

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

Organisation: Independent Commission Against Corruption
Name: Hon Jerrold Cripps QC
Position: Commissioner
Telephone:
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INDEPENDENT COMMISSION AGAINST CORRUPTION

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The Hon Frank Terenzini MP
Chair, Parliament Committee on the ICAC
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Terenzini

In relation to your letter dated 18 July 2008, please find attached ICAC submissions to the Parliamentary Joint Committee's review of the Protected Disclosures Act 1994.

Yours faithfully

A handwritten signature in black ink, appearing to be 'J. Cripps', is written over a horizontal line.

The Hon Jerrold Cripps QC
Commissioner

4 September 2008

SUBMISSION BY THE ICAC TO THE PARLIAMENTARY JOINT COMMITTEE'S REVIEW OF THE *PROTECTED DISCLOSURES ACT 1994*

Introduction

Information provided to the ICAC about alleged wrongdoing by public officials may in some circumstances amount to a "protected disclosure" under the *Protected Disclosures Act 1994* ("the PDA").

However, like many other agencies, the Commission sometimes has trouble determining whether a particular allegation comes within the terms of the legislation.

Because the present provisions of the PDA are fairly prescriptive about what constitutes a protected disclosure, people providing information to the Commission and other agencies may also be unsure whether they are protected, or may wrongly think that they have protection when they do not.

In this submission, the Commission addresses some areas where it is considered that legislative amendment could assist both agencies and whistleblowers to determine when a protected disclosure has been made.

Who May Make a Protected Disclosure

Under the PDA, the only persons who may make protected disclosures are "public officials". This is defined to include people employed in the public service generally, employees of state owned corporations or local government authorities and any other person having public official functions.

Section 3 of the PDA provides that the object of the Act is to "encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector... ". It does this by enhancing procedures for making protected disclosures, protecting persons from reprisals and providing for protected disclosures to be properly investigated.

In the Commission's view, this object of the PDA would be better served by expanding the categories of persons who may make a protected disclosure. As governments move more and more towards privatization, contracting out government work and public/private partnerships, it becomes more likely that people who are not public officials may come across information about serious misconduct in the public sector.

At the moment, these people are not protected under the PDA if they provide that information to an appropriate agency for investigation.

In Queensland, the *Whistleblowers Protection Act 1994 (Q)* (“the WPA”) has extended the protection it provides to private citizens in a limited number of categories. A public interest disclosure can be made under the WPA by anyone, not just a public official, who has information about danger to a person with a disability or a contravention of various Acts relating to mainly environment protection issues.

In principle, the Commission cannot see why the protection of the PDA should not be extended generally to any person who provides information about corrupt conduct, maladministration or serious and substantial waste of public money in the public sector. As the figures provided in the Commission’s last annual report show (at p.15), complaints from the public made up 31.6% of the matters received by the Commission during 2006-07, compared with 9% of matters received being classified as protected disclosures. Members of the public often come across information about public sector misconduct. Private individuals who provide evidence or assistance to the ICAC are presently protected by some of the provisions in the ICAC Act (e.g. ss. 50 and 93-94). However these protections are only available in the limited circumstances specified in the ICAC Act and, in the Commission’s view, it would provide greater protection and consistency if the primary whistleblower protection legislation in this State also extended to private individuals.

If this submission is not supported by the Committee, the Commission would submit that consideration should be given to at least amending the PDA to include within its terms private individuals who are in contractual relationships with public sector agencies (perhaps using the definition of “public sector contractor” contained in Schedule 6 of the Queensland WPA).

What Information May be Provided and to Which Agency

The PDA sets out in some detail what information may be provided as a protected disclosure, and these provisions have been interpreted quite narrowly by the courts. In the case of the ICAC, s.10 provides that, to be protected by the PDA, information provided to the ICAC must be a disclosure of information that shows or tends to show that a public authority or a public official has engaged, is engaged or proposes to engage in corrupt conduct.

In interpreting comparable legislation, the Supreme Court of the ACT concluded that it was “not sufficient... that the information reveals a mere possibility of such conduct” or merely tends to show “that the relevant circumstances need to be investigated”¹.

This contrasts with the broader provisions in the ICAC Act which require an officer to report “... any matter that the officer suspects on reasonable grounds concerns or *may concern* corrupt conduct” (section 11) and empower the ICAC to investigate “... any circumstances which ... imply that... corrupt conduct ... *may have occurred*” (section 13(1)).

¹ *Berry v Ryan* [2001] ACTSC 11 at [26] and *Falk v ACT* [2006]ACTSC 68 at [19]

In the Commission's submission, it is in the public interest to encourage those with information about possible corrupt conduct to report the information, and provisions which restrict the protections of the PDA to circumstances where there is more than a mere possibility that such conduct is occurring do not provide much encouragement to those with such information to come forward.

In the Queensland WPA, provision has been made for those with an honest and reasonable belief that they have information about public sector misconduct to come forward, and they are protected even if it turns out that the information they have does not amount to such misconduct.

Section 14(2) of the WPA provides that a person has information about the various types of misconduct that can constitute a public interest disclosure under that Act if "the person *honestly believes on reasonable grounds* that the person has information that tends to show the conduct or danger" in question.

This makes it clear that, as long as a person has acted honestly and reasonably, they will be protected even if the information provided is not substantiated by investigation, or does not amount to the particular category of misconduct which they thought it did.

The PDA in its present form is also arguably very restrictive about the agency to which a person must provide information in order to make a protected disclosure.

It provides that information about corrupt conduct may be provided to the ICAC, information about serious and substantial waste may be made to the Auditor-General, and information about maladministration may be made to the Ombudsman.

In many cases, the line between serious maladministration and corrupt conduct may be quite fine, and it may be difficult in many cases for a complainant to know which agency to go to.

Arguably, section 14 of the PDA addresses this issue to some extent by providing generally that a public official may make a protected disclosure about corrupt conduct, maladministration or serious and substantial waste of money to the principal officer of a public authority if it relates to that public authority or another public authority.

However, there has been some difference of opinion even among the members of the Protected Disclosures Steering Committee (made up of officers from various agencies that operate under the PDA) about whether this section extends to protect, for example, people who complain to the ICAC about maladministration. Some take the view that, because section 10 of the PDA provides specifically that complaints to the ICAC must be about corrupt conduct to constitute a protected disclosure, the general provisions of section 14 of the Act do not apply to such a disclosure to the ICAC.

In the Commission's view, this needs to be clarified. The Queensland WPA deals with this issue by allowing public interest disclosures to be made to an appropriate agency or to any public sector entity, if it is made by somebody entitled to make a disclosure who "honestly believes it is an appropriate entity to receive the disclosure" because it is about the conduct of that agency or its officers or because it is about something that the agency has the power to investigate or remedy (section 26 of the WPA).

If similar provisions were inserted into the PDA, it would make it clear that people who complained to the ICAC under the honest belief that it was something that the ICAC had the power to investigate would be protected. In fact, anyone who made a complaint to any public sector entity about a matter under the honest belief that it was the appropriate agency to receive the information would be protected.

Injunctions

The ability to obtain an injunction to prevent reprisal action against whistleblowers can be a powerful tool, and the Commission supports the introduction of such a power in the PDA. The Queensland WPA allows a person who has been the subject of a reprisal, or the Crime and Misconduct Commission in cases where the reprisal involves an act that it may investigate, to apply to the Industrial Commission or the Supreme Court for an injunction (ss.47-48).

The *Crime and Misconduct Act 2001 (Q)* also makes provision for the CMC to apply for an injunction to protect the interests of persons who have provided information to it (s.344). This section was used on one occasion to require a local authority to reinstate its CEO, who had been dismissed in circumstances where the CMC formed the view that the dismissal resulted from the CEO providing information to it.

While the ICAC Act presently has provision for an injunction to be obtained by the Commission to restrain conduct that affects the subject of an investigation or proposed investigation by the Commission (ss.27-28), an injunction will not be granted unless the court is satisfied that the conduct in question is likely to impede the conduct of the investigation or it is necessary to restrain the conduct in order to prevent irreparable harm being done because of corrupt conduct. These are quite onerous conditions to satisfy, and it would not always be possible to bring adverse action against a whistleblower within them.

In the circumstances, the Commission would support the introduction of a power in the PDA to obtain an injunction to prevent detriment to a person who has made a protected disclosure, in terms similar to the WPA provisions.

Civil Damages

The Queensland WPA provides that a reprisal is a tort and a person who takes a reprisal is liable in damages to anyone who suffers detriment as a result. As far as the Commission is aware, this provision has never been used to base an action.

The Commission does not support the introduction of a provision relating to civil damages in the PDA.

The question of whether a person intends to seek civil damages may be used to question the genuineness of their protected disclosure. In addition, in most cases where civil damages would be applicable, there would already be an existing cause of action available, for example, in the case of wrongful dismissal or demotion or transfer causing monetary loss.

In the Commission's view, by the time a matter reaches the stage where a person has suffered such detrimental action that civil damages are applicable, the system has already failed to protect that person adequately.

There are better ways to try to ensure that whistleblowers are not victimized, including:

- Making reprisals against whistleblowers an offence (which the PDA currently does, section 20)
- Allowing injunctions to be obtained to protect against reprisals (which the Commission submits should be considered)
- Making reprisals a disciplinary breach.

In respect of this last issue, while taking a reprisal would arguably already come within public sector agencies' disciplinary regimes, section 57 of the Queensland WPA specifically provides that a public officer is guilty of misconduct under any Act under which the officer may be dismissed from office or disciplined for misconduct if the officer contravenes the provisions of the WPA relating to reprisals, preservation of confidentiality and providing false or misleading information.

The Commission considers that clarifying that a failure to comply with key provisions of the PDA will base a disciplinary action against a public official, as well as allowing injunctions to be obtained and prosecuting appropriate cases of reprisals, will assist whistleblowers more effectively than the introduction of specific provision for civil damages in the PDA.

Co-ordinating Unit

One of the recommendations made by the Parliamentary Joint Committee on the ICAC in its November 2006 report on its review of the *Protected Disclosures Act 1994* was that the PDA be amended to enable the establishment of a Protected Disclosures Unit within the Office of the Ombudsman, funded by an appropriate budgetary allocation, to perform various monitoring and advisory functions.

In the Commission's view, some of the proposed functions for this unit would arguably involve the Ombudsman too directly in the operations of other agencies, leading to

situations where a complaint may later be made to the Ombudsman about steps taken by an agency where the Ombudsman has been involved in the decision under review. This is particularly so in respect of the proposed role of providing advice on the conduct of investigations and monitoring the operational response of public authorities to the PDA.

Many of the other functions, such as collecting statistics and coordinating education and training programs, could readily be undertaken by existing agencies or could be undertaken by a policy unit within an appropriate government agency or department. Carrying out these functions in this way would not require any legislative amendments.

It has been government policy for many years, both here and in other states, to require public sector agencies to take more responsibility for their own corruption prevention activities. The ICAC Act, for example, requires the Commission to exercise its functions taking into account "the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct".

The oversighting role suggested for the proposed Protected Disclosures Unit would seem to be at odds with this trend. In the Commission's view, it would be more desirable to concentrate on educating public sector agencies about how to deal with protected disclosures and their duty to take responsibility for protecting officers who make protected disclosures in their agencies.

The Ombudsman and the ICAC have both had a leading role in past years in providing education and training in these areas, and this will continue in the future.

For the reasons outlined above, the Commission does not support the establishment of a Protected Disclosures Unit in the Ombudsman's office.