clarified.

**ISSUE 33: What limitations should be placed on the extent of information which may be disclosed without committing an offence?**

The release from obligations of confidence contained in section 21 which operates to protect a "whistleblower" should not be watered down with respect to information which forms the basis of a protected disclosure.

Freeing a "whistleblower" from having to keep confidential information which shows or tends to show corrupt conduct, maladministration or serious and substantial waste must be at the very essence of the *Act*.

If there is to be any watering down of this protection, such exception could only be justified where there is a greater and countervailing public interest. An example which comes to mind is where the putative "whistleblower" becomes aware of serious and substantial waste with respect to a covert operation of the proposed PIC. The maintenance of the secrecy of the covert operation is in the public interest as is the disclosure about serious and substantial waste. It would therefore seem appropriate that the "whistleblower" be released from the obligation of secrecy only in the circumstance where the disclosure is made to an investigating authority which has jurisdiction to investigate the disclosure, in this example the PIC Inspector.

However, there may be situations where a "whistleblower" breaches an obligation of secrecy and or confidence or makes defamatory remarks as part of their disclosure and reveals information which is not covered, either in whole or in part, by the *Act*. With respect to allegations which are wholly outside the *Act*, it follows that no protection will be available. However, the situation is not so clear with respect to mixed disclosures and we can envisage situations where mixed disclosures involve delicate matters of profound consequence for an individuals or an organisation.

We discussed this issue under Issue 24 of our Submission to the JPC where we said:

> *"ISSUE 24: Can a disclosure be partly a protected disclosure and partly not protected?*

*Discussion: It is to be expected that disclosures will often include information which does not show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money. However, the Act does not say in express terms that only so much of a disclosure as shows or tends to show those matters is protected. It may be difficult to make a distinction between parts of a disclosure in a particular case and that possibility may be a deterrent to the making of protected disclosures which Parliament would not have intended.*

*Recommendation 24: Consideration should be given to clarifying the way in which the protections under the Act apply to disclosures about matters such as corrupt conduct, maladministration or serious and substantial waste which are mixed with disclosures about other matters."*

On balance, the protection against legal action arising from a breach of confidence or secrecy and defamation ought apply only to those parts of disclosures which are about maladministration, corruption and serious and substantial waste.

**ISSUE 34: Should the protections under the Act be limited to disclosures based on information which public officials acquire in the course of their duties as public officials, as distinct from matters arising in the course of their private lives?**

This question is discussed in relation to Issue 10 in our Submission to the JPC where we said:

*"Discussion: Only disclosures made by public officials can be protected under the Act. However, this creates some difficulties where there is no obvious connection between the person making the disclosure and the public authority or official the subject of the disclosure. For example, should the protection of and obligations imposed by the Act extend to public officials who make disclosures (which comply with the requirements of the Act) about such public officials as traffic police with whom they come into contact while driving their private vehicles, or council staff who deal with their private BAs or DAs?*

*From the specific terms of the Act, in theory a protected disclosure can be made by a "whistleblower" about a public authority even if the person making the disclosure has never been or is no longer employed by that public authority. However, while the matter is not beyond doubt, the investigating authorities prefer the view that it is not the intention of the Act to extend protection to disclosures by persons of information or material of which they became aware or obtained*

*otherwise than by virtue of the fact that they are public officials and in that capacity.*

*Another way of looking at this issue is to consider whether the connection between the person making a public disclosure, and the public authority or official the subject of the disclosure, is sufficiently tenuous that the likelihood of detrimental action is so minimal as not to warrant extending the protections contained in the Act to the person who makes the disclosure.*

***Recommendation 10:** 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."*

## INTERNAL REPORTING SYSTEMS

**ISSUE 35: The nature and adequacy of internal reporting systems adopted by public authorities for the making of disclosures.**

We have developed a Model Internal Reporting Policy which we are using to answer enquires from agencies. We annexe a copy of the Model Policy as Annexure 2.

We have also organised workshops on Protected Disclosures for the afternoon of 31 July and morning of 1 August 1996. The workshops will cover such important issues as the development of internal reporting systems, the responsibilities of agencies on receipt of disclosures, the investigation of disclosures by agencies and the protection of "whistleblowers".

In this regard, we note that the NSW Police Service has developed an extensive policy with respect to the protection and support of internal witnesses and that a representative of this Office sits on the Police Service's Internal Witness Advisory Council.

**ISSUE 36: Access of public officials in isolated or small units to a Disclosure Officer and the importance of protected disclosure as a mechanism for fraud prevention.**

The encouragement of disclosures about serious and substantial waste, corrupt conduct or maladministration is likely to assist in the detection and investigation of fraud

matters. Therefore, any measures which enhance the detection and investigation of fraud must be in the public interest.

Public officials in small or isolated units must be encouraged to make protected disclosures. At present, such officials would have access to the investigating authorities in the event that their units are too small or isolated to have effective reporting procedures. However, we recognise that there will be circumstances where it will not be possible in practice for the identity of the person making the disclosure to be kept confidential in practice owing to such factors as size or isolation of work units. In these circumstances, the protection from detrimental action becomes paramount and our comments with respect to improvements in this area are applicable.

**ISSUE 37: Concerns regarding the accuracy and description of conduct used by public authorities in their internal information brochures for staff on the protected disclosures system.**

This matter is linked with issue 35 above. It is unlikely that legislative fiat will ensure an adequate level of compliance with the *Act*. It is more likely that continued efforts by the investigating authorities, such as our workshop and Model Policy, will see improvements in the area.

## DETRIMENTAL ACTION

**ISSUE 38: Prosecutions re detrimental action - Who should investigate and prosecute allegations of detrimental action? Should such allegations be referred to the ICAC for investigation as corrupt conduct and should the ICAC be given responsibility for initiating prosecution where there appears to be a case to answer?**

This question is discussed in relation to Issues 20 and 21 in our Submission to the JPC.

We believe there should be a nominated prosecuting authority for the criminal offence of detrimental action and would suggest that the matter be specifically brought under the jurisdiction of the Director of Public Prosecutions.

The ICAC is an inquisitorial investigating authority and it would, in our view, be inconsistent with this role for the ICAC to assume an adversarial prosecutorial function. The same comment would equally apply to the Ombudsman.

As detrimental action is a criminal offence, it already falls within the definition of corrupt conduct set out in the *ICAC Act*.

**ISSUE 39: Should public authorities have a statutory duty to investigate allegations of detrimental action and if appropriate take disciplinary action against the person responsible?**

This question is discussed in relation to Issues 20 and 21 in our Submission to the JPC.

Under issue 20 we say:

> *"In our view, good administrative practice would dictate that CEOs and other senior public officials be responsible to ensure that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action". The Act is, however, silent as to steps which a public authority or official should take to ensure the "whistleblower" is protected. Rather, section 20 imposes criminal liability upon a person who takes detrimental action against a person who has made a protected disclosure, which is taken substantially in reprisal for that person making the protected disclosure. Whilst this sanction is an incentive for public authorities and officials to not take detrimental action, it falls short of encouraging or obliging public authorities and officials to take positive steps to protect whistleblowers.*
>
> *Obliging a public authority or official to take positive steps in relation to preventing the occurrence of detrimental action is problematic in that the public authority or official may be the body or person responsible for the detrimental action.*
>
> *If it is considered to be impractical to cast a positive duty on public authorities or officials, consideration could be given to adopting the "legislative intention" mechanism used in the Freedom of Information Act. In section 5(3) of the FOI Act the Legislature has set out its intention with respect to how the Act should be interpreted and applied and also its intention that the discretions contained in the Act should be exercised in a manner which is consistent with the objects of the Act. The Protected Disclosures Act could be amended in a like manner with the Legislature setting out its intention or expectation that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action".*

*Recommendation 20: Consideration should be given to amending the Act to require public authorities and officials to take positive steps to protect "whistleblowers". Alternatively, the Act could be amended to provide for a section setting out the Legislature's intention that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action".*

**ISSUE 40: Appropriate penalties for detrimental action.**

It may be appropriate to give consideration to including a range of penalties or responses for detrimental action, for example disciplinary proceedings or damages.

**ISSUE 41: Legislative provision for grounds on which public officials subject to detrimental action may claim damages and compensation.**

There does not appear to be any good reason why persons subject to detrimental action should not be able to claim damages. If "whistleblowers" suffer loss or damage as a consequence of being subjected to detrimental action then they should be appropriately compensated.

However, we are opposed to any structure or system which would see "whistleblowers" being rewarded for "blowing the whistle". This would send entirely the wrong signal to the community for it would be seen to be rewarding people for behaving with integrity. Such behaviour should be the norm rather than a cause for reward.

There is the potential for claims for compensation to head down the track of claims for massive awards of punitive damages. We believe that punitive damages should be available as an incentive against those who would take detrimental action and that a sliding scale be available to distinguish between the truely malicious and vindictive and the merely incompetent of stupid. However, such awards should be capped with maximum level of payment so as to avoid massive punitive claims and awards.

[Note: See also issues 45 & 51 below].

**ISSUE 42: The issue of whether a public official who is subject to detrimental action because they made a disclosure, and the latter was not investigated, should have a right of appeal.**

We are totally opposed to any provision which would give any right of judicial "merits" appeal from the decisions of investigating authorities. Judicial review of administrative action is a sufficient safeguard, as has been proved the case in relation to the exercise of the Ombudsman's and ICAC's powers.

**ISSUE 43: Concerns regarding delays in responding to claims of detrimental action and protective measures available in such circumstances.**

We are of the view that statutorily imposed time limits and/or penalties for delays are impractical and are certainly not cost neutral. In order for the investigating authorities to be able to guarantee performance within specified time-limits, some thought would have to be given to the sufficiency of current levels of resourcing of the investigating authorities so that responses can be made within any proposed time-frame. To do otherwise would be to set up the investigating authorities to fail.

At present there is a time-frame of six months before which public authorities and investigating authorities must report to the "whistleblower" on what action, if any, they have taken in relation to the disclosure. Following this period, "whistleblowers" are then free to take their matters to MPs or journalists and still be protected from detrimental action.

**ISSUE 44: Is there a need for legislative provisions enabling investigating authorities to issue injunctive type orders forbidding reprisals against a public official who has made a protected disclosure pending investigation of their original complaint. Should such injunctive orders include orders preventing dismissal?**

The making of such reprisals constitutes a criminal act under the offence of "*detrimental action*" - section 20 of the Act.

If a person has or intends to commit a criminal act by engaging in "*detrimental action*" against a "whistleblower", the availability of an injunction is unlikely to be effective in preventing such action occurring. At present, there does not appear to be any impediment to a "whistleblower" seeking an injunction to restrain an anticipated breach of the "whistleblower's" right not to have detrimental action taken against them. However, the process of a "whistleblower" obtaining an injunction in the Supreme Court raises the same issues we spoke about in relation to the "whistleblower" having to

launch, manage and pay for a private criminal prosecution. Obtaining an injunction from the Supreme Court on an urgent basis would involve enromous financial costs. Further, the question arises as to how many "whistleblower" would be able to offer a realistic undertaking as to damages. The injunction mechanism would not, therefore, seem a satisfactory method to offer protection to a "whistleblower".

It could be suggested that an "*investigating authority*" simply assume the burden with respect to obtaining an injunction. This option would involve significant resource implications for an "*investigating authority*" and could lead to significant burdens upon the time and staff of an "*investigating authority*". We favour another option.

The option we favour is the one which is currently before the Parliament of South Australia. An amendment is proposed to the *Ombudsman Act 1972 (SA)* allows the Ombudsman, in certain circumstances, to issue a temporary prohibition on administrative acts. The full text of the proposed amemdment is set out below:

*"19a (1) The Ombudsman may, by notice in writing, prohibit an agency to which this Act applies from performing an administrative act specified in the notice for any period specified in the notice (provided that no administrative act may be prohibited pursuant to a notice or notices for more than 45 days in aggregate).*

*(2) The Ombudsman must not issue a notice under this section unless satisfied-*

*(a) that the administrative action sought to be prohibited is likely to prejudice-*

*(i) an investigation or proposed investigation; or*

*(ii) the effect or implementation of a recommendation that the Ombudsman might make as a result of an investigation or poposed investigation; and*

*(b) that compliance with the notice by the agency woud not result in the agency breaching a contract or other legal obligation or cause any third parties undue hardship; and*

*(c) that issue of the notice is necessary to prevent serious hardship to a person.*

*(3) The Ombudsman may, at any time, revoke a notice under this section.*

*(4) If an agency that has received a notice under this section fails to comply with the terms of the notice, the following provisions apply:*

(a) *the principal officer of the agency must, at the request of the Ombudsman, report to the Ombudsman within the time allowed in the request on the reasons for the agency's failure to comply with the notice;*

(b) *if, following receipt of the principal officer's report, the Ombudsman if of the opinion that the agency's failure to comply with the notice was unjustified or unreasonable, the Ombudsman may make a report on the matter to the Premier;*

(c) *the Ombudsman may forward copies of any report to the Premier to the Speaker of the House of Assembly and the President of the Legislative Council with a request that they be laid before their respective Houses."*

In our view, a similar power granted to the NSW Ombudsman would greatly assist in providing "whistleblowers" with effective and timely protection.

**ISSUE 45: Should a person who has made a disclosure be able to take legal action to obtain compensation for any losses.**

This question is discussed in relation to issue 41 above where we said:

*"There does not appear to be any good reason why persons subject to detrimental action should not be able to claim damages. If "whistleblowers" suffer loss or damage as a consequence of being subjected to detrimental action then they should be appropriately compensated.*

*However, we are opposed to any structure or system which would see "whistleblowers" being rewarded for "blowing the whistle". This would send entirely the wrong signal to the community for it would be seen to be rewarding people for behaving with integrity. Such behaviour should be the norm rather than a cause for reward.*

*There is the potential for claims for compensation to head down the track of claims for massive awards of punitive damages. We believe that punitive damages should be available as an incentive against those who would take detrimental action and that a sliding scale be available to distinguish between the truely malicious and vindictive and the merely incompetent of stupid. However, such awards should be capped with maximum level of payment so as to avoid massive punitive claims and awards."*

**ISSUE 46: Should financial assistance to obtain legal representation be provided to a person who has made a disclosure at any subsequent inquiry proceedings?**

The existing arrangements for such representation should be sufficient.

## SETTLEMENT PROVISIONS

**ISSUE 47: Whether it is in the public interest that departments and agencies are able to require public officials who have made public interest disclosures to refrain from taking any further action as a condition for settling the matter.**

No. Disclosures about corrupt conduct, maladministration and serious and substantial waste are in the public interest and the fact that the "whistleblower" and the agency have reached a private agreement does not make the matter any the less in the public interest. The public interest component remains despite any settlement and if necessary, would, in our view, over-ride a settlement.

It should be noted that any agreement to settle a matter is not binding on any investigating authority to which a matter may have been referred and nor should it be.

## SUPPORT FOR PUBLIC OFFICIALS MAKING DISCLOSURES

**ISSUE 48: Whether, in the public interest, the Act should contain a statement that its provisions should be interpreted in a manner which is favourable to public officials who have made disclosures.**

This is the basis of the interpretation of the Act advocated by the Crown Solicitor and Solicitor General. In effect such a provision would merely clarify that position.

**ISSUE 49: Whether there should be an explicit obligation on investigating authorities to protect the interests of public officials who have made disclosures.**

This question is discussed in relation to Issue 20 in our Submission to the JPC.

Under Issue 20 we say:

> *"In our view, good administrative practice would dictate that CEOs and other senior public officials be responsible to ensure that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action". The Act is, however, silent as to steps which a public authority or official should take to*

*ensure the "whistleblower" is protected. Rather, section 20 imposes criminal liability upon a person who takes detrimental action against a person who has made a protected disclosure, which is taken substantially in reprisal for that person making the protected disclosure. Whilst this sanction is an incentive for public authorities and officials to not take detrimental action, it falls short of encouraging or obliging public authorities and officials to take positive steps to protect whistleblowers.*

*Obliging a public authority or official to take positive steps in relation to preventing the occurrence of detrimental action is problematic in that the public authority or official may be the body or person responsible for the detrimental action.*

*If it is considered to be impractical to cast a positive duty on public authorities or officials, consideration could be given to adopting the "legislative intention" mechanism used in the Freedom of Information Act. In section 5(3) of the FOI Act the Legislature has set out its intention with respect to how the Act should be interpreted and applied and also its intention that the discretions contained in the Act should be exercised in a manner which is consistent with the objects of the Act. The Protected Disclosures Act could be amended in a like manner with the Legislature setting out its intention or expectation that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action".*

***Recommendation 20:** Consideration should be given to amending the Act to require public authorities and officials to take positive steps to protect "whistleblowers". Alternatively, the Act could be amended to provide for a section setting out the Legislature's intention that public authorities and officials act in a manner which is consistent with the objects of the Act and/or that they take responsibility for ensuring that bona fide "whistleblowers" are protected from both direct and indirect "detrimental action".*

**ISSUE 50: Whether there should be a specific agency to deal with disclosures which would be more able to take action on behalf of persons who make disclosures.**

There would be resource implications involved in the setting up of a new agency. However, the Director of Public Prosecutions should be given the special brief to

perform prosecutions for the offence of detrimental action with sufficient resources as are required.

**ISSUE 51: The avenues of legal action for persons who have made disclosures to obtain compensation.**

We have addressed this issue under issue 41 where we said:

> *"There does not appear to be any good reason why persons subject to detrimental action should not be able to claim damages. If "whistleblowers" suffer loss or damage as a consequence of being subjected to detrimental action then they should be appropriately compensated.*
>
> *However, we are opposed to any structure or system which would see "whistleblowers" being rewarded for "blowing the whistle". This would send entirely the wrong signal to the community for it would be seen to be rewarding people for behaving with integrity. Such behaviour should be the norm rather than a cause for reward.*
>
> *There is the potential for claims for compensation to head down the track of claims for massive awards of punitive damages. We believe that punitive damages should be available as an incentive against those who would take detrimental action and that a sliding scale be available to distinguish between the truely malicious and vindictive and the merely incompetent of stupid. However, such awards should be capped with maximum level of payment so as to avoid massive punitive claims and awards."*

## OTHER MATTERS

**ISSUE 52: Concerns have been expressed that disclosures which are genuine only in the opinion of the persons making the disclosure, but are not objectively genuine, do not attract the protections afforded by the Act.**

This problem relates primarily to disclosures to MP's and journalists. The limitation in section 19(5) should be deleted from the Act so all that is required is for a "whistleblower" to have reasonable grounds for believing that the disclosure is substantially true. It is, in our view, simply not possible for a matter to be judged conclusively or objectively at the time that a disclosure is made. There must be some threshold which seeks to eliminate frivolous or vexatious disclosures. However, the threshold should be of the nature that the "whistleblower" genuinely believes

(subjectively determined) on reasonable grounds (objectively determined) that the conduct is corrupt, or involves maladministration or serious and substantial waste.

From a practical perspective, for a "whistleblower" to be obliged to prove that a disclosure is substantially true to obtain the protection of the Act is onerous and unrealistic.

Annexure 1

**Section 81 of the *Health Care Complaints Act 1993* provides:**

*"81. The Commission is subject to the control and direction of the Minister except in respect of the following:*

- *the assessment of a complaint*
- *the investigation of a complaint*
- *the prosecution of disciplinary action against a person*
- *the terms of any recommendation of the Commission*
- *the contents of a report of the Commission, including the annual report."*

**Section 91 of the *Health Care Complaints Act 1993* provides:**

*"91. A recommendation made by the Commission in relation to a matter investigated under this Act must be made in such a way that to give effect to*

*(a) would not be beyond the resources appropriated by Parliamen for the delivery of health services; or*

*(b) would not be inconsistent with the way in which those resource have been allocated by the Minster and the Director-general in accordance with government policy."*

# MODEL INTERNAL REPORTING POLICY

1. **Purpose of the policy:**

An internal reporting system should be adopted as a formal policy of the authority. This policy should then be documented in a code of conduct, procedure manual, administration manual, memorandum or the like.

The policy should include a statement to the effect that what is being established is an internal reporting system for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any officer of the authority. The purpose of the internal reporting system should be stated to be to enable such disclosures to be made by staff to officers of the authority other than its principal officer/CEO.

2. **Object of the Act:**

The policy should state that the object of the Protected Disclosures Act is to encourage and facilitate the disclosure - in the public interest - of corrupt conduct, maladministration and serious and substantial waste in the public sector. This is achieved by:

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

3. **Support for disclosures:**

The authority should clearly state that it encourages its staff to report known or suspected instances of corrupt conduct, maladministration or serious and substantial waste of public money.

The authority should also express its clear intention to take all reasonable steps to protect *bona fide* "whistleblowers".

4. **Definitions**:

The key terms (such as "corruption conduct", "*maladministration*" and "*serious and substantial waste*") should be defined in as much detail as possible. Assistance in this regard can be found at pages 10-13 of the *Ombudsman's Protected Disclosures Guidelines*.

5. **What disclosures are protected**:

Guidance should be given as to what disclosures are or can be protected under the Act, and in particular the need for disclosures to "*show or tend to show*" (as opposed to merely allege) corrupt conduct, maladministration or serious and substantial waste of public money.

Reference should also be made to the circumstances when a disclosure is not protected (set out in sections 9(2), 16, 17 & 18).

6. **What protection is available**:

A brief outline of the various protections provided through the Act should be included, making specific reference to the protections in sections 20, 21 & 22.

7. **Alternative avenues for disclosures**:

The alternative avenues available for making a protected disclosure should be listed including reference to the:

1) Audit Office;
2) ICAC;
3) NSW Ombudsman;
4) principal officer of the authority/CEO; or
5) internal reporting system established under the policy.

8. **Internal reporting channels**:

Two or more persons or positions to whom or which internal disclosures can be made (other than to the principal officer/CEO) should be identified.

The procedures to be followed by those persons or the holders of those positions on receipt of a disclosure should be specified, including the persons or positions delegated to act on disclosures.

9. **Roles of those involved in the system:**

The roles and responsibilities of all persons involved in the internal reporting system should be set out, for example along the lines set out on pages 24-27 of *Internal Reporting Systems* modified to meet the specific circumstances of the authority concerned and its preferred internal reporting system model.

10. **Format for disclosures:**

It is important to specify whether disclosures should be made in writing initially, or whether oral disclosures are acceptable (provided sufficient information is provided to "*show or tend to show*" one of the required categories of conduct).

If oral disclosures are acceptable, it should be stated that such disclosures must immediately be reduced to writing by the recipient of the disclosure.

11. **Options for action by agency:**

The options for action open to the agency depending on the nature, scope and seriousness of the disclosure should be identified. Such options could include:

1) no action;
2) preliminary or informal enquires;
3) full or formal investigation;
4) prosecution or disciplinary action; or
5) referral to another relevant body for investigation or other action.

12. **Confidentiality:**

The policy should specify that every effort will be made to ensure confidentiality of information that might identify or tend to identify a person who has made a protected disclosure, it should be emphasised however, such information may need to be disclosed in certain circumstances. These circumstances include:

1) where the person who made the disclosure consents in writing to the disclosure of such information; or

2) where it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern;
3) the authority or recipient of the disclosure is of the opinion that the disclosure of the identifying information is necessary to investigate the matter effectively; or
4) it is otherwise in the public interest to do so.

It should be made clear that while an assurance of complete confidentiality cannot be given, it is the intention of the authority that confidentiality will be maintained unless it is unreasonable or not possible to do so.

13. **Notification of action taken or proposed**:

A committee should be given that officers who make disclosures will be notified within 6 months of the disclosure being made of the action taken or proposed by the authority in respect of the disclosure.

14. **Further information**:

Staff contemplating making a protected disclosure should be informed that they may obtain further guidance as to the requirements of the Act from one or more of the following sources:

1) the Protected Disclosures Co-ordinator for the authority (if any);
2) the Deputy Ombudsman (who performs a general advisory role for public officials throughout the NSW public sector - (02) 286 1004);
3) the ICAC or Audit Office;
4) the *Ombudsman's Protected Disclosures Guidelines;* and/or
5) *Internal Reporting Systems* (published by the Audit Office, ICAC and NSW Ombudsman in 1995).

Tabled by ICAC 4/7/96 AMH Rec'd 2/7/96 HM

# I·C·A·C

## INDEPENDENT COMMISSION AGAINST CORRUPTION

2 July 1996

The Chairman
Joint Committee on the Office of the Ombudsman
Room 813
Parliament House
Macquarie Street
SYDNEY N S W 2000

Attn: Helen Minnican

Dear Chairman,

Re: Review of the *Protected Disclosures Act, 1994*

Earlier this morning I spoke with the secetary to the Joint Committee, Ms Minnican, about a short (note form) submission dealing with the 52 issues raised in the document forwarded to me on 18 June, 1996. Ms Minnican advised me that it could be of assistance to the Committee if the document could be forwarded before the Committee held its public hearing on 4 July, 1996. I enclose it herewith and hope that it may be of assistance to the Committee.

Yours sincerely,

Barry O'Keefe.

The Hon B S J O'Keefe AM QC
Commissioner

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# REVIEW OF THE PROTECTED DISCLOSURES ACT 1994

## NOTES FOR PUBLIC HEARING ON 4 JULY 1996

These notes relate to the issues numbers 1-52 which have been submitted to the Joint Committee on the Office of the Ombudsman in relation to its review of the Protected Disclosures Act. Reference is made to the ICAC's submission to that Committee. Appendices 1 and 2 to that submission are the interim reports of the Research Section in relation to its survey of NSW public sector agencies and local councils which is monitoring the impact of the Protected Disclosures Act 1994.

1. Refer submissions 2.1 and 3.2 at pages 7 and 14; Appendix 2 page 8.

2. The natural ordinary (i.e. dictionary) meaning of the term "serious and substantial waste" would be sufficient. It would be difficult to formulate a useful definition as the question of whether the waste was serious and substantial will involve a comparison, a variable and thus will vary according to all the circumstances. It is not just a standard such as a certain or fixed monetary value.

3. The necessity to define the term "disclosure" does not appear to be established. It is an ordinary English word and should bear its ordinary, as opposed to an artificial or statutory, meaning.

4. Refer submission 2.6 at page 9. Deficiency should be corrected.

5. Refer submission 2.6 at page 9. This may be one avenue of curing the deficiency identified in Issue 4.

6. Yes. Each is a public authority within the definition in the Ombudsman Act.

7. No. Adding further investigating authorities may create confusion, increases the prospect of duplication and would be likely to increase the cost of administration. The three existing authorities have managed well and in co-operation. The PIC is to be added. Four should be ample. In addition query the expertise available within each of the additional organisations nominated.

8. It is unclear whether this issue is directed at employees of contractors who may blow the whistle on those contractors in relation to their dealings with a public authority or to employees of contractors blowing the whistle in relation to the conduct of public officials or the public authority at which they are working. Whilst the issue of whether the protection given under the Protected Disclosures Act should be extended to the private sector is a matter for Parliament, it may be seen as inequitable that contractors making disclosures about conduct of public officials or public authorities should be at a disadvantage as compared to public officials, if they were carrying out the same function.

9. The Internal Audit Bureau operates in the same competitive market as private firms. It is arguable that an extension of the Protected Disclosures Act to allow the Internal Audit Bureau to be nominated as a body to receive disclosures may impose on it an unfair disadvantage in that market. There are already many ways in place by which Protected Disclosures can be made, including to the Auditor General. It is not necessary to extend the Act in this way.

10. Yes - police officers should be in the same position as other public officials.

11. The question of the extension of the application of the Act to include disclosures by private sector employees in respect of matters in the private sector (but not involving the public sector) would be a major extension of the ambit of the Act. It could have a major effect on the number of complaints and hence cost. The ICAC would not support such an amendment, at least at this stage. Persons making complaints to the ICAC concerning corrupt conduct in the public sector will be protected in any event if the proposed amendments to the ICAC Act to make it an offence to take action against those who assist the ICAC become law.

12. Refer submission 2.4 at page 8.

13. No. Refer submission 2.5 at page 9.

14. Refer submission 2.5 at page 9.

15. Refer submission 2.5 at page 9. ICAC supports clarification of the Act to make it clear that a disclosure is protected when first made.

16. Anonymous disclosures should not be protected. Refer to reasons in submission 2.2 at page 7.

17. Refer submission 2.6 at page 9.

18. The existing mechanisms for councillors to make disclosures are adequate and appropriate at least in relation to disclosures concerning corrupt conduct and maladministration (assuming they should be protected at all). There is a problem with disclosures concerning serious and substantial waste in local government (Issue 4). Disclosures about all three types of conduct can also be made to the General Manager of each council under the existing scheme of reporting.

19. It is unclear whether this means a disclosure which was made previously by the same person or a disclosure made by another person. If a disclosure has been partially investigated or resolved on a previous occasion and had been made for a second time by the same person, there may be some issue as to whether that second disclosure is protected because it may be considered to be frivolous or vexatious especially if the allegations made had not been substantiated. If there is additional information

provided on the second occasion that the disclosure is made it would be less likely to be frivolous or vexatious. If two different persons make the same disclosure then each ought to have the benefit of being protected.

20. Not relevant to the ICAC.

21. Acknowledgment of the receipt of disclosures should occur as a matter of course whether or not there is a specific requirement for that to be done. However it may not be practicable to outline the action which is to be taken or indicate the time frame of the investigation in all cases and there should not be a mandatory requirement to do so other than in very general terms. The issue further highlights the inappropriateness of treating anonymous disclosures as protected.

22. Whilst such an approach might produce satisfactory results in some cases, it would mean that the identity of the person making the disclosure would have to be made known. In addition persons with different or additional skills would have to be employed by the investigating authorities.

23. Refer 2.11 of submission at page 12. Note the clear inference in s.19 of the Protected Disclosures Act that an investigating public authority or officer to whom a disclosure is made may decide not to investigate a matter. A provision such as that as referred to in Issue 23 would however clarify the situation especially in light of s.3(1)(c) of the Protected Disclosures Act which states that one of the objects of the Act is to provide for disclosures to be properly investigated and dealt with.

24. No comment - this is a matter for the Auditor General.

25. No - statistics may be open to misinterpretation. Much can depend on the quality of the disclosure which is not within the control of investigating authorities.

26. Funding is relevant to the review of the legislation, if the ambit of the Act is to be extended, for example by adopting the matter in issue 11.

27. Refer to Parts 3 &4 of the ICAC submission to the Committee. Note that the Premier has agreed in principle to an approach involving the formation of a steering committee which includes a number of agencies. This proposal was put forward because the ICAC Research findings suggested that further work needed to be undertaken by central government agencies to promote the benefits of the Protected Disclosures Act and encourage organisations to meet its requirements.

28. Refer submission 2.8 at page 10.

29. Refer submission 2.7 at page 10.

30. It would be more equitable if an amendment were to be made to the relevant Act in relation to local government employees so as to afford them protections such as those afforded through the Public Sector Management Act and the Government and Related Employees Tribunal Act to state government public officials. It should be noted that other public officials such as those employed by the State Rail Authority and the Roads and Traffic Authority do not have access to GREAT either.

31. Note submission 2.6 at page 9. Protections in s.20 are not generally applicable to councillors. The rationale for them to be included is difficult to appreciate. Like Members of Parliament they are not employees, they respond to and are part of the political process - not the industrial process. However they already have protections under s21, such as those concerning defamation proceedings.

32. Refer submission 2.3 at page 8.

33. Refer submission 2.9 at page 11. The operation of s.21(2) should be limited to matters which are related to the principal subject matter of the disclosure and should not permit wider revelations to be made.

34. Refer submission 2.10 at pages 11-12.

35. Refer submission 3.7 at page 18: Refer Appendix 1 at page 6. As the ICAC's research shows many government agencies and local councils have failed to implement an, or an adequate, internal reporting system for protected disclosures.

36. This issue is similar to that raised in paragraph 3.2 of ICAC's submission on page 16.

37. This and the previous two issues are among those to be addressed by the steering committee comprising officers of the ICAC, Ombudsman, Auditor-General's Department, Public Employment Office, Department of Local Government and the Cabinet Office.

38. Refers 2.8 of submission on page 10. It may not be appropriate a public authority to investigate an allegation of detrimental action, if it is that authority, or its CEO or another senior employee, which has allegedly taken the action. The Ombudsman has the jurisdiction to investigate allegations of detrimental action arising following protected disclosures made or referred to her. In those cases where the Ombudsman has dealt with the initial disclosure, it would be more efficient for the Ombudsman to investigate any allegations of detrimental action in the matter.

39. Refer submission 2.8 at page 10. If such a statutory duty were to be imposed, a scheme would need to be set up whereby the statutory authority is required to refer a matter to the ICAC if it does not have the capacity to investigate such an allegation itself.

40. The penalty for taking detrimental action as defined in s.20 of the Act is a fine of $5,000 or 12 months imprisonment or both. There is also provision for disciplinary action to be taken under the Public Sector Management Act. Also note matters raised under Issue 30 - disciplinary provisions are not available to all public sector authorities. The punitive nature and deterrent effect of the existing penalty might differ according to who is paying the penalty. While it may be onerous for an individual public official who has taken detrimental action against a person to pay a fine of up to $5,000, such an amount may not have deterrent value against public authorities. It may be that if the public authority is the body which has taken the detrimental action a higher penalty should be imposed or the penalty could be imposed on an individual whose responsibility it is to prevent such action.

41. This question is a policy issue. Damages as opposed to compensation may create problems, eg budgetary as well as in relation to the credibility of the complainant. It may be a more satisfactory result for a person subjected to detrimental action to be able to claim compensation for any pecuniary loss and damages, if it has occurred, rather than merely prosecute or take action to ensure prosecution occurs of the person who has taken the action against them. Refer submission 2.8 at page 11.

42. It is not clear whether this is a reference to a right of appeal against the decision of the investigating authority (or other authority or official to whom a protected disclosure has been made) not to investigate. If it is, then such a provision providing a right of appeal would interfere with the discretion of investigating authorities etc to investigate. Such a right would be likely to delay finalisation and would not be consistent with the scheme of the Act. The person who has made a protected disclosure is protected whether or not the authority investigates.

43. The ICAC has not observed such delays.

44. No. It is not appropriate for investigative authorities to issue injunctive orders. Injunctions are serious interferences with individual rights and are the province of the Supreme Court, not administrative bodies such as the Auditor General, the Office of the Ombudsman or the ICAC.

45. This issue is related to Issue 41. See that answer.

46. There are already provisions in the ICAC Act for a witness to obtain financial assistance in relation to legal representation. This would apply to protected disclosures as to any other matter.

47. It is not in the public interest for such requirements to be imposed. To impose such a requirement would be to allow the buying of silence and could prevent exposure of the wrong the subject of the disclosure.

48. Since it is remedial legislation it would, as a matter of law, be so interpreted. An express provision would not cure inadequacies of drafting in the Act.

49. There is an obligation on investigating authorities to protect the person who has made a protected disclosure under the confidentiality guideline in s.22. Protection of the interests of public officials is more appropriately addressed by educating public authorities and public officials generally about their obligations in relation to Protected Disclosures Act. To make provision in the form suggested by the question would be unwise and could turn investigating authorities into bodies with a quite different (and costly) function from that presently conferred. It could impact on budget and in turn on the exercise of discretion.

50. There are already sufficient investigating agencies (Note the Police Integrity Commission will also be an investigating authority).

51. This is related to Issues 41 & 45. Some persons may already be able to obtain compensation if they are wrongfully dismissed on an appeal to GREAT. It is a matter for Parliament to decide whether action such as compensation for losses arising from protected disclosures should be taken in the local courts or in some other forum but general access to the Courts would add to the expense of administering the Act.

52. Disclosures which are genuine in the opinion of the person making the disclosure but are not objectively genuine attract most of the protections afforded by the Act. This is unless they are determined to be frivolous or vexatious or have been made with the intention of avoiding disciplinary action or dismissal. It is only when the disclosure is taken to a journalist or a member of Parliament that the requirement that the disclosure be substantially true applies. It is appropriate that truth, rather than the opinion or belief of the discloser (which may be genuine but quite wrong headed ) be the determinant.

LOCAL GOVERNMENT and
SHIRES ASSOCIATIONS of NSW

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PLEASE NOTE: As from 29 July 1996 the Associations' phone number will be 9242 4000; fax 9242 4111

Our ref.: R93/0112.DC

4 July 1996

Mr Bryce Gaudry MP
Chairman
Joint Committee on the Office of the Ombudsman
Parliament House
SYDNEY NSW 2000



Dear Mr Gaudry

**Re: Review of the Protected Disclosures Act 1994**

I refer to the appearance of Cr Peter Woods, President of the Local Government Association of N.S.W., and me before your Committee yesterday.

As arranged, a copy of the notes prepared for the Associations' submission are enclosed.

The issue of the apparent conflict between section 21 of the Act and section 664 of the Local Government Act 1993 will be the subject of a separate submission. This is now in the course of preparation. Its thrust is likely be that the obligation imposed on councillors under the Local Government Act 1993 to maintain confidentiality in matters discussed and dealt with in closed council meetings should prevail over any protection available under the Protected Disclosures Act.

Yours sincerely

David Clark
Legal Officer

# REVIEW OF THE PROTECTED DISCLOSURES ACT 1994

## NOTES ON ISSUES

## LOCAL GOVERNMENT AND SHIRES ASSOCIATIONS OF N.S.W.

### GENERAL REMARKS

The Act does not seem to have been a matter of great moment for councils. Only two have sought advice from the Associations about any aspect of its operation, on both occasions these inquiries being on the basis of "what do we do if we get a disclosure" rather than "we've got a disclosure, how do we deal with it". As far as the Associations are aware, no council has actually had to face a situation involving the operation of the Act.

The notes which follow deal with matters raised in the Issues Summary issued by the Committee using the numbering sequence set out in that document.

### ISSUES

1-3. There will always be difficulties with definitions of these matters, because to a large extent they need to be defined in terms of the facts of the particular case. By and large the definitions given in the Act (in those instances where a definition is in fact given) are as adequate as they can be.

4. The Associations see no need to give the Auditor General power to investigate disclosures under the Act relating to local government. Matters involving serious and substantial waste of public money within local government will almost certainly involve either maladministration (which can be investigated by the Ombudsman) or corruption (by ICAC). As such, there are already adequate avenues for investigating such matters.

   The Associations are particularly concerned that the Auditor General should not be given this power. The Auditor General does not at present have any jurisdiction over local government, councils being free to appoint their own auditors. The Associations are concerned that if the Auditor General is given this power, his office will insist on greater involvement in other areas. This has the potential for causing unnecessary expense for councils.

5. The Associations see no need for the Department of Local Government to be involved in this way.

6. The Associations consider that the Act does allow that protection.

7. The Associations have no strong view on this matter.

8. The coverage of the Act should be extended to external organisations carrying out work for public authorities under contract, but only in relation to the carrying out of that work.

9. The Associations have no strong view on the IAB's role, but it may be useful for internal auditors to be able to receive internal disclosures.

10. It is in the community's interest that the Act should extend to police officers.

11. This rather suggests that the Act as it stands has very little to do.

12. If this is so, the Act should clarify the status of such disclosures.

13. Such a requirement might disadvantage some people. It may be better that the requirement be for anyone receiving a disclosure under the Act which is not in writing to make a written record of it.

14. The Associations see no need to change, given that the type of conduct investigated by each body is different.

15. Section 25 of the Act deals adequately with this issue.

16. The whole purpose of the Act is to afford protection to those who identify themselves when making a disclosure. Anonymous disclosures should not be investigated or afforded any protection.

17-18. The status and rights of councillors under the Act needs to be clarified. A separate written submission will be made on the apparent conflict between section 21 of the Act and the obligation on a councillor under section 664 of the Local Government Act 1993.

19. To a large extent this depends on whether or not the fresh disclosure adds new information which would not otherwise have come to light. If it does, it should receive the same protection as a disclosure *ab initio*.

20. Not of direct relevance to local government.

21. Acknowledge, yes; as to the other matters, the Associations have doubts that it would be practicable or even necessary.

22. This can do no harm.

23. Yes, if only to clear away any doubt on the matter.

24. This type of allegation is serious, and there should be some provision made for specific reporting arrangements.

25. Yes, if only to show how much use is made of the Act.

26. There is no point in having an investigating system which cannot function because of a lack of resources.

27. The question should really be, "How much use is made of the Act by officers of Government departments and agencies?". If the Associations' experience is anything to

go by, the answer would be "Very little". Is this because people are not aware of the Act, or because it is not understood, or because most agencies actually have adequate internal mechanisms to deal with this sort of problem?

28. Yes, but the onus should only be to the civil standard, i.e. proof on the balance of probabilities.

29. The protection given by the Act to those who make disclosures is already adequate. Such additional obligations are unnecessary.

30. Is this really an issue, given the little use which seems to have been made of the Act in local government thus far?

31. This will be the subject of a separate submission.

32. It should be made clear that disclosures pursuant to a statutory duty are protected.

33. The matters disclosed must be relevant and made in good faith.

34. The source of the information is not relevant, nor is the capacity in which the discloser received it.

35. On the face of it, local government's systems seem to be reasonable and adequate.

36. It should not be difficult for organisations to set up structures to deal with officers in isolated or small units. Protected disclosure should be an important tool in fraud prevention; whether it is so in fact cannot be judged on the basis of the figures available.

37. It is important that any information provided by agencies to staff should be relevant and accurate.

38. This will depend to a large extent on what is brought to light by the disclosure. Prosecution action is probably best initiated by the Director of Public Prosecutions at the instance of the investigating agency, in cases where such action is warranted.

39. Yes.

40. The penalties already prescribed in s.20 are probably adequate, but it may be of value for the Act to go on to say that the imposition of a penalty under that section should not prejudice the right of the agency employing the offender to take disciplinary or other action against the offender.

41. For completeness, it would be desirable for these matters to be spelled out in the Act.

42. The Associations have no strong views. The legislation's track record so far does not suggest that this needs to be considered at the moment. It could be a two-edged sword, in that an officer with a fixation about a matter could use such a provision as a trouble-making exercise.

43. It is clearly in everyone's interest that any such claim be dealt with expeditiously, so that the air is cleared and things can be allowed to return to normal (or as near to normal as circumstances will allow).

44. The provisions of section 20 of the Act are adequate in this regard.

45. Yes, if the losses stem directly from the making of the disclosure.

46. Only on a needs basis. In appropriate cases it might be useful for a tribunal to be able to make an order for costs in favour of such a person.

47. On balance, the answer is probably yes.

48. This is likely to happen in any event. It is preferable that it should not be enshrined in legislation.

49. This is adequately covered by the Act as it stands.

50. It is unlikely that such an agency would substantially improve the present process.

51. Is there a need for this? What is the nature of the "compensation" which would be awarded, and the reason(s) for awarding it? The Associations need more information on this issue before commenting further.

52. This will always be a problem with this kind of legislation. The Act as drawn probably goes as far as it needs to in dealing with such situations.

**ISSUES RAISED BY THE OMBUDSMAN (Annexure 1 to the Issues Summary)**

Issue 1: Yes

Issue 2: The phrase should be interpreted as referring to conduct within the jurisdiction of the Ombudsman.

Issue 3: Jurisdiction.

Issue 4: No. This is something which will depend on the facts in each case. Devising a workable definition would be difficult.

Issue 5: Not of direct relevance to local government, but there seems to be no reason why this should not be the case.

Issue 6: No. Anonymous disclosures should be given very short shrift. There is a real danger that if anonymous disclosures are tolerated the level of frivolous or vexatious complaints will rise, to the detriment of the investigation of those complaints which are genuine.

Issue 7: The expression is vague, and could usefully be clarified.

Issue 8: Yes.

Issue 9: No. The section is quite explicit, and there seems to be no basis for extending it in this way.

Issue 10: The source of the information is irrelevant - if the disclosure is made by a public official in respect of the official activities of his/her organisation, and is in accordance with the Act, it should be protected.

Issue 11: The important aspect of this is surely that the investigating body must be able to say at some stage of its investigation that there has or has not been corrupt conduct, etc. However, it is probably reasonable to say that the initial complaint should at least show prima facie evidence of some sort of improper behaviour.

Issue 12: It is probably not appropriate, given that they are not in the same position as an employee of their organisations. The Act should specifically provide that it does not affect the operation of section 664 of the Local Government Act 1993 (Disclosure and misuse of information), particularly in relation to the unauthorised release of information relating to matters discussed at closed council meetings [s.664(1A)]. A separate, more detailed written submission will be made on this point.

Issue 13: There is concern in some quarters that the Act could be misused by complainants, even though there is at present no evidence to suggest that there is in fact such misuse (in local government, at least). That said, such a provision would be useful if there is evidence of widespread misuse in other areas.

Issue 14: Do these two expressions refer to the same thing? If so, then for consistency they should be the same. Otherwise, there is no need for change, since the difference in terminology emphasises that the references are to different procedures.

Issue 15: The discloser should be given sufficient information to satisfy him/her that reasonable steps have been taken to investigate the matter the subject of the disclosure. What will amount to "sufficient information" will depend on the nature of the disclosure in each case.

Issue 16: For the reasons already advanced, it should not.

Issue 17: Section 25(2) says that a disclosure **must** be referred on in the circumstances set out in the section. On that basis, the investigating authority has no discretion even in these circumstances. Perhaps the Act requires amendment in this area.

Issue 18: Sections 16-18 of the Act deal with disclosures which are not protected in any event. There seems to be no point in referring on a disclosure to which these sections apply.

Issue 19: Yes.

Issue 20: The Act deals adequately with this already.

Issue 21: Responsibility should rest with the Director of Public Prosecutions, if only to show that it is being dealt with by an arms-length organisation.

Issue 22: No.

Issue 23: If the investigating authority sees a need to keep confidential the identity of the discloser, a process should be available should be available to ensure that the confidentiality is maintained.

Issue 24: Yes. Parts of a disclosure which is otherwise protected might not be protected in themselves because they did not come within the terms of the Act.

Issue 25: If this is the case, clause 20(d) of Schedule 1 to the Freedom of Information Act may need to be amended to ensure that the discloser's identity is not revealed.

**Whistleblowers Australia Inc.**
New South Wales Branch



*All it needs for evil to prosper is for people of goodwill to do nothing.* **Edmund Burke**

Ms Helen Minnican,
Project Officer,
Joint Committee on the Office of the Ombudsman,
Parliament House,
Macquarie St., Sydney
July 14, 1996.

Dear Ms Minnican,

Re: Issues Summary - to the Review of the Protected Disclosures Act 1994.

Attached is the required response to the Issues Summary by Whistleblowers Australia Inc. (N.S.W. Branch). I have used your order of presentation.

Thank you for the opportunity to provide further comment. I would appreciate if I could be kept informed of the outcome of the Committee's review and would assist when and as is possible in the future.

Yours Sincerely,

Cynthia Kardell.

Cynthia Kardell,
Whistleblowers N.S.W..

**P.O. Box M44, Marrickville South, N.S.W. 2204**

**Submission from Whistleblowers Australia Inc (N.S.W. Branch).**

## REVIEW OF THE PROTECTED DISCLOSURE ACT 1994

## RESPONSE TO THE ISSUES SUMMARY

### GENERAL COMMENT

1. There is not much to be gained in trying to coin a replacement for 'whistleblower.' It is pointless. *It is.* And it is a matter of pride.

   Whistleblowers have no difficulty with the word only with the treatment meted out to them and this is where the Committee should direct its efforts.

2. The Act *should be renamed* to focus on public interest whistleblowing.

   It should be titled ***The Public Interest Disclosures Act*** providing for the constitution of a *Public Interest Disclosures Agency and the protection of public interest whistleblowing.*

### DEFINITIONS

1 - 2. The *requirement* to provide examples of definitions, explanation, assistance and advice etc should be legislatively prescribed, to be dealt with at an operational level. A P.I.D.A. would address this need.

3. Defining the general nature of a *public interest disclosure* could prove useful. However its focus should not be on the procedural requirements for a disclosure to be made but on its content. It should emphasise the public interest inherent in the information being known, made public and acted upon by an appropriate authority.

### JURISDICTIONAL ISSUES

4. ***Local Govt.*** - The scrutiny of Local Government should fall within the jurisdiction of the Auditor General.

5. Further investigating authorities is probably counter - productive.

6. ***Community Services*** - Protected public interest disclosures per se should be possible from the Department of Community Services, the Ageing and Disability Department and the Home Care Service of NSW.

7. Further investigating authorities is probably counter - productive.

8. ***Contract agencies*** - coverage of the Act should be extended to employees of contract agencies.

9. ***Internal Audit Bureau*** - The Chief Executive Officer (CEO) could provide for this within the terms of the individual contract thereby making the I.A.B. the *internal investigative unit for receipt of protected public interest disclosures* responsible to the CEO for the purpose.

10. ***Police service*** - This anomaly needs to be addressed: in fact it raises the whole question of whether the mandatory / voluntary distinction need even be there. Whistleblowers believe it to be confusing, unnecessary and open to manipulation when it could be argued that making public interest disclosures should be the norm not the exception.

11. ***Private sector*** - Yes. Particularly when the boundaries between public and private are becoming so blurred and indecipherable.

12. ***Preliminary enquiries*** - Public officials who provide information in the course of preliminary investigations are, like witnesses, often subjected to reprisals and should be afforded protection.

**MAKING A DISCLOSURE**

13. Disclosures made in writing are preferable as it concentrates the mind and benefits the whole process. It need not be mandatory.

14. Uniformity of procedural requirements across all interrelated acts is essential.

15. Many of these issues are resolved simply by first focussing on the substance of the public interest disclosure rather than the actions of the whistleblower and then, on whether they were made to an investigating authority. There should be no loss of brownie points for not having correctly matched information to authority, after all, this is why the investigating authority is there.

16. ***Anonymous disclosures*** - The difficulties associated with processing anonymous disclosures are overrated and often (Whistleblowers suspect) conveniently so. Again, focus on the information and the matter resolves itself.

    Actual protection can be afforded later, when the whistleblower comes forward (when the protection initially afforded by anonymity starts to disintegrate).

17. ***Local Govt. Councillors*** - Whistlblowers considers any extension of the Act in this direction inappropriate.

18. Ditto the above item.

## DEALING WITH DISCLOSURES.

19. Judicial appeal should be possible where partially investigated or wrongly resolved matters are a source of detriment to the whistleblower. Their protected status should continue whilesoever the matter is active in its effect on the whistleblower.

20. ***Special audits*** - No comment.

21. ***Responding to a disclosure*** - Investigating authorities should keep the whistleblower adequately informed. It is a very reasonable expectation and the fact that the question must be addressed (now) indicates the need for it to be a legislated requirement.

22. No. Public interest whistleblowing is not a dispute between parties.

23. No. The discretion not to investigate should not be available in relation to protected public interest disclosures and in particular to those giving rise to allegations of detrimental action. Legislation is required.

## REPORTING REQUIREMENTS

24. No comment.

25. ***Annual Report entries*** - Most assuredly yes. How else can one competently assess an the agency's performance?

## FUNDING

26. Whistleblowers is not in a position to comment further than to say that 'adequacy' does not necessarily ensure that the budget is spent in a manner consistent with the object of the Act. Firstly one would need to consider whether the expressed object of the organisation in question is consistent with the legislation and or public perception..

## EDUCATION & UTILISATION

27. Whistleblowers suspect 'precious little.' Admittedly ours is necessarily a biased view however it is reliable indicator of there being problems with the adequacy of current arrangements.

## ADEQUACY OF PROTECTIONS UNDER THE ACT

28. No. Most emphatically not: it is not consistent with 'encouraging and facilating' public interest whistleblowing.
Invariably the employer's response to even the would be whistleblower is to immediately 'muddy' the waters. Even the blemish free will not survive as the strength of reprisal is usually in direct proportion to the employer's knowledge of their own actions and the threat of exposure.

Rather curiously the ability to bring a criminal action under section 20 of the Act is portrayed by some as a protection. It is not. It is the final outrage. After the studied indifference of the investigating authorities, dismissal and personal loss it remains for the whistleblower to bring the offender to book.
Ahhhh but some would say .... it is a great save on the budget.

29. Yes. Most definitely. That is protection from reprisals; meaning security of and safety in employment while the matter is properly investigated and making the public interest disclosure the subject of proper and public inquiry.

The matter should not as a matter of common practice get to the Industrial Relations Commission. If it did then the employer should be directed to reinstate the whistleblower pending the outcome of the investigation.

30. ***Local government employees*** - no comment.

31. ***Local government councillors*** - Whistleblowers suspect none.

32. The mandatory / voluntary distinction needs to be addressed. Whistleblowers is not sure that it should be retained as a determinant for protection.

33. None. It is given in confidence in the public interest to facilate the investigation in the public interest.

34. No. The two are in all likelihood inseparable and essential.

**INTERNAL REPORTING SYSTEMS**

35. Time, continuing effort and inclination may solve these issues. As a practice the whistleblower should be made aware that external disclosures are more likely to succeed where they relate to senior management.

36. A P.I.D.A. could overcome these difficulties.

37. Consistency is everything. However written advice will never suffice or overcome the need for people to deal directly with people whether as part of a P.I.D.A. or not.

**DETRIMENTAL ACTION**

38. ***Prosecutions re detrimental action*** - Detrimental action *is* a corrupt use of power. Allegations of corrupt conduct *are* made to the I.C.A.C. for investigation. The I.C.A.C. *has* a responsibility to investigate corrupt conduct. The I.C.A.C. *has responsibility for the referral of criminally corrupt conduct to the D.P.P. for prosecution.*

Criminal matters are usually a matter for the State.

Now that the Ombudsman is able to investigate allegations of detrimental action arising out of a matter under their investigation a similar strategy should apply.

39. Investigating authorities should have a duty to investigate allegations of detrimental action and take appropriate disciplinary action as required.

40. Detrimental action should be made the basis for both tortious and exemplary damages at the personal and institutional level. Penalties should be both financial and or custodial.

41. Yes. Most definitely. The likely prospect of a successful claim for damages and compensation would provide a real deterrent against detrimental action.

42. Yes. The very fact of detrimental action could well be evidence of there being some substance to the whistleblower's original public interest disclosure.

43. Stipulating a timely and appropriate response to a public interest disclosure is probably the first and strongest protective measure the Act can provide. Where the disclosure gives rise to detrimental action the nature of that response is of the essence.

Public sector management should not be able to rely, as they do, on the likelihood that the investigating authority may well do nothing but if they do then by that time the whistleblower will have been so thoroughly discredited as to make dismissal or medical retirement plausible

Investigating authorities *must investigate* and not see investigation as simply a self serving device to further its own aims. A budget well spent is not simply that which comes in on target.

44. Yes indeed there is a need for the issue of injunctive orders preventing dismissal..... because the priority is the public interest disclosure and that the potential for harm to the individual as a result of making that disclosure should be removed.

It is not a matter of cocooning a possibly unsatisfactory employee from a reckoning: although it could occur. This is not a real concern. Mostly the employer, knowing rather more than the whistleblower, has good reason to fear exposure and corruptly makes the necessary opportunity to dismiss or medically retire the whistleblower. Presently the employer thinks that they can get away with it.

Consider for example the recent reports in the media regarding the treatment meted out by the SRA to whistleblower Ms Neena Chadha and the less than satisfactory response to being caught out (reinstatement followed by an immediate one month suspension).

This is an area where the likely overall benefit to the public sector has to be put ahead of the possibility that the employer may lose an opportunity to shed

a less than satisfactory employee..... particularly where to do so may well be a criminally corrupt use of power.

45. Loss due to detrimental action should be made a tort to provide a safety net for whistleblowers in the event that legislative protective measures are not properly utilised.

Loss should be distinguished from reward, which for a whistleblower is to be instrumental in putting right what was wrong.

46. Yes. It is an upfront and sensible action which may avoid the need to take further legal action to obtain compensation for loss. It could also be a powerful deterrent to the employer with deep pockets who tries to 'starve out' the whistleblower.

## SETTLEMENT PROVISIONS

47. It is not in the public interest to silence public interest whistleblowing because it gives the organisation an out.... an opportunity to avoid full and public accountability. Nor is it reasonable to see entry into an agreement as simply a matter of individual choice..... there is no equity.

## SUPPORT FOR PUBLIC OFFICIALS MAKING DISCLOSURES

48. This is an absolute essential and maintains the public interest as the filter. Should there be a perceived need to provide a balance then the nature of a public interest disclosure should be defined.

49. The need for an explicit obligation on investigating authorities to protect the whistleblower is readily apparent given the experience one year on: one which tends to suggest that the need wasn't obvious to some.

50. Whistleblowers believe a P.I.D.A. with the primary object of furthering public interest whistleblowing will suffer none of the conflicts of interest that seem to beset existing agencies..... and achieve where the others have not.

51. Whistleblowers can only reiterate that to succeed public interest whistleblowing must be a reliably safe option free of personal loss.

## OTHER MATTERS

52. Whistleblowers believe this to be a futile exercise. The focus should, must, be on the public interest disclosure and if that is the approach then it acts as a self filtering process. There need be no interest in what drives the whistleblower.

If there needed to be a test for any reason then it should be whether it is in the public interest for the information to be known, made public and acted upon by an appropriate authority. To do it any other way is to put the cart before the horse ..... and fail the wider public interest.

Philosophically, making the whistleblower and not the disclosure the focus is (Whistleblowers believe) revealing of an inability to see these issues other than in terms of power and a concern that yours (rhetorically speaking) might well become the vested interest under threat.

# Annexure I

Internal Audit Bureau responses to issues raised by the Committee.

Issue 1 Yes

Issue 2 First interpretation "conduct within juristiction ..." appears appropriate.

Issue 3 Yes

Issue 4 Yes

Issue 5 Yes

Issue 6 Yes

Issue 7 Yes

Issue 8 Yes

Issue 9 No

Issue 10 No

Issue 11 Yes

Issue 12 No

Issue 13 Yes

Issue 14 Yes

Issue 15 The person should be advised of the outcome of the investigation in general terms or if no action can be taken the reasons why.

Issue 16 No

Issue 17 No

Issue 18 Yes

Issue 19 No

Issue 20 No

Issue 21 Police Service

Issue 22 No

Issue 23 Yes

Issue 24 No

Issue 25 Can't be sure if the person will be identified or not, it is a case by case issue.

**W Middleton**
**MANAGING DIRECTOR**

# Minutes of the Meeting of the Committee on the Office of the Ombudsman & the Police Integrity Commission

Thursday, 2 May, 1996
Jubilee Room, Parliament House, 9.00am

**Members Present**

**Legislative Assembly**
Mr B Gaudry (Chairman)
Mr J Anderson
Mr J Kinross
Mr P Lynch
Ms C Moore
Mr A Stewart

**Legislative Council**
The Hon M Gallacher
The Hon E Nile
The Hon P Staunton

**Apologies**
Mr A Fraser

**In Attendance**
Ms Helen Minnican (Project Officer) and Ms Ronda Miller (Clerk)

The Chairman opened the meeting and welcomed Mr Gallacher as a new member of the Committee.

1. **Confirmation of the Minutes** - Minutes of the meetings held on 20 November and 7 December, 1995 were confirmed on the motion of Mr Anderson, seconded by Mr Stewart.

2. **Correspondence arising from the Minutes** - The Committee noted the following items of correspondence previously circulated and despatched:

   A. **Dr Evan Davies:**
      i) Letter from the Chairman to Dr Davies dated 20 November, 1995.
      ii) Letter from the Chairman to the Ombudsman dated 20 November, 1995 - seeking advice on issues raised by Dr Davies.
      iii) Advice to the Chairman from the Ombudsman, dated 28 November, 1995, concerning Dr Davies' correspondence.
      iv) Letter from the Chairman to Dr Davies dated 6 February, 1996 providing a final response to Dr Davies' correspondence.

   B. **Councillor Leon Atkinson - Nambucca Shire Council:**
      i) Letter from the Chairman to Councillor Atkinson dated 20 November, 1995.
      ii) Letter from the Chairman to the Ombudsman dated 20 November, 1995 seeking advice on Councillor Atkinson's correspondence.

iii) Advice to the Chairman from the Ombudsman dated 22 November, 1995.

iv) Letter from the Chairman to Councillor Atkinson dated 6 February, 1996 informing the Councillor of the Ombudsman's advice on the Councillor's proposals.

**C. Mr Dowsett**

Letter from the Chairman to Mr Dowsett dated 20 November, 1995 concerning the Committee's response to his original correspondence about the investigation of his complaint to the Ombudsman's Office.

**D. Mr Peter Gill**

i) Letter from the Chairman to Mr T Windsor, MP dated 20 November, 1995 advising of Committee's response to the Ombudsman's advice on Mr Peter Gill's complaint.

ii) Letter from the Chairman to the Ombudsman, dated 20 November, 1995, seeking further assurances on office confidentiality procedures.

iii) Letter from the Ombudsman to the Chairman dated 21 December, 1995 providing further advice on office confidentiality procedures.

The Committee resolved on the motion of Mr Lynch, seconded Mr Anderson, to forward the Ombudsman's advice of 21 December, 1995 to Mr Windsor for his information.

**E. Police Complaints Review** - Letter from the Chairman to Mr G Crooke QC, Senior Counsel Assisting, Police Royal Commission, dated 8 December 1995, concerning the release of submissions to the Committee's police complaints review.

**F. Mr K Bruce** - Letter to the Chairman from Mr Morris Iemma, MP (Parliamentary Secretary to the Attorney) concerning previous correspondence from Mr K Bruce.

**G. Ombudsman's Office - Funds and Resources**

i) Undated letter from the Ombudsman received on 24 November, 1995 concerning proposed staff reductions within the Human Resources Section of the Office as a result of the current review of Corporate Services.

ii) Letter from the Ombudsman dated 14 December, 1995 concerning the Office's Forward Estimates and Enhancement Proposals for the next three financial years commencing 1996-7.

iii) Letter from the Chairman to the Premier dated 9 January, 1996 seeking advice on items i) and ii) prior to Committee's next meeting.

iv) Letter from the Premier to the Chairman dated 4 March, 1996 in response to request for advice on Ombudsman's budget situation (i.e. item iii).

The Committee agreed to discuss the funding situation for this area of the Office's operations during the next General Meeting with the Ombudsman which would preferably be scheduled for after the end of the current parliamentary session.

**H. Mr R Lee**

i) Letter from Dr P Macdonald MP to Chairman, dated 19 December, 1995 concerning correspondence from Mr R Lee, a former complainant to the Ombudsman.

ii) Letter to Ms R Miller from Mr Lee dated 15 December 1995 concerning his previous correspondence to the Committee.

iii) Letter from Project Officer to Dr Peter Macdonald dated 4 January, 1996 providing interim advice to item i) prior to Committee's next meeting.

iv) Letter from the Project Officer to Mr Lee acknowledging representations by Dr Macdonald on his behalf dated 4 January, 1996.

The Committee resolved on the motion of Mr Lynch, seconded Ms Staunton, to advise Dr Macdonald that it does not propose to take any further action on Mr Lee's correspondence although it will provide the Ombudsman with a copy of his letter for any comment she may wish to make.

**I. Mr Ray Emmerton**

i) Letter from Mr Ray Emmerton, dated 30 November 1995, concerning a police complaint he made to the Ombudsman.

ii) Letter from the Chairman to Mr Emmerton, dated 6 February, 1996, explaining the Committee's functions and inviting him to resubmit his correspondence.

The Committee noted this correspondence and resolved on the motion of Mr Anderson, seconded Ms Staunton, not to take any further action on this matter.

**3. Business Arising from Minutes**

The Committee noted advice from the Clerk to the Committee concerning potential conflicts for Members when dealing with matters affecting the interests of their constituents.

**4. Correspondence received**

**A.** i) Letters from Mr and Mrs P Bowden, dated 9 April and 17 March, 1996 concerning the investigation of a complaint they made to the Office of

the Ombudsman.

ii) Letter from the Chairman to Mr Bowden, dated 3 April 1996, explaining the Committee's functions and inviting them to resubmit their correspondence.

The Committee noted this correspondence and resolved on the motion of Ms Staunton, seconded Mr Anderson, not to take any further action unless the correspondence is resubmitted in a meaningful way.

**B.** Letter to the Committee from Mr Trevor Jenson, dated 15 April, 1996, concerning a complaint he made to the Ombudsman about his Local Council. The Committee resolved on the motion of Mr Lynch, seconded Mr Stewart, that the Chairman should write to Mr Jenson explaining the Committee's functions and its inability to review determinations by the Ombudsman. It would then be open to Mr Jenson to resubmit his correspondence should he have any procedural matters which he wishes to pursue.

The Committee also agreed that it should discuss the educative roles performed by the Ombudsman and the Committee at the next General Meeting.

**5. A.** **Police Complaints Review** - The Committee resolved on the motion of Mr Lynch, seconded Ms Staunton, that in view of the Royal Commission's Interim Report and the proposed changes to the police complaints system the Committee should obtain formal briefings from the Royal Commission and the Ombudsman's Office prior to deciding the course it should take in relation to its Police Complaints Review.

**Police Corruption Commission Bill 1996** - The Committee also resolved on the motion of Ms Moore, seconded Ms Staunton, to examine the Police Corruption Commission Bill 1996 in order to prepare a submission to the Minister for Police stating its view that the Ombudsman Committee, rather than the ICAC Committee, would be the most appropriate parliamentary committee to oversight the operations of the proposed Police Corruption Commission and the Inspector of the PCC.

**B.** **Review of the Protected Disclosures Act 1994** - The Committee discussed the scope and conduct of the review. It was agreed that the Chairman and Project Officer would arrange to publicly advertise the review and call for submissions. The Committee resolved on the motion of Mr Stewart, seconded Mr Kinross, that the Project Officer should organise dates for public hearings and submit for the Committee's approval a list of individuals and groups from whom submissions would be invited, including the Ombudsman, ICAC Commissioner, and Auditor-General. The confidential background briefing material supplied by the Deputy Ombudsman was distributed to Committee

Members.

6. **International Ombudsman Conference 1996** - The Committee discussed a proposal for a delegation to attend the conference and visit Ombudsmen and Parliamentary Ombudsmen Committees in the United Kingdom and Canada. It was resolved on the motion of Ms Staunton, seconded Mr Anderson that the Committee should submit the travel proposal, as agreed, to the Presiding Officer for approval.

7. **General Business**

**A** **New functions for the Ombudsman - Witness Protection Act 1995**
The Committee discussed funding arrangements and the nature of the Ombudsman's functions under this Act and signalled this subject as a matter for further examination during the next General Meeting.

**B** **Ombudsman's Report on "Botany Council's challenge to limit the scope of the FOI Act and the jurisdiction of the Ombudsman" - January 1996.**
The Committee noted the Ministerial Statement made by the Minister for Local Government in response to the Ombudsman's report on Botany Council. (Hansard - 17 April 1996). The Committee directed the Project Officer to prepare a briefing on the proposed amendments to the FOI Act referred to in the part of this report made under section 31 of the Ombudsman Act 1974.

The meeting concluded at 10.00 am.

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Thursday, 6 June, 1996
Greenway Room at 4.00pm

**Members Present**

**Legislative Assembly**
Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr P Lynch MP
Ms R Meagher MP
Ms C Moore MP

**Legislative Council**
The Hon M Gallacher MLC

**Apologies**
The Hon P Staunton, MLC, The Hon E Nile, MLC, Mr T Stewart MP and Mr J Kinross MP

**In Attendance**
Ms Helen Minnican (Project Officer), Ms Ronda Miller (Clerk) and Ms Natasha O'Connor (Assistant Committee Officer).

**Protected Disclosures Review**

1. *Hearing arrangements* - The Committee finalised the selection of witnesses for public hearings on the basis of submissions received to date.

2. Formal advice was requested from the Clerk-Assistant (Committees) regarding a request by Whistleblowers Australia for its National Director, Ms Leslie Pinson, to give evidence at a later date.

3. The Committee resolved on the motion of Mr Fraser, seconded Ms Moore, that the Project Officer should prepare an issues paper, based on issues raised in submissions, which would highlight some of the matters to be examined by the Committee. The Committee further resolved that the paper would be distributed to witnesses for the purpose of assisting them in preparing for hearings and would indicate some of the directions to be taken by the Committee.

   Witnesses would be advised that the review is not limited to examination of the issues outlined in the paper and that the Committee would welcome comment on any other aspect of the legislation.

4. *Whistleblowers Conference* - The Committee resolved on the motion of Mr Lynch, seconded Mr Gallacher, that the Project Officer should attend the Whistleblowers Conference being organised by the Victorian Branch of Whistleblowers Australia (Melbourne 29-39 June 96) and report back to the Committee. Members would be advised of the conference and a proposal would be submitted to the Speaker for approval if any Members wished to attend.

5. *Proposed review timetable* - The Chairman proposed a timetable for the conduct of the review including deliberative meetings to discuss the hearings and draft report. Members were requested to respond to the proposed meeting and hearing dates.

The meeting concluded at 4.20pm

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Tuesday, 2 July, 1996
at 10.00am in the Jubilee Room, Parliament House

**Members Present**

**Legislative Assembly**
Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr J Kinross MP
Mr P Lynch MP
Ms R Meagher MP

**Legislative Council**
The Hon M Gallacher MLC
The Hon E Nile MLC

**Apologies**
The Hon P Staunton, MLC, Mr T Stewart MP, Ms C Moore, MP.

**In Attendance**
Ms Helen Minnican (Project Officer), Ms Ronda Miller (Clerk) and Ms Natasha O'Connor (Assistant Committee Officer).

The Committee commenced in a deliberative session.

Resolved on the motion of Mr Lynch, seconded Mr Anderson, that the media be permitted to make sound and vision recordings of the Committee proceedings.

The Chairman opened the hearing to the public.

Mr John Edward Hatton, took the oath, acknowledged receipt of summons and tabled a submission. Mr Hatton addressed the Committee. The Committee Members questioned the witness. At 11.20am, the Committee went in camera to continue questioning Mr Hatton. Questioning concluded, the witness withdrew.

Dr William de Maria, Lecturer, University of Queensland, affirmed and acknowledged receipt of summons. Dr de Maria addressed the Committee, and then answered questions. Questioning concluded, the witness withdrew.

(Luncheon adjournment)

Ms Cynthia Kardell, Mr Robert May and Mr Graham Wilson, representatives of Whistleblowers Australia Inc - NSW Branch, all took the oath and acknowledged receipt of summons.

Ms Kardell addressed the Committee and tabled a submission on behalf of Whistleblowers Australia Inc - NSW Branch.

At 3.25pm the Committee went in camera.

Ms Kardell answered questions from the Committee, then withdrew.

Mr May entered, addressed the Committee, answered questions and then withdrew.

Mr Wilson entered, addressed the Committee, answered questions and then withdrew.

At 4.05pm the meeting re-opened to the public and Dr Simon Longstaff, Executive Director, St James Ethics Centre took the oath and acknowledged receipt of summons. Dr Longstaff addressed the Committee, and then answered questions.

Chief Inspector Caroline Smith, Commander, Internal Witness Support Unit, NSW Police Service; Ms Susan Elizabeth Thompson, Acting Deputy Director-General, NSW Police

Ministry and Ms Julie Heysmand, Policy Analyst, NSW Police Ministry all took the oath and acknowledged receipt of summons. Police Ministry submission was tabled.

The Committee questioned the witnesses. Questioning concluded, the witnesses withdrew.

The Committee adjourned at 5.50pm, until 11.00am, Wednesday 3 July 1996.

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Wednesday 3 July, 1996
at 11.00am in the Jubilee Room, Parliament House

**Members Present**

**Legislative Assembly**
Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr J Kinross MP
Mr P Lynch MP
Ms R Meagher MP

**Legislative Council**
The Hon M Gallacher MLC
The Hon E Nile MLC

**Apologies**
The Hon P Staunton, MLC, Mr T Stewart MP, Ms C Moore, MP.

**In Attendance**
Ms Helen Minnican (Project Officer) and Ms Natasha O'Connor (Assistant Committee Officer).

The Committee commenced in a deliberative session. The Chairman advised the Committee that the Law Society had withdrawn from the public hearings. The Committee resolved on the motion of Mr Anderson, seconded Mr Lynch, that the Committee should hold another deliberative meeting at the conclusion of evidence from the Department of Local Government. Minor changes to the hearings schedule were agreed to.

The Committee also discussed a letter from Mr John Turner MP, dated 3 July 1996 concerning the issue of protection available to Members of Parliament who receive protected disclosures. The Committee agreed to discuss this issue further at the deliberative meeting.

The Chairman opened the hearing to the public at 11.10am.

Mr David Michael John Bennett, QC, President of the NSW Bar Association, affirmed and acknowledged receipt of summons. Mr Bennett addressed the Committee, and then answered questions. Questioning concluded, the witness withdrew.

Mr Timothy James Campbell Rogers, Acting Director-General, Department of Local Government, affirmed and acknowledged receipt of summons. Fausto Sut, Manager, and Mrs

Janet Irene Ryan, Senior Investigation Officer, Investigations and Review Branch, Department of Local Government, took the oath and acknowledged receipt of summons.

Department submission tabled. Mr Rogers addressed the Committee and the witnesses then answered questions. Questioning concluded, the witnesses withdrew.

At 1.05pm the Committee began a deliberative meeting.

Members present for the deliberative meeting were: Mr Gaudry (Chairman), Mr Anderson, Mr Fraser, Mr Kinross, Mr Lynch and The Hon M Gallacher MLC.

The Committee discussed issues raised in the public hearings. Resovled on the motion of Mr Lynch, seconded Mr Fraser, that the Committee would seek advice from the Crown Solicitor on the protections available to Members of Parliament and the media who receive protected disclosures.

Luncheon adjournment.

The public hearing resumed at 3.45pm.

Councillor Peter Robert Woods, President of the Local Government and Shires Association of NSW and Mr David Bremner Clark, Legal Officer, Local Government and Shires Association of NSW affirmed and acknowledged receipt of summons.

Mr Woods addressed the Committee and the witnesses answered questions. Questioning concluded, witnesses withdrew.

Mr William Middleton, Managing Director, and Mr Stephen Frank Vidovic, Director of Internal Audit, Internal Audit Bureau, took the oath and acknowledged reciept of summons. Mr Middleton addressed the Committee and tabled a submission. The witnesses answered questions. Questioning concluded, the witnesses withdrew.

The Committee adjourned at 5.20pm until 10.00am, Thursday 4 July 1996.

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Thursday 4 July, 1996
at 10.00am in the Jubilee Room, Parliament House

**Members Present**

**Legislative Assembly**
Mr B Gaudry MP (Chairman)
Mr J Anderson MP
Mr A Fraser MP
Mr J Kinross MP
Mr P Lynch MP

**Legislative Council**
The Hon M Gallacher MLC
The Hon E Nile MLC

**Apologies**
The Hon P Staunton, MLC, Mr T Stewart MP, Ms C Moore, MP, Ms R Meagher MP.

**In Attendance**
Ms Helen Minnican (Project Officer), Ms Ronda Miller (Clerk) and Ms Natasha O'Connor (Assistant Committee Officer).

The Chairman opened the hearing.

Mr Anthony Clement Harris, Auditor General of NSW, affirmed and acknowledged receipt of summons.

Mr Dennis Streater, Director, Performance Audit, took the oath and acknowledged receipt of summons.

Mr Harris addressed the Committee, tabled a submission from the NSW Audit Office and answered questions from the Members. Questioning concluded, the witnesses withdrew.

Ms Irene Moss, Ombudsman, Mr Chris Wheeler, Deputy Ombudsman, Mr Kimber Swan, Senior Investigation Officer (Legal), all affirmed and acknowledged receipt of summons.

Ms Moss addressed the Committee and tabled a submission. The Committee questioned the witnesses. Questioning concluded, the witnesses withdrew.

(Luncheon adjournment)

Mr Roger Booth West, Community Services Commissioner, Ms Joanna Maureen Quilty, Manager, Policy, Community Services Commission. Both affirmed and acknowledged receipt of summons. The submission from the Community Services Commission was tabled. The Committee questioned the witnesses. Questioning concluded, the witnesses withdrew.

The Hon Barry O'Keefe, AM, AC, Commissioner, Independent Commission Against Corruption, took the oath and acknowledged receipt of summons. Commissioner O'Keefe tabled a submission, addressed the Committee, and then answered questions. Questioning concluded, the witness withdrew.

The Committee adjourned at 4.50pm sine die.

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Monday, 19 August 1996
Waratah Room Parliament House at 9.30am

**Members Present**

| **Legislative Assembly** | **Legislative Council** |
|---|---|
| Mr B Gaudry (Chairman) | The Hon M Gallacher |

Mr J Anderson
Mr J Kinross
Mr P Lynch
Mr A Stewart

The Hon E Nile
The Hon P Staunton

**Apologies**
Mr A Fraser, Ms C Moore and Ms R Meagher

**In Attendance**
Ms Helen Minnican (Project Officer) and Mr Leslie Gonye (Acting Clerk) and Ms Natasha O'Connor (Assistant Committee Officer)

**Confirmation of the Minutes**
The Committee confirmed minutes for the following meetings:

i) 6 June, 1996 (12 noon) - resolved on the motion of Mr Lynch, seconded Mr Stewart.
ii) 6 June, 1996 (4.00pm) - resolved on the motion of Mr Anderson, seconded Mr Stewart.
iii) 2 July, 1996 - as amended, resolved on the motion of Mr Anderson, seconded Mr Gallacher.
iv) 3 July, 1996 - as amended, resolved on the motion of Mr Anderson, seconded Mr Gallacher.
v) 4 July, 1996 - as amended, resolved on the motion of Mr Anderson, seconded Mr Lynch.
vi) 5 August, 1996 - resolved on the motion of Ms Staunton, seconded Mr Anderson.

The Committee discussed the draft report as previously circulated and several amendments were proposed to the draft recommendations. The Committee resolved to finalise the draft report at the next meeting after further consideration of the draft and proposed amendments.

The Committee adjourned at 11.31am.

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Thursday, 12 September, 1996
Waratah Room Parliament House at 9.30 am

**Members Present**

**Legislative Assembly**
Mr B Gaudry (Chairman)
Mr J Anderson
Mr P Lynch

**Legislative Council**
The Hon M Gallacher
The Hon E Nile
The Hon P Staunton

**Apologies**
Mr A Fraser, Mr J Kinross, Ms R Meagher, Ms C Moore, Mr T Stewart.

**In Attendance**
Ms Helen Minnican (Project Officer) and Ms Sally Gurgis (Assistant Committee Officer).

**1 Confirmation of the Minutes**
Minutes of the meeting held on 19 August, 1996 were confirmed on the motion of Ms Staunton, seconded Mr Anderson.

**2 Correspondence**
*General* - The Committee resolved on the motion of Mr Anderson, seconded Ms Staunton, to:

a) note a copy of a letter from the Deputy Ombudsman to Councillor Max Graham, Mayor Nambucca Shire Council (dated 1 August, 1996), concerning an investigation into Council's handling of gravel extraction matters (copy forwarded by Ombudsman).

b) confirm the Project Officer's interim reply to Mr James Lynch, Bathurst, outlining the Committee's functions and advise that his letter to the Committee concerning his present situation in custody falls outside its jurisdiction.

c) note advice from the Ombudsman (dated 13 August, 1996), concerning representations from Mr John Turner MP about the Office's handling of a complaint by Mr and Mrs Smith of Pacific Palms.

d) refer the Ombudsman's advice on the complaint by Mr and Mrs Smith to Mr Turner for his information and include the issue of turnaround times for discussion with the Ombudsman during the next General Meeting.

e) note correspondence from Mr Paul Lynch MP (dated 15 May, 1996), concerning a police complaint made by Ms Joanne Whittaker to the Office of the Ombudsman, and discuss the procedural issues raised by this letter at the next General Meeting with the Ombudsman.

f) advise Mr J A Wall (letter dated 12 August, 1996), of the Committee's functions and that it does not act as an appeal body in relation to decisions by the Ombudsman on particular complaints. The Committee further resolved to forward Mr Wall's allegations of staff misconduct to the Ombudsman.

g) advise Mr D Lightowler, Kurnell (undated letter), that it has noted the decisions made by the Ombudsman and Local Court with regard to his case, and inform him that it is unable to review decisions by the Ombudsman on particular cases.

h) provide Mr Trevor Jenson, Moree, with a final reply to his ongoing correspondence with the Committee and inform him that it does not propose taking any further action in relation to his latest letter, dated 3 June, 1996.

I) take no further action in relation to a letter from Mr L Dowsett (dated 23 May, 1996), who had previously received a final reply to his correspondence with the Committee.

*Correspondence relating to the Review of the Protected Disclosures Act 1994* - Letter from the Ombudsman, dated 28 August, 1996, forwarding a copy of the draft of the *Ombudsman's Protected Disclosure Guidelines* (second edition) for comment. The Committee resolved on the motion of Ms Staunton, seconded Mrs Nile, to:

i) advise the Ombudsman that the Committee's forthcoming report on the Review of the Protected Disclosures Act deals in a substantial way with three sections of the draft guidelines and may impact on them; and

ii) suggest to the Ombudsman that it might be timely to finalise the guidelines after the report is tabled and she has had an opportunity to examine its contents and the recommendations made by the Committee.

**Draft report on the Review of the Protected Disclosures Act 1994**

The Committee discussed the draft report and resolved on the motion of Mr Anderson, seconded Mr Gallacher, to adopt the "Summary of Recommendations" as prepared for the meeting, with the exception of those recommendations and proposed amendments which it agreed to consider further at the next meeting.

Recommendation 1 - adopted as amended.
Recommendation 2 - adopted.
Recommendation 3 - adopted.
Recommendation 4 - adopted.
Recommendation 5 - adopted.
Recommendation 6 - adopted.
Recommendation 7 - adopted.
Recommendation 8 - adopted.
Recommendation 9 - adopted.
Recommendation 10 - adopted.
Recommendation 11 - Committee to discuss further.
Recommendation 12 - adopted.
Recommendation 13 - adopted.
Recommendation 14 - adopted.
Recommendation 15 - adopted.
Recommendation 16 - adopted.
Recommendation 17 - adopted.
Recommendation 18 - adopted.
Recommendation 19 - adopted.
Recommendation 20 - adopted.
Recommendation 21 - adopted.
Recommendation 22 - adopted as amended.
Finding 1 - adopted.

The issue of the ICAC being required to give reasons for decisions not to investigate disclosures was discussed and the Committee resolved that Mr Lynch should draft an appropriate recommendation for consideration at the next meeting.

The Committee agreed to further discuss proposed amendments to the body of the report at its next meeting.

The Committee adjourned at 11.00am.

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Thursday, 19 September, 1996
Room 814/815 Parliament House at 4.00 pm

**Members Present**

**Legislative Assembly**
Mr B Gaudry (Chairman)
Mr J Anderson
Mr A Fraser
Mr J Kinross
Mr P Lynch

**Legislative Council**
The Hon M Gallacher
The Hon E Nile

**Apologies**
Ms R Meagher, Ms C Moore, Mr T Stewart and The Hon P Staunton.

**In Attendance**
Ms Helen Minnican (Project Officer), Ms Ronda Miller (Clerk to the Committee) and Ms Natasha O'Connor (Assistant Committee Officer).

**1 Confirmation of the Minutes**
Minutes of the meeting held on 12 September, 1996 confirmed on the motion of Mr Anderson, seconded Mr Lynch.

**2 Correspondence**

i) Letter from the Ombudsman dated 16 September, 1996 concerning schedule 1 of the *Ombudsman Act 1974*.

The Committee resolved on the motion of Mr Fraser, seconded Mr Lynch, to hold informal discussions with the Ombudsman and her staff on the issues raised in the letter.

ii) Letter from Mr Grahame Wilson to the Chairman, dated 8 August, 1996 concerning his latest correspondence with the Ombudsman's Office and the ICAC.

iii) Letter from the Ombudsman dated 19 August, 1996 providing advice on correspondence from Mr G Wilson.

The Committee noted the Ombudsman's advice and resolved on the motion of Mr Lynch, seconded Mr Anderson, to inform Mr Wilson that the Committee:

- is not in a position to recommend that he should be protected under the Protected Disclosures Act 1994;
- is not authorised to re-examine the decisions of any investigating authority in relation to a particular disclosure.

(The Chairman was called away, Mr Fraser took the Chair for the duration)

## 4 Draft Report on the Review of the Protected Disclosures Act 1994

*Recommendation 3* - Mr Lynch circulated a draft recommendation 3 which the Committee discussed. Resolved on the motion of Mr Lynch, seconded Mr Gallacher, that the recommendation be adopted.

*Recommendation 12* - The Committee considered draft recommendation 12 (previously no.11). Debate ensued. Resolved on the motion of Mr Lynch, seconded Mr Gallacher, the recommendation, as amended, be adopted.

*Recommendation 15* - The Committee considered draft recommendation 15. Resolved on the motion of Mr Lynch, seconded Mr Gallacher, that the recommendation, as amended, be adopted.

(The Chairman returned)

The Committee considered amendments to the body of the report. Adopted on the motion of Mr Fraser, seconded Mr Anderson.

The draft Executive Summary was adopted on the motion of Mr Fraser, seconded Mr Anderson.

Resolved on the motion of Mr Fraser, seconded Mr Anderson, that the draft report, as amended, be the Report of the Committee and that it be signed by the Chairman and presented to the House, together with the minutes of evidence, and that the Chairman, Project Officer and Committee Clerk be permitted to correct stylistic, typographical and grammatical errors.

The Chairman thanked Committee members and staff for their work on the report.

The Committee adjourned at 4.40pm.