

**Submission
No 52**

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

Organisation:

Name: Ms Cynthia Kardell

Telephone:

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ICAC Committee - Submission to: Inquiry into protection of public sector whistleblower employees.

From: "cynthia kardell"
To: <icac@parliament.nsw.gov.au>
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Mr Frank Terenzini, MP
 Chair,
 Committee on the ICAC.,
 NSW Parliament.



ICAC COMMITTEE

- 6 MAY 2009

RECEIVED

Dear Sir,

Submission: as to the proposals set out in the Discussion Paper: Report No. 5/54 published March 2009.

Please note I have adopted your order and nomenclature.

Proposal 1:

I see the proposed new oversight body as doing little more than what is presently done, by the parliamentary Steering Committee, which as I understand it still has responsibility for administering the Act. I note the Ombudsman Office chaired the Committee, the last time I had cause to refer to it.

The second part of the proposal will essentially make formal an existing practice of the NSW Ombudsman. The Ombudsman does a good job of it, so it is good sense to recognise that work and fund it properly.

The proposal in toto represents a missed opportunity, particularly as the proposed new body has no oversight responsibility for investigating authorities like the ICAC, nor will it act as a clearing house for public interest disclosures or have any role, practical or otherwise in the protection of whistleblowers.

Proposal 2:

Enforceable regulations based on the Ombudsman's Guidelines may be a good idea, if they also prescribe how and when an agency head should proactively intervene to presumptively afford protection (as and when the need arises), rather than do nothing on the belief and assumption that only a court can determine whether or not protection should be afforded.

See too, my comments and suggestions under proposal number 13.

Proposal 3:

This is too little, too late. You may say I am ungracious and, something is always better than nothing, but then so be it. Note the South Australian Act has always allowed for disclosures from persons, not just persons working for public sector organisations. Government has not fallen, as far as I am aware.

The Committee should look to extending it's operation to any person and include the opportunity for a person to make a formal disclosure, directly to a court of competent jurisdiction as a relator in the action.

Proposal 4:

Extending cover to interns and volunteers is an obvious and necessary improvement, but one which would not be necessary if the act allowed for disclosures from a person.

Proposal 5:

This proposal is not sensible and misses the point.

The aim of the game (see section 3) *is* to 'encourage and facilitate' disclosures, in the public's interest. That is, the aim of the game *is not* to set up a test, with winners and losers, with the prize being protection by the Act.

This proposal should be to amend sections 8 to 12, 14 and 15 by deleting the opening words "To be protected by

this Act', because protection should not rest on a test about whether the 'disclosure' shows something or other, or was made in a honest belief.

Why? Because the work of sections 8-10, 12, 14 and 15 is about educating the reader about which investigating authority does what, so that the reader can make an educated guess about where best to send it (their disclosure).

A potential whistleblower should not be put to a test in this respect or punished for getting it wrong, because the *State (not the whistleblower)* has decided that it will not have a stand alone investigating authority, but will utilise existing authorities, all of which have different roles and are required to pass them on anyway. The potential whistleblower can not be required to be an expert: the investigating authority is.

Having said that I don't think there is anything intrinsically wrong with maintaining the existing requirement that a disclosure to an existing authority should be in the accordance with that authority's act, to the extent that there is no inconsistency.

Nor with stating that a person should have an honest belief (etc) in s.19 or more generally, as I indicated in my earlier submission about defining a disclosure.

(Although thinking about it again now, s.28 with its embargo on frivolous & vexatious disclosures is probably all that is necessary.)

Or with including a test of sorts in order to attract protection, but I think it should be approached from the opposite direction, if it is to be successful in realising the objects of its the act, out in the field. That is, there should be an upfront presumption as to protection.

To put it at its most basic: there should be a presumption that a person, who says in writing or verbally that they are making a disclosure in the public's interest in accordance with the Act, *will be afforded protection unless and until a court determines otherwise.*

This would reverse the current approach, which is that you *will be afforded protection if and when* a court decides you should be. This approach has had disastrous results: it explains why employers and public authorities say they can do nothing to protect whistleblowers until a court decides, other than to wring their hands.

Proposal 6:

Providing for injunctive relief is a good proposal, although the opportunity should also be extended to the whistleblower.

It would be better still, if the oversight body had both the opportunity to seek injunctive relief and the responsibility for protecting whistleblowers.

What this proposal fails to take account of is threefold. There is no oversight body. The public agencies or investigating authorities may be responsible for taking the detrimental action against the whistleblower. And mostly, for a variety of reasons, the investigating authority is disinclined to support a whistleblower in any way: they invariably see it as something that necessarily places their objectivity as an investigator at risk.

There is a real issue here and one that won't go away. This is why there needs to be an overseeing body, having a leading role in protection.

Proposal 7:

This is generally a sensible move, but one that should not be confined to public officials, given that there is a proposal on the board to include contractors, interns and volunteers.

Also I think you should think again and extend it further, to cover a 'person' *making a public interest disclosure pursuant to the act.*

Proposal 8:

This amendment would give legislative effect to the current practice of the ICAC, which routinely asks the whistleblower whether or not they consent to having their identity being disclosed.

I have no issue with this proposal, if at the same time the Act makes it very clear that (1) an investigating authority may not decide not to investigate, because the whistleblower wants to remain anonymous, (2) the authority should not disclose a whistleblowers identity at any time, whether or not consent is given, unless it is impossible to pursue the allegations without the accused knowing the identity of his or her accuser (natural justice).

This is a natural justice test imposed as a protection for both the accused and the accuser and it should remain, because public interest disclosures (by their very nature) do not usually require the accused to know the identity of the accuser.

And because, disclosing the whistleblower's identity when natural justice did not require it, would give the accused an unnecessary opportunity, to mobilise support in the public authority against the whistleblower.

It also creates the opportunity for sloppy investigative methods to become the norm, because having to distill the facts from the allegation, without including the identity of the whistleblower is both a necessary discipline and the only way you can ascertain whether or not the disclosure was made substantially in the public's interest.

Proposal 9:

Whether the act should require the whistleblower to keep the **fact** of having made a disclosure confidential is another, quite separate issue. I think this proposal is wrong and misconceived.

A person who makes a disclosure under the Act should be in no different a position to the person, that files a claim in a court, tribunal or commission etc. The claim becomes a matter of the public record, but the court (etc) does not give information out about the claim and the litigant does not have to keep the conduct of the matter confidential. True their lawyer must keep their client's business confidential, but that is irrelevant as to whether and if so who, the litigant talks to about it.

Another issue is that it might provide a whistleblower with a cause of action against the employer and investigating agency, if it could be shown that natural justice did not require the disclosure of their identity (in the investigation of their disclosure), the whistleblower kept her mouth shut and still her employer and or its officers found out and took detrimental action against them.

Proposal 10:

I have no issue with this proposal, except that it assumes the alleged wrongdoer is always going to be a public official. What about the contractor's whistleblowing employee, whose boss harassed & intimidated him, because the boss was unhappy about losing the government contract, after the flack hit the fan? In this scenario, the boss could just as well be an enraged public official.

I think the amendment would need to hinge on employment rather than the employee or the employee's status as a public official. It should be an incident of employment or an offence *arising out of employment*.

This proposal may create the circumstances where an employer might take disciplinary action, to stop reprisals being taken against the whistleblower more often, which would be a very good thing.

Proposal 11: I don't have any problems with this proposal.

Proposal 12:

I do have some problems with this proposal. Refer my comments under proposal 5.

Proposal 13:

I don't think we need to expand on s.28 in any way. I would have thought most investigating authorities would be able to work out whether or not an allegation was frivolous or vexatious. Frivolous is readily identified. Vexatious is what makes it potentially a serious issue. Vexatious might take a little longer, if it relies on establishing that the disclosure was (say) based on a deliberate lie, but the existing laws cover that eventuality.

But either way, I think the problem is greatly overrated. If it was such a problem, investigating authorities, like say the ICAC would be able to give the Committee chapter and verse about it. But they don't: and I think it is because it is relatively rare.

I wonder though, whether the committee might be confusing this question with how does one determine whether a disclosure is actually a public interest disclosure? Frivolous and vexatious has nothing to do with that question.

That question, is determined by thinking about the information, that the whistleblower has supplied and pondering:

1. Whether the disclosure substantially serves a private or public interest.

[An example. Did Andrew Wilkie complain that his boss is bullying him or did he complain that his boss deliberately lied about the existence of weapons of mass destruction or is it both?

If it is no, yes and no, it is a clear cut public interest disclosure, because Wilkie is acting on behalf of the interested

party, that is the public.]

2. What is the allegation being made? If it is a public interest disclosure you should, generally be able to exclude any reference to the whistleblower.

[Continuing the example: the allegation is that Mr Howard & his government deliberately lied to the Australian public about the existence of weapons of mass destruction.

That is, the question is not who makes the allegation. The allegation stands or falls on the facts. Andrew Wilkie saying someone said something or told him something, doesn't make it any more true or false.]

3. Does the allegation provide any factual basis for further inquiry and if so, does it support the allegation.

[Continuing the example: if (say) Wilkie provided information and or a copy of the analysis & records provided to the PM, do they support the allegation, sufficient to take it further?]

4. Is there any other information / evidence to be had to support the allegation.

It is a deceptively simple approach, which I have borrowed from a decision in *Pelechowski v The Department of Housing* in 1994. In that case the Court found the Department wrongly asked itself whether anything was known, which would influence them to think that she (the alleged wrongdoer), might have done what Pelechowski had alleged. The answer was apparently, that she was a fine, lovely woman and that *she* thought, Pelechowski was not well liked and an odd and peculiar man. And that as they say, was that. Pelechowski was sacked.

But the Court asked itself the self same questions and found the woman had been corruptly running her own business from her work, as alleged. The Court stated that much trouble would have been avoided had the Department simply asked themselves the right questions at the outset.

It is a simple little decision and a deceptively simple little process, but one that is apparently very hard to apply, even though it works.

Accordingly I suggest that the Committee's proposal number 2 should be expanded to include regulations that would require the investigating authorities to establish and apply best practice principles and practice for the investigation of the disclosures.

Proposal 14:

I have no issue with the first part of the proposal, if the opportunity is taken to correct the suggested advice to read something like the following, because *inter alia* there should be a presumption as to protection (refer under proposal 5 above).

That *the person making a complaint found by a court* to be (etc) will not be eligible (etc).

That is, as I have said before it is the person, *not* the disclosure, that is to be afforded protection. This is an example of the poor drafting that has beset this Act from the outset.

As to the second part of this proposal, may I say this is a good thing, although long overdue. But note that the policies and advice should also include the information that the investigation of grievances requires that the accused is to know the identity of the accuser as a matter of natural justice and practicality: *in stark contrast* to what is required in the handling of a public interest disclosures.

Proposal 15:

This is a very good development, although the Committee might give some thought to requiring the investigating authorities under the proposed regulations to approach the investigation from a position that recognises the whistleblower as a potential contributor to the investigation.

The Ombudsman has a useful history here, because it is not unusual for the Ombudsman to come back for comments as the investigation unfolds, about what they have deduced from their investigation thus far.

Proposal 16:

This is a sensible amendment and one that would make the job of the proposed oversight body much more meaningful if the suggested criteria included more information and was used to satisfy other objectives.

The information must be sufficient to identify the type of wrongdoing and allow the relevant employees to recognise

their disclosure. The whistleblower should be encouraged to consent to being identified. The Act and the statistics should be promoted as an important part of the organisations risk management policy and practice.

That is, the management of the public authorities need to accept and adopt policies and processes that recognise that they are not perfect, that no one expects them to be perfect, but that we do expect them to welcome and deal with the disclosures as problems, for solutions. Not panic, consternation and cover-up.

Finally, I encourage you to re-read my submission, because while I am always pleased to see any change that might eventually entrench whistleblowing as the serious risk management tool it is and, a valuable contribution to public life, I do think you are missing an opportunity to do something seriously worthwhile.

Thank you for your time and attention.

Yours faithfully,

Cynthia Kardell LLb.