

**INQUIRY INTO PROTECTION OF PUBLIC SECTOR
WHISTLEBLOWER EMPLOYEES**

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PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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

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SUBMISSIONS

Terms of Reference and Process for Inquiry

1. The terms of reference for the inquiry into the 'Protection of Public Sector Whistleblower Employees' are as follows:

That the Committee on the Independent Commission Against Corruption, which is a joint statutory committee, inquire into and report on the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament.

2. It is important to break these terms of reference down into two separate but interrelated areas of inquiry, as follows:
 - How effective are *current laws* in protecting whistleblower employees?
 - How effective are *current practices and procedures* in protecting whistleblower employees?

3. These two areas of inquiry are dealt with under relevant headings below.

4. Before doing so it is important to make some comment on the methodology chosen by the Committee on the Independent Commission Against Corruption (the 'ICAC Committee') for conducting this inquiry.

5. In a media release issued on 11 July 2008 the following statement appeared

"Both Houses of Parliament have referred to the Committee, which is a joint statutory committee, an inquiry into the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament", Mr Terczini said.

The Committee is in the initial planning stages of the inquiry and has resolved to publicly advertise the inquiry and call for submissions. The advertisement will be placed in the *Sydney Morning Herald* and the *Daily Telegraph* on Wednesday, 23 July 2008 and the closing date for submissions will be Wednesday, 20 August 2008. This gives interested individuals and organisations four weeks to make their submissions, which is the usual timeframe that applies to committee inquiries."

6. The most significant sentence in the above is the final one, viz.

"This gives interested individuals and organisations four weeks to make their submissions, which is the usual timeframe that applies to committee inquiries."

7. This statement begs the question as to who are such '*interested individuals and organisations*'. It also raises the issue as to whether the calling for written submissions is or indeed can be an effective and appropriate methodology for determining the effectiveness of current laws, practices and procedures, and whether, even if there were merit in this approach, a four week time period for submissions is adequate.
8. If the inquiry is to be any more than another 'tick the box exercise', conducted largely for the purpose of being able to say that 'an inquiry was conducted', then the methodology chosen must be such as to ensure that the members of the ICAC Committee have a body of evidence which is sufficiently reliable and comprehensive for them to be able to draw reliable conclusions, and to make recommendations which

will in the future ensure that (if this indeed the objective) genuine whistleblowers are given effective protection, and their allegations are taken seriously.

9. It is my view, based on a great deal of practical experience in research generally (as a former Associate Professor of the University of New South Wales), in organisational behaviour, and in dealing with public sector corruption generally, that the methodology apparently chosen by the ICAC Committee is ineffective for achieving its goals.
10. As a starting point, before engaging in any 'research', the Committee should have sought expert advice and/or sought submissions in respect of the manner in which the inquiry should be conducted. In failing to do so, the inquiry would appear to be fundamentally flawed from the outset.
11. So as not to leave this broad introductory submissions 'hanging' without giving some indication of my views as to how the inquiry should be and/or should have been structured, I submit that without members of the Committee being exposed to, and reviewing, individual case studies of whistleblowers and their treatment, they will have little understanding of the risks which whistleblowers face in reporting corruption and/or maladministration, and the damage that they typically suffer to their careers and personal lives as a result of having the courage to stand up for what they (rightly or wrongly) believe to be 'the right thing'.
12. On Friday 15 August 2008, the ICAC Committee issued a further media release. This release stated inter alia:

Mr Frank Terenzini, Chair of the Committee on the Independent Commission Against Corruption announced today the next stage of the Committee's inquiry into the protection of public sector whistleblower employees who make allegations against government officials and members of Parliament.

"The Committee will begin holding public hearings on 18 August 2008, with the Deputy Ombudsman, Mr Chris Wheeler, and the Deputy Commissioner of the Independent Commission Against Corruption, Ms Theresa Hamilton, giving evidence before the Committee", Mr Terenzini said.
13. The fact that this media release was issued on a Friday, in respect of a 'public hearing' to be held on the following Monday, must raise questions as to whether there was any desire or intention on the part of the ICAC Committee that this hearing be a 'public hearing' in the manner that that term is usually understood.
14. While the views of Mr Wheeler (with whom I have had a great deal of contact in respect of 'whistleblower' issues) and Ms Hamilton (with whom I have had limited dealings in the same area) will certainly be of interest to the ICAC Committee and provide input relevant to the current inquiry, the question which must be asked in respect of any evidence which they give is: "*What interest and/or interests are they representing?*"

Relevance of the Interests of Submitting Parties

15. It is trite to state that the primary interest of most politicians is to be re-elected at the next election. That is not to preclude the presence of other motivations (which one would trust the majority of politicians have) such as trying to create a better society, improve health care and the environment etc. – and being re-elected is arguably a precondition to achieving such goals.

The Effectiveness of Current Laws in Protecting Whistleblowers

34. The *Protected Disclosures Act 1994* ('the PDA') has been totally ineffective in protecting whistleblowers.

35. Section 20 of that Act provides:

20 Protection against reprisals

(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.

(1A) In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.

(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.

(3) Proceedings for an offence against this section may be instituted at any time within 2 years after the offence is alleged to have been committed.

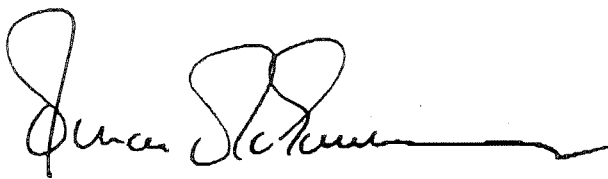
36. I am aware of four prosecutions brought against persons pursuant to the provisions of s 20 of the PDA. None of these were successful.
37. One of those prosecutions was initiated by me in December 2003. The defendants to my action were represented by the Crown Solicitor of New South Wales. After it became clear to my legal representatives and myself on the second day of the trial that the strategy of the defendants was to draw out the trial as long as possible so as to exhaust my finances, I decided – on legal advice – not to present any further evidence so as to avoid possible bankruptcy.
38. Section 20(2) of the PDA defines ‘detrimental action’ to include:
- (c) discrimination, disadvantage or adverse treatment in relation to employment,
 - (d) dismissal from, or prejudice in, employment,
39. The *Ombudsman Act 1974* enables the Ombudsman to investigate a wide range of conduct of public authorities. The Independent Commission Against Corruption has similar powers in respect of a narrower range of conduct.
40. Schedule 1 of the *Ombudsman Act 1974* is titled: ‘*Excluded conduct of public authorities*’. It includes at 12 of the schedule:
- 12 Conduct of a public authority relating to:
- (a) the appointment or employment of a person as an officer or employee, and
 - (b) matters affecting a person as an officer or employee,
- unless the conduct:
- (c) arises from the making of a protected disclosure (within the meaning of the *Protected Disclosures Act 1994*), or
 - (d) relates to a reportable allegation or reportable conviction (within the meaning of Part 3A of this Act), or to the inappropriate handling or response to such an allegation or conviction.

Concluding Submissions

59. The methodology adopted by the ICAC Committee for this inquiry is unsuited to the task which the Parliament of New South Wales has given the Committee on behalf of the people of New South Wales.
60. Unless the ICAC Committee takes time to review case studies of 'whistleblowers' it will be difficult if not impossible for members of the Committee to fulfill their task.
61. In answer to the question: *'How effective are current laws in protecting whistleblower employees'*, I submit that current statutory provisions, including the *Protected Disclosures Act 1994*, the *Ombudsman Act 1974* and the *Independent Commission Against Corruption Act 1988*, notwithstanding the powers conferred by those Acts on certain public officials on behalf of the people of New South Wales, are almost totally ineffective in protecting whistleblowers. One of the major reasons for this is that were

the relevant officials to use the powers conferred on them they would incur the wrath of the executive government in whose interest it is to 'keep a lid' on whistleblowing.

62. The only effective remedies available to whistleblowers are those provided by the common law.
63. In answer to the question: *'How effective are current practices and procedures in protecting whistleblower employees'*, I submit that these are totally ineffective – largely for the reasons stated above.
64. If I can be of any more assistance to the ICAC Committee in its task, I would be happy to provide it. This can most effectively be done by the provision of oral evidence. Preparing submissions such as this is extremely time-consuming and, in my experience, in 99 cases out of 100, a waste of time.



Gerard Michael McGuirk
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