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PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

MEDIA RELEASE

Inquiry into protection of public sector whistleblower employees Final report

Mr Frank Terenzini, Chair of the Committee on the Independent Commission Against Corruption, today tabled the Committee's report on the protection of public sector whistleblower employees.

"The Committee found that the current whistleblower protection scheme in New South Wales is in need of substantial legislative and administrative reform and renewed policy direction. Changes are needed to emphasise the responsibility of agencies to adequately manage and protect whistleblowers. It was clear to the Committee that there is a lack of consistency in public sector agencies' adoption and application of protected disclosures policies and procedures, and this must be addressed", Mr Terenzini said.

"The *Protected Disclosures Act 1994* is overly technical and does not provide for effective oversight of the whistleblower protection scheme. In addition, the Committee found it difficult to assess the efficacy of the Act, due to the lack of consolidated data and information on the amount of disclosures received and investigated by NSW agencies under the Act."

The Committee has made 31 recommendations for reform to the scheme, covering broad issues including: wide-ranging oversight powers and functions for the NSW Ombudsman's Office; improved, standardised internal agency policies for dealing with disclosures and protecting whistleblower employees; increased transparency through requiring agencies to report on disclosures and their outcomes in their annual reports; and clarifying that parliamentary employees and contractors are eligible for protection under the Act.

"The changes recommended by the Committee seek to boost the protections available to whistleblowers. Specific changes include a less stringent threshold for eligibility for protection, to include disclosures made with an 'honest belief on reasonable grounds'. The Committee has also recommended that detrimental action against a whistleblower is a disciplinary matter, as well as providing for investigating or public authorities to apply for injunctions on a whistleblower's behalf. The Committee's reforms provide that a public official suffering detriment for having made a protected disclosure will be able to claim civil damages under the Act, while the Director of Public Prosecutions will be responsible for prosecuting offences of taking detrimental action."

"The Committee's recommendations will mean that, by the time the first major review of the reformed scheme is conducted in 5 years' time, there will be sufficient information, data and expertise to make accurate evaluations and assessments about the protected disclosures scheme and its ongoing development. In particular, it will be timely to assess whether there is a need to progress to a totally separate administering body."

"The Committee sought to develop reforms with the aim of bringing about cultural change within agencies, through the application of best practice standards and strategies. Changing attitudes at the ground level should serve to deter reprisals, however, the Committee has also recommended that the penalty provisions for reprisal offences under the Act be increased."

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“It is hoped that the Committee’s recommendations will improve the effectiveness of the whistleblower protection scheme by encouraging public officials to report wrongdoing, and stressing the responsibilities agencies have to investigate and manage disclosures and protect whistleblowers.”

“Employees disclosing wrongdoing in the workplace are acting in the public interest and it is important that their contribution to the improvement of public sector integrity is given proper recognition, and that it is valued and encouraged,” Mr Terenzini concluded.

The report is available on the Committee’s website at www.parliament.nsw.gov.au/icac, or by request from the secretariat on 9230 3382.

For additional comments, please contact the Committee Chair, Mr Frank Terenzini MP, on 0447 112 270.

List of recommendations

RECOMMENDATION 1: That the NSW Ombudsman's Office be funded, resourced and empowered to perform the following oversight functions in relation to the protected disclosures scheme:

Monitoring function

- (a) Collect and collate statistics regarding protected disclosures, current policies and agency compliance with statutory requirements, based on agency reporting.
- (b) Publish on an annual basis the information gathered as part of its monitoring function.
- (c) Monitor the operational response of public authorities (other than investigating authorities) to the *Protected Disclosures Act 1994*.
- (d) Monitor and report, as considered necessary, on trends in the operation of the *Protected Disclosures Act 1994*, based on information received from public authorities in relation to the management and outcomes of all disclosures received.

Audit function

- (e) The NSW Ombudsman conduct a regular protected disclosures audit and report to Parliament on the findings of the audit and any recommendations for reform. (The audit could be conducted on a staged basis if necessary.)
- (f) The NSW Ombudsman's audit would encompass:
 - Checking agency compliance with the proposed statutory reporting requirements of the *Protected Disclosures Act 1994*.
 - Checking agency compliance with the proposed internal policy requirements of the *Protected Disclosures Act 1994*.
 - Arriving at an assessment of the quality of protected disclosures investigations by public sector agencies.

Education and advisory function

- (g) That the NSW Ombudsman's Office be responsible for:
 - Providing advice in relation to protected disclosures to public officials and public authorities.
 - Evaluating the internal reporting policies and procedures of public authorities.
 - Coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities.
 - Providing advice on internal education programs to public authorities.72

RECOMMENDATION 2: That the effectiveness of the oversight system proposed by the Committee, and the functions of the NSW Ombudsman's Office within that scheme, be reviewed after a five year period with a view to assessing whether there is a need for an alternative oversight model. (see Recommendation 7).72

RECOMMENDATION 3: That the *Protected Disclosures Act 1994* be amended to require the Premier, as the relevant Minister, to provide a response to the NSW Ombudsman's protected disclosures audit report, addressing any specific recommendations by the NSW Ombudsman, and for the response to be tabled in Parliament.72

RECOMMENDATION 4: That the *Protected Disclosures Act 1994* be amended to change the name of the Act to the Public Interest Disclosures Act.80

RECOMMENDATION 5:

- (a) That the *Protected Disclosures Act 1994* be amended to:
- Make the Protected Disclosures Steering Committee a statutory advisory body with the role of providing advice to the Premier, as the relevant Minister, on issues arising for investigating authorities and other agencies surrounding the operation of the Act, and possible areas for reform.
 - Provide that the NSW Ombudsman publish in his protected disclosures audit reports (see Recommendation 1), an account by the Steering Committee of its activities and any recommendations it has made for reform during the audit reporting period.
- (b) That, in *responding* to the NSW Ombudsman's audit reports, the Premier be required under the *Protected Disclosures Act 1994* to address any recommendations of the Steering Committee.
- (c) Provide that the Steering Committee be consulted by the Premier on any legislative proposals going before Cabinet, subordinate legislation, or any administrative instrument that affects the operation of the *Protected Disclosures Act 1994*. 81

RECOMMENDATION 6: That, as a matter of some priority, the Protected Disclosures Steering Committee, consider the findings and recommendations of the *Whistling While They Work* project and report on the policy implications of the reports for the protected disclosures scheme in New South Wales and also identify possible areas for reform. 81

RECOMMENDATION 7: That the *Protected Disclosures Act 1994* be amended to provide that the NSW Ombudsman may provide a special report to Parliament, as he or she considers necessary, on systemic issues or other problems identified with the operation of the *Protected Disclosures Act 1994*, and suggested legislative reform. 81

RECOMMENDATION 8: That the *Protected Disclosures Act 1994* be amended to require the Premier, as Minister with administrative responsibility for the relevant legislation, to table in Parliament a response to any special report of the NSW Ombudsman, and for the response to address each recommendation for reform.

(The Committee notes in making the recommendations for special and audit reports by the NSW Ombudsman on protected disclosures that the parliamentary oversight committee dedicated to the NSW Ombudsman's Office has the capacity to examine such reports and report to Parliament on any matter considered necessary.) 81

RECOMMENDATION 9:

- (a) That section 32 of the *Protected Disclosures Act 1994* be amended to remove the need for a biennial review of the Act and to provide for a parliamentary committee to undertake a review of the Act five years from the implementation of the recommendations contained in this report.
- (b) That the need for ongoing review of the legislation by a parliamentary committee be one of the issues subject to examination in the next parliamentary committee review, and that the report on the review include a recommendation to Parliament on this question, in light of progress made in reforming the scheme and the implementation of the new roles proposed for the NSW Ombudsman and the Protected Disclosures Steering Committee.
- (c) That the next parliamentary committee review of the Act in five years time examine:

List of recommendations

- i. the extent to which the amendments proposed by the Committee have successfully addressed the problems with the protected disclosures scheme identified during this inquiry;
- ii. whether the structures in place to support the operation and future direction of the protected disclosures scheme remain appropriate, including —
 - the need to establish a separate body dedicated to overseeing the investigation of disclosures and the operation of the protected disclosures scheme; and,
 - if such a need exists, the extent of the role and functions to be performed by such a body and the powers it should be able to exercise.....81

RECOMMENDATION 10: That the *Protected Disclosures Act 1994* be amended to require public authorities (including local government authorities) to have internal policies that adequately assess and properly deal with protected disclosures, and to provide adequate protection to the person making the disclosure. As far as is practicable, the internal policies should be consistent with the NSW Ombudsman’s ‘Model internal reporting policy for state government agencies’ and its ‘Model internal reporting policy for councils’ as outlined in the NSW Ombudsman’s *Protected Disclosures Guidelines*.87

RECOMMENDATION 11:

- (a) That the *Protected Disclosures Act 1994* be amended to require public authorities to publish in their annual reports the following information on protected disclosures:
 - i. the number of disclosures made in the past 12 months
 - ii. outcomes
 - iii. policies and procedures
 - iv. year-on-year comparisons
 - v. organisational impact of investigations of disclosures
- (b) That the NSW Ombudsman review the appropriateness of the above categories of information and data in consultation with the Protected Disclosures Steering Committee, and recommend amendments to the Act if the categories are considered to be inadequate.94

RECOMMENDATION 12: That, to ensure consistent reporting and to give agencies assistance, the NSW Ombudsman include in its *Protected Disclosures Guidelines* an Appendix setting out a model for agency annual reporting of information on protected disclosures, with the *Protected Disclosures Act 1994* requiring public authorities to adopt this model.....94

RECOMMENDATION 13: That the *Protected Disclosures Act 1994* be amended to expressly provide that detrimental action taken substantially in reprisal for a protected disclosure is misconduct, subject to disciplinary action, for all public officials.....98

RECOMMENDATION 14: That the *Protected Disclosures Act 1994* be amended to put beyond doubt that a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both, be included in the definition of ‘public official’ under the Act.....121

RECOMMENDATION 15: That the *Protected Disclosures Act 1994* be amended to put beyond doubt that disclosures about a member of Parliament:

- (a) concerning maladministration, made to the NSW Ombudsman, or to the Clerk of the Legislative Assembly, the Clerk of the Parliaments or the Executive Manager of the

Department of Parliamentary Services, in accordance with the NSW Parliament's current policies and procedures; and

- (b) concerning serious and substantial waste of public money, made to the Auditor-General;

are eligible for protection under the Act..... 121

RECOMMENDATION 16: That the Parliament of New South Wales consider updating its Protected Disclosures policy, Parliamentary Staff Code of Conduct and Code of Conduct for Members' Staff to include a statement that detrimental action is a disciplinary matter for staff, as well as a criminal offence under section 20 of the *Protected Disclosures Act 1994*.
..... 125

RECOMMENDATION 17: That the Parliament of New South Wales consider amending its Protected Disclosures policy to make explicit that post-employment assistance and entitlements available to members' staff should not be varied or reduced because the making of a protected disclosure formed part of the circumstances which led to the termination of their employment. 125

RECOMMENDATION 18: That the Departments of the Legislative Assembly, Legislative Council and Parliamentary Services, consider providing, as far as practicable, the following information on protected disclosures in their annual reports:

- (a) the number of disclosures made in the past 12 months
 (b) outcomes
 (c) policies and procedures
 (d) year-on-year comparisons
 (e) organisational impact of investigations of disclosures. 126

FINDING 1:

- (a) That while the Parliament of New South Wales has protected disclosures policies and procedures in place, there may be scope for further improvements to these through:
- Educational initiatives for parliamentary employees and, as far as is practicable, other individuals located within the offices of members of Parliament.
 - A comprehensive review of existing policies, procedures and codes of conduct relevant to the making and handling of protected disclosures.
 - A review of induction programs to ensure such programs provide adequate information about protected disclosures policies, internal reporting systems and support mechanisms for individuals wishing to make disclosures.
- (b) Further, that the administrative structures of the Parliament of New South Wales have changed significantly since the commencement of the inquiry and that the Department of Parliamentary Services has commenced a number of initiatives relating to the above measures.

The Committee encourages DPS's initiatives in this regard and draws the attention of the Parliament of New South Wales to the best practice models currently available through the NSW Ombudsman's Office and the national *Whistling While They Work* research project, and initiatives in other Parliaments..... 126

RECOMMENDATION 19: That the Parliament of New South Wales review its current policies, procedures and codes of conduct for volunteers and interns relating to protected disclosures, including reviewing induction programs to ensure they provide adequate information and support on protected disclosures..... 127

RECOMMENDATION 20: That the *Protected Disclosures Act 1994* be amended to provide that, in order to be eligible for protection, disclosures must be made by a public official who has an honest belief on reasonable grounds that the disclosure tends to show corrupt conduct, maladministration, or serious and substantial waste.134

RECOMMENDATION 21: That the *Protected Disclosures Act 1994* be amended to provide that a public official is eligible for protection, if the official makes a disclosure to a public authority or investigating authority, in the honest belief that it is an appropriate authority to receive a disclosure concerned with such conduct.137

RECOMMENDATION 22: That the *Protected Disclosures Act 1994* be amended to provide that, in addition to public officials, disclosures that are made by individuals who are in contractual relationships with public authorities are eligible for protection.153

RECOMMENDATION 23: That section 16 the *Protected Disclosures Act 1994*, which provides for disclosures made on frivolous or other grounds, be repealed.160

RECOMMENDATION 24:

- (a) That agency protected disclosure policies include advice that complaints made substantially to avoid disciplinary action are not eligible for protection and that it is an offence to wilfully make false statements to or mislead, a public authority, investigating authority or public official, in making a disclosure, pursuant to section 28 of the *Protected Disclosures Act 1994*.
- (b) Further, that the policies should also indicate appropriate avenues for resolving grievances and performance issues.160

RECOMMENDATION 25: That the NSW Ombudsman’s guidelines on ‘Managing information arising out of an investigation’ May 2009, be used as a guide for agencies in circumstances where a public official who has made a protected disclosure seeks information about the status of the matters they have raised, prior to the expiration of the six month statutory notification period provided for in section 27 of the *Protected Disclosures Act 1994*.163

RECOMMENDATION 26:

- (a) That the *Protected Disclosures Act 1994* be amended to provide for applications by public or investigating authorities for injunctions against detrimental action, on behalf of a public official who has made a protected disclosure.
- (b) That the Steering Committee consider the feasibility of providing for applications for injunctions against detrimental action by public officials who have made a protected disclosure, based on the effectiveness of such provisions in other jurisdictions. ...179

RECOMMENDATION 27: That the *Protected Disclosures Act 1994* be amended to provide for a public official to claim civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.185

RECOMMENDATION 28: That section 22 of the *Protected Disclosures Act 1994* be amended to:

- (a) remove the requirement for confidentiality where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.
- (b) clarify that the confidentiality guidelines apply to a public official who has made a protected disclosure, in addition to the relevant investigating and/or public authorities investigating the disclosure.188

RECOMMENDATION 29: That the *Protected Disclosures Act 1994* be amended to provide that the Office of the Director of Public Prosecutions is the nominated prosecuting authority for offences under section 20 of the Act, and that these matters be referred to the Office of the Director of Public Prosecutions to undertake or supervise any prosecutions. 192

RECOMMENDATION 30: That the Office of the Director of Public Prosecutions be fully consulted by the Department of Premier and Cabinet on any proposed amendment, which would give effect to the Committee’s recommendations 29 and 31, in regard to the prosecution of offences under the *Protected Disclosures Act 1994*. 192

RECOMMENDATION 31: That section 20(1) of the *Protected Disclosures Act 1994*, which provides that it is an offence to take detrimental action against a person, if the action is substantially in reprisal for the person making a protected disclosure, be amended to provide a maximum penalty of 100 penalty units or imprisonment for two years, or both. 195