



NSW Police Force
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Mr Frank Terenzini MP
Chair
Committee on the Independent Commission Against Corruption
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

09/1210
Lex 5417

26 May 2009

Dear Sir

Re: Inquiry into the Protection of Public Sector Whistleblower Employees

We refer to your letter of 4 May 2009 to the Commissioner of Police enclosing further questions on notice from the Committee relating to the prosecution of offences under Section 20 of the *Protected Disclosures Act 1994* (PDA). We now respond on behalf of the Commissioner to those questions on notice as follows:

1. *Are you aware of any prosecutions commenced under Section 20 of the Protected Disclosures Act 1994 (PDA)? If so, what were the outcomes of these prosecutions?*

A search of the NSW Police Force prosecutions database reveals that there has only been one charge laid by police under the provisions of the PDA. That occurred in November 2001 and related to alleged detrimental action taken by a Senior Constable of Police against a Probationary Constable. The prosecution of the matter was taken over by the Director of Public Prosecutions but was withdrawn and therefore never proceeded to a hearing. We are aware that there have been some private prosecutions brought by individuals but as the NSW Police Force was not involved in those prosecutions we do not hold any records as to how many such private prosecutions have occurred, or the outcomes. It is however unlikely that there have been many.

2. *The penalty provisions for reprisal offences under Section 20 of the PDA provide for a maximum penalty of 12 months imprisonment or 50 penalty units.*

- (a) *Do you have any comment on the adequacy of the penalty provisions for reprisal offences under the PDA?*
- (b) *Do you have any comment on the possibility of increasing the maximum penalty for an offence against Section 20 of the PDA?*

- (a) A review of the maximum penalties for comparable offences found in other Australian jurisdictions (as listed in the table in your letter) suggests a need for

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some national consistency in relation to the offences. We note however that the current penalties under the PDA of a maximum of 12 months imprisonment and/or 50 penalty units are the same maximum penalties imposed for offences under section 206 of the *Police Act 1990* relating to reprisals made against police officers making protected allegations.

- (b) The very small number of incidents where section 20 PDA charges have been laid suggests that the penalties under the Act may be providing sufficient deterrent to prevent many offences occurring. We do not therefore see any need to increase the maximum penalty for such offences, even though the maximum penalties are slightly higher in some of the other jurisdictions.

3. *In evidence provided before the Committee the NSW Deputy Ombudsman, Mr Chris Wheeler, commented, in response to questions about Section 20 of the PDA, that there is 'no specific prosecution body nor is there any obligation on any agency to prosecute if they believe there have been a breach of the Act'.*

- (a) *Do you have any comment on the above concerns of the NSW Deputy Ombudsman?*
 - (b) *Do you consider the NSW Police Force to be the appropriate prosecuting body to prosecute proceedings against Section 20 of the PDA?*
 - (c) *Should the PDA be amended to include a statement specifying the NSW Police Force as a prosecuting body with responsibility for prosecuting offences under the PDA?*
 - (d) *Where an agency, including an investigative authority named under the PDA, has received and investigated a Protected Disclosure and there appears to be suspicion evidence to show that detrimental actions have occurred, should there be an obligation placed upon those agencies and investigating authorities to recommend to the NSW Police Force that a person be prosecuted? If so, what information should accompany such recommendation?*
- (a) We note the comments of Mr Wheeler and suggest that consideration ought be given to having the Office of Director of Public Prosecutions (DPP) as the specified prosecuting authority for these types of matters. You will note that under its prosecution guidelines the DPP may take over proceedings where *"the public interest otherwise requires it"*. We would submit that section 20 PDA offences by their very nature involve a high level of public interest, and therefore ought be taken over by the DPP, as occurred in the matter referred to above in our response to question 1.
- (b) See (a) above.
- (c) See (a) above.
- (d) We do not however agree that there should be an obligation placed upon investigating authorities to recommend to the prosecuting authority that a person be prosecuted under the Act. The obligation should be to investigate whether a complaint has in fact been made and whether any reprisal has been

taken in respect of that complaint, and not whether a prosecution should proceed as the DPP clearly has sufficient review mechanisms in place. We also note that a particular agency where the complaint has arisen would have other effective means of dealing with such matters without necessarily proceeding to a prosecution. By way of example you will note that under Section 148A of the Police Act, the Commissioner or Ombudsman may decide to take no further action in respect of the investigation of a complaint.

We hope that this is of assistance to the Committee.

Yours faithfully



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Superintendent Anthony Trichter
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