

**Submission
No 57**

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

Organisation: NSW Department of Health

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Position: Director General

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

Dear Mr Terenzini

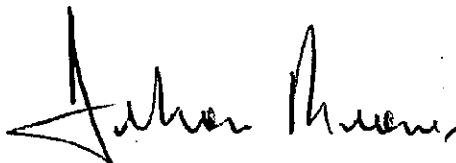
I am writing in response to your letter dated 12 March 2009 that invited comment on the proposals made in your Committee's discussion paper issued as a consequence of the inquiry into the protection of public sector whistleblower employees.

The Department's Director of Corporate Governance and Risk Management has reviewed the discussion paper and provided comment on those proposals that are within the scope of the Department of Health's experience in managing protected disclosures. These comments are attached.

The Department has been an active participant in the Whistling While They Work research project and is aware that the project's second report (due in 2009) will contain new model procedures for managing whistleblowing in public sector agencies. The Department will incorporate these new procedures into NSW Health Policy.

Please direct further inquiries regarding this matter to Jeanette Evans,
Director, Corporate Governance and Risk Management

Yours sincerely



Professor Debora Picone AM
Director-General

7/6/09

RESPONSE TO PROPOSALS

PROPOSAL 1:

a) That a Protected Disclosures Unit be established in a suitable oversight body to:

- **monitor the operational response of public authorities (other than investigating authorities) to the Protected Disclosures Act 1994 (the Act);**
- **act as a central coordinator for the collection and collation of statistics on protected disclosures;**
- **publish an annual report containing statistics on disclosures;**
- **identify systemic issues or problems with the operation of the Act;**
- **develop reform proposals for the Act; and**
- **monitor and report on trends in the operation of the Act, based on information received from public authorities in relation to the management and outcomes of all disclosures received.**

b) That the Ombudsman's Office should be responsible for:

- **providing advice in relation to protected disclosures to public officials and public authorities;**
- **auditing the internal reporting policies and procedures of public authorities;**
- **coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities; and**
- **providing advice on internal education programs to public authorities.**

Department of Health comment

Since 1995, the Ombudsman has produced guidelines to assist public officials in State Government Departments and agencies in the implementation of their obligations under the Protected Disclosures legislation. The Ombudsman has also facilitated training workshops covering the Protected Disclosures Act for NSW Health staff. The proposal to establish a Protected Disclosures Unit within the Ombudsmans Office is a logical extension of this role and is supported.

PROPOSAL 2:

That, pursuant to section 30 of the Protected Disclosures Act 1994, enforceable regulations on protected disclosures be made requiring public authorities (including local government authorities) to have internal policies that adequately assess and properly deal with protected disclosures, and to provide adequate protection to the person making the disclosure. These protected disclosure regulations should require the internal policies to be consistent with, but not necessarily identical to, the NSW Ombudsman's "Model internal reporting policy for state government agencies" and its "Model Internal Reporting Policy for Councils" as outlined in the NSW Ombudsman's Protected Disclosure Guidelines, 5th Edition.

Department of Health comment

This proposal is supported. The Department initially issued policy covering procedures under the Protected Disclosures Act, based on advice issued by the NSW Ombudsman, in July 1995. The Department's current policy directives on protected disclosures (PD 2005-135 and PD 2005-263) are consistent with the *NSW Ombudsman's Protected Disclosure Guidelines, 5th Edition*.

PROPOSAL 3: That the Protected Disclosures Act 1994 be amended to provide that, in addition to public officials, disclosures that are made by people who are in contractual relationships with public authorities are eligible for protection.

Department of Health comment

This proposal is supported, provided that the protection is limited to the time the contractor remains in a contractual relationship with the public authority

PROPOSAL 4: That the Protected Disclosures Act 1994 be amended to make it clear that, in addition to public officials, disclosures made by volunteers and interns working in the office of a member of Parliament are eligible for protection.

Department of Health comment

No comment.

PROPOSAL 5: That the Protected Disclosures Act 1994 be amended to provide that in order to attract protection, disclosures must show or tend to show that a public authority or official has, is or proposes to engage in corrupt conduct, maladministration, or serious and substantial waste; or be made by a public official who has an honest belief on reasonable grounds that the disclosure, concerning corrupt conduct, maladministration, or serious and substantial waste, is true.

Department of Health comment

No comment.

PROPOSAL 6: That the Protected Disclosures Act 1994 be amended to provide for applications, by public or investigating authorities, for injunctions against detrimental action on behalf of public officials.

Department of Health comment

No comment.

PROPOSAL 7: That the Protected Disclosures Act 1994 be amended to provide for a public official to claim for civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.

Department of Health comment

No comment.

PROPOSAL 8: That section 22 of the Protected Disclosures Act 1994 be amended to remove the requirement for confidentiality in cases where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.

Department of Health comment

No comment.

PROPOSAL 9: That section 22 of the Protected Disclosures Act 1994 be amended to clarify that the confidentiality guidelines apply to a public official who has made a protected disclosure, in addition to the relevant investigating and/or public authorities investigating the disclosure.

Department of Health comment

No comment.

PROPOSAL 10: That the Protected Disclosures Act 1994 be amended to provide that detrimental action taken substantially in reprisal for a protected disclosure is a disciplinary offence for all public officials.
PROPOSAL 11: That the Protected Disclosures Act 1994 be amended to provide a detailed, stand-alone definition of a public authority along the lines of Schedule 5(2) of the Whistleblowers Protection Act 1994 (Queensland).

Department of Health comment

No comment.

PROPOSAL 12: That section 14 of the Protected Disclosures Act 1994 be amended to clarify that, to be protected by the Act, disclosures by public officials that show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money may be made to an appropriate public authority or investigating authority where the public official honestly believes it is the appropriate authority to receive the disclosure.

Department of Health comment

No comment.

PROPOSAL 13: That the Protected Disclosures Act 1994 be amended to include definitions for "vexatious" and "frivolous" complaints, as provided for in section 16 of the Act, to enable agencies to more easily identify complaints that are not eligible for protection.

Department of Health comment

Departmental Officers responsible for receiving and investigating protected disclosures have experienced difficulty in assessing whether the disclosures

were vexatious or frivolous within the meaning and intention of the Act. The proposal to clarify these words by including definitions would be beneficial and is supported.

PROPOSAL 14: That public authorities include in their Protected Disclosures policies advice:

- ***that complaints made substantially to avoid disciplinary action, or made vexatiously or frivolously, are not eligible for protection under the provisions of the Protected Disclosures Act 1994; and***
- ***specifying appropriate avenues for resolving grievance and performance related issues.***

Department of Health comment

Supported. Departmental policy directives on protected disclosures contain advice that complaints made substantially to avoid disciplinary action, or made vexatiously or frivolously are not eligible for protection.

PROPOSAL 15: That section 27 of the Protected Disclosures Act 1994 be amended to require agencies that receive a protected disclosure to keep the public official who has made the disclosure informed as to developments in relation to their disclosure.

Department of Health comment

This proposal is supported. Current departmental policy contains a provision for the officer nominated to assess the disclosure, to ensure that feedback is provided where applicable to the public official who made the disclosure.

PROPOSAL 16: That the Protected Disclosures Act 1994 be amended to require public authorities to report on protected disclosures, along the lines of what is required for freedom of information applications under section 69 of the Freedom of Information Act 1994. This reporting requirement could take the form of a protected disclosures regulation requiring a public authority to publish in their annual report the following information on protected disclosures (as per Clause 10 of the Freedom of Information Regulation):

- 1. the number of disclosures made in the past 12 months;***
- 2. outcomes;***
- 3. policies and procedures;***
- 4. year on year comparisons***
- 5. organisational impact of investigations of disclosures.***

To ensure consistent reporting, the NSW Ombudsman's Protected Disclosure Guidelines could be revised to include an Appendix setting out a pro-forma for agency reporting of information on protected disclosures for annual reports, with the protected disclosures regulation requiring public authorities to adopt this pro-forma.

Department of Health comment

This proposal is supported on the provision that only de-identified information is published.