PARLIAMENT OF NEW SOUTH WALES

REPORT OF

THE LEGISLATION COMMITTEE

ON THE

WHISTLEBLOWERS PROTECTION BILL (NO 2) 1992

JUNE 1993

PARLIAMENT OF NEW SOUTH WALES

REPORT OF

THE LEGISLATION COMMITTEE

ON THE

WHISTLEBLOWERS PROTECTION BILL (NO 2) 1992

JUNE 1993

TABLE OF CONTENTS

COMMITTEE MEMBERSHIP

LEGISLATIVE ASSEMBLY

Mr Don Page MP
(Chairman)

Mr John Turner MP

Mr Jeremy Kinross MP

Ms Sandra Nori MP

Mr Paul Crittenden MP

Ms Clover Moore MP

CLERK TO THE COMMITTEE

Mr Greg Kelly

COMMITTEE SECRETARIAT

Mr Daniel Wright

CHAIRMAN'S FORWARD

It is with satisfaction that I table this Report of the Legislation Committee on the Whistleblowers Protection Bill 1992 (No. 2). The Committee's Report makes many significant recommendations which improve the overall scheme for whistleblower protection and will result in better public administration in New South Wales. The final system seeks not only to protect the rights of genuine whistleblowers but also persons and organisations about whom wilfully false and misleading disclosures are made. I believe the recommendations, if implemented, will lead to effective and well-balanced legislation.

On behalf of the Committee I would like to thank all individuals and organisations who made submissions to the Committee and especially those persons who gave evidence at the Committee's public hearings.

I would also like to extend my personally thanks and appreciation to all Committee Members for their time, effort and co-operation during our deliberations.

Finally, I wish to thank Mr Greg Kelly, Clerk to the Committee and Mr Daniel Wright, Project Officer to the Committee, for their professional assistance with the Committee's inquiries and the preparation of this Report. In particular, Mr Daniel Wright's advice and experience proved invaluable to the Committee.

Don Page
Chairman

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

The Committee therefore recommends that an advice unit is not necessary to achieve the objectives of the Bill. However, the Committee would suggest that each of the investigating authorities charge at least one officer with the responsibility for providing advice to whistleblowers and liaising with the other investigating authorities. These officers will constitute an overall "whistleblowers panel". The Chairman of this panel, the Committee believes, should be the officer representing the ICAC. The Committee believes this will avoid the duplication of actions, resources will be used efficiently and economically, and ensure the most effective result is obtained from disclosures.

RECOMMENDATION 2

The Committee, therefore, recommends that the Bill be amended so as to prescribe that all public authorities establish appropriate internal procedures for dealing with disclosures by whistleblowers. Public authorities should be required to have these systems in place within one year of the Act's assent. Each of the investigating authorities should put forward guidelines to assist public authorities with the establishment of proper internal procedures.

RECOMMENDATION 3

On the question of: who is to investigate disclosures from <u>within</u> the ICAC, Office of the Ombudsman and the Auditor-General's Office? the Committee makes the following recommendations:

1. The Parliamentary Committees which are responsible for overseeing the operations of the investigating authorities should be the external channel of disclosure for the investigating authorities. The Chairman of each Committee should be designated as the person to whom disclosures should be made.

2. The Acts under which the Parliamentary Committees are

established should be amended to invest the respective Committees and Chairmen with the function of receiving disclosures from within the relevant investigating authority.

3. Protection under the Bill should be stated to begin when, in this case, a disclosure is made to the Chairman of the Committee.

4. The limitation should remain upon the Parliamentary Committees ability to review the regular "decisions" of the investigating authorities.

5. The Parliamentary Committees should be given the final responsibility to decide how a disclosure is to be handled.

RECOMMENDATION 4

The majority of the Committee, therefore, recommends that last resort disclosures to the media not be given protection under the Bill as is the case with the Bill before the Parliament.

RECOMMENDATION 5

The Committee therefore recommends the following:

1. Generally, all public officials covered by the Bill should have an opportunity to rely upon the protection given in the Bill.

2. The term "action" in clause 17 should include "detrimental action" as defined in clause 16 of the Bill.

3. A "decision" under the GREAT Act, taken against a protected person under the Bill, should encompass any "detrimental action", as defined in clause 16 of the Bill, taken against that person.

4. The jurisdiction of the GREAT Act should be extended to allow a right of appeal to all protected persons under the Whistleblowers Bill.

RECOMMENDATION 6

The Committee, therefore, recommends:

1. That the Bill clearly state when protection is to begin under the Bill. As to when protection should begin a clause similar to the following should be added to the Bill:

   > Protection shall commence under this Act when a public official makes a disclosure, in accordance with clauses 8-9, to one of the designated bodies or persons named in clauses 10-13 of the Act.

2. A provision should be added to the Bill to govern the situation where multiple disclosures are made by a whistleblower, at least one of which is within the terms of the Act and the others which may be outside the terms of the Act.

RECOMMENDATION 7

The Committee, therefore, recommends that the Bill be amended to include a penalty for the making of a disclosure which is wilfully false and misleading.

RECOMMENDATION 8

The Committee, therefore, recommends that consideration be given to including in the Bill comprehensive annual reporting obligations upon all public authorities and investigating authorities. Statistics to be collected should be forwarded directly to the Joint Parliamentary Committee charged with reviewing this Act.

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.

RECOMMENDATION 10

The Committee therefore recommends that consideration be given to amending clause 9 of the Bill to allow protection for disclosures which are made in accordance with a legal duty, whether it be under a code of conduct or some other instrument, which have as their aim exposing corrupt conduct, maladministration or substantial waste of public money.

RECOMMENDATION 11

The Committee, therefore, recommends that the Bill be amended by deleting the good faith test contained in clause 9(3) and replacing the test of "suspects on reasonable grounds" in clauses 10-13 with a single state of mind test of "honest belief on reasonable grounds". Clause 15 of the Bill should be amended accordingly.

RECOMMENDATION 12

The Committee recommends that the discretion to decline to investigate or discontinue an investigation should be extended to encompass disclosures made to other public officials named in clause 12 of the Bill.

RECOMMENDATION 13

The Committee, therefore, recommends that:

1. Attention be given to clarifying and simplifying clause 16 to ensure that a real and effective offence is created for taking reprisal action against a protected person. Specifically, clause 16 should be amended to cover the situation where a person takes detrimental action against a public official because that official may make a protected disclosure.

2. A separate defence be created for the situation where a person taking what may be detrimental action against a whistleblower had just and reasonable grounds for so doing.

RECOMMENDATION 14

The Committee, therefore, recommends that internal procedures developed by public authorities and internal and "operational" procedures developed by investigating authorities should make provision for the making of complaints concerning reprisal(s) against a whistleblower.

RECOMMENDATION 15

The Committee, therefore, recommends that clauses 12(a) and 12(b) of the *Ombudsman Act* be amended to enable the Ombudsman to entertain a complaint of reprisal action but only in the context of that action following a protected disclosure under the Bill.

RECOMMENDATION 16

The Committee recommends that:

1. The first paragraph of the clause 18 be amended by adding the words "or an officer of an investigating authority" after the words "investigating authority".
2. The confidentiality provisions contained in clause 18 be extended to cover persons or bodies named in a protected disclosure. [Ms Clover Moore of the Committee was of the view that the term "bodies" should be deleted from this amendment]
3. Subparagraph (b) of clause 18 be amended by replacing the word "it" in the second line with the words "disclosure of identity". This amendment should cover both the identity of the discloser and persons or bodies named in the protected disclosure. [Ms Clover Moore of the Committee was of the view that the term "bodies" should be deleted from this amendment]
4. Protected disclosures should be exempt from the scope of the *Freedom of Information Act*.

1 INTRODUCTION

1.1 Background to the Inquiry

1.1.1 This inquiry was referred to the Committee from the Legislative Assembly on 27 November 1992. The Committee's term of reference is:

> The Whistleblowers Protection Bill 1992 (No. 2) be referred to a Legislation Committee for consideration and report to the House on such amendments as it considers should be proposed to the Committee of the Whole on that Bill. (Votes and Proceedings No 55, Entry 24, 27/11/93) (Appendix 1)

1.1.2 The Committee consisted of three members supporting the Government, Mr Don Page MP (Member for Ballina) who was appointed Chairman of the Committee, Mr John Turner MP (Member for Myall Lakes) and Mr Jeremy Kinross MP (Member for Gordon); two members supporting the Opposition, Ms Sandra Nori MP (Member for Port Jackson) and Mr Paul Crittenden (Member for Wyong); and the honourable member for Bligh, Ms Clover Moore MP.

1.1.3 The Committee was to initially report by 31 March 1993. However, due to the numerous problems that arose on the Committee's examination of the Bill the Committee thought it appropriate to report at a later date being 30 June 1993.

1.2 Conduct of the Inquiry

1.2.1 The Committee publicly called for submissions on the Bill. A copy of the Committee's advertisement calling for public submissions on the Bill appears at Appendix 3.

1.2.2 The Committee received thirty-six (36) submissions. A full list of persons or organisations making submissions to the Committee appear at Appendix 4.

1.2.3 The Committee held public hearings on 2 & 3 June 1993. A full list of those persons or organisations appearing before the Committee are set out in Appendix 5.

2 GENERAL AMENDMENTS TO THE BILL

2.1 An Advice Unit

2.1.1 The Bill establishes three principal investigating authorities, the ICAC, Ombudsman and the Auditor-General, for receiving and investigating disclosures by whistleblowers. Whistleblowers may also make disclosures to a principal officer of a public authority.

2.1.2 However, a number of submissions put to the Committee that a separate "co-ordinating" body of some kind needs to be established if the Bill is to succeed.

2.1.3 Whistleblowers Anonymous (now Whistleblowers Australia) recommended in their submission:

> The establishment of an office where all complaints be registered and that these be directed to the appropriate investigating authority. (Whistleblowers Anonymous 1993b:3)

2.1.4 At the Committee's public hearing the Chairman of Committee Mr Don Page MP put to the National Director of Whistleblowers Australia, Mr John McNicol the following:

> One of the issues that is exercising the mind of the Committee is whether there needs to be an advice unit to assist whistleblowers which would be available to whistleblowers and not necessarily to other members of the public. You obviously have a view that that would be desirable. Why should the taxpayers of N.S.W. make resources available, particularly for whistleblowers, that they wouldn't make available for other members of the public? (Minutes of Evidence 1993a:41)

Mr McNicol replied:

> First of all because whistleblowers represent a very effective body within the government area in saving, I would say, countless of millions of dollars and for that reason the setting up of an advice unit to assist the whistleblowing would be, indeed, effective in looking after the government's overall budget in saving waste mismanagement and corruption. (Minutes of evidence 1993a:41-42)

2.1.5 Mr Kevin Fennell, Deputy Auditor-General responded to Whistleblowers Australia call for an advice unit by stating:

> I can tell the Committee quite frankly that I think there is no necessity

whatever for a separate unit to give anybody advice.

The worst thing the Parliament could do is to set up another body tied up with this whistleblowing activity.

The prospect of having a government authority as a wherewithal or a government agency or something like that set up - I think they were using things like Whistleblowers Commission, or something of that nature - would be a waste of time and a waste of government money. (Minutes of Evidence 1993a:72-73)

2.1.6 The ICAC put to the Committee that it was their view that the system of whistleblower protection required co-ordination. However, Mr Peter Gifford, Director of Corruption Prevention made it quite clear that:

> We are not suggesting that it requires the establishment of a new element in the bureaucracy. (Minutes of Evidence 1993a:10)

2.1.7 The Committee understands that the policy underlying the Bill is to utilise existing accountability structures thereby avoiding what is probably the unnecessary creation of a new body to deal exclusively with matters relating to whistleblowers. Elected Governments in NSW have established three major bodies to investigate corruption, maladministration and substantial waste. To date there has been no reason to have but full confidence in the effectiveness of these bodies. The Committee holds the view that to establish a new body to investigate disclosures of the same matters as above made by a specific class of persons, that is whistleblowers, would be superfluous.

2.1.8 The Committee took the view of the Bill that it established **a system of protection for whistleblowers**, not new avenues of disclosure or investigation to cater for whistleblowers "special needs". The Bill, the Committee believes, does not alter in a significant way the operations of the ICAC, Ombudsman or Auditor-General. In reality whistleblowers are just one category of persons who make allegations to each of the investigating authorities about corruption, maladministration and substantial waste. The Bill does not create new areas of disclosure and thereby justifying the creation of a new investigatory body.

2.1.9 The Committee recognises that each of the investigating authorities have well established and effective mechanisms for receiving and investigating allegations made to them. Upon the enactment of this Bill these investigating authorities will no doubt take into account the provisions of the Bill. Consequently, the Committee would hope that the investigating authorities would inform whistleblowers of possible protection under the Act.

2.1.10 The Committee, as it took very seriously the whistleblowers' need to be informed

of the protections available under the Bill, did not want to leave the matter there. Taking into account the requirements of clause 21 of the Bill, which deals with referrals between the investigating authorities and co-ordination of their activities, the Committee considered the suggestion that one person from each of the three investigating authorities be charged with the responsibility of providing any special assistance that a whistleblower may require. It was also suggested that these officers could then meet regularly to co-ordinate the activities of each of the investigating authorities.

2.1.11 Mr Paul Crittenden M.P. clarified this point when he put to the Deputy Auditor-General, Mr Kevin Fennell:

> The point that I am making is, we are going to cut down the bureaucracy by having say, someone from the Auditor-General, Ombudsman and the ICAC who are there to provide the basic package. You can use it as a sort of costing if you like but the bottom line is to cut down the personnel function and all that sort of thing in setting up a separate body but at the same time providing advice to public servants who come there and wish to get advice as to the most appropriate avenue to pursue. (Minutes of Evidence 1993a:77)

Mr Fennell replied that he "would have no objection whatever to the Audit Office participating in such a panel."

2.1.12 The Committee took the view that even if a new unit for whistleblowers was necessary, and it does not thinks so, then it would be preferable to use the existing bodies to assist the whistleblower rather than create a new bureaucratic mechanism.

2.1.13 The Committee believes that if proper internal procedures are established in all public authorities (this will be discussed below) and the investigating authorities establish an effective system of co-operation whistleblowers will have sufficient assistance if they are seeking to obtain the protections provided by the Bill.

RECOMMENDATION 1

The Committee therefore recommends that an advice unit is not necessary to achieve the objectives of the Bill. However, the Committee would suggest that each of the investigating authorities charge at least one officer with the responsibility for providing advice to whistleblowers and liaising with the other investigating authorities. These officers will constitute an overall "whistleblowers panel". The Chairman of this panel, the Committee believes, should be the officer representing the ICAC. The Committee believes this will avoid the duplication of actions, resources will be used efficiently and economically, and ensure the most effective result is obtained from disclosures.

2.2 *Internal Procedures for Public Authorities*

2.2.1 Clause 13(2) of the Bill states that a public official can make a disclosure to a principal officer of a public authority in accordance within internal procedures established by that public authority. If a public official makes a disclosure in this way he or she will be protected.

2.2.2 The Committee, however, foresees a problem with the operation of this part of the Bill. As the Bill stands there is no duty placed upon public authorities to establish internal procedures for disclosures by whistleblowers. It would seem clear from the wording of Clause 13(2) that if internal procedures are not in place and a disclosure is made then the person making the disclosure will be denied protection.

2.2.3 The ICAC submitted to the Committee:

> It is essential that all government agencies have workable systems for the making of disclosures protected by the Bill, and for appropriate management response, including protection against victimisation where this occurs.
>
> The Bill recognises this by protecting disclosures made in accordance with an established internal reporting system, but does not require government agencies to develop such a system. (ICAC 1993a:2)

2.2.4 Similar comments were made by the Department of Housing, State Development, the Minister for Police and The St James Ethics Centre.

2.2.5 If a duty is to be placed upon public authorities to establish internal procedures as envisaged by the Bill then the Committee had to consider if the Bill should be amended to place upon all public authorities a simple prescription to establish such procedures or that a more detailed provision be included which set out the actual procedures which should be put in place.

2.2.6 The Chairman of the Committee, Mr Don Page MP, put this problem to the ICAC. Their answer is as follows:

> Our view would be, Mr Chairman, that *a prescription that such a system should be developed would be sufficient*. We believe that from our experience of contributing to organisations developing internal reporting mechanisms that different systems would apply to different organisations. It may be that large organisations dispersed geographically would need to take account of the geographical circumstances, the different levels of reporting within the organisation. On the other hand the small organisation might develop procedures that relate to a direct and open access to the principal officer of the organisation.

> In summary we feel that its important that there be a prescription that internal systems should be in place but that prescription should recognise that those systems may take a variety of means of operation. (Minutes of Evidence 1993a:3) (emphasis added)

2.2.7 The ICAC also briefly outlined to the Committee what should be the minimum content of such procedures.

> We feel it would be desirable that the legislation touch briefly on the three purposes of such systems which would be to provide a means to receive disclosures, to provide for the means by which those disclosures will be acted upon, and to protect the makers of disclosures from victimisation within the organisation. (Minutes of Evidence 1993a:3)

2.2.8 The Chairman put a similar question to the Deputy Ombudsman, Mr John Pinnock who replied:

> I do not think there is much benefit to be gained by [a detailed] prescription. I think you have to leave it up to the individual authorities as to quite how they are to go about it. Putting them under the obligation is sufficient. (Minutes of Evidence 1993b:10)

2.2.9 The Committee accepts the need for flexibility in the development of appropriate procedures for public authorities and therefore is of the view that a simple prescription in the Bill as to the establishment of internal systems for disclosures by whistleblowers will suffice. However, the Committee would suggest that each of the investigating authorities put forward guidelines to assist public authorities with the development of proper internal procedures. This will hopefully ensure that consistent procedures are developed by public authorities.

2.2.10 The Committee also realises that public authorities will require time to develop and implement these procedures. As the Act is to be reviewed by a Joint Parliamentary Committee as soon as practicable after the expiration of one year after the date of assent to the Act, this Committee suggests that before this time all public authorities should be required to have in place proper internal systems of disclosure for whistleblowers.

RECOMMENDATION 2

The Committee, therefore, recommends that the Bill be amended so as to prescribe that all public authorities establish appropriate internal procedures for dealing with disclosures by whistleblowers. Public authorities should be required to have these systems in place within six months of the Act's assent. Each of the investigating authorities should put forward guidelines to assist public authorities with the establishment of proper internal procedures.

2.3 *Disclosures made from within Investigating Authorities*

2.3.1 The functions and powers of the three investigating authorities are wide-ranging and extensive. Each of these bodies is a major accountability instrument in the exercise of governmental power. To ensure their effectiveness the legislature has seen fit to grant substantial investigatory powers to each of these authorities. Of special importance is the far-reaching powers granted to the ICAC.

2.3.2 When the importance of these bodies as the principal independent accountability mechanisms, other than the Parliament and the media, is taken into account the need for special procedures to deal with disclosures made from within the investigating authorities becomes apparent. It is essential that each of these bodies maintain their integrity as an independent body, both in appearance and substance. The Bill does not establish an external channel of review for disclosures concerning, for example in ICAC's case, corruption. All allegations of corruption are serious, but it is fair to say that an allegation that there is corrupt conduct occurring with the body which investigates corrupt conduct is an allegation of the utmost gravity.

2.3.3 However, the legislature has already recognised the need for special accountability mechanisms for these bodies. Both the ICAC and the Ombudsman have Joint Standing Parliamentary Committee's to monitor and review the exercise of the functions of each body. The Public Accounts Committee also has a limited review of the Auditor-General's work. However, Part 4 of the Public Finance and Audit Act 1983 would need amendment to confer similar powers as the previous two Committees have over the ICAC and the Ombudsman.

2.3.4 The Committee took the view that the Bill creates internal and external channels of disclosure for all public authorities. Internally, disclosures can be made to the principal officer of the public authority or another officer nominated in an authority's internal procedures for whistleblowers. Externally, disclosures can be made to one of the three investigating authorities depending on the subject matter of the disclosure.

2.3.5 Each of the investigating authorities should operate as models for all public authorities within the area in which they are concerned. The public interest would not be served if the three investigating authorities were somehow exempt from the development of an external channel of disclosure. Without this channel each of the bodies would be less accountable. This can not be in the public interest.

2.3.6 However, because of the special nature of the ICAC, Ombudsman and Auditor-General the Committee had to consider in some depth the most appropriate mechanism to recommend.

2.3.7 The Committee acknowledges that with respect to disclosures of, for instance in

the case of the ICAC, maladministration and substantial waste can be made to the Ombudsman and Auditor-General respectively. However, who is to investigate disclosures of; again in the case of the ICAC, corruption from **within** the ICAC itself? Neither the Ombudsman nor the Auditor-General, in the Committee's opinion are qualified to perform such a task. Who then should be charged with this responsibility?

2.3.8 This question was put to each of the three investigating authorities by the Committee.

The Auditor-General's view was:

> If the disclosures concern matters of corruption or maladministration then after initial inquiry in the Audit Office, each matter should be referred to the Independent Commission Against Corruption (ICAC or the Ombudsman, as required by the Bill. Disclosures concerning substantial waste will be investigated by the Audit Office. *Disclosures concerning the Audit Office itself, that is those that involve allegations of corruption maladministration or substantial waste by a member or members of the Office would need to be referred elsewhere. An internal investigation would not suffice and I think that the Office of Public Management (OPM) should carry out an initial investigation before referring the question to the ICAC or the Ombudsman in the first two disclosure categories. I would suggest that disclosures of substantial waste should be subject to in depth inquiry by OPM.* (emphasis added) (Auditor-General 1993b:1)

The Ombudsman's submitted:

> So far as disclosures made from within the Office of the Ombudsman are concerned, disclosures of "substantial waste" could be investigated by the Auditor-General under his existing powers. Disclosures of "corrupt conduct" could similarly be investigated by the ICAC under its existing powers. Disclosures of "maladministration" present a different problem. The definition of conduct which amounts to maladministration proposed under clause 11(2) means that such conduct would not fall within the jurisdiction either of the Auditor-General or of the ICAC. Administrative conduct relating to the management of this Office or its procedures would fall within the jurisdiction of the Joint Committee on the Ombudsman constituted under Part 4A of the Ombudsman Act. However, conduct of the Ombudsman relating to the exercise of powers of investigating, determining, reporting and recommending are specifically excluded from the Joint Committee's consideration by virtue of Section 31B(2) of the Ombudsman Act. It would be entirely inappropriate for these restrictions on the Joint Committee's power to be varied to accommodate a complaint of maladministration. (Office of the Ombudsman 1993b:2)

The ICAC submitted to the Committee that:

> The Commission believes that the Parliamentary Joint Committee on the ICAC (PJC) would be the most suitable body to receive such disclosures. The PJC would be unlikely to investigate the matter itself. In most cases, the PJC would probably refer the matter to the Commission (while protecting the confidentiality of the complainant) and require a report back in specific terms. If the conduct complained about was such as to be grounds for complaint under s 10 of the ICAC Act, the PJC might consider that the appropriate course was to refer the matter to the Committee to be treated as such. This would ultimately entail consideration of the matter by the ORC [Operations Review Committee], thus ensuring an additional accountability mechanism.
>
> Should the matter concern the handling of a complaint by the Commission, the views of the Operations Review Committee could also be sought. *There may be circumstances in which the PJC would consider it inappropriate to refer the matter to the Commission for investigation. In such an extreme case, the Commission regards it as appropriate that the PJC, as the primary Parliamentary oversight, has responsibility for deciding how the matter is to be handled.* (emphasis added) (ICAC 1993c:2)

2.3.9 The Committee recognises the concern of the Ombudsman that the Joint Parliamentary Committee on the Ombudsman may not have the jurisdiction to receive and investigate some matters which come with the definition of maladministration in the Whistleblowers Bill. The Committee, however, wishes to make it quite clear that what is in question here is who is to receive and examine a disclosure **made by an officer of one the three investigating authorities**.

2.3.10 The Committee considers this a special case and no doubt would hopefully only occur in exceptional circumstances. In spite of this, the Committee would be remiss if it did not consider this situation, because, as discussed previously, that in the case of the ICAC, Ombudsman and Auditor-General appearance is of special importance.

2.3.11 Although the Courts will always, at least in the case of the Ombudsman and more so the ICAC, offer an avenue of oversight through the principles of judicial review the Committee considers that the matter in question would not be best handled in a judicial forum due to the possible sensitivity of the situation.

2.3.12 The Committee agrees with ICAC that in the extreme case, and that is what is being considered here, that only Parliamentary oversight can provide a viable external channel of disclosure. The form of this oversight is the presently existing system of Parliamentary Committees charged with monitoring and reviewing the

functions of the ICAC, Ombudsman and Auditor-General. Although, the Committee realises this is not strictly the case for the Public Accounts Committee in its role vis a vis the Auditor-General. The Committee, therefore, again notes that the functions of this Committee may require amendment.

2.3.13 The Committee also clearly recognises the limitations of Parliamentary Committees. Specifically Parliamentary Committees are not suited to intensive investigatory work. However, this Committee would suggest that it be left to the respective Parliamentary Committees to determine, if they receive a disclosure from within an investigating authority, how the matter is to be dealt with.

2.3.14 Taking into account the Ombudsman's concern that the Parliamentary Committee not be given the power to review decisions on its normal operations and determinations the Committee would recommend that each of the three Acts under which the Parliamentary Committee's are established be amended to clarify that each Committee has the power to receive disclosures from within the body which they oversee. However, clearly a limitation should remain upon the Parliamentary Committees, restricting them from reviewing the regular decisions which each of the investigating authorities has the function of making.

RECOMMENDATION 3

On the question of: who is to investigate disclosures from <u>within</u> the ICAC, Office of the Ombudsman and the Auditor-General's Office? the Committee makes the following recommendations:

1. **The Parliamentary Committees which are responsible for overseeing the operations of the investigating authorities should be the external channel of disclosure for the investigating authorities. The Chairman of each Committee should be designated as the person to whom disclosures should be made.**

2. **The Acts under which the Parliamentary Committees are established should be amended to invest the respective Committees and Chairmen with the function of receiving disclosures from <u>within</u> the relevant investigating authority.**

3. **Protection under the Bill should be stated to begin when, in this case, a disclosure is made to the Chairman of the Committee.**

4. **The limitation should remain upon the Parliamentary Committees ability to review the regular "decisions" of the investigating authorities.**

5. **The Parliamentary Committees should be given the final responsibility to decide how a disclosure is to be handled.**

2.4 Disclosures to the media

2.4.1 One of the most difficult issues that the Committee had to confront was whether the Bill's protection should be extended, perhaps on certain conditions, to disclosures made to the media.

2.4.2 The Australian Press Council submitted to the Committee:

> that a disclosure to a journalist or to the media in general should be a protected disclosure under the Bill where the whistleblower, in good faith, believes in the truth of the matter and that it is in the public interest, for example, to disclose corrupt conduct, maladministration or substantial waste to a journalist or to the media. (Australian Press Council 1993:2)

2.4.3 However, the ICAC supported "the Bill's emphasis on effective non-public channels for disclosure" and submitted that:

> The public interest is not served by media attention on every allegation of corruption, maladministration or waste, especially where those allegations are being properly dealt with. There are several reasons for this:
>
> - Premature public disclosure can hamper proper investigation;
> - Public disclosure can unjustifiably damage reputation where allegation subsequently are proved to be groundless or inaccurate; and
> - Distorted, unbalanced or sensational media reports, where these occur, may actually work against what should be an important objective of a whistleblower regime: to ensure appropriate action follows. Furthermore, media attention inevitably tends to focus on the allegations rather on measures later taken, for example systems improvement in response to deficiencies revealed by the allegations. (ICAC 1993a:2)

2.4.4 The ICAC, however, also submitted:

> Nevertheless, institutions may fail. A safety-valve may be necessary where inaction or victimisation occurs. However, public disclosure should be a last resort and the circumstances in which the public disclosure is protected should reflect this. (ICAC 1993a:2)

Consequently the ICAC recommended:

> Protect public disclosures subject to a test of last resort. The test should

take account of:

- the person's belief in the accuracy of the information;
- the seriousness of the matter; and
- whether non-public disclosure has been, or would likely be, fruitless or lead to victimisation. (ICAC 1993a:3)

2.4.5 During the course of its inquiry the Committee sought to examine at some length the issue of a last resort right to disclose to the media.

2.4.6 Dr Simon Longstaff of The St James Ethics Centre brought to the Committee's attention another last resort test set out in a working paper by Professor Paul Finn of The Australian National University.

He sets three conditions that would justify it, as follows:

(i) that he or she had reasonable grounds for believing that the report made was true;

(ii) that the allegation has been found to be substantially accurate in the event; and

(iii) that notwithstanding his or her failure to avail of established procedures, the course taken was excusable in the circumstances. (Minutes of Evidence 1993a:89)

2.4.7 The majority Committee immediately saw that the two tests on a last resort right to disclose to the media contained conditions and terms that were broad and possibly ambiguous in their scope. For instance the condition in Professor Finn's test of "excusable in the circumstances" appeared to the majority Committee to be subjective and lacking certainty.

2.4.8 At the Committee's public hearing the ICAC admitted:

> The test of last resort as it takes broadly the shape we proposed in the submission is going to be difficult one to apply in practice. There are going to be grey areas. Making an assessment about the reasonableness of the person's judgment of whether their complaint has been acted upon, whether they were likely to be victimised means that its going to be a difficult test to apply in practice. (Minutes of Evidence 1993a:31)

2.4.9 The Committee in considering the merit of last resort right to make a public disclosure had to look at who would determine if the conditions set out in the test

had been satisfied.

2.4.10 On this point the ICAC thought that:

> [I]n the first instance, of course, it will be the person or organisation that's going to take action that would otherwise be prohibited under the legislation.
>
> For instance, it might be the organisation that has a media policy that says "you don't go to the media without prior approval" that would seek to discipline the person pursuant to that policy or those rules **and ultimately it would become a matter for the court.** (Minutes of Evidence 1993a:24) (emphasis added)

2.4.11 Dr Simon Longstaff also agreed that it would be the courts that would determine if the last resort test had been satisfied. (Minutes of Evidence 1993a:91)

2.4.12 The test, therefore, appeared to the majority of the Committee to be subject to the whims of legal interpretation. The whistleblower, if he or she made a disclosure to the media would have to prove to a court that the conditions of the test had been satisfied. The Committee therefore had to look closer at whistleblowers reasons for wanting a right to disclose to the media as it was reluctant to recommend a test which was uncertain and ambiguous and in the end may do more harm than good.

2.4.13 It was submitted to the Committee that whistleblowers will want the right to go to the media for a number of reasons. One of these might be that they feel that their complaint has not been adequately investigated and that in their mind the seriousness of the allegation demands public investigation.

2.4.14 Whistleblowers Australia submitted to the Committee:

> The only protection that whistleblowers have had in recent years has been to turn to the media and depending on public outcry to keep themselves from prosecution or retaliatory discharge.
>
> Whistleblowers are reluctant to endorse support to a Bill which denies them the right to approach the media with their complaint, for up to the present it has been the only protection they have had.
>
> Once a whistleblower makes his or her disclosure, the information is no longer under their control leaving them no assurance that the matter will be investigated. It would appear to be inappropriate to rule out an approach to the media. (Whistleblowers Anonymous 1993b:3)

2.4.15 The majority of the Committee believe that a number of the reasons given above for the necessity of whistleblowers to have the possibility of making disclosures to the media are no longer be as forceful.

2.4.16 Firstly, "public outcry" will not be the sole source of protection for whistleblowers. The Bill offers substantial and comprehensive protections against prosecution and retaliatory discharge. Clause 17 of the Bill clearly states that "no action, claim or demand may be taken or made of or against the person for making a disclosure". This means that a protected whistleblower will have, for example, an absolute privilege in proceedings for defamation; he or she will not be bound by any duty of secrecy or confidentiality; nor will the whistleblower be liable to suffer any disciplinary action because of the disclosure. Furthermore, clause 16 of the Bill creates an offence, penalising any person who takes a reprisal action against a whistleblower for making a protected disclosure. The Bill has the clear objective of ensuring that a genuine whistleblower should not suffer any detriment because of his or her actions.

2.4.17 Secondly, whistleblowers will no longer be without assurance that their disclosure will be considered and investigated, if it is not frivolous, vexatious or not in good faith. They can make a disclosure internally through established procedures to be established by each and every public authority. The Committee recommends, in fact, that a duty be imposed upon public authorities to set up these procedures within six months of the Act's assent. The procedures should then be published in the authorities annual report. If internal procedures are considered to be inadequate, whistleblowers always have the option of making a disclosure externally to one of the investigating authorities.

2.4.18 Thirdly, the Committee was not presented with argument that the investigating authorities are ill-equipped or in some way incapable of dealing with the matters raised by whistleblowers. In fact each of these authorities continually deal with and resolve disclosures of the same type as would be made by a whistleblower. It is important to note that whistleblowers are not making disclosures which each of the investigating authorities are not used to nor experienced in investigating. The Committee can, therefore, have nothing but faith in the ICAC, Ombudsman and the Auditor-General to properly and competently investigate disclosures made by whistleblowers.

2.4.19 In summary, with the introduction of this Bill the majority of the Committee believe that the reasons given for the necessity of disclosures to the media no longer apply as the protection offered by the Bill completely overcomes the problems that whistleblowers formerly had to face.

2.4.20 The majority of the Committee agree with the reasons given by the ICAC for preferring that disclosures be received and investigated through non-public channels. It is the majority of the Committee's view that the best method of

properly investigating allegations of corruption, maladministration or substantial waste of public money is through the principal investigating bodies named in the Bill and internal procedures established by public authorities. The majority of the Committee is of the view that confidence must be placed in these bodies, where experienced persons are charged with the responsibility of working for the public interest in exposing various types of improper conduct.

2.4.21 Although the media is a valuable and indispensable institution in any liberal democracy, there are a number of other equally important interests that must be taken into account in a decision to positively protect disclosures concerning corruption, maladministration or substantial waste of public money. A whistleblowers protection policy cannot focus on the interests of the whistleblower alone, **but must take into account the interests of the person or persons against whom an allegation is made and the interests of any organisation affected by such allegations**. The majority of the Committee did not take the view that the rights of the whistleblower were somehow more important than the rights of person named by a whistleblower or vice versa. In the majority of the Committee's view the bona fides of whistleblower and an accused person or persons must be the same until proven otherwise. For the majority of the Committee this came to be a crucial fact when it had to consider the question of protecting last resort disclosures to the media.

2.4.22 As the Bill stands the whistleblower's disclosure is **not** subject to a test of accuracy or truth. Consequently, if a whistleblower makes a disclosure in good faith to one of the investigating authorities and the disclosure turns out to be misplaced because the whistleblower was not aware of the full facts of the matter; the whistleblower will still have the right to protection under the Bill.

2.4.23 The majority of the Committee in considering whether to extend protection to whistleblowers who make a last resort disclosure to the media had to weigh very carefully the consequences of granting protection in this instance. In the above case, if the disclosure was made to the media, and the whistleblower was simply misplaced in his or her belief as to the truth of the allegation, then upon publication of the disclosure, serious harm could be inflicted upon a person or persons who are implicated in the disclosure. The Committee, in this situation, had to look at protecting the rights of persons accused as well as the rights of genuine whistleblowers.

2.4.24 A similar problem could arise because of the fact that unfortunately each of the investigating authorities has limited resources and can not hope to investigate every disclosure made to it. Consequently, a situation may arise where for one reason or another an investigating authority would not have the opportunity to investigate a disclosure immediately. If, in this case, there existed a last resort right to go to the media, a whistleblower unable to obtain immediate satisfaction with the investigating authority may take the matter to the media. In this case, if the

whistleblower did go to the media, but his or her disclosure was misplaced in its substance, and the story was published, the person named in the media report would have no recourse in defamation against the person making the disclosure because that disclosure would be protected by the Bill.

2.4.25 Of course, the innocent person who has been accused could attempt to sue the media organisations that published the story, but realistically this would not be feasible for most persons. The cost of defamation proceedings are exorbitant, with no guarantee of success against organisations with vast and powerful legal resources. All the average public official could hope for is a small correction tucked away in the paper, little to heal the damage done to a front page assault on his or her integrity and honesty.

2.4.26 In this situation where a matter can not be properly investigated because of the limited resources an investigating authority has at its disposal, the situation could arise where a range of interests groups may turn to the media to further their own case knowing that they have the full protection of this Act. This may occur, for example, where an interest group alleges that a department has committed some act of maladministration as defined in the Bill by not accepting or conforming to the demands made by that interest group. This interest group, firstly makes a disclosure to the Ombudsman with the knowledge that it may not be investigated because of lack of resources. The interest group then makes a disclosure to the media which would, if there was a last resort right to disclose to the media, ensure protection for that disclosure. Persons or organisations named in that protected disclosure would be put in a severely disadvantaged position.

2.4.27 The majority of the Committee, however, not only had to consider a case where a disclosure was made which is inadvertently misplaced, but also the situation where an individual may maliciously seek to destroy the reputation of another person. In this case if there is a last resort right to go to the media and similar events occur as described above, where the disclosure is not properly or immediately investigated then the malicious individual would no doubt turn to the media to have the matter published. Again the innocent person would not realistically have a chance of clearing their name nor obtaining compensation for the damage done.

2.4.28 Even if the test of last resort contained a condition requiring the disclosure to be true, malicious persons acting upon the Act's endorsement of disclosures to the media, may have ensured that they have no assets to which an innocent person can make a claim upon in an action of defamation, that is, the person making the allegation in the media is a "man of straw".

2.4.29 The majority of the Committee had to face the reality that media organisations do not have the resources nor the expertise to investigate every allegation brought to them. The priorities of the media are not solely with the public interest. Other factors such as profit and expediency will be taken into account by media

organisations as they are businesses. The media generally do not perform *investigative* functions but rather simply report the results of investigations. If the majority of the Committee was to endorse a policy of allowing protected disclosures to the media, even on certain conditions, the reality of the divergent interests of the media to the general public interest had to be taken into account. To not do so would be negligent.

2.4.30 Another problem with adding a last resort right to the media is how to ensure that only the information the person first disclosed to the investigating authority is published by the media. The situation may arise where a person provides direct evidence of corruption, for instance, and then relying upon a right to go to the media with protection makes a much wider disclosure to the media, containing a large amount of purely circumstantial and unsupported evidence. Persons or organisations named in that circumstantial evidence would have little opportunity to clear their names.

2.4.31 The option to include a last resort right to disclosure to the media with protection is further complicated by the problem of when should that right end. Can a person who has the right under the Act to go to the media with protection continually year after year rely on that right to air their complaints? The circumstances upon which that disclosure was initially based may have changed. In this case repeated disclosures will be protected by the Act, but the disclosure may no longer be valid.

2.4.32 On balance the majority of the Committee took the view that the only protection available to persons who are implicated in disclosures is to have the disclosure properly investigated through internal procedures or by the investigating authorities. The Committee looked carefully and realistically at the issue and noted that a person implicated will never be able to demand the same press coverage to clear his or her name as the whistleblower who makes the allegations. It may be that once a person is publicly named a cloud will always hang over his or her integrity. **Clearly a policy that endorsed disclosures to the media in any form would also, in reality, abrogate the right to innocence of a person accused by a whistleblower before he or she is proven to be guilty.** An endorsement by the Parliament of right to disclosure to the media with protection thereafter, the majority of the Committee believed could be seen by some persons as a signal not to use the proper channels of investigation. This endorsement if it was to act in this way would be contrary to the Bill's clearly stated objective of enhancing and augmenting established procedures for making disclosures. The majority of the Committee, therefore, took the view that endorsing protected disclosures to the media was not in the public interest and the Bill should remain as it is now, without a last resort right to disclose to the media.

2.4.33 Finally, the majority of the Committee does not regard the Bill as prohibiting disclosures to the media. If a person wishes to make a disclosure to the media the conditions will remain the same as they are at the present. If a whistleblower is

completely certain of the truth of the allegations which he or she wishes to disclose then that person will have nothing to fear as this disclosure will be true and in the public interest. This Bill has the clear policy of encouraging disclosures to be made within public authorities or to the ICAC, Ombudsman or Auditor-General, but it does not follow that the Bill in some way prohibits public disclosures.

RECOMMENDATION 4

The majority of the Committee, therefore, recommend that last resort disclosures to the media not be given protection under the Bill as is the case with the Bill before the Parliament.

2.4.34 The majority of the Committee consisted of Mr Don Page (Chairman), Mr John Turner MP and Mr Jeremy Kinross MP. The minority members of the Committee, Ms Sandra Nori, Mr Paul Crittenden and Ms Clover Moore held a different view which is outlined below.

Protection for last resort disclosure to the media - Dissenting Opinions

We dissent from the recommendation of the Committee that disclosure to the media as a last resort not be protected.

We propose that a whistleblower's disclosure to the media, as a last resort, be protected where the following conditions are met:

(i) that the whistleblower had reasonable grounds for believing that the report made was true; and

(ii) that the allegation is true in all material respects; and

(iii) the whistleblower had made the disclosure to an investigating authority and that authority had completed its investigations of the disclosure or decided not to investigate the matter.

The whistleblower's protection from defamation actions does not extend to the media, only to the whistleblower.

We believe that disclosure to the media as a last resort should be protected because:

- institutional failure can occur. This was acknowledged by the ICAC in their submission. In such circumstances, there is no other effective means of ensuring the allegation is investigated.

- the requirement that the whistleblower had made a disclosure to an investigating

authority before disclosing to the media compels a whistleblower seeking protection to follow the proper channels of investigation.

- the requirement of "truth in all material respects" is a more stringent test than is applied to disclosures within the bureaucracy. This is appropriate because a disclosure which is incorrect could cause harm to a person the subject of the disclosure.

- the test operates after the disclosure is made. A person cannot be certain at the time of the media disclosure that they will be protected. This places the person in the same position as a person seeking to justify a defamatory statement, which is appropriate in view of the capacity for their disclosure to harm an individual.

2.5 Right of appeal

2.5.1 One of the principal protections provided to whistleblowers under the Bill is a right of appeal to the Government and Related Employees Appeal Tribunal (GREAT) where detrimental action has occurred in the form of an administrative decision which was substantially in reprisal for a protected disclosure.

2.5.2 The ICAC submitted to the Committee that this provision may be of little assistance to some persons covered by the Bill. For instance, the ICAC noted that SES officers and all local government employees can not appeal to GREAT.

2.5.3 The Committee supports the ICAC's call for a simple, effective, and accessible remedy for employment-related victimisation. The Committee agrees that this remedy should be "quick, inexpensive and focused on the merits of the situation, rather than on legal technicalities."

2.5.4 The ICAC submitted that the Industrial Court's powers in relation to victimisation, under sections 481 and 482 of the Industrial Relations Act could be extended to encompass victimisation which is the result of a protected disclosure covered by the Bill.

2.5.5 The Committee asked the ICAC to expand upon its submission.

> With regard to the ambit of employer action, relief will only be available where the employer action involves a "decision " within the meaning of section 23(1) of the GREAT Act 1980. It can be seen that a range of possible reprisals would not be covered, for example arbitrary transfer or inappropriate allocation of work. These actions would fall with the much broader definition of victimisation in section 481(2) of the Industrial Relations Act 1991. (ICAC 1993b:2)

2.5.6 A similar point was made by the Public Service Association of NSW in its submission to the Committee.

> The Act in its present form refers to Section 24 of the Government and Related Employees Appeal Tribunal Act 1980 No 39 and seeks to add a clause relating to the Whistleblowers Protection Act 1992.
>
> The Association does not believe that this link is clearly spelt out in its present form. If an appeal were to arise where an individual has been disadvantaged by way of promotion, transfer or deferral of increment, it would be reasonable to expect that a department would argue that such treatment constituted discrimination and this could not be dealt with by the GREAT Tribunal or the Industrial Relations Commission of NSW.
>
> One is therefore faced with having to take an action under the Anti-Discrimination Act which is highly unlikely to succeed.
>
> It should be further noted that only the GREAT Tribunal and the Industrial Relations Commission have the power currently to return an individual to employment and/or reverse an arbitral decision. (Public Service Association of NSW 1993:1)

2.5.7 The Committee had to examine whether there was some way of improving the protection offered to whistleblowers by the Bill. The Committee firstly turned to clause 17(1) of the Bill which states:

> A person is not subject to any liability for making a protected disclosure and no action, claim or demand, may be taken or made of or against the person making the disclosure.

2.5.8 Examples of the operation of this sub-clause is given in clause 17(3) the relevant example being that a person who has made a protected disclosure is not liable to disciplinary action because of the disclosure. The term "disciplinary action" is not defined in the Bill.

2.5.9 The Committee is of the view that a genuine whistleblower should be free from the kind of "action" alluded to by the Public Service Association of NSW in its submission (i.e. disadvantage by way of promotion, transfer or deferral of increment). To achieve this objective the Committee would firstly amend clause 17 of the Bill by inserting the words "including detrimental action" after the word "action" in the second line of the clause. The term action is not defined, other than by way of example in the Bill. The Committee believes that a whistleblower should be able to rely on protection against an action if that action would fall within the ambit of the offence for taking a reprisal against a whistleblower.

2.5.10 With this in mind, it can be seen from the definition of detrimental action that such action would include "discrimination, disadvantage or adverse treatment in employment". The Committee considers that these terms would encompass the examples given by the Public Service Association.

2.5.11 However, even this amendment would not overcome the limited meaning of the term "decision" in the GREAT Act. The Committee is of the view that it would be inconsistent if whistleblowers were excluded from real protection through the limitations of legal definition. The Committee believes that a "decision", when it applies to a whistleblower, should encompass the term "detrimental action" in clause 16 of the Whistleblowers Bill. This amendment will ensure that detrimental action is not taken against whistleblowers by employers through devious means.

2.5.12 The Committee recognises, however, that this does not solve all the problems put to it. A large group of persons are excluded from the jurisdiction of the GREAT Act (SES and all local government employees). The ICAC, as mentioned, submitted that the Industrial Courts powers should be extended to cover whistleblowers through an amendment of sections 481 and 482 of the Industrial Relations Act.

2.5.13 The Committee became aware of one significant problem with this submission, that these sections are in a Division of the Industrial Relations Act entitled "Voluntary Unionism". The Committee had some concern that provisions relating to whistleblowers would be inappropriate in this part of the Act. The Chairman of the Committee Don Page MP raised this problem with the ICAC who responded:

> Our feeling was, on looking at the provisions that it was a provision that dealt with victimisation in a particular situation, i.e. voluntary unionism and that one could use those provisions which, from our point of view, are appropriately broadly drawn to encompass a range of situations and to give the appropriate powers to the court to deal with the situation and that it was an extension of that. Effectively you are turning it around and saying "They are really about voluntary unionism."
>
> Our point is that what was desirable about those provisions was the ambit of victimisation which was covered and the breath of the remedial orders that the tribunal is able to make. If it is more appropriate to take those and locate them somewhere else in the legislation, then that would still achieve the goals proposed by the Commission. (Minutes of Evidence 1993a:29)

2.5.14 The Committee believes that all persons covered by the Whistleblowers Bill should be entitled to the protection given by that Bill. The Committee considers that the GREAT Tribunal provides the most appropriate forum for public officials covered by the Bill to exercise their rights therein. Furthermore an appeal under the GREAT Act is an informal process with the provision of an automatic right of

appeal on a point of law. The Committee believes that the simplest way to resolve the problem that not all public officials under the Bill are within the jurisdiction of the GREAT Act is to extend the jurisdiction of the GREAT Act to allow all **protected persons** under the Bill to make an appeal to the GREAT Tribunal.

RECOMMENDATION 5

The Committee therefore recommends the following:

1. **Generally, all public officials covered by the Bill should have an opportunity to rely upon the protection given in the Bill.**

2. **The term "action" in clause 17 should include "detrimental action" as defined in clause 16 of the Bill.**

3. **A "decision" under the GREAT Act, taken against a protected person under the Bill, should encompass any "detrimental action", as defined in clause 16 of the Bill, taken against that person.**

4. **The jurisdiction of the GREAT Act should be extended to allow a right of appeal to all protected persons under the Whistleblowers Bill.**

2.6 When does protection begin and end

2.6.1 One of the more difficult issues the Committee had to come to terms with was determining when protection commenced and ended under the Bill. The Committee had to consider whether the Bill was to be read, on the one hand, in way which would mean that protection began, if clauses 8 and 9 were complied with, simply when a person made a disclosure to one of the three investigating authorities or to another public official. On the other hand the Bill could possibly be read so that protection would begin only when a disclosure had been verified that it had been made correctly and in good faith.

2.6.2 The Chairman of the Committee Don Page MP put the following to the ICAC:

> The question of when protection begins and ends - if somebody makes a disclosure and is unhappy about the way it is handled and subsequently goes to the media, because they have gone to the media, should the protection that was inherent in that initial disclosure cease to exist? If so, at what point in time? Should it be when they made a disclosure to the media or should it be when they made the disclosure to the investigating authority? That is quite an important issue in relation to reprisal and so on.

> Do you have a view on that issue as to when protection should actually occur in circumstances such as that? (Minutes of Evidence 1993a:25-26)

2.6.3 The ICAC responded:

> Up to the point at which they have gone to the media, we would presume they have operated in accordance with the spirit and letter of the system. It seems to me that the system ought to apply and, therefore, that protection should be available and delivered. If through their actions in going to the media they offend, as my colleague has suggested, some other rule or policy of the relevant organisation, apart form losing the protection offered under the Bill now before you, it would seem likely that action would be taken in accordance with whatever organisation's policy. (Minutes of Evidence 1993a:26)

2.6.4 If the situation where a disclosure has to be made in good faith the ICAC thought that:

> A person who comes in good faith, as it were, although that may not be established until a subsequent time, the person can't expect protection for the period of time that it takes to ascertain that they are acting in bad faith or trying to mislead or what have you. (Minutes of Evidence 1993a:27)

2.6.5 The Committee agrees with the ICAC that protection will cease from the beginning if a disclosure is discovered not to have been made in good faith (or honestly on reasonable grounds). Similarly protection can not be said to have begun if a disclosure is frivolous or vexatious.

2.6.6 A related problem arises where two disclosures are made by a whistleblower, one in accordance with the Act, and the other outside its terms. The Chairman put it this way to the ICAC:

> If somebody goes to the ICAC, for example, with a whistleblower's complaint, you investigate it thoroughly and you discover that it is groundless and the whistleblower is still unhappy with the quality of your investigations and then they go public in the media. As I read the Bill at the moment that would be an unprotected disclosure, wouldn't it?
>
> I can see this being quite a regular thing. I can see people being unhappy with the results of investigating authorities investigation and then going out and saying "Well, they didn't look at my issue properly" or "there is new evidence" and so on. As I read the Bill at the moment that person has no protection unless they resubmit the complaint for further investigation. You don't have any problem with that situation, do you? (Minutes of Evidence 1993a:33)

2.6.7 The ICAC replied:

> The problem is one of multiple disclosures and what do you do in a situation where the same thing has been disclosed more than once and one disclosure is protected and one isn't? The Bill does not specifically address that. Implicitly what it creates is a situation where you have unprotected disclosure and you have a protected disclosure. What follows from that is that action taken which is tied back to the unprotected disclosure, the Bill doesn't help you. (Minutes of Evidence 1993a:33-34)

2.6.8 The Committee acknowledges that the Bill is not clear on this point. It would no doubt promote the clarity in the Bill if it is clearly stated in the Bill firstly, when protection begins and ends, and secondly what is the consequence of making a multiple disclosure, where one of those disclosures is outside the terms of the Bill.

2.6.9 Specifically, the Committee strongly believes that it is necessary to ensure the effective operation of the Bill that a clause similar to the following be inserted in the Bill:

> Protection shall commence under this Act when a public official makes a disclosure, in accordance with clauses 8-9, to one of the designated bodies or persons named in clauses 10-13 of the Act.

2.6.10 As to when protection should end under the Bill the Committee is of the view that if a public official does an act or acts which would exempt that person from the Bill's protection then that person should be regarded as never being protected by the Bill.

RECOMMENDATION 6

The Committee, therefore, recommends:

1. That the Bill clearly state when protection is to begin under the Bill. As to when protection should begin a clause similar to the following should be added to the Bill:

> **Protection shall commence under this Act when a public official makes a disclosure, in accordance with clauses 8-9, to one of the designated bodies or persons named in clauses 10-13 of the Act.**

2. A provision should be added to the Bill to govern the situation where multiple disclosures are made by a whistleblower, at least one of which is within the terms of the Act and the others which may be outside the terms of the Act.

2.7 False, misleading or malicious disclosures

2.7.1 The Bill, contains a number of protections for the genuine whistleblower, however persons making disclosures not in the public interest, but rather for their own self-interest, are not met with any sanction.

2.7.2 The ICAC submitted to the Committee:

> The Bill should encourage and protect the genuine whistleblower without providing a cover for those who make trivial, wilfully false or misleading disclosures for ulterior motives. Clearly this is a question of balance. Genuine whistleblowers should not be deterred or left without protection because threshold requirements are unduly onerous or complex. On the other hand, the mala fide whistleblower should be discouraged. (ICAC 1993a:5)

2.7.3 At the Committee's public hearing the Chairman of the Committee Don Page MP asked Whistleblowers Australia if:

> You would support some form of penalty for those who are vexatious or malicious whistleblowers in an effort to protect the genuine ones? (Minutes of Evidence 1993a:53)

2.7.4 Mr John McNicol, National Director of Whistleblowers Australia, replied:

> I believe that protection only should go to the genuine whistleblowers and I believe that anyone who makes a malicious or vexatious complaint should be dealt with to the full extent of the law. I believe they are wasting time which departments can not afford and they should be totally judged and I also believe it should be a criminal offence. (Minutes of Evidence 1993a:54)

2.7.5 The Auditor-General and the Ombudsman also supported the inclusion of an offence in the Bill for the making of wilfully false and misleading disclosures.

2.7.6 The submission from The St James Ethics Centre took into account the varying interests involved in whistleblower protection and put forth a different view:

> On balance, it may be preferable to exclude a provision creating such an offence and instead rely on civil remedies that continue to be available where disclosures are not protected under the Bill, or where they cease to be protected under s. 15(1) (where disclosures will not be protected if the investigating authority discontinues an investigation because it is of the opinion that a disclosure was made "frivolously, vexatiously or not in good faith"). (The St James Ethics Centre 1993b:4)

2.7.7 The Committee took the view that the substantial protections to whistleblowers required balancing with a sanction of some sort against persons who may seek to misuse the Bill. Genuine whistleblowers will have nothing to fear from such a provision.

2.7.8 The Committee, then had to examine what kind of provision should be included in the Bill. At first the Committee considered creating an offence for the making of a disclosure which is **wilfully** false, misleading and malicious. On reflection the last term, "malicious", appeared inconsistent with the Committee's approach to the Bill.

2.7.9 Later in this Report the Committee recommends that the test of good faith should be removed from the Bill because it requires the assessment of subjective motives of the whistleblower which will be very difficult to ascertain. The inclusion of provision which prohibits "malicious" disclosures would, similarly, require the examination of the subjective motives of the whistleblower. The Committee's approach to the Bill is one of enhancing its clarity and reducing its complexity; the Committee therefore did not think a penalty provision on "malicious disclosures" would add to the Bill.

2.7.10 On this point the ICAC submitted:

> In the Commission's view, there will be few if any "malicious" disclosures deserving of prosecution which would not also have been knowingly false or misleading. Conversely if the disclosure were true and not misleading, albeit made with the malicious intent, the balance of the public interest, in the Commission's view, would be in favour of ensuring that the disclosure is made. (ICAC 1993a:5)

2.7.11 On the inclusion in the Bill of a penalty for false and misleading complaints the Committee notes that similar provisions are included in the draft Whistleblowers Protection Bill prepared by the Queensland Electoral and Administrative Review Commission and the draft Whistleblowers Protection Bill tabled in the Senate on 25 May 1993 by Senator Christabel Chamarette (Independent Senator for the Greens (WA)).

2.7.12 The St James Ethics Centre submitted that:

> people may be frightened by the prospect of making an innocent error only to be **charged** with an offence. (The St James Ethics Centre 1993b:4)

2.7.13 The Committee recognises this concern but considers that innocent errors will be outside the reach of a clause which creates an offence for **wilfully** false and misleading disclosures. A whistleblower who honestly makes a disclosure on reasonable grounds but was unaware of the truth of the matter to which he or she

made a disclosure, the Committee believes, could not be said to have wilfully made a false or misleading disclosure.

RECOMMENDATION 7

The Committee, therefore, recommends that the Bill be amended to include a penalty for the making of a disclosure which is wilfully false and misleading.

2.8 Annual Reporting Obligations

2.8.1 The ICAC submitted to the Committee:

> The Bill sets up a whistleblower protection system with many parts. It will require central co-ordination and monitoring if the impact of the Bill is to be properly evaluated. Clause 26 of the Bill provides for periodic review by a Joint Parliamentary Committee. These reviews will not be very meaningful unless appropriate information is recorded once the Bill has commenced. (ICAC 1993a:8)

2.8.2 The Committee supports the introduction in the Bill of reporting requirements for investigating authorities and public authorities. Unless details are kept by authorities on the use of the protection offered by the Bill the Parliamentary Joint Committee tasked with reviewing the Act will face substantial obstacles in its review.

2.8.3 As a guide to the possible matters that should be included in the annual reports the Committee notes clause 29 of the draft Whistleblowers Protection Bill prepared by the Queensland Electoral and Administrative Review Commission.

> 29. (1) A public sector unit that is required by an Act to prepare an annual report of its activities during a year for tabling before the Legislative Assembly is to include in the report -
>
> (a) a description of the procedures maintained by it under section 20 during the year; and
> (b) statistics mentioned in subsection (2) relating to the year; and
> (c) particulars mentioned in subsection (3) relating to the year.
>
> (2) The statistics to be included in the annual report are -
>
> (a) the number of public interest disclosures received by the public sector unit; and
> (b) the number of public interest disclosures received by the public sector unit that were referred to it by other public sector units; and

(c) the number of public interest disclosures accepted by the public sector unit for investigation; and

(d) the number of public interest disclosures the public sector unit referred to other public sector units for investigation, stating the identity of each unit together with the total number of disclosures referred to the unit; and

(e) the number of public interest disclosures on which the public sector unit declined to take action under section 17; and

(f) the number of public interest disclosures that were substantiated by the public sector unit's investigation of the disclosure; and

(g) the number of complaints of unlawful reprisal received by the public sector unit; and

(h) the number of complaints of unlawful reprisal that the public sector unit referred to the Commission.

(3) The annual report is to include brief particulars of remedial action taken by the public sector unit in relation to public interest disclosures, including complaints of unlawful reprisal, that were substantiated on investigation by the public sector unit, or by another proper authority.

2.8.4 The Committee, however, is aware that these statistics may be used by a few opportunistic individuals for their own self-interest. To avoid this situation arising the Committee believes that the statistics required to be collated by the authorities should be forwarded directly to the Joint Parliamentary Committee charged with reviewing the Act. However, the Committee strongly believes that all public authorities should still publish in their annual reports the complete details of the internal procedures for disclosures by whistleblowers.

RECOMMENDATION 8

The Committee, therefore, recommends that consideration be given to including in the Bill comprehensive annual reporting obligations upon all public authorities and investigating authorities. Statistics to be collected should be forwarded directly to the Joint Parliamentary Committee charged with reviewing this Act.

2.9 The Name of the Bill

2.9.1 The issue of whether the name of the Bill is the most appropriate one was raised by some members of the Committee during the course of its inquiry. Some members of the Committee believe that the term "whistleblower" is not understood by members of the general public. The word originates from the United States

and has been used there for a number of years. However, in Australia the term is not part of the general vocabulary. These members of the Committee think that the term may still have many negative connotations in the average person's mind, signifying an activity which is not in the public interest.

2.9.2 Some members of the Committee would like to see that the activities protected by this Bill are recognised for what they are: actions done in the public interest. Persons making a protected disclosure under this Bill should not have a name attached to them which leaves it unclear whether they have acted in the public interest or not. The term whistleblower is not used anywhere else in the Bill, other than in the title and therefore changing the title will not substantially alter the Bill.

2.9.3 Furthermore, the Bill does a lot more than simply protect whistleblowers. Protecting persons who make disclosures in accordance with the Bill is but one of the three mechanisms that the Bill uses to achieve its overall objective of encouraging and facilitating the disclosure, in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector. The Bill also seeks to enhance and augment established procedures for making disclosures and providing for those disclosures to be properly investigated and dealt with.

3. SPECIFIC AMENDMENTS TO THE BILL

3.1 Definition of Public Official

3.1.1 To be protected by the Bill a disclosure must be made by a "public official". The term "public official" is defined in clause 4 of the Bill to mean:

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

3.1.2 The Committee received a number of submissions that criticised this definition for its lack of clarity.

3.1.3 The Local Government Association of NSW submitted:

> this definition is very confusing and unclear for two reasons:-
>
> a) The definition is in terms of a person who may be investigated whereas a "public official" in Part 2 of the Bill is a person who may make a disclosure.
>
> b) It is necessary to refer to the Independent Commission Against Corruption Act, the Ombudsman's Act or the Public Finance and Audit Act in order to ascertain who is a "public official". A non-lawyer will not understand this task and is unlikely to have copies of these Acts at hand. A person would not be confident to make a disclosure without the guidance of a lawyer in relation to this definition. (Local Government Association 1993:1)

3.1.4 Similar submissions on the ambiguity of the definition were made by the Hunter Water Corporation and the Minister for Education and Youth Affairs.

3.1.5 Other submissions criticised the fact that the Bill **only** protected public officials. The ICAC submitted:

> The Bill protects only disclosures made by public officials, and this creates an unfortunate anomaly. If, for example, an employee of a private contractor reports to the ICAC on kickbacks being paid for government contracts, he or she would not be protected, although a public official reporting the same situation would be protected. This anomaly may prove particularly significant given the increasing emphasis on the contracting- out of government services to the private sector. The ICAC experience has shown that corruption is often discovered by persons outside the public

> sector, but having dealings with it. Extending protection to these people would greatly assist the objectives of the Bill. (ICAC 1993a:3)

3.1.6 In a similar vein, the Ombudsman submitted:

> The Bill protects only disclosures made by public officials. It is obvious that in many instances a member of the public e.g. a contractor, who has dealings with a public authority or official, may become aware of corrupt conduct, maladministration or substantial waste in the public sector. Any disclosure of such conduct by a member of the public is not protected, notwithstanding that a contractor would fear and could suffer the substantial reprisal action should a disclosure be made. Again, this deficiency should be remedied if the object of the Bill is to be achieved. (Office of Ombudsman 1993a:3)

3.1.7 The Committee considered the possibility that the definition of "public official" may include persons such a private contractors with the government.

3.1.8 The Auditor-General submitted to the Committee:

> I would not read the clause up that far, but would prefer to see some specific mention of contractor or person employed by the contractor written into the clause. (Auditor-General's Office 1993b:2)

3.1.9 The Ombudsman also thought that it would be difficult to read the definition in this way. The Ombudsman clearly stated that "it has never been considered that the conduct of a contractor could be investigated under the Ombudsman Act." (Office of Ombudsman 1993b:2) At the Committee's public hearing the Deputy Ombudsman, Mr John Pinnock made further and more elaborate comments upon this issue.

> I am . . . intrigued [by] the idea that a contractor, for instance, might come within the definition of public official within the terms of that phrase of the Bill. I have difficulty in seeing that.
>
> It would, of course, extend considerably the ambit of the Bill, as noted by the Ombudsman in his [second submission]. The definition also includes or requires that a public official is a person whose conduct may be investigated by the investigating authority, that is to say under its own legislation. It is difficult to find anything in the Ombudsman Act and in the definition of public authority which would really support that contention.
>
> The only possibility which could support that interpretation is paragraph (h) of the definition of public authority in section 5(1) of the Ombudsman Act:

> . . . any person acting for or on behalf of, or in place of, or as deputy or delegate of, any person described in any of the foregoing paragraphs.
>
> In another context it has been suggested to me that the use of the word delegate in that paragraph might extend to someone who is not in any sense an employee under the *Public Sector Management Act* or any other legislation which might otherwise constitute a public authority, and hence in that sub-context you could perhaps look at it encompassing a contractor. There is no support for that argument that I can see in the second reading speech on the *Ombudsman Act*. It has never been suggested prior to this that that paragraph would extend the Ombudsman's jurisdiction in that mater. **I think 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.** (emphasis added) (Minutes of Evidence 1993b:1-2)

3.1.10 As this is one of the most important definitions in the Bill, the Committee is of the view that it should be as clear, concise and consistent as possible. The Committee is also of the opinion that persons such as private contractors should be covered by the Bill. Persons in this category should have a clear and definable relationship with the public sector, such as private contractors.

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.

3.2 Should Disclosures be made Voluntarily?

3.2.1 The Committee received a number of submissions which questioned the reason for excluding disclosures made under legal compulsion from protection under the Bill. This exclusion is contained in clause 9(1) and 9(2) which state:

> *9. (1) To be protected by this Act, a disclosure must be made voluntarily.*
>
> *(2) A disclosure is not voluntarily made for the purposes of this section if it is made by a public official in the exercise of a duty imposed on the public official by or under an Act.*

3.2.2 Pacific Power submitted to the Committee that under Pacific Power's code of

conduct employees:

> have a duty to report to a senior officer of Pacific Power any corrupt conduct, involving or affecting Pacific Power, of which you are aware, or which you suspect. (Pacific Power 1993:1)]

3.2.3 Pacific Power called upon the Committee to re-examine the clause 9(2) of the Bill as it believed that an employee of Pacific Power could be argued to be under a duty to report corrupt conduct. Pacific Power submitted that this duty could have the force of law as it could be said to be derived from the provisions of the *Electricity Commission Act 1950*. However, to the Committee's knowledge it is not only employees of Pacific Power who would be under a legal duty, but most public sector employees because of the implications of the Public Sector Management Act 1988.

3.2.4 Pacific Power concluded that it:

> would not like to have an employee, who willingly, readily and promptly reported corrupt conduct, deprived of the benefit of this Bill merely because the employee was bound to comply with the duty in Pacific Power's "Code of Conduct". (Pacific Power 1993:1)

3.2.5 A number of other submissions highlighted the affect of clause 9(2) of the Bill when s11 of the *Independent Commission Against Corruption Act (ICAC Act)* is taken into account. This section of the ICAC Act imposes upon named officers a duty to report to the ICAC "any matter that the officer suspects on reasonable grounds concerns or may concern corrupt conduct". Taking into account that the definition of corrupt conduct within the ICAC Act is wide in its compass, this is a substantial duty imposed upon the named officers. However, clause 9(2) would exclude any person making a report under s11 of the ICAC Act from the protection offered by the Bill.

3.2.6 The Committee notes that the ICAC considers s.11 of the ICAC Act to be a mechanism which assists the Commission in carrying out its investigative, preventative and educative work. [ICAC Annual Report 1992 p13] The Committee believes that clause 9(2) of the Bill detracts from rather than complimenting the effectiveness of s11 of the ICAC Act.

RECOMMENDATION 10

The Committee therefore recommends that consideration be given to amending clause 9 of the Bill to allow protection for disclosures which are made in accordance with a legal duty, whether it be under a code of conduct or some other instrument, which have as their aim exposing corrupt conduct, maladministration or substantial waste of public money.

3.3 *Good Faith test*

3.3.1 Clause 9(3) of the Bill states that "to be protected by this Act, a disclosure must be made in good faith." The Committee received submissions from the ICAC, Office of the Ombudsman, Professor Paul Finn and Whistleblowers Anonymous which criticised this clause.

3.3.2 The ICAC submitted:

> The Commission believes that "good faith" should not be defined in terms of the person's motivation for making the disclosure. Motivation is hard to establish, and it is likely that many whistleblowers will be motivated at least in part by considerations other than the public interest. Furthermore, the public interest in a true disclosure is not diminished by the fact that it was disclosed for reasons other than the public interest. (ICAC 1993a:6)

3.3.3 Professor Paul Finn of The Australian National University submitted that:

> [t]he "good faith" requirement's actual purpose is anything but self-evident. The later sections - ss 10-12 - require suspicion "on reasonable grounds". If this exists what purpose is served by s9(3)? If it refers to the official's motive, e.g. the official must not be acting spitefully, it makes motive more important than inducing disclosures which have reasonable grounds. This, with respect, is an untenable policy choice as has been recognised elsewhere in the common law world. (Finn 1993:1)

3.3.4 Whistleblowers Anonymous advocated in its submission:

> Removal of any reference to the whistleblower's state of mind (mens rea). It is irrelevant to society whether the person blows the whistle for the best of motives, or out of malice. What matters is that the irregularities that they complain of are corrected, and seen to be corrected. Legal wrangling about motives benefits no-one but lawyers and people rorting the system, and places an enormous and unnecessary burden on the whistleblower. (Whistleblowers Anonymous 1993a:1)

3.3.5 The Ombudsman's submission was critical of the inclusion of this provision from a different aspect. The Ombudsman submitted that the manner in which the good faith test was included in the Bill created a condition precedent for the obtaining of protection under the Bill. The Ombudsman argues that persons who approach his Office usually seek some form of protection before they make a disclosure not after. The Ombudsman concludes that this frustrates the objective of the Bill to encourage disclosures.

3.3.6 The Chairman of the Committee Mr Don Page MP put the following to the Deputy

Ombudsman, Mr John Pinnock:

> It seems to me that we should not discriminate initially in favour of whistleblowers in a way which puts them in an advantageous position vis a vis other complainants in relation to giving a guarantee up-front irrespective of whether the complaint is made in good faith or bad faith, but we should provide protection in the event that whistleblowers face a court, or face the prospect or reality of victimisation in the workplace as a result of their complaints. That is why I think there is really not the problem here that I suspect you think there is. (Minutes of Evidence 1993b:9-10)

3.3.7 The Committee, with respect to the opinions of the Ombudsman and Deputy Ombudsman, agree with the Chairman that whistleblowers should not receive initial guarantees that are not given to other persons who makes disclosures to one of the three investigating authorities.

3.3.8 A part of the Bill related to the test of "good faith" in clause 9(3) is the second "state of mind" test included in clauses 10-13. These clauses cover disclosures to the three principle investigating authorities and to other public officials. The test in question states that to gain protection under the Bill the disclosure of information must be one that "the public official **suspects on reasonable grounds** shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct."

3.3.9 This test is objective, providing protection to the whistleblower only when he or she had reasonable grounds for making the disclosure. The good faith test is a subjective test requiring the whistleblower to have a certain state of mind when making the disclosure. The process of assessing a subjective test poses many practical difficulties.

3.3.10 The reasons for a whistleblower making a disclosure, the Committee recognises, will be varied and difficult to establish. The Committee, however does not believe that if the good faith requirement is to be deleted from the Bill that a mere suspicion on reasonable grounds is a test which strikes the correct balance between the many interests covered by the Bill.

3.3.11 The ICAC submitted that "good faith" should be defined to mean "honest belief that the information is true and not misleading". The ICAC submitted that defined in this way the "good faith" requirement will deny protection to those persons making false or misleading complaints.

3.3.12 The Committee would favour the amendment of the Bill so that there is one "state of mind" test to satisfy in the Bill. This will bring further clarity and simplicity to the Bill, which would be of benefit to all concerned.

3.3.13 The Queensland Electoral and Administrative Review Commission in its Report on Protection of Whistleblowers advocated the adoption of test for a draft Bill prepared by the Commission of **"that the person honestly believes on reasonable grounds"**. The Commission recommended that this should be uniformly adopted throughout the Bill. The Commission explained and gave reasons for the test as follows:

> This is basically an objective test requiring that the information disclosed be objectively capable of giving rise to an honest belief that the information provides evidence of a matter falling within the recommended categories of public interest disclosure. The test also imports some elements of a good faith requirement but it has been inserted primarily to cover the instance of a person who discloses part only of the information available to him or her, that part being objectively capable of giving rise to an honest belief in the existence of a matter falling within the categories of public interest disclosure, whereas the information withheld would negative inference. It is designed to deter persons from mischievously seeking to subject another to the emotional distress of an investigation, when the first mentioned person could not reasonably have an honest belief that illegal or improper conduct has occurred in the light of all the information available to him or her. (EARC 1991:147)

3.3.14 The Committee considers that the test adopted by the Queensland Electoral and Administrative Review Commission is a simplified version of the amendments suggested by the ICAC. The Committee believes that such a test will strike the best balance in the Bill.

RECOMMENDATION 11

The Committee, therefore, recommends that the Bill be amended by deleting the good faith test contained in clause 9(3) and replacing the test of "suspects on reasonable grounds" in clauses 10-13 with a single state of mind test of "honest belief on reasonable grounds". Clause 15 of the Bill should be amended accordingly.

3.4 Clause 15: The discretion to decline or discontinue an investigation

3.4.1 Clause 15 of the Bill provides a discretion to investigating authorities to decline to investigate or discontinue any matter raised by a disclosure if the investigating authority is of the opinion that the disclosure was made frivolously, vexatiously or not in good faith.

3.4.2 The Minister for Education and Consumer Affairs, the Honourable Virginia Chadwick, submitted to the Committee that no such provisions apply to disclosures made to principal officers of public authorities. This it was suggested, could

result in public administration being bogged down in the investigation of disclosures of this kind.

3.4.3 The Committee took into account that it may be implicit that this discretion extends to public authorities as well as investigating authorities. However, the Committee is of the view that it would promote the clarity of the Bill if it was clearly set out in this clause that public authorities, as well as investigating authorities, have the discretion to decline to investigate a disclosure because it is frivolous, vexatious or not in good faith. (On the good faith requirement see section 3.3 of the Report)

3.4.4 Finally, the Committee would like to make it clear that even if a person has their disclosure declined or discontinued by a public authority he or she may still go to an investigating authority with that matter.

RECOMMENDATION 12

The Committee recommends that the discretion to decline to investigate or discontinue an investigation should be extended to encompass disclosures made to other public officials named in clause 12 of the Bill.

3.5 Reprisals

a. Uncertainty

3.5.1 The principal objective of the Bill is to encourage and facilitate the disclosure in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector. One of the mechanisms to achieve this objective is through protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures. Clause 16 encapsulates this mechanism by creating an offence where a person takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure. The maximum penalty for this offence is set at 50 penalty units or imprisonment for 12 months, or both.

3.5.2 The Ombudsman submitted that:

> Clause 16 is a quite inadequate protection for whistleblowers. Clause 16 creates a criminal offence involving complex and uncertain elements. The experience of any lawyer with expertise in criminal law would suggest that this provision is unlikely to be used, if at all, other than in the most obvious and outrageous of cases. It is frequently observed that nothing brings the law more quickly into contempt than a provision which is never enforced. (Office of Ombudsman 1993a:3)

3.5.3 Similar comments were made on the ambiguity of clause 16 by the Department of Transport, State Development and the Building Services Corporation.

3.5.4 Professor Paul Finn submitted:

> If there is a "reprisal" why should the protected disclosure need to be the "substantial" reason for the reprisal. Should not the fact that it is "a reason" be sufficient? (Finn 1993:2)

3.5.5 The Committee believes that this clause should have a real affect upon persons who take reprisals against genuine whistleblowers. The Committee recommends, therefore, that further attention be given to clarifying and simplifying this clause.

3.5.6 One area that the Committee believes could improve the operation of this offence is if the offence covered the situation where a person takes a reprisal action against a public official because that person **may** make a disclosure. The situation may arise where an employer hears that a person is going to make a disclosure to an investigating authority and takes action before that person does so. The Committee considers that clause 16 should be amended to cover this situation.

3.5.7 It may be that this clause could also be improved through the creation of a separate defence for a person who takes an action which is not substantially in reprisal. The Committee notes that this was the method adopted by the Queensland Electoral and Administrative Review Commission in its draft Whistleblowers Protection Bill. That Bill contained a similar offence to that in clause 16 and a separate defence. This defence stated:

> In any proceedings in which it is relevant to prove that a person has taken, or is proposing to take an unlawful reprisal, it is a defence for the person to prove that despite an unlawful ground being a ground for engaging in the conduct alleged to constitute the unlawful reprisal -
> (a) the person had other just and reasonable grounds for engaging in the conduct; and
> (b) the person had taken a significant step towards engaging in the conduct before acting on the unlawful ground. (EARC 1991:194)

3.5.8 The Committee is of the opinion that there may be some merit in providing a separate defence in the Bill, rather than using a conditional term "substantially".

RECOMMENDATION 13

The Committee, therefore, recommends that:

1. Attention be given to clarifying and simplifying clause 16 to ensure that a real and effective offence is created for taking reprisal action against a protected

person. Specifically, clause 16 should be amended to cover the situation where a person takes detrimental action against a public official because that official may make a protected disclosure.

2. A separate defence be created for the situation where a person taking what may be detrimental action against a whistleblower had just and reasonable grounds for so doing.

b. A reprisal action: where to go?

3.5.9 The Minister for Employment Education and Youth Affairs, the Honourable Virginia Chadwick submitted:

> The Bill does not specify who may take such action [under clause 16] and it would seem that such proceedings would have to be taken by the public official who is "victimised" by the detrimental action. In order for the officer to pursue the case, legal costs would have to be paid up front and the office would have to prove the case on a criminal onus of proof. (Chadwick 1993:1)

3.5.10 Similar comments were made by the Department of Industrial Relations, Employment, Training and Further Education.

3.5.11 The Committee recognises that there may be two instances when a whistleblower turns to an investigating authority or a principal officer of a public authority. In the first instance, a whistleblower will wish to make a disclosure concerning corruption, maladministration or substantial waste. In the second instance, which is of concern here, a whistleblower will wish to make a complaint that he or she has suffered detrimental action because he or she has made the disclosure in the first instance.

3.5.12 The Bill has little to say about the procedures that a whistleblower is to follow in this second instance. The Committee is of the view that internal procedures develop by public authorities and internal and "operational" procedures developed by investigating authorities could include provisions dealing with complaints concerning reprisals.

RECOMMENDATION 14

The Committee, therefore, recommends that internal procedures developed by public authorities and internal and "operational" procedures developed by investigating authorities should make provision for the making of complaints concerning reprisal(s) against a whistleblower.

3.5.13 A related problem was raised by the Ombudsman in his submission to the

Committee:

> the principle deficiency in the Bill is that there is no practical protection afforded a complainant whistleblower against whom reprisal action is taken. In this regard, evidence of reprisal action is most likely to be brought to the attention of an investigating authority as a complaint itself. At the moment, however, a complaint of reprisal action is effectively outside the jurisdiction of this Office by virtue of Clause 12(a) and (b) of Schedule 1 of the *Ombudsman Act*. This is a major deficiency in the Bill, and in my view the Bill should provide that Clause 12(a) and (b) of Schedule 1 of the *Ombudsman Act* does not apply in relation to a complaint of reprisal action arising out of a protected disclosure. (Office of Ombudsman 1993a:3)

3.5.14 At the Committee's public hearing the Chairman of the Committee Don Page MP, with the Ombudsman submission in mind, put the following question to the Deputy Ombudsman Mr John Pinnock:

> You mentioned [in your submission] that an amendment to the Ombudsman Act might be necessary. If there was such an amendment to the Act, would you regard that as being a minor amendment, or would it fundamentally change the nature of the Ombudsman's powers across the whole gamut of government activity? (Minutes of Evidence 1993b:3)

3.5.15 Mr Pinnock replied:

> We would certainly not want to see an amendment in such wide terms that it would enable the Ombudsman to entertain a complaint relating generally to employment matters. Clauses 12(a) and 12(b) [of the Ombudsman Act] were inserted at a time when control of discipline and other matters relating to employment was in the hands of the old Public Service Board and the Industrial Commission. We do not see any reason why that prohibition on the Ombudsman's jurisdiction should be changed in general. There are appropriate fora to deal with such complaints. But in the context of the whistleblower situation we believe that amendment to clauses 12(a) and 12(b) would provide a real means of protecting a whistleblower. **In other words, we are saying that we would want clauses 12(a) and 12(b) to be amended to enable us to entertain a complaint of reprisal action but only in the context of that action following a protected disclosures under the Bill, and no further than that.** (emphasis added) (Minutes of Evidence 1993b:3)

3.5.16 A disclosure by a whistleblower of maladministration, as the Committee understands the Bill, can **only** be investigated by the Ombudsman. It seems incongruous to the Committee that where a whistleblower has made a disclosure to the Ombudsman he or she can not turn to the Ombudsman for assistance if action

is taken against him or her for making that disclosure. A limited amendment to the *Ombudsman Act* in this respect would seem to improve the consistency of whistleblower protection.

RECOMMENDATION 15

The Committee, therefore, recommends that clauses 12(a) and 12(b) of the *Ombudsman Act* be amended to enable the Ombudsman to entertain a complaint of reprisal action but only in the context of that action following a protected disclosure under the Bill.

3.6 Confidentiality Guidelines

3.6.1 Clause 18 of the Bill states:

> *An investigating authority, public authority or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:*
>
> *(a) 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; or*
>
> *(b) the investigating authority, public authority or public official is of the opinion that it is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.*

3.6.2 The Committee's first concern with this clause was to make it clear in the Bill that this clause applies to individual officers of the investigating authorities. A simple amendment to the first paragraph of the clause, adding the words "or an officer of an investigating authority" after the words "investigating authority", would clarify this issue.

3.6.3 Secondly, the Committee thought that this clause was somewhat imbalanced in that it only protected the identity of the person making the protected disclosure and not persons or bodies about whom the disclosure has been made. The protected disclosure could identify a number of persons who have an equal right to have the matter kept confidential until it is properly investigated.

3.6.4 The Queensland Electoral and Administrative Review Commission observed in its *Report on the Protection of Whsitleblowers*:

> [A] person may honestly and reasonably believe that impropriety has occurred on the basis of the limited information available to him or her, and hence be eligible for protection under the scheme even though the full picture is revealed upon investigation, no finding of impropriety can be sustained. The reputation of a person or organisation against whom an allegation of impropriety is made must also be afforded protection, at least until such time as the allegation is substantiated. (EARC 1991:138-139)

3.6.5 The Committee has sought to look at the Bill in balanced way ensuring that whistleblowers do not suffer for making a protected disclosure and those persons or bodies named by whistleblowers are equally protected until the truth of the disclosure can be ascertained. The Committee would, therefore, recommend that the confidentiality provisions contained in clause 18 be extended to cover persons or bodies named in a protected disclosure.

3.6.6 Thirdly, the Committee received a submission from the Privacy Committee stating:

> Clause 18(b) contains a potential ambiguity. It is not clear whether the prohibition on disclosure of the identity of the public officer who makes the original disclosure is to be waived in circumstances where disclosure is necessary or more generally where it is necessary to investigate the matter further. The replacement of the words "it" in line 2 [of subparagraph (b)] by "disclosure of the identity" would clarify this point. (Privacy Committee 1993:2)

3.6.7 The Committee is of the view that the confidentiality provision should be a strict one and that any potential ambiguities should be clarified. The Committee would therefore adopt the recommendation of the Privacy Committee to amend subparagraph (b) of clause 18 by replacing the word "it" in the second line with the words "disclosure of identity". This amendment would cover both the identity of the discloser and persons or bodies named in the protected disclosure.

3.6.8 Finally, the Committee became aware of problem with the relationship between this Bill and the *Freedom of Information Act*. The Committee would not like to see the FOI Act used to circumvent the confidentiality provision in this Bill. This could occur where a person makes a FOI request to ascertain either the identity of the person making the disclosure or the identity of the person or persons or bodies named in that disclosure. The Committee is of the view that protected disclosures should be exempt from the scope of the *Freedom of Information Act*.

RECOMMENDATION 16

The Committee recommends that:

1. The first paragraph of the clause 18 be amended by adding the words "or an

officer of an investigating authority" after the words "investigating authority".

2. The confidentiality provisions contained in clause 18 be extended to cover persons or bodies named in a protected disclosure. [Ms Clover Moore of the Committee was of the view that the term "bodies" should be deleted from this amendment]

3. Subparagraph (b) of clause 18 be amended by replacing the word "it" in the second line with the words "disclosure of identity". This amendment should cover both the identity of the discloser and persons or bodies named in the protected disclosure. [Ms Clover Moore of the Committee was of the view that the term "bodies" should be deleted from this amendment]

4. Protected disclosures should be exempt from the scope of the *Freedom of Information Act*.

Auditor-General's Office (1993a) *Submission to the Committee.*

Auditor-General's Office (1993b) *Supplementary Submission to the Committee.*

Chadwick, V. (1993) *Submission to the Committee.*

Electoral and Adminstrative Review Commission (Qld) (EARC) (1991) *Report on the Protection of Whistleblowers*. Brisbane.

Independent Commission Against Corruption (ICAC) (1993a) *Submission to the Committee.*

Independent Commission Against Corruption (ICAC) (1993b) *Supplementary Submission to the Committee.*

Independent Commission Against Corruption (ICAC) (1993c) *Further Submission to the Committee.*

Local Government Association of New South Wales (1993) *Submission to the Committee.*

Minutes of Evidence of Legisaltion Committee on the Whistleblowers Protection Bill 1992 (No. 2) (1993a) 2 June. Sydney.

Minutes of Evidence of Legisaltion Committee on the Whistleblowers Protection Bill 1992 (No. 2) (1993b) 3 June. Sydney.

Office of the Ombudsman (1993a) *Submission to the Committee.*

Office of the Ombudsman (1993b) *Supplementary Submission to the Committee.*

Pacific Power (1993) *Submission to the Committee.*

Privacy Committee (1993) *Submission to the Committee.*

Public Service Association of New South Wales (1993) *Submission to the Committee.*

The St James Ethics Centre (1993a) *Submission to the Committee.*

The St James Ethics Centre (1993b) *Supplementary Submission to the Committee.*

Whistleblowers Anonymous (1993a) *Submission to the Committee.*

Whistleblowers Anonymous (1993b) *Second Submission to the Committee.*

Whistleblowers Anonymous (1993c) *Supplementary Submission to the Committee.*

APPENDIX 1

TERMS OF REFERENCE

OF

COMMITTEE

TERMS OF REFERENCE OF COMMITTEE

Votes and Proceedings No. 55, Entry 24, dated 27 November 1992:

Ordered by the Legislative Assembly, on motion of Mr West, That

(1) The Whistleblowers Protection Bill 1992 (No. 2) be referred to a Legislation Committee for consideration and report to the House on such amendments as it considered should be proposed to the Committee of the Whole on that bill;

(2) That such committee consist of:

(a) Three members supporting the Government nominated by the Leader of the House in writing to the Clerk of the Legislative Assembly;

(b) Two members supporting the Opposition nominated by the Leader of the Opposition in writing to the Clerk of the Legislative Assembly; and

(c) The honourable member for Bligh.

(3) That for the purpose of any Parliamentary Committees Enabling legislation the Legislation Committee on the Whistleblowers Protection Bill 1992 (no. 2) be a committee to which the Act applies.

(4) The Committee report by 31 March 1993.

Votes and Proceedings No. 10, Entry 11 of 31 March 1993

Ordered by the Legislative Assembly, on motion of Mr West, That so much of the Standing and Sessional Orders be suspended as would preclude the reporting date for the Legislation Committee upon the Whistleblowers Protection Bill being extended until 27 May 1993.

(Further extension of reporting time to 30 June 1993 granted after application by Committee to Premier.

APPENDIX 2

MINUTES OF COMMITTEE MEETINGS

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 1

Monday 21 December 1992, at 3.00 p.m.
Room 1043, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page
Mr J. Kinross
Mr P. Crittenden
Ms S. Nori
Ms C Moore

Apologies:

Received from Mr J. Turner.

The Clerk Assistant (Procedure) of the Legislative Assembly opened the meeting at 3.40 p.m. and read the following:

Entry No. 24, Votes and Proceedings of the Legislative Assembly, 27 November 1992.

That:

1. The Whistleblowers Protection Bill 1992 (No. 2) be referred to a Legislation Committee for consideration and report to the House on such amendments as it considers should be proposed to the Committee of the Whole on that bill;

2. That such Committee consist of:
   (a) three members supporting the Government nominated by the Leader of the House in writing to the Clerk of the Legislative Assembly;
   (b) Two members supporting the Opposition nominated by the Leader of the Opposition in writing to the Clerk of the Legislative Assembly: and
   (c) The honourable member for Bligh.

3. That for the purpose of Parliamentary Committees Enabling legislation the Legislation Committee on the Whistleblowers Protection Bill (No. 2) be a committee to which the Act applies.

4. The Committee report by 31 March 1993.

Election of Chairman

Resolved on motion of Mr Kinross, seconded by Ms Moore: That Mr Page be elected Chairman of the Committee.

Mr Page accepting the nomination, motion put and passed.

Procedural Resolutions

Resolved on motion (in globo) of Mr Kinross, seconded by Ms Moore:

1. That arrangement for the calling of witnesses and visits of inspection be left in the hands of the Chairman and the Clerk to the Committee.

2. That, unless otherwise ordered, parties appearing before the Committee shall not be represented by any member of the legal profession.

3. That, unless otherwise ordered, when the Committee is examining witnesses, the press and public (including witnesses after examination) be admitted to the sitting of the Committee.

4. That persons having special knowledge of the matters under consideration by the Committee may be invited to assist the Committee.

5. That press statements on behalf of the Committee be made only by the Chairman after approval in principle by the Committee or after consultation with Committee members.

Staffing of Committee

Mr Gönye introduced the members of staff delegated to assist the Committee

Mr Daniel Wright, Project Officer to the Committee
Mr Greg Kelly, Clerk to the Committee.

Timetable

The Committee noted that, within the resolution establishing the Committee, it was required to report by Wednesday 31 March 1993.

The Committee deliberated and resolved that to be effective in its role of review of the bill an extension of reporting time would be necessary to allow proper consultation/consideration of the issues, and adequate input by external sources.

Resolved that the draft newspaper advertisement be submitted for publication in the second week of January 1993 with a submission closing date of 19 February 1993.

General Business

1. <u>Background material</u>

The following material was distributed for the information of members:

- Terms of reference of the Committee

- Whistleblowers Protection Bill 1992 (No. 2)

2. Mode of operation

The Committee decided:

(a) that initially a letter together with the background material should be forwarded to interested persons and groups, including those mention in debate in the House;

3. Deliberation on initial issues of bill

The Committee then deliberated as to the initial issues of the Bill, its impact on other legislation and the public sector.

That a definition of "corrupt conduct", a definition still not agreed to by the ICAC directly impacts on the content and effectiveness of the bill.

The Committee adjourned at 4.05 p.m. to a date to be fixed.

Chairman

Clerk to the Committee

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 2

Wednesday 3 March 1993, at 12.00 noon
Room 1136, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)
Mr J. Kinross
Mr J. Turner
Mr P. Crittenden
Ms S. Nori

APOLOGIES:

Received from Ms C. Moore.

CONFIRMATION OF MINUTES

Resolved on motion of Ms Nori, seconded Mr Crittenden , that the minutes as tabled be accepted as the record of the meeting of the Committee, subject to the following alteration:

That Mr J. Turner's name be deleted from the attendance list and included as an apology.

BUSINESS ARISING FROM THE MINUTES

Discussion centred on the application by the Chairman to the Leader of the House to extend the Committees reporting date from 31 March 1993 to the first week of the 1993 budget session of Parliament.

SUBMISSIONS/ISSUES PAPER

Discussion centred on the submissions received to date, the initial responses received from Government Departments, Members agreeing that the complexity of the issues contained within the Bill and raised by the submissions received make it impossible to report by the due date and improbable that the Committee will be able to report by an extended time of 20 May 1993.

Discussions further mentioned the question of overseas practice in relation to whistleblowers legislation etc. and the decision to call for additional submissions from public sector employee and employer groups.

Deliberations continued on the question of what constitutes corrupt conduct and the impact of the decision/s of the Parliamentary Committee on the ICAC on that question.

TIMETABLE

The Chair raised the matter of public hearings, and the limited timeframe before the committee, suggesting that initially 2 days in June would be practical if the Committee application for extension is successful. Although suggestions as to possible witnesses were discussed the Committee resolved that a formal list of possible witness would not be decided upon until all submissions had been received.

The Committee adjourned at 12.37 p.m. to a date to be fixed.

Chairman

Clerk to the Committee

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 3

Wednesday 31 March 1993, at 12.00 noon
Room 1136, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)	Mr P. Crittenden
Mr J. Kinross	Ms S. Nori
Mr J. Turner	Ms C. Moore

CONFIRMATION OF MINUTES

Resolved on motion of Mr Turner, seconded Mr Kinross, that the minutes as tabled be accepted as the record of the second meeting of the Committee, subject to the inclusion of Mr Kinross' name in the attendance list.

BUSINESS ARISING FROM THE MINUTES

The Chairman reported that resulting from the Committee's application to extend the reporting date to the first week of the 1993 budget session he had been informally advised that an extension would be granted until the 27 May 1993.

The Committee deliberated on the limitations placed upon the Committee through the inappropriate reporting timeframe; Members expressing their concern of being able to effectively report on the complex issues contained within the bill by the new reporting date.

Discussion then centred on the main issues within the Bill.

Motion moved by Mr Turner, seconded by Mr Kinross, that further discussion on the issues be deferred until: The Chairman meet with the independent Members of the Legislative Assembly in an effort to qualify their concerns for, and conveying the Committee's concerns in reporting by the 27 May 1993—put and passed.

SUBMISSIONS

Mr Wright, as Committee Project Officer, reported that as a result of representations made last meeting that submissions had been sought and responses had been received from most Government Departments, the Attorney-General and Ombudsman. He also informed the Committee that although contacted the employee groups such as the Public Service Association, the AJA, Labor Council and Anti-Discrimination Board had not responded as to date.

TIMETABLE

The Committee discussed public hearings in view of the limited timeframe before the committee, the Chairman placing before the Committee the suggestion that 2 hearing days initially, each with 6 witnesses, would be practical to immediately raise the issues.

As the question of hearing dates directly relates to the time frame for report, a meeter still not considered final, further discussion was deferred until the next meeting.

ISSUES PAPER

Mr Wright, Committee Project Officer, discussed the issues paper circulated to Committee Members and raised the question as to whether Members wanted a direct comparison between the issues raised in submissions and the bills effectiveness in dealing with such issues.

The Committee adjourned at 12.45 p.m. to a date to be fixed.

Chairman

Clerk to the Committee

LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 4

Wednesday 21 April 1993, at 12.30 p.m.
Waratah Room, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)	Mr P. Crittenden
Mr J. Kinross	Ms S. Nori
Mr J. Turner	Ms C. Moore

CONFIRMATION OF MINUTES

Resolved on motion of Mr Turner, seconded Mr Crittenden, that the minutes as circulated be accepted as the record of the third meeting of the Committee.

BUSINESS ARISING FROM THE MINUTES

The Chairman reported that as a result of the discussions of the previous meeting, that as agreed, he had met with the independent members of the Legislative Assembly in an effort to try to qualify their concerns relating to an extension of reporting time for the Committee. He further advised that the independent members were not overly concerned with the extension of reporting time but were committed to the issue of whilstleblowing and stressed the importance of the bill before the House and this Committee. The Chairman during discussion highlighted the Committee's concerns relating to the adequacy of the bill and the bill's ability to cover the issues being raised. The meeting further resolved that little objection would be forthcoming from the independent members on a further application for extension of the reporting date on the understanding that the Committee was endeavouring to address the issues implicit within the bill and reported in sufficient time for Parliamentary Counsel to prepare legislation for presentation before the House during the "Budget Session".

Committee timetable

Considering the issues involved within the bill, after deliberation, the Committee resolved that it conduct hearings on 3rd and 4th June 1993, between 10.00 a.m. and 5.00 p.m. in room 812/3. The number of witness to be called yet to be determined.

Issues Paper/questions

The Project Officer tabled his paper covering general issues not covered within the bill, entitled "Questions".

The Committee then resolved to work through the issues "Questions" paper.

1. Is there something wrong with the present structure of proper authorities for the receiving of disclosures? i.e. is there a confusing overlap in the functions of the authorities/

   The Committee deliberated.

2. Should there be an overseeing body to ensure the efficient functioning of whistleblower protection?

   The Committee deliberated.

3. Should the Bill prescribe that all public authorities are to establish appropriate mechanisms to deal with and investigate public interest disclosures and complaints concerning reprisals?

   The Committee deliberated.

4. Who is to investigate disclosures made from within one of the three principle investigating authorities?

   The Committee deliberated.

5. What safeguards (if any) should be included in the Bill to prevent persons making false, misleading, or malicious disclosures?

   The Committee deliberated.

6. Should the Bill contain specific provisions to deal with disclosures concerning serious and immediate dangers to public health and safety?

   The Committee deliberated.

7. What further protections (if any) should be afforded to legitimate whistleblowers? for instance are any of the following worth including in the present system?

   * Provisions for injunctions to be made to the Court for protection against detriment presently occurring or which may occur to a person who had made or may make a disclosure. Applications for injunctions could be made by the whistleblower or an overseeing authority.

   The Committee deliberated.

   * A right to appeal to the appropriate industrial body against any unlawful reprisal taken against the whistleblower.

   The Committee deliberated.

   * Provisions for assistance to the whistleblower when a disclosure is made. At present the whistleblower is very much "forgotten" by the Bill once a disclosure has been made. This can hardly encourage the making of public

interest disclosures.

The Committee deliberated.

* Last resort right to disclose to the media.

The Committee deliberated.

Ordered: That consideration of part II of the paper, questions 8 to 16 be stood over to the next meeting; and that the additional issue dealing with the appropriateness of the title of the bill be listed as question No. 17.

The Committee adjourned at 2.10 p.m. to Thursday 29 April 1993 at 4.00 p.m. in the Waratah Room.

Chairman

Clerk to the Committee

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 5

Wednesday 29 April 1993, at 4.00 p.m.
Waratah Room, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)
Mr J. Kinross
Mr J. Turner
Mr P. Crittenden
Ms S. Nori.

APOLOGIES Ms C. Moore.

CONFIRMATION OF MINUTES

Confirmation of the minutes of the fourth meeting of the Committee deferred to next meeting pending correction.

ISSUES PAPER/QUESTIONS

By direction of the Chairman discussion of Part II of the paper prepared by the Committee's Project Officer, covering general issues not covered within the bill—resumed, discussion highlighting the following points:

* the method of dealing with complaints within specific authorities and the existing investigating authorities;

* the assessment as to whether an issue is **urgent** or a **public health related** issue;

* the instillation of mechanisms making it compullsory to advise "internally" first, giving an opportunity for internal investigation before whilstlblowing;

* the ability for an authority to respond to allegations/situations before whistleblowing.

II MAJOR SECTIONS OF THE BILL

8. Are there any definitions in the Bill that require clarification? eg. "public official", "public authority", and "substantial waste"—(Clause 4).

9. Is the interrelationship between this Bill and other existing Acts, especially those which govern the operation of the investigating authorities, clear and straightforward?—(Clause 5).

10. Should persons other than "public officials" be afforded protection under the Bill?—(Clause 8).

The Committee deliberated raising the folowing points:

* adequacy of definitions contained within the bill and cross reference of definitions already determined within other legislation;

* the subjective issue of what is or could be considered as "substantial waste" or "maladministration" (s. 11(2)), and "good faith" or "reasonable grounds" (s. 11 (1)(b));

* the question or opinion of what is defined as "trivial", "misconceived" or "lacking in substance".

Mr Kinross raised the point that matters that may be considered "trivial", "misconceived" or "lacking in substance" should be considered as an "objective as opposed to subjective" test. Decisions in this regard are largely based upon a "jury test" to establish "reasonable grounds" for the complaint as this would be a better standard than the subjective element of the Whilsteblowers complaint.

The Committee deliberated on the point raised by Mr Kinross, concluding that even a "jury test" was somewhat too restrictive and agreed that a "reasonable person test" was preferable in establishing partial grounds for complaint.

* that the question of whether the definition of "public official" includes sub-contractors undertaking government work should be clarified; and the resultant possible retribution against a sub-copntractor should whilstleblowing occurr.

11. Should disclosures have to be made voluntarily?—(Clause 9).

The Committee deliberated; noting the fact that this clause appears to be inconsistent with the remainder of the bill—particularily if public authorities are to have responsibility for conducting initial investigations relating to a complaint.

12. Is the good faith reequirement imposed on whistleblower an intelligible and practical requirement? If not, what requirement should the whilstleblower have to satisfy to receive protection?— (Clause 9).

The Committee deliberated; issues raised-

* the availability of appropriate resources within government authorities to conform with the requirements of the bill;

* definition requires as to "internal procedures".

13. Should the whilstlblower have to make a disclosure to the right body to be afforded protection?—(Clauses 10-13).

The Committee deliberated.

* Initial discussions indicating that circumstances may not allow a whistleblower, for a variety of reasons, the freedom to make a disclosure to the right body, but that matters could always be referred.

14. Is it sufficient for the whistleblower merely to have a suspicion that "improper" conduct has occurred?—(Clauses 10-13).

The Committee deliberated.

15. Should bodies, other than investigatingh authorities, be given the discretion to decline to investigate or discontinue an investigation?—(Clause 15).

The Committee deliberated.

* Responsibility of government authorities to investigate to the end matters raised in all good faith, notwithstanding their ability to refuse to investigate for unsubstantiated, trivial or frivolous matters more adequately handled under other legislation.

16. Is the offence for taking a reprisal against a whistleblower adequate? If not, what should be ambit of this test be?—(Part 3).

The Committee deliberated.

* Difficult issue to assess—onus of proof is on the whistleblower to prove that they are protected, but at what point to they become protected. The current bill provides for protection once it appears that there is some degree of substance to the whistleblower's complaint that they are protected.

HEARINGS

The Project Officer tabled a suggested list of possible witnesses, taken from the interested parties who had contacted the Committee.

With the concurrence of the Committee the Chairman requested the Project Officer to prepare, for the next meeting, a list of suggested questions for the Committee.

ADJOURNMENT

The Committee adjourned at 5.45 p.m. to Wednesday 12 May 1993 at 4.00 p.m. in Committee Room to be advised.

Chairman

Clerk to the Committee

C:\WP51\TABLE\WHISTLE\minutes.5

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 6

Wednesday 12 May 1993, at 4.00 p.m.
Committee Room 1043, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)
Mr J. Kinross
Mr J. Turner
Mr P. Crittenden
Ms S. Nori.

APOLOGIES Ms C. Moore.

CONFIRMATION OF MINUTES

Minutes No. 4—deferred from last meeting; and Minutes of last meeting, No. 5.

Mr Kinross raised the following amendment to Minutes No. 5:

Page 2, item 10:

Omit: "Mr Kinross raised the point that matters that may be considered "trivial", "misconceived" or "lacking in substance" are largely subjective or objective making decisions in this regard largely a "jury test" to establish "reasonable grounds" for complaint."

Insert: "Mr Kinross raised the point that matters that may be considered "trivial", "misconceived" or "lacking in substance" should be considered as an "objective as opposed to subjective" test. Decisions in this regard are largely based upon a "jury test" to establish "reasonable grounds" for the complaint as this would be a better standard than the subjective element of the Whilsteblowers complaint.".

The Committee deliberated, inserting thereafter:

However the Committee was of the opinion that even a "jury test" was somewhat too restrictive and agreed that a "reasonable person test" was preferable in establishing partial grounds for complaint.

Minutes of the Committee Nos 4 and 5 were confirmed on motion Mr Crittenden, seconded Mr Kinross, as record of the Committee subject to the following amendment to Minutes No. 5:

ISSUES PAPER/QUESTIONS

By direction of the Chairman discussion of Part II of the paper prepared by the Committee's Project Officer, covering general issues not covered within the bill—resumed, discussion highlighting the following points:

* the method of dealing with complaints within specific authorities and the existing investigating authorities;

* the assessment as to whether an issue is urgent or a public health related issue;

* the instillation of mechanisms making it compullsory to advise "internally" first, giving an opportunity for internal investigation before whilstlblowing;

* the ability for an authority to respond to allegations/situations before whistleblowing.

II MAJOR SECTIONS OF THE BILL

8. Are there any definitions in the Bill that require clarification? eg. "public official", "public authority", and "substantial waste"—(Clause 4).

9. Is the interrelationship between this Bill and other existing Acts, especially those which govern the operation of the investigating authorities, clear and straightforward?—(Clause 5).

10. Should persons other than "public officials" be afforded protection under the Bill?—(Clause 8).

The Committee deliberated raising the folowing points:

* adequacy of definitions contained within the bill and cross reference of definitions already determined within other legislation;

* the subjective issue of what is or could be considered as "substantial waste" or "maladministration" (s. 11(2)), and "good faith" or "reasonable grounds" (s. 11 (1)(b));

* the question or opinion of what is defined as "trivial", "misconceived" or "lacking in substance".

Mr Kinross raised the point that matters that may be considered "trivial", "misconceived" or "lacking in substance" are largely subjective or objective making decisions in this regard largely a "jury test" to establish "reasonable grounds" for complaint.

* that the question of whether the definition of "public official" includes sub-contractors undertaking government work should be clarified; and the resultant possible retribution against a sub-copntractor should whilstleblowing occurr.

11. Should disclosures have to be made voluntarily?—(Clause 9).

The Committee deliberated; noting the fact that this clause appears to be inconsistent with the remainder of the bill—particularily if public authorities are to have responsibility for conducting initial investigations relating to a complaint.

12. Is the good faith reequirement imposed on whistleblower an intelligible and practical requirement? If not, what requirement should the whilstleblower have to satisfy to receive protection?— (Clause 9).

The Committee deliberated; issues raised-

* the availability of appropriate resources within government authorities to conform with the requirements of the bill;

* definition requires as to "internal procedures".

13. Should the whilstlblower have to make a disclosure to the right body to be afforded protection?—(Clauses 10-13).

The Committee deliberated.

* Initial disucssions indicating that circumstances may not allow a whistleblower, for a variety of reasons, the freedom to make a disclosure to the right body, but that matters could always be referred.

14. Is it sufficient for the whistleblower merely to have a suspicion that "improper" conduct has occurred?—(Clauses 10-13).

The Committee deliberated.

15. Should bodies, other than investigatingh authorities, be given the discretion to decline to investigate or discontinue an investigation?—(Clause 15).

The Committee deliberated.

* Responsibility of government authorities to investigate to the end matters raised in all good faith, notwithstanding their ability to refuse to investigate for unsubstantiated, trivial or frivolous matters more adequately handled under other legislation.

16. Is the offence for taking a reprisal against a whistleblower adequate? If not, what should be ambit of this test be?—(Part 3).

The Committee deliberated.

* Difficult issue to assess—onus of proof is on the whistleblower to prove that they are protected, but at what point to they become protected. The current bill provides for protection once it appears that there is some degree of substance to the whistleblower's complaint that they are protected.

HEARINGS

The Project Officer tabled a suggested list of possible witnesses, taken from the interested parties who had contacted the Committee.

With the concurrence of the Committee the Chairman requested the Project Officer to prepare, for the next meeting, a list of suggested questions for the Committee.

ADJOURNMENT

The Committee adjourned at 5.45 p.m. to Wednesday 12 May 1993 at 4.00 p.m. in Committee Room to be advised.

Chairman

Clerk to the Committee

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 7

Wednesday 2 June 1993, at 10.00 a.m.
Committee Room 1136, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)	Mr P. Crittenden
Mr J. Kinross	Ms S. Nori.
Mr J. Turner	Ms C. Moore

HEARING

The Committee proceeded to take evidence.

The press and public were admitted.

By direction of the Chairman the clerk read Legislative Assembly Standing Order N°. 362 relating to the examination of witnesses.

Mr Peter Gifford, Director, Crime Prevention, ICAC; sworn.
Mr Craig Sahlin, Principal Corruption Prevention Officer, ICAC; affirmed.

Witnesses examined concurrently.

Question taken on notice by witness Gifford during examination:

Chairman: .....

"I wonder from the point of view of the lasting integrity of the ICAC in NSW whether it would not, in fact, be in the ICAC's interest to have such a mechanism notwithstanding that you already have internal mechanisms?

Considered response to be in writing.

Examination continued.

Examination concluded the witnesses withdrew.

Mr John McNicol, National Director, Whistleblowers Australia, formerly Whistleblowers Anonymous; sworn.
Mr Bruce Hamilton, Retired bank officer, and foundation member of Whistleblowers Anonymous; sworn.

Witnesses examined concurrently.

Chairman: During examination questioned reference in submission by McNicol to:

> "using a simple test to determine whether the complaint was a genuine whistleblower and not a disgruntled public servant."

Information not immediately available—undertaking given by McNicol to fax information to Committee.

Examination continued.

Examination concluded the witnesses withdrew.

Mr Kevin Fennell, Deputy Auditor General, Auditor General's Office; sworn.

Witness examined.

Examination concluded the witness withdrew.

Dr Simon Longstaff, St James Ethics Centre; sworn.

Witness examined.

Examination concluded the witness withdrew.

The Chairman left the chair until 10.00 tomorrow, Committee to meet in room 812/13

Wednesday 2 June 1993, at 10.00 a.m.
Committee Room 812/13, Parliament House, Sydney

The Chairman resumed the chair.

The Committee resumed taking evidence.

The press and public were admitted.

Mr John E. Pinnock, Deputy Ombudsman, sworn.

Examination of witness commenced.

Resolved, on motion of Ms Nori, seconded Mr Crittenden, That at the request of the witness proceedings of the Committee continue "in-camera".

The Committee room closed to the Press and public.

Examination resumed.

In camera evidence concluded the press and public were admitted.

Examination resumed.

Evidence concluded the witness withdrew.

Mr Gerard Draper, representing the NSW Council for Civil Liberties, affirmed.

Witness examined.

Examination concluded the witness withdrew.

Mr Alan Gibson, General Secretary, Public Service Association of NSW, sworn.

Witness examined.

Examination concluded the witness withdrew.

The **hearing concluded** the committee room was closed to the press and public.

The Committee deliberated on the evidence given.

ADJOURNMENT

The Committee adjourned at 1.25 p.m. to Tuesday 22 June 1993 at 9.30 a.m. Committee room to be advised.

Chairman

Clerk to the Committee

C:\WP51\TABLE\WHISTLE\minutes.7

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 8

Tuesday 22 June 1993, at 9.30 a.m.
Committee Room 1043, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)	Mr P. Crittenden
Mr J. Kinross	Ms S. Nori.
Mr J. Turner	Ms C. Moore

CONFIRMATION OF MINUTES

Minutes Nos 6 & 7—due to the committments of Members consideration of the Minutes deferred to later in the meeting.

REPORT

The Chairman tabled his draft Report, which having been transmitted to each member of the Committee, was accepted ass being read.

The Committee proceeded to consider the draft Report.

Consideration postponed to next meeting.

ADJOURNMENT

The Committee adjourned at 1.25 p.m. to Tuesday, 22 June 1993 at 9.30 a.m. Committee room to be advised.

Chairman

Clerk to the Committee

C:\WP51\TABLE\WHISTLE\minutes.8

MINUTES OF THE MEETING OF THE LEGISLATION COMMITTEE UPON THE WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

No. 9

Tuesday 29 June 1993, at 3.00 p.m.
Committee Room 812\13, Parliament House, Sydney

MEMBERS PRESENT

Mr D. Page (Chairman)	Mr P. Crittenden
Mr J. Kinross	Ms S. Nori.
Mr J. Turner	Ms C. Moore

CONFIRMATION OF MINUTES

Resolved on motion of Mr Turner, seconded Ms Moore, that Minutes Nos 6, 7 and 8 be accepted as record of Committee proceedings.

REPORT

The Committee proceeded to consider the circulated and amended draft Report.

Resolved, on motion of Ms Moore, That Mr A. King and Ms R. Bragg be admitted to assist with discussions on particular aspects of the Bill as mentioned within the Report.

The Chairman left the Chair

Mr King and Ms Bragg were admitted to the meeting.

Informal discussion ensued.

Discussion concluded Mr King and Ms Bragg withdrew.

The Chairman resumed the Chair, the Committee progressively working its way through the content and recommendations of the Report.

Recommendation 4—Disclosures to the media.

Question put: That the recommendation as contained within the report stand as the recommendation of the Committee.

Discussion ensued.

Question put.

AYES 3	NOES 3
Mr Page	Mr Crittenden
Mr Kinross	Ms Nori
Mr Turner	Ms Moore

The numbers being equal the Chairman gave his casting vote with the Ayes and declared the vote to have passed in the affirmative.

Discussion ensued.

Resolved, on motion of Ms Nori, seconded Ms Moore, That the opposition and independent members of the Committee be permitted to put an alternative or minority view within the relevant section of the report.

Consideration continued.

Resolved on motion of Ms Nori, seconded Mr Turner, That:

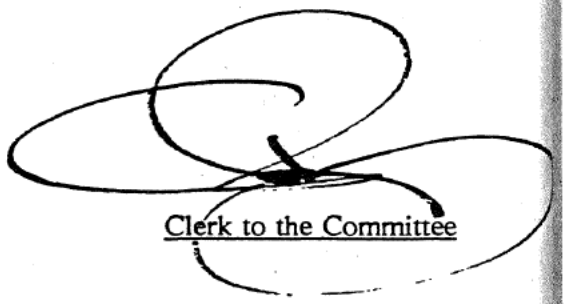
(1) the Draft Report, as circulated and amended, be adopted by the Committee and tabled with the Minutes of Evidence by forwarding copies to the Clerk of the House;

(2) the Chairman be authorised to make any spelling, minor grammatical and publishing corrections to the Report as may be necessary prior to tabling.

ADJOURNMENT

The Committee adjourned at 5.15 p.m. sine die.

Chairman



Clerk to the Committee

APPENDIX 3

ADVERTISEMENT

CALLING FOR SUBMISSIONS FROM INTERESTED PARTIES

PARLIAMENT OF NEW SOUTH WALES
LEGISLATIVE ASSEMBLY

Legislation Committee upon the
Whistleblowers Protection Bill 1992 (No. 2)

The Legislative Assembly of New South Wales has referred the Whistleblowers Protection Bill 1992 (No.2) to a Legislation Committee for consideration. The Committee, which consists of six Members of the Legislative Assembly, is required to report to Parliament by the 31 March 1992 on the general content and principles of the Bill.

Individuals and organisations having contributions likely to assist the Committee with its inquiry are invited to submit them in writing. Submissions will be made available to Committee Members and some persons making submissions may be invited to formally discuss them with the Committee.

Submissions should be addressed to: Greg Kelly, Clerk to the Legislation Committee upon the Whistleblowers Protection Bill, Legislative Assembly, Parliament House, Macquarie Street, Sydney NSW 2000

Closing date for submissions is Friday 19 February 1993.
Further information: Greg Kelly, ph 230 2440.

Mr D. Page, M.P.
Chairman

C:\WP51\TABLE\WHISTLE\add

APPENDIX 4

LIST OF

SUBMISSIONS RECEIVED

SUBMISSIONS RECEIVED TO DATE

1. **Mr Edward C Reynolds**
   P.O. Box 188
   Woy Woy NSW 2256

2. **Dr Jean Lennane**
   Whistleblowers Anonymous
   P.O. Box 1466
   Tuggeranong ACT 2900

3. **Mr John McNicol**
   President & National Director
   Whistleblowers Anonymous
   P.O. Box 1466
   Tuggeranong ACT 2900

4. **Mr W J Burke**
   45 Goodwin Street
   West Ryde NSW 2114

5. **Mr Fritz Schroeder**
   2A Clovelly Road
   Hornsby NSW 2077

6. **ICAC**
   GPO Box 500
   Sydney NSW 2001

7. **Local Government & Shires Associations of NSW**
   Local Government Centre
   215-217 Clarence Street
   Sydney NSW 2001

8. **The Institute of Internal Auditors — Australia**
   GPO Box 5183
   Sydney NSW 2001

9. **Mr Vince Neary**
   27 Catalpa Crescent
   Turramurra NSW 2074

10. **Mr Tony Paynter**
    c\- Post Office
    GLEBE NSW 2037

11. **Ethnic Affairs Commission**
164 Liverpool Road
P.O. Box 1266
ASHFIELD NSW 2131

12. **Department of Courts Administration**
Goodsell Building
8-12 Chifley Square
Sydney NSW 2000

13. **Department of Housing**
23-31 Moore Street
Liverpool NSW 2170

14. **The Law Society of NSW**
170 Phillip Street
Sydney NSW 2000

15. **The Honourable Wayne Merton MP**
Minister for Justice
Roden Cutler House
24 Campbell Street
Sydney NSW 2000

16. **Mr Allan Barry**
Research officer for Mr John Hatton MP

17. **Public Works**
McKell Building
2-24 Rawson Place
Sydney NSW 2000

18. **The Treasury**
GPO Box 5285
Sydney NSW 2000

19. **NSW Agriculture**
161 Kite Street
Locked Bag 21
Orange NSW 2800

20. **Mr Peter E Crisp**
4/377 Mowbray Road
Chatswood NSW 2067

21. **Office of the Ombudsman**
3rd Floor
580 George Street
Sydney NSW 2000

22. **Department of Transport**
227 Elizabeth Street
Sydney NSW 2000

23. **Pacific Power**
GPO Box 5257
Sydney NSW 2001

24. **Thew Honourable Robert Webster MLC**
Minister for Planning and Housing
Level 12 Westfield Tower
100 William Street
Darlinghurst NSW 2010

25. **The Honourable Virgina Chadwick**
Minister for Education and Youth Affairs and
Minister for Employment and Training
55 Market Street
Sydney NSW 2000

26. **Privacy Committee**
GPO Box 6
Sydney NSW 2000

27. **Auditor General's Office**
GPO Box 12
Sydney NSW 2001

28. **Professor Paul Finn**
The Australian National University
The Research school of Social Sciences

29. **Department of Industrial Relations, Employment, Training and Further Education**
1 Oxford Street
Darlinghurst NSW 2010

30. **Australian Press Council**
Suite 303
149 Castlereagh Street
Sydney NSW 2000

31. **The Honourable Terry Griffiths MP**
Minister for Police
Level 20 Avery Building
14-24 College Street
Darlinghurst NSW 2010

32. **State Development**
State Office Block
74-90 Phillip Street
Sydney NSW 2000

33. **Public Service Association of NSW**
160 Clarence Street
Sydney NSW 2000

34. **The Honourable Joe Schipp MP**
Minister for Sport, Recreation and Racing
Level 11, 139 Macquarie Street
Sydney NSW 2000

35. **NSW Council for Civil Liberties Inc**
149 St Johns Road
Glebe NSW 2037

36. **The St. James Ethics Centre**
GPO Box 3599
Sydney NSW 2001

APPENDIX 5

LIST OF

WITNESSES EXAMINED

LEGISLATION COMMITTEE

ON THE
WHISTLEBLOWERS PROTECTION BILL (NO 2) 1992

PUBLIC HEARINGS

WEDNESDAY	WITNESS	
10 - 11	**ICAC**	
	Mr Peter Gifford	Director of Corruption Prevention
	Mr Craig Sahlin	Principal Corruption Prevention Officer
11 - 12	**Whistleblowers Anonymous**	
	Mr John McNicol	President
12 - 1	**Auditor-General**	
1 - 2.30	**LUNCH**	
2.30 - 3.30	**St James Ethics Centre**	
	Dr Simon Longstaff	Executive Director

THURSDAY	WITNESS	
10 - 11	**Ombudsman**	
	Mr John Pinnock	Deputy Ombudsman
11 - 12	**NSW Council for Civil Liberties**	
	Mr Gerard Draper	
12 - 1	**Public Service Association**	
	Mr Allan Gibson	General Secretary
	Mr Nick Street	

APPENDIX 6

WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

FIRST PRINT

WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

NEW SOUTH WALES

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector by:

(a) enhancing and augmenting established procedures for making disclosures concerning such matters; and

(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and

(c) providing for those disclosures to be properly investigated and dealt with.

The Independent Commission Against Corruption Act 1988 and the Ombudsman Act 1974 confer wide powers on the Independent Commission Against Corruption and the Ombudsman to investigate possible corruption and action and inaction relating to matters of administration, respectively. The proposed Act will protect disclosures of corrupt conduct and maladministration concerning public authorities and public officials made to the ICAC and the Ombudsman by public officials in accordance with those Acts. It will also protect disclosures of substantial waste made to the Auditor-General in accordance with a new provision relating to special audits that the proposed Act will insert in the Public Finance and Audit Act 1983.

The proposed Act will also protect disclosures of corrupt conduct, maladministration and substantial waste made by public officials to the principal officers of public authorities or officers constituting public authorities and to officers of public authorities in accordance with internal procedures established by the authorities for reporting such matters.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the proposed Act to commence on a day or days to be appointed by proclamation.

Clause 3 states the object of the proposed Act.

Clause 4 defines expressions used in the proposed Act. These include:

- "investigation Act" (defined to mean the Independent Commission Against Corruption Act 1988, the Ombudsman Act 1974 or the Public Finance and Audit Act 1983)
- "investigating authority" (defined to mean the ICAC, the Ombudsman or the Auditor-General)
- "maladministration" (defined to include conduct of some of the kinds that may be investigated by investigating authorities such as the Ombudsman)
- "public authority" (defined so that it may include, for example, a government department or administrative body, a local government authority and the Police Service)
- "public official" (defined so that it may include, for example, the Governor, a public servant or a Minister of the Crown)
- "relevant investigation Act" (defined so as to describe the Acts referred to above).

Clause 5 describes the relationship of the proposed Act to the investigation Acts and other Acts. It makes it clear that it only affects the operation of the investigation Acts to the extent that it provides further protections for whistleblowers and sets out confidentiality guidelines for the investigating authorities in relation to the exercise of their functions in investigating such disclosures under those Acts. The proposed Act does not authorise an investigating authority to investigate a complaint that it is not authorised to investigate under the relevant investigation Act.

Clause 6 states that the proposed Act binds the Crown.

PART 2—PROTECTED DISCLOSURES

Clauses 7–14 describe the disclosures that will be protected by the proposed Act. To be protected, a disclosure must be a voluntary disclosure by a public official:

- made to an appropriate investigating authority in connection with a complaint concerning corrupt conduct, maladministration or substantial waste
- made to the principal officer of a public authority or officer who constitutes a public authority and concern an allegation of corrupt conduct, maladministration or substantial waste by the authority or any of its officers
- made to another officer of the public authority to which the public official belongs in accordance with any internal procedure established within the authority for reporting such matters.

A disclosure will also be protected by the proposed Act if it is referred by an investigating authority or public official to whom it is made to an investigating authority or to a public official or public authority considered by the investigating authority or public official to be the appropriate person or authority to deal with the matter.

A disclosure must be made in good faith to be protected by the proposed Act.

A disclosure is not voluntary if it is made by a public official in the exercise of a duty imposed on the official by or under an Act. For example, a disclosure made by an officer under a duty to report to the Commission under section 11 of the Independent

Commission Against Corruption Act 1988 is not a voluntary disclosure.

The ICAC is specified as the appropriate investigating authority for disclosures concerning corrupt conduct, the Ombudsman for disclosures concerning maladministration and the Auditor-General for disclosures concerning substantial waste of public money. The disclosure must be made to the authority in accordance with the procedures set out in the relevant investigation Act.

Clause 15 provides that a disclosure will not be protected by the proposed Act if the investigating authority to which it is made declines to investigate the matter or discontinues an investigation on the ground that the disclosure was made frivolously, vexatiously or not in good faith. It does not remove the protection if the authority decides not to investigate or to discontinue an investigation for some other reason (for example, a disclosure would not lose the protection if the Ombudsman decided to discontinue an investigation under section 13 (4) (b) (ii) of the Ombudsman Act 1974 on the ground that the matter was trivial or too remote in time). The clause also confirms the power of an investigating authority to decline to investigate, or discontinue the investigation, of any matter disclosed to it.

PART 3—WHISTLEBLOWER PROTECTIONS

The proposed Part describes the ways in which whistleblowers will be protected by the proposed Act.

Clause 16 protects a whistleblower against reprisals. It will be an offence to take detrimental action against a person who makes a protected disclosure if the action is substantially in reprisal for the disclosure. The provision will make it an offence, for example, to intimidate or harass such a whistleblower or take disciplinary action against the whistleblower.

Clause 17 protects a whistleblower against liability for making a protected disclosure. No action, claim or demand will be able to be made or taken against a person for making a protected disclosure. It also makes it clear that such a disclosure will be protected despite any duty of secrecy or other restriction on disclosure applicable to the person. This will apply to such a restriction whether or not imposed by an Act. For example, a person will not be guilty of an offence against an Act imposing a duty on the person to maintain confidentiality if the person makes a protected disclosure. Similarly, a person will not be liable in respect of any breach of a duty of confidence imposed otherwise than by an Act.

Clause 18 requires investigating authorities to which protected disclosures are made or referred under the proposed Act to maintain the confidentiality of the identity of whistleblowers as far as possible.

Clause 19 makes it clear that nothing in the proposed Act affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

Clause 20 preserves the protection a whistleblower may have under any other Act or law. The provisions of the proposed Act will not, for example, affect the existing defence of absolute privilege in respect of the publication of disclosures made to the ICAC in proceedings for defamation.

PART 4—MISCELLANEOUS

Clause 21 authorises an investigating authority to which a disclosure is made to refer the matter to another investigating authority or to a public official or public authority it considers appropriate. It requires the authority to do so if it is not authorised to investigate the matter under the relevant investigation Act and it is of the opinion that another investigating authority or a public official or public authority could appropriately deal with it.

Clause 22 makes similar provision in relation to public officials to whom disclosures are made.

Clauses 23–26 contain provisions relating to proceedings for offences, authorising the making of regulations, giving effect to the Schedule of amendments and providing for review of the proposed Act.

SCHEDULE 1—AMENDMENT OF ACTS

The Schedule contains amendments for the following purposes:

- to provide a right of appeal under the Government and Related Employees Appeal Tribunal Act 1980 against a decision made in reprisal against a whistleblower
- to enable public officials to complain to the Auditor-General that an authority (which may be a person) has substantially wasted public money
- to confer on the Auditor-General the power to conduct a special audit under the Public Finance and Audit Act 1983 of an authority if such a complaint is made
- to provide a related defence of absolute privilege under the Defamation Act 1974 for a publication made for that purpose
- to provide a defence of absolute privilege under the Defamation Act 1974 for a publication for the purposes of investigating a complaint made by a whistleblower to the principal officer of a public authority, an officer who constitutes a public authority or to another officer under an internal complaints procedure
- to make it a breach of discipline under the Public Sector Management Act 1988 to take reprisals against whistleblowers.

FIRST PRINT

WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

NEW SOUTH WALES

TABLE OF PROVISIONS

WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

NEW SOUTH WALES

No. , 1992

A BILL FOR

An Act to provide protection for whistleblowers disclosing corrupt conduct, maladministration and substantial waste in the public sector; and for related purposes.

The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Whistleblowers Protection Act 1992.

Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Object

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

(a) enhancing and augmenting established procedures for making disclosures concerning such matters; and

(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures; and

(c) providing for those disclosures to be properly investigated and dealt with.

Definitions

4. In this Act:

"Commission" means the Independent Commission Against Corruption;

"corrupt conduct" has the meaning given to it by the Independent Commission Against Corruption Act 1988;

"detrimental action" is defined in section 16;

"disciplinary proceeding" includes a disciplinary inquiry within the meaning of the Public Sector Management Act 1988;

"exercise" of a function includes, where the function is a duty, the performance of the duty;

"function" includes power, authority or duty;

"investigate" includes inquire or audit;

"investigating authority" means:

(a) the Auditor-General; or

(b) the Commission; or

(c) the Ombudsman;

"investigation Act" means:

(a) the Independent Commission Against Corruption Act 1988; or

(b) the Ombudsman Act 1974; or

(c) the Public Finance and Audit Act 1983;

"maladministration" is defined in section 11 (2);

"protected disclosure" means a disclosure satisfying the applicable requirements of Part 2;

"public authority" means any public authority whose conduct or activities may be investigated by an investigating authority;

"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;

"relevant investigation Act", in relation to an investigating authority, means the Act that appoints or constitutes the investigating authority.

Relationship of this Act and other Acts

5. (1) This Act prevails, to the extent of any inconsistency, over the provisions of any investigation Act.

(2) However, 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.

(3) Nothing in this Act authorises an investigating authority to investigate any complaint that it is not authorised to investigate under the relevant investigation Act.

Act binds the Crown

6. This Act binds the Crown in right of New South Wales.

PART 2—PROTECTED DISCLOSURES

Effect of Part

7. A disclosure is protected by this Act if it satisfies the applicable requirements of this Part.

Disclosures must be made by public officials

8. (1) To be protected by this Act, a disclosure must be made by a public official:

(a) to an investigating authority; or

(b) to the principal officer of a public authority or officer who constitutes a public authority; or

(c) to another officer of the public authority to which the public official belongs in accordance with an internal procedure established by the authority for the reporting of allegations of corrupt conduct, maladministration or substantial waste of public money by the authority or any of its officers.

(2) A disclosure is protected by this Act even if it is made about conduct or activities engaged in, or about matters arising, before the commencement of this section.

(3) A disclosure made while a person was a public official is protected by this Act even if the person who made it is no longer a public official.

(4) A disclosure made about the conduct of a person while the person was a public official is protected by this Act even if the person is no longer a public official.

Disclosures must be made voluntarily and in good faith

9. (1) To be protected by this Act, a disclosure must be made voluntarily.

(2) A disclosure is not voluntarily made for the purposes of this section if it is made by a public official in the exercise of a duty imposed on the public official by or under an Act.

(3) To be protected by this Act, a disclosure must be made in good faith.

Disclosure to ICAC concerning corrupt conduct

10. To be protected by this Act, a disclosure by a public official to the Commission must:

(a) be made in accordance with the Independent Commission Against Corruption Act 1988; and

(b) be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.

Disclosure to Ombudsman concerning maladministration

11. (1) To be protected by this Act, a disclosure by a public official to the Ombudsman must:

(a) be made in accordance with the Ombudsman Act 1974; and

(b) be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show that, in the exercise of a function relating to a matter of administration conferred or imposed on the public authority or another public official, the public authority or public official has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration.

(2) For the purposes of this Act, conduct is of a kind that amounts to maladministration if it involves action or inaction that is:

(a) contrary to law; or

(b) unreasonable, unjust, oppressive or improperly discriminatory; or

(c) based wholly or partly on improper motives.

Disclosure to Auditor-General concerning substantial waste

12. **(1)** To be protected by this Act, a disclosure by a public official to the Auditor-General must:

(a) be made in accordance with the Public Finance and Audit Act 1983; and

(b) be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show that an authority or officer of an authority has substantially wasted public money.

(2) In this section, **"authority"** and **"officer of an authority"** have the meanings given to those expressions in the Public Finance and Audit Act 1983.

Disclosures to public officials

13. **(1)** To be protected by this Act, a disclosure by a public official to the principal officer of a public authority or officer who constitutes a public authority must be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show corrupt conduct, maladministration or substantial waste of public money by the authority or any of its officers.

(2) To be protected by this Act, a disclosure by a public official to another officer of the public authority to which the public official belongs in accordance with an internal procedure established by the authority for the reporting of allegations of corrupt conduct, maladministration or substantial waste of public money by the authority or any of its officers must be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show corrupt conduct, maladministration or substantial waste.

Referred disclosures protected

14. (1) A disclosure is protected by this Act if it is made by a public official to an investigating authority and is referred (whether because it is not authorised to investigate the matter under the relevant investigation Act or otherwise) by the investigating authority under Part 4 to another investigating authority or to a public official or public authority.

(2) A disclosure is protected by this Act if it is made by a public official to another public official in accordance with section 8 (1) (b) or (c) and is referred under Part 4 by the other public official to an investigating authority or to another public official or public authority.

Frivolous and other disclosures

15. (1) An investigating authority may decline to investigate or may discontinue the investigation of any matter raised by a disclosure made to it of a kind referred to in this Part if the investigating authority is of the opinion that the disclosure was made frivolously, vexatiously or not in good faith. If the investigating authority does so, the disclosure is not (despite any other provision of this Part) protected by this Act.

(2) Nothing in this section limits any discretion the investigating authority has to decline to investigate or to discontinue the investigation of the matter under the relevant investigation Act.

PART 3—WHISTLEBLOWER PROTECTIONS

Protection against reprisals

16. (1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

(2) In this Act, **"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) disciplinary proceeding.

Protection against actions etc.

17. (1) A person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.

(2) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person.

(3) The following are examples of the ways in which this section protects a whistleblower. A person who has made a protected disclosure:

- has a defence of absolute privilege in respect of the publication to the investigating authority or public authority or public official concerned of the disclosure in proceedings for defamation
- on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act
- who is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law relevant to the oath, rule or practice
- is not liable to disciplinary action because of the disclosure.

Confidentiality guideline

18. An investigating authority, public authority or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:

(a) 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; or

(b) the investigating authority, public authority or public official is of the opinion that it is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

Rights and privileges of Parliament

19. Nothing in this Act affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

Other protection preserved

20. This Act does not limit the protection given by any other Act or law to a person who makes disclosures of any kind.

PART 4—MISCELLANEOUS

Referral of disclosures by investigating authorities

21. (1) An investigating authority may refer any disclosure concerning an allegation of corrupt conduct, maladministration or substantial waste that is made to it by a public official to another investigating authority or to a public official or public authority considered by the authority to be appropriate in the circumstances, for investigation or other action.

(2) The 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.

(3) A disclosure may be referred before or after the matter concerned has been investigated and whether or not any investigation of the matter is complete or any findings have been made by the investigating authority.

(4) The investigating authority may communicate to the other investigating authority or to the public official or public authority any information the investigating authority has obtained during investigation (if any) of the matter concerned.

(5) The investigating authority may recommend what action should be taken by the other investigating authority or the public official or public authority.

(6) The investigating authority is not to refer the disclosure to another investigating authority, or to a public official or public authority, except after taking into consideration the views of the authority, public official or public authority.

(7) An investigating authority referring a matter to another investigating authority may enter into arrangements with the other authority:

(a) to avoid duplication of action; and

(b) to allow the resources of both authorities to be efficiently and economically used to take action; and

(c) to ensure that action is taken in a manner providing the most effective result.

Referral of disclosures by public officials

22. (1) A public official may refer any disclosure concerning an allegation of corrupt conduct, maladministration or substantial waste made to the public official under Part 2 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.

(2) The public official may communicate to the investigating authority, the other public official or the public authority any information the public official has obtained during investigation (if any) of the matter concerned.

Proceedings for offences

23. Proceedings for an offence against this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Regulations

24. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Amendment of Acts

25. The Acts specified in Schedule 1 are amended as set out in that Schedule.

Review

26. (1) A joint committee of members of Parliament is to review this Act.

(2) The review is to be undertaken as soon as practicable after the expiration of one year after the date of assent to this Act, and after the expiration of each following period of 2 years.

(3) The committee is to report to both Houses of Parliament as soon as practicable after the completion of each review.

SCHEDULE 1—AMENDMENT OF ACTS

(Sec. 25)

Defamation Act 1974 No. 18

Sections 17P, 17Q:

Before section 18, insert:

Matters arising under the Public Finance and Audit Act 1983

17P. There is a defence of absolute privilege for a publication to or by the Auditor-General or a member of the Auditor-General's Office as such a member of a disclosure made in relation to a complaint under section 38B (1A) of the Public Finance and Audit Act 1983.

Matters relating to the Whistleblowers Protection Act 1992

17Q. There is a defence of absolute privilege for a publication to or by a public official or public authority referred to in section 8 (1) (b) or (c) of the Whistleblowers Protection Act 1992 of a disclosure made to the public official or public authority in relation to an allegation of corrupt conduct, maladministration or substantial waste of public money if the publication is for the purpose of investigating that allegation.

Government and Related Employees Appeal Tribunal Act 1980 No. 39

Section 24 (**Right of appeal**):

At the end of section 24, insert:

(2) Such an appeal may be made on the ground that the decision appealed against was made substantially in reprisal for a protected disclosure within the meaning of the Whistleblowers Protection Act 1992.

SCHEDULE 1—AMENDMENT OF ACTS—*continued*

Public Finance and Audit Act 1983 No. 152

Section 38B (**Special audit by Auditor-General**):

After section 38B (1), insert:

(1A) A public official within the meaning of the Whistleblowers Protection Act 1992 may complain to the Auditor-General (whether orally or in writing) that public money has been substantially wasted by an authority or an officer of an authority. When a public official makes such a complaint the Auditor-General may conduct an audit under this section.

Public Sector Management Act 1988 No. 33

At the end of section 66 (**Breaches of discipline**):

(a) At the end of section 66 (f), insert:

; or

(g) takes any detrimental action (within the meaning of the Whistleblowers Protection Act 1992) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act; or

(h) takes any disciplinary proceedings or disciplinary action against another officer that is substantially in reprisal for an internal disclosure made by that officer.

(b) At the end of section 66, insert:

(2) In this section, **"internal disclosure"** means a disclosure made by an officer regarding an alleged breach of discipline by another officer belonging to the same Department as that to which the officer belongs.