

OUR REFERENCE

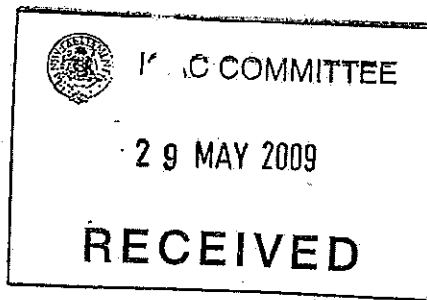
DIRECTOR'S CHAMBERS

YOUR REFERENCE

DATE

27 May 2009

Mr Frank Terenzini MP
Chair
Committee on the ICAC
Parliament of NSW
Macquarie Street
SYDNEY NSW 2000



Dear Mr Terenzini

Inquiry into protection of public sector whistleblower employees

I refer to your letter dated 4 May 2009. In response to the three questions posed I answer as follows.

1. I am aware of one prosecution under s 20 of the *Protected Disclosures Act* 1994.

The subsequent investigation included an interview with the accused. He was told the interview was for departmental purposes only. The accused made certain admissions and was then given a caution. He was charged under s 20 of the *Protected Disclosures Act*. At the hearing in the Local Court the defence objected to the admissibility of the interview, as under s 170 of the *Police Service Act* then in force a document brought into existence for the purposes of disciplinary action was not admissible in criminal proceedings. Despite the prosecution arguing its admissibility the magistrate refused to admit the interview into evidence. The prosecution case was dependent on the interview so the matter was dismissed.

The offence under section 20 of the *Protected Disclosures Act* is to be dealt with summarily in the Local Court and this Office (rather than the police prosecutors) prosecuted the matter because the accused was a serving police officer.

2. I note the penalties for similar offences in legislation in other States are heavier penalties than provided in the NSW Act (other than SA and the Commonwealth). The

NSW legislation should be brought into line with other States particularly as the legislation is important and amendments are anticipated which will provide for a more flexible process. Prosecutions may result and deterrence is a primary objective.

3. I note the comments of the NSW Deputy Ombudsman. In my view it is not essential that a prosecuting body specifically be named within the legislation. Any suspected criminal activity should be referred to the Police Force. Any agency which comes to a conclusion that there is a possible breach of the *Protected Disclosures Act* should be notifying the police. The agency itself cannot make the determination that a charge should be laid. That is a matter for the police.

Police prosecutors usually prosecute summary offences; however, because of the nature of the legislation and its objectives I am of the view that any prosecutions under section 20 of the *Protected Disclosures Act* should be referred to my Office for prosecution. This would ensure consistency in approach in dealing with the complainants and in the prosecutions themselves and also will provide police (and the relevant agencies) with guidance as to evidentiary requirements. The police may seek advice prior to laying charges. If it is accepted that this Office should prosecute I will liaise with the police to ensure such matters are referred to me.

Yours faithfully

A handwritten signature in black ink, appearing to read 'N R Cowdery', with a long horizontal line extending to the right.

N R Cowdery AM QC
Director of Public Prosecutions