Submission No 40

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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27 March 2009

Mr Frank Terenzini, MP
Chair
Committee on the Independent
Commission Against Corruption
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Terenzini

Re: Discussion Paper – Protection of public sector whistleblower employees

Please find attached our submission in response to several of the proposals set out in the above Discussion Paper, Report No. 5/54 of March 2009.

Should your Committee wish any further information, please contact either myself or my Deputy, Chris Wheeler.

Yours sincerely

Bruce Barbour
Ombudsman

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Submission in response to Discussion Paper – Protection of Public Sector Whistleblower Employees

Proposal 1

The report sets out in paragraphs 3.11 - 3.13 various arguments put forward by the ICAC and the Department of Education against the proposal to set up an oversight unit based in the Ombudsman's Office. Looking at these arguments in order:

- Paragraph 3.11, 1st dot point: A certain level of involvement in the way agencies investigate disclosures is needed to ensure an appropriate standard is achieved and maintained across the public sector. The NSW Ombudsman currently undertakes an equivalent role in relation to the thousands of complaints made to the NSW Police Force each year and the thousands of child protection related complaints made to several thousand public and private sector organisations each year. Our experience has been that the level of involvement of the Office varies depending on the expertise of the agency conducting investigations. For this reason, the Office has entered into what are called 'class or kind' agreements with, for example NSW Police Force, Department of Education and Training, 11 Catholic Diocese, four Centacare organisations and Barnardos. This means that the level of direct involvement of the Office varies considerably depending on the demonstrated expertise of the agencies concerned.

- Paragraph 3.11, 2nd dot point: I am not sure what the ICAC is referring to about the Office becoming involved in complaints that relate to decisions we were involved in. The only circumstances I can think of where this might arise would be where we have oversighted the investigation of a complaint by an agency within another area of our jurisdiction. In such circumstances issues relating to the appropriate response to such disclosures would be addressed as part of that oversight role. Further, our role is to advise not to make decisions or determinations.

- Paragraph 3.11, 3rd dot point: The argument that the proposed educative and data collection functions of such a unit could be undertaken by existing agencies or a policy unit within an appropriate department is partly correct. Certainly the educative functions could be undertaken by existing bodies, however, if we look at the existing educative functions undertaken by my Office, for example, these are not funded by government and are unlikely to be funded in the absence of a statutory role. In relation to data collection, we have found through long experience that this is a difficult issue in the absence of statutory authority, both in relation to ensuring adequate compliance by agencies, and ensuring that issues do not arise under the *Privacy and Personal Information Protection Act* or the *Health Records and Information Privacy Act*. Having an explicit statutory function would also avoid any issues that could arise in relation to potential breaches of the confidentiality requirements of the *Protected Disclosures Act*.

- Paragraph 3.11, 4th dot point: I must disagree with the argument that the "*proposed unit would not be in keeping with current government policy, which requires agencies to take greater responsibility for their corruption prevention activities*". On the contrary, such a unit would in fact be in keeping with a such a policy because its role would be, amongst other things, to facilitate agencies taking greater responsibility for their corruption prevention activities.

- Paragraph 3.12: The Commission's view that such a unit would involve "*the shifting of responsibilities for the management of protected disclosures to a central unit*" seems to be based on the misunderstanding of what would be the role of such a unit. It would not be to take responsibility for the management of protected disclosures but to ensure that agencies take appropriate responsibility for the disclosures that are made to them. It would achieve this in part through ensuring that agencies are "*...educated and encouraged to take responsibility for dealing with disclosures*".

- Paragraph 3.13: With reference to the Department of Education's submission that the establishment of such a unit "*...would increase the red tape and administrative burdens already placed upon public sector agencies...*", this appears to be based on a misunderstanding of the role of such a unit. Taking appropriate steps to ensure that agencies properly investigate complaints and disclosures is not appropriately categorised as increasing 'red tape', a term that is normally associated with excessive attention to formality and routine. Looking at the DET as an example, the Department's ability to investigate allegations has improved significantly arising out of implementation of the recommendations made by this office in the 10 years since we were given the role to oversight the Department's investigation of child protection related complaints (per Part 3A of the *Ombudsman Act 1974*). This process started with a major investigation conducted into the investigative capacity and practices of the Department, and has been followed up in a range of investigations since that time. Issues still arise from time to time, including in relation to the Department's practices and procedures for dealing with protected disclosures and the people and staff members who make them.

  We have noted that DET and other agencies have found the management of whistleblowers in the workplace, particularly after investigations have ceased, to be somewhat problematic. It also appears that access to advice from persons suitably qualified and experienced in dealing with protected disclosures is extremely limited. We have also noted that it is not uncommon for officers designated by agencies as 'Notifiable Disclosure Officers' or 'Disclosure Officers' to have little training in the requirements of the Act, nor an understanding of their responsibilities when dealing with whistleblowers.

  Looked at from the perspective of relative costs and benefits involved, the additional administrative and reporting tasks that would be placed on agencies are minimal compared to the level of detriment that can occur when an agency fails to properly deal with a disclosure and the person who made it, both in terms of detriment to the whistleblower, detriment to person or persons the subject of the disclosure, detriment to the workplace and detriment to the agency itself.

Proposal 1 consists of two parts. The first part refers to the establishment of a Protected Disclosures Unit in a suitable oversight body to perform certain functions in relation to the *Protected Disclosures Act* (PD Act). The second part indicates that the Ombudsman's office should be responsible for certain other functions in relation to that Act.

Wherever the issue of a suitable oversight role has been considered, it has consistently been recommended that the role be performed by one oversight body, and indeed commonsense would indicate that would be the most effective way to proceed.

On the issue of the most appropriate location for this oversight role, as noted in paragraph 3.2 of the Discussion Paper, the three previous reviews of the Act by Parliamentary Committees have recommended the establishment of a Protected Disclosures Unit within the Office of the Ombudsman.

We note that this approach has also been adopted in the report of the inquiry into whistleblowing protection within the Australian government public sector (entitled *Whistleblower Protection: A comprehensive scheme for the Commonwealth Public Sector*), handed down by the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Dreyfus Committee) in February 2009. The Committee expressed the following views:

> *7.1.22 The Committee is of the view that the Public Service Commissioner and the Commonwealth Ombudsman could bring expertise to the role of providing the central oversight function.*
>
> *7.123 The Public Service Commissioner manages the strategic performance in the public sector and has a key role in fostering the 'embedding (of) ethics and integrity' within the public sector. In addition to the Commissioner's role and developing an ethical public service, the Commissioner's responsibilities and, therefore, expertise, can be best described as in those areas that develop, promote, review and evaluate APS employment policies and practices, foster continuous improvement in the management of people, and provide strategic direction in those personnel functions that have an APS-wide application.*
>
> *7.124 The Committee is of the view that the agency responsible for administering the new legislation should have extensive experience and an established reputation for handling complex and sensitive investigations in matters of public administration beyond individual grievances. This is beyond the current administration of matters that traditionally fall within the Public Service Commissioner's responsibilities.*
>
> *7.125 In the Committee's view, the Commonwealth Ombudsman, as the Commonwealth's only generalist investigative agency, already possesses the requisite skills, experience and public profile to fulfil the roles of providing the central oversight function and general administration of the new legislation."*

In relation to the functions to be performed by the body performing the oversight role, the report of the Dreyfus Committee noted:

> *"7.92 Broadly, the evidence received by the Committee was that the role of an agency administering legislation would be to set standards by which disclosures are properly assessed, investigated, actioned, reconsidered, reviewed and reported, to set standards for the protection of persons from reprisals and to monitor the treatment of people making disclosures.*
>
> *7.93 The majority of evidence before the Committee supported an administering agency having an investigative role and powers to refer cases to other agencies and to have powers to investigate matters of its own motion, possibly with the assistance of other agencies.*
>
> *7.94 It was proposed to the Committee that an administering agency, in addition to its other roles, would have the role of assisting agencies to implement comprehensive models of best practice in the management of whistleblowing and playing an educative role.*
>
> *7.95 In summary, it was suggested that the oversight integrity agency could have the general responsibilities of the other integrity agencies and in addition, monitor the system, report to Parliament on the implementation and operation of the system and provide training and education."*

Later the Committee noted:

> *"7.120 It was the view of the Committee that agency heads should be obliged to establish public interest disclosure procedures appropriate to their agencies, report on the use of those procedures to the Commonwealth Ombudsman, and delegate powers to appropriate staff within the agency who receive and act on disclosures..."*

The Committee went on (as para 7.128) to set out what should be the roles of the Commonwealth Ombudsman in relation to whistleblowing.

I note that in the NSW context, there is no equivalent to the Commonwealth Public Service Commissioner, and that in NSW the Ombudsman is the only general jurisdiction integrity agency. In this regard I note that any issues that could constitute either serious and substantial waste or corrupt conduct would, in nearly all cases, come within the scope of the Ombudsman's jurisdiction as set out in s.26 of the *Ombudsman Act* (the primary exclusions from this would be limited to the conduct of Ministers of the Crown and the judiciary).

Proposal 12

There are inherent difficulties in the recipient of a disclosure being able to make an assessment of the state of mind of the person who made the disclosure, as at the time the disclosure was made. In the case of line agencies, even if the principal officer of the organisation met with the whistleblower in each case, it would be difficult to make such an assessment.

One way around this difficulty, while still providing for both objective and subjective tests, may be to distinguish between when the tests apply. It would be appropriate to make a distinction between:

(1) determining whether the obligations under the Act apply to the recipient of a disclosure, and
(2) determining whether the protections of the Act apply to the maker of a disclosure.

In the first instance, the objective test of "*show or tends to show*" would be practical and appropriate.

In the second case, either or both of the objective and/or subjective tests could apply.

Proposal 13

In relation to the references in the Act "*vexatious*" and "*frivolous*", two issues need to be considered:

- what they mean, and
- what purpose they serve.

In relation to the 'what', I think the proposal to include definitions for those terms could be problematic, particularly in relation to "*frivolous*". As s.16 refers to motive (ie "*made... frivolously*") not content (to be a protected disclosure the matters disclosed must be serious), it requires an assessment to be made as to the state of mind of the person who made a disclosure, at the time the disclosure was made. After giving this issue some thought, examples do not immediately come to mind of circumstances where a disclosure of serious matters in the public interest (ie one of three the categories of conduct covered by the Act) could be made 'frivolously'.

The second issue relates to the purpose served. Provided that the content of a disclosure shows or tends to show a serious matter in the public interest (ie it meets the definition of one of the three

The second issue relates to the purpose served. Provided that the content of a disclosure shows or tends to show a serious matter in the public interest (ie it meets the definition of one of the three categories of conduct covered by the Act), does it matter what may have been the motive of the whistleblower?

As an example, it is appropriate to distinguish between a complaint or allegation made vexatiously as opposed to one motivated by malice. In this context 'vexatious' could be said to be where the motive of the person is to cause harm or detriment and the person is aware there is no substance to the disclosure or that it is actually false or intentionally misleading. Malicious would be where the motive of the person is to cause harm or detriment but there is substance to the disclosure. From the perspective of agencies and investigating authorities, allegations motivated by malice are an important source of information about misconduct and mismanagement. From a practical perspective of course, if it is known that a whistleblower or other complainant is motivated by malice, this would diminish the reliability of the evidence provided and would mean that other more reliable evidence must be found to substantiate the allegations.

In my view, section 16 should be deleted from the Act.

Bruce Barbour
Ombudsman

27 March 2009