**Submission No 15**

# INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES


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# SPAI
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Mr Frank Terenzini MP
Member for Maitland
Chairman
Committee on the Independent Commission Against Corruption
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Dear Chairman,

I forward a submission regarding the inquiry by the ICAC Committee into legislative issues concerning whistleblowing in the New South Wales public sector, focusing on the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make disclosures alleging corruption or misconduct (inappropriate or improper conduct) by government officials or members of Parliament. Whistleblowing protection is about ensuring that there are appropriate processes in place, and protections offered, to facilitate the making of such disclosures.

In 2006, the ICAC Committee of the 53rd Parliament produced a definitive report of a review of the Protect Disclosures Act (NSW) 1994 and seventeen recommendations for action were made. The recommendations are included on the following pages.

To date, I am unaware if there has been a response of government to this report and recommendations. I am also not aware of the views of the NSW Ombudsman or the Independent Commission Against Corruption regarding the report and recommendations.

The report of the ICAC Committee of the 53rd Parliament into protected disclosures (or what is better termed whistleblowing) is important. The approach adopted by the ICAC Committee of the 53rd Parliament involved significant consultation with each Minister in the New South Wales government. Ministers sought advice from agencies in their portfolios and made comments as they thought relevant. These comments were included as an annexure to the report, and provide an important insight into the knowledge, practices and procedures of government agencies regarding whistleblowing disclosures.

In New South Wales a public sector whistleblower employee who might consider making an allegation against government officials and members of Parliament remains at risk of punitive action if the allegation is made, as the question of whether a whistleblowing employee has acted lawfully cannot be determined at an administrative or executive level and can only be conclusively determined by a court or tribunal.

The Independent Commission Against Corruption, or the other investigating authorities in New South Wales, cannot determine whether a disclosure by a whistleblower employee meets the requirements for protection under the Protected Disclosures Act 1994 (as these investigating authorities exercise administrative, not judicial, functions). Interestingly, this does not appear to be well understood—the ICAC Committee of the 53rd Parliament found that these investigating authorities will advise—in ignorance or with misplaced confidence—on whether a disclosure by a whistleblowing employee meets the criteria for protection.

Clearly, there is a need for substantial reform of whistleblowing law in New South Wales.

This could be done, for example, by adopting the approach used in other Australian jurisdictions to protect a whistleblower where a person had an "honest belief on reasonable grounds". This test is easier to satisfy because the belief need not be correct but only that the public sector employee, in fact, demonstrably held the belief and that there were reasonable grounds for the employee to have formed this belief.

As well, reform of whistleblower law in New South Wales should ensure that an obligation is placed on authorities to investigate a disclosure by a whistleblowing employee. In New South Wales, the authorities must be under a clear obligation to adequately assess and properly deal with a disclosure by a whistleblowing employee.

The ICAC Committee of the 53rd Parliament recommended:

Recommendation 1: The Parliamentary Committee recommends that the name of the Protected Disclosures Act 1994 be altered to Public Interest Disclosures Act 1994 so as to focus it on the public interest objectives of the Act. This change is supported by the Protected Disclosures Act Implementation Steering Committee.

Recommendation 2: The Parliamentary Committee recommends that the long title of the Protected Disclosures Act 1994, which currently reads "An Act to provide protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector; and for related purposes" should be re-worded to reflect the broader objective in section 3.

Recommendation 3: The Parliamentary Committee recommends that the Protected Disclosures Act Implementation Steering Committee examine and advise the Minister whether the Protected Disclosures Act should be amended so as to bring dangers to public health, safety and the environment clearly within the scope of the Protected Disclosures Act 1994. These are matters of obvious public concern that at present do not clearly fall within the definition of maladministration in section 11. In that examination the cost implications of creating additional investigating authorities such as the Department of Health, Workcover and the Department of Environment and Planning should be assessed.

Recommendation 4: The Parliamentary Committee recommends that the regulation making power in section 30 of the Protected Disclosures Act 1994 be amended to expressly provide for the making of enforceable regulations or guidelines as to the lodgment, investigation, handling and reporting of protected disclosures.

Recommendation 5: The Parliamentary Committee recommends that Part 2 of the Protected Disclosures Act 1994 be amended so as to protect a disclosure where the public official has

an honest belief on reasonable grounds that it is true. This will bring New South Wales into line with other States and give improved protection to the whistleblower. This change is not intended to replace the existing criteria but to provide an additional alternative protection to the purely objective test that is currently in place.

Recommendation 6: The Parliamentary Committee recommends that:

(a) the NSW Department of Health seek advice from the Crown Solicitor on whether the current definition of "Public Official" includes Area Health staff that are employed under the Health Services Act 1997; and

(b) if the Crown Solicitor is of the view that the definition does not include these employees, then an appropriate amendment should be made to the Act.

Recommendation 7: The Parliamentary Committee recommends that consideration be given to including the Health Care Complaints Commission as an investigating authority under the Protected Disclosures Act 1994.

Recommendation 8: The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to require each public authority and investigating authority to adequately assess and properly deal with a protected disclosure. This requirement will bring New South Wales into line with other Australian States who, with the exception of South Australia, already have a similar provision.

Recommendation 9: The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended to enable the establishment of a Protected Disclosures Unit within the Office of the Ombudsman, funded by an appropriate additional budgetary allocation, to perform monitoring and advisory functions as follows:

(a) to provide advice to persons who intend to make, or have made, a protected disclosure;

(b) to provide advice to public authorities on matters such as the conduct of investigations, protections for staff, and general legal advice on interpreting the Act;

(c) to provide advice and assistance to public authorities on the development or improvement of internal reporting systems concerning protected disclosures;

(d) to audit the internal reporting policies and procedures of public authorities, (other than investigating authorities);

(e) to monitor the operational response of public authorities (other than investigating authorities) to the Act;

(f) to act as a central coordinator for the collection and collation of statistics on protected disclosures, as provided by public authorities and investigating authorities;

(g) to publish an annual report containing statistics on protected disclosures for the public sector in New South Wales and identifying any systemic issues or other problems with the operation of the Act;

(h) to coordinate education and training programs, in consultation with the Protected Disclosures Act Implementation Steering Committee, and provide advice to public authorities seeking assistance in developing internal education programs;

(i) to publish guidelines on the Act in consultation with the investigating authorities;

(j) to develop proposals for reform of the Act, in consultation with the investigating authorities and Protected Disclosures Act Implementation Steering Committee; and

(k) to provide executive and administrative support to the Protected Disclosures Act Implementation Steering Committee.

In order to enable the proposed Public Interest Disclosures Unit to monitor trends in the operation of the protected disclosures scheme, there should be a requirement for:

(i) public authorities and investigating authorities to notify the Protected Disclosures Unit of all disclosures received which appear to be protected under the Act;

(ii) public authorities (excluding investigating authorities) investigating disclosures to notify the Protected Disclosures Unit of the progress and final result of each investigation of a protected disclosure they carry out; and

(iii) investigating authorities to notify the Protected Disclosures Unit of the final result of each protected disclosure investigation they carry out.

All members of the Protected Disclosures Act Implementation Steering Committee support this amendment. If Recommendation 1 is adopted, the name of the unit should be changed for consistency, to the Public Interest Disclosures Unit.

Recommendation 10: The Clerk of the Legislative Assembly and the Clerk of the Parliaments ensure that appropriate training and supportive documentation is made available to members of Parliament regarding the receipt of a disclosure from a public official under section 19 of the Protected Disclosures Act 1994.

Recommendation 11: The absence of a statistical base has been a central weakness in the implementation of the Protected Disclosures scheme to date. To rectify this, the Protected Disclosures Unit should develop uniform standards and formats for statistical reporting. For this purpose, it should seek professional advice on the development of an appropriate statistical model or framework for the on-going assessment of the effectiveness of the Protected Disclosures Act 1994. This framework, including the information that needs to be captured, should be established before the regulations are finalised.

Recommendation 12: The Parliamentary Committee agrees in principle that the Protected Disclosures Act 1994 should be amended to provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action in reprisal, but suggests that before the matter proceeds further the Protected Disclosures Act Implementation Steering Committee should review and develop this proposal in more detail and to consult with relevant authorities to resolve the issues mentioned in this report. Subject to the satisfactory resolution of those matters the Committee recommends that an appropriate amendment go forward for inclusion in a Statute Miscellaneous Provisions (Amendment) Act.

Recommendation 13: The Parliamentary Committee recommends that the Protected Disclosures Act 1994 be amended so as to authorise a person who has made a protected disclosure (or a public authority or investigating authority on behalf of such a person) to apply for an injunction against the making of a reprisal. This amendment will assist persons and authorities to limit detrimental action occurring during the management of a protected disclosure. The inclusion in the Act of a suitable provision for injunctive relief has been recommended by the Ombudsman, the Protected Disclosures Act Implementation Steering Committee and in other evidence or submissions. Similar injunctions against reprisals are available in Queensland and in the Australian Capital Territory.

Recommendation 14: The Parliamentary Committee recommends that sections 20 and 28 of the Protected Disclosures Act 1994 be amended to include a statement specifying the Director of Public Prosecutions (DPP) as the prosecuting authority for the purposes of those

provisions, in order to remove the uncertainty that currently exists as to the prosecuting authority in relation to these provisions. The change recommended should not preclude a criminal action by an individual.

Recommendation 15: In its submission, the Protected Disclosures Act Implementation Steering Committee recommends that the review period for the Protected Disclosures Act 1994 should be changed from the current two-year review cycle to a more realistic and practicable period of five years. Current Government policy requires one review after five years in respect of principal legislation. No further reviews are required thereafter. The recommendations of this report, if implemented, will result in important practical changes to the protected disclosures scheme, which would benefit from a further review after five years. The Parliamentary Committee accordingly recommends that section 32 be amended to require one further review at the expiration of five years. Section 32 should sunset after that review.

Recommendation 16: The Parliamentary Committee notes that the Protected Disclosures Act Implementation Steering Committee is an ad hoc body established by the various New South Wales investigating authorities as a means of co-ordinating and sharing concerns and experiences with the practical implementation of the Protected Disclosures Act 1994. The Parliamentary Committee recommends that consideration be given to establishing this function under the Act, as a statutory advisory committee.

Recommendation 17: The Parliamentary Committee recommends that a national conference of representatives of key integrity bodies and relevant government representatives from each Australasian jurisdiction be convened under the auspices of the Office of the Ombudsman to discuss, with a view to reaching consensus on the fundamental principles for whistleblowing legislation. The conference would build on the issues identified for discussion in the course of the collaborative national research project 'Whistling While They Work'. The conference should be organised on the basis that participants pay their own travel and accommodation expenses, with the convening organisation providing the venue, refreshments and lunches, settling an agreed agenda, chairing the conference and preparing minutes setting out what was agreed. Organised on this basis, the conference should not involve a significant financial impost on the convening agency. The conference should be supported by a suitable supplementation of funds.

I continue to endorse the findings and recommendations of the report of the ICAC Committee of the 53rd Parliament of a review of the Protect Disclosures Act (NSW) 1994.

Yours sincerely,

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Partner