

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

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*Partially Confidential*

# **Submission to the Committee on the Independent Commission Against Corruption, Parliament of NSW.**

## **PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES**

### **1. Introduction.**

This submission argues for the urgent need for reform of the NSW Protected Disclosures Act, 1994.

The submission, through the reforms that are suggested, aims at the successful achievement of three objectives:

1. A strengthening of ethical practices in the NSW Public Sector,
2. The provision of administrative support, encouragement and protection to those who wish to disclose wrongdoing in the organisations with which they are associated,
3. Ensuring that those disclosures are properly investigated and dealt with.

The submission draws on several sources: (i) an extensive examination of relevant literature, including the NSW Ombudsman's 2004 review of the adequacy of the Protected Disclosures Act; (ii) presentations to and extensive interaction with the Griffith University's *Whistling While They Work* Project; (iii) research funded by the University of Sydney that compared legislation throughout the states of Australia, and in turn with that in the US and the UK; (iv) interviews and discussions with close to 40 actual and potential whistleblowers over the last four years, and (v) an analysis of the institutional capabilities of an agency of government to bring effective management into the whistleblowing process.

The submission has been prepared by the undersigned, Dr. Peter Bowden, President of the NSW Branch of Whistleblowers Australia (WBA). He has also been active in support, education and research with WBA, and is on its National Committee as Education Officer. He has a wide background in institutional strengthening, both domestically and internationally, and who, as a Research Officer in the Department of Philosophy at the University of Sydney, currently works on ethics-related organisational issues, including the teaching of whistleblowing. His background is available through the Australian pages of Google.

This introductory section sets out those issues which are believed to be the more important in the submission. They are

#### **1. a. The need for the Committee to ensure that it is seen as genuine by the people of NSW**

This is the second inquiry on whistleblowing that has been conducted by the NSW government in the last two years. The first, which contained a number of very necessary reforms, was not acted on.

The reasons are unclear to the undersigned and to Whistleblowers Australia.

The reason for rejecting reform is probably that the NSW government believes that an effective Whistleblower Protection Act may encourage more people to speak out, thus creating greater difficulties for the incumbent administration. This is doubtful logic. The openness and honesty of Government of NSW is suspect at the moment, with strong evidence that voters no longer regard it favourably. But most of its problems (not all) have stemmed from the unwillingness of employees to speak out against corruption and maladministration earlier (Wollongong, several hospitals, RailCorp). A stronger law would likely have nipped these problems in the bud, before they surfaced so forcefully.

The Office of the Premier has issued press statements saying that departments manage whistleblowing problems satisfactorily. As President of Whistleblowers NSW I have received a reply to a letter of complaint to the Premier over the lack of action on the earlier recommendations, which made these statements. As a teacher of ethics and senior member of a whistleblower support group, I certainly intend to campaign strongly for the introduction of the reforms that were previously put forward and that this committee will likely suggest again.

It should be noted that while Whistleblowers Australia would be extremely pleased to see the introduction of the reforms suggested by the previous inquiry, this submission takes those reforms further along the path of introducing effective legislation.

#### **1. b. The definition of whistleblowing:**

***Whistleblowing is the exposure, made in the public interest, by people within or from outside an organisation, of information on corruption and wrongdoing that would not otherwise be available.***

*An action that is illegal or that brings harm or has the potential to bring harm, directly or indirectly to the public at large, now or in the future, is not in the public interest.*

Alternate definitions include inter-personal grievances such as bullying and harassment of various types. The above definition however, concentrates solely on disclosures in the public interest. It is for this reason that we believe the name of this Act should be changed to Public Interest Disclosures Act, a far more common title worldwide.

#### **1. c. The need for a Whistleblower Agency**

Whistleblowing requires a considerable amount of courage, for the possible whistleblower is about to cut him/herself off from the organisation that is their basic means of income and support. Whistleblowers however are just ordinary people risking a great deal to reveal wrongdoing. They need support and encouragement to do so. They are also often acting on suspicions and partial information yet are asked to provide court acceptable level of evidence to prove their accusation. While reasonable evidence is necessary, investigating and proving the wrongdoing should be the role of an agency of government. Whistleblower management is currently the responsibility of the employing departments of Government, with some responsibility with the Office of the Ombudsman and the Independent Commission Against Corruption (ICAC). The suggestion is that the complaint can still go to the employing agencies, but that an agency be created to support whistleblowers, as well as manage the whistleblowing process. We suggest two alternatives for the creation of this unit. One that a separate agency be created and the second that it would be best concentrated in one

dedicated unit in the Ombudsman's Office. The recommendation would also apply to complaints that came to the other offices in NSW, including the NSW police. The whistleblowing management organisation could be called the Public Interest Disclosures Agency or Unit. It will be referred to under either title in this submission.

The principle reason for placing ultimate authority with a special unit is that supervisors or even Heads of Departments are not impartial when they receive a whistleblower complaint, and could (and sometimes do) react adversely, or as happens many times, investigate and then do nothing. For this reason, all whistleblower complaints would be forwarded from the department to an independent body - the PID Unit in this submission. ICAC is not favoured as it asks for firm evidence from the whistleblower, which is not always possible, and as it is an organisation which investigates the wrongdoing. We are seeking an agency that supports and manages the whistleblower and whistleblowing. The reason for including the other agencies is to give the PID agency an oversighting role of the entire process of public interest disclosures in NSW.

To differentiate between a personal grievance and a genuine wrongdoing is sometimes difficult, requiring a personal interview. Although the first line of interviews would normally be the complainant's supervisors (or the department's ethics officer), in difficult cases this interview would be best handled by dedicated specialists, sympathetic to the benefits of whistleblowing, rather than by the departmental staff. The handling of information on wrongdoing must be the responsibility of the department's senior management, but when that information questions the reputation and honesty of senior management or of even the department, an external and independent unit needs to manage the issue.

The preferred option is a location in the Ombudsman's Office. The reason for recommending this option is primarily to reduce costs (although it should be noted that a separate office or offices has been the recommendation of past inquiries). Location in the Ombudsman Office also gains some synergies from related activities in that office.

## **2. Who can make disclosures?**

**2. a.** The categories of people who could make protected disclosures would include current or former employees in the government, current and former contractors and consultants, and current and former employees of parliament. A later paragraph outlines a process by which revealing wrongdoing can be extended to the private sector, but the submission at this point is confined solely to the public sector

**2. b.** This submission extends these categories to include all persons connected with the department or agency in any way. This extension would primarily include clients or users of the agency's services, or staff in other agencies which interact with the one where the offence is occurring. Such people can come across a wrongdoing, but if they expose it, they could suffer in their access to a particular service that the agency may be providing, or could lose the cooperation of that agency.

### 3. Types of Disclosures that are protected

**3. a. The types of disclosures that should be protected** are illegal activities, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment.

**3. b. Disagreements on Policy:** The NSW Act currently does not offer protection to persons who disclose confidential information on policy (s.17). The reason is presumably because it is assumed that the dominant purpose of airing disagreements about particular government policies is to cause embarrassment to the government, or for personal benefit. The restriction is a unique condition in Australia (and world-wide). It is also a difficult and debatable issue.

On the surface, it would seem a reasonable clause. We are in a democracy, and policy decisions are a result of the democratic process. Once the decision is made, public servants should implement it and we should abide by it. Members of the public may agitate against a particular decision, but they are activists, not whistleblowers, and would not need protection under the Act. There are, however, public servants who will question a particular policy decision, sometimes indirectly, seeking media attention in the process. To give them protection may be helping some self-serving or misguided objective of that employee. Public servants are to implement policy, not subvert it.

On the other hand, public policy decisions should not be made in secret. One of the fundamental human rights that we have is to know of government decisions that may impact on us. Policy which raises safety issues on the rail system, for instance, or security questions at airports should be made known, and the employee who reveals these decisions is blowing the whistle in the public interest and should be protected.

It is suggested, therefore, that the proposed legislation not prohibit a questioning of government policy, but that such a questioning be reviewed by the PID Unit/Agency on the basis of the extent of existing public awareness and discussion on the issue, and an assessment of whether the complainant is pursuing a personal agenda. This examination is another reason why this submission suggests a specialised group be established.

If that office finds that a policy decision, or even a current government practice that a whistleblower reveals has the potential for harm, or infringes guidelines, but is not publicly known and has not been subject to debate, or to review, then the whistleblower would be protected. If the policy is public knowledge, has been adequately reviewed, and has been subject to scrutiny, then the public servant should be entitled to voice his or her disagreement, but would not have the protection of the Act.

**3.c. Personal Grievances:** The definition of whistleblowing above raises the question whether grievances over internal staffing matters should be included or be addressed through separate mechanisms.

The answer to this question is that they should not be included, except under specific conditions. The crucial issue is public interest. The definition of public interest wrongdoing

stated above precludes personal grievances. The two most serious sets of offences on which the Committee may receive submissions for inclusion are bullying and harassment (race, sex, etc.). Promotion or discipline issues or personal antagonisms are sometimes behind personal grievance complaints. This submission suggests that they be excluded on the grounds that, unless they accompany an allegation of wrongdoing, there are other mechanisms to deal with these issues. All agencies have (or should have) internal mechanisms to deal with interpersonal conflict within their organisations. In addition, Australia has wide anti-discrimination legislation under which victims can seek redress. There is no anti-bullying legislation, but it can be handled under agency provisions.

The three exceptions to the statement that interpersonal conflicts be excluded are serial bullying (or discrimination) for they are then of wider public interest, independent observation by an outsider (which takes away the self serving elements of some grievances), and complaints about reprisals.

Should an agency receive a complaint on a staff conflict, it would still report that complaint to the PID Unit.

#### **4. Conditions on the whistleblower**

**4. a. No threshold of seriousness should be required** for allegations to be protected; mainly as such a threshold will be difficult to define. There will be at times a complaint from a whistleblower who is at loggerheads with his/her supervisor, where the wrongdoing cited is small - distorting travel claims for instance. The disclosure should still be investigated and also forwarded to the PID Unit.

**4. b. An honest and reasonable belief that the allegation is correct is a necessary condition**, with vexatious whistleblowers subject to disciplinary action. No sanctions, however, should apply to whistleblowers who materially fail to comply with the procedures under which disclosures are to be made, except when they knowingly or recklessly make false allegations;

**4. c. It should be noted that the whistleblower need not necessarily act from solely altruistic reasons**, nor even appear to be acting from these reasons. This condition is an important additional factor to consider. The overriding condition must be the revealing of activities against the public interest, not the personal relations between two officers. This writer is closely familiar with situations where a staff member has increasingly been frustrated by the inability to stop the continuing employment of borderline ethical practices by another officer, usually senior. Tensions then set up between the officers. Eventually one of the offending actions becomes serious enough to blow the whistle. ...

One organisational response between two officers, one of whom accuses the other of wrongdoing, is to institute mediation. This action places the mediator in a difficult position. A preferred approach would be to first determine whether the accusation is correct.

## 5. Protections for the Whistleblower

The statutory protections that should be available would include the nine protections that are collectively available under the various state Acts (Set out below - No state provides all nine):

a. Confidentiality for whistleblower's identity.
b. Prohibition against reprisals.
c. Injunctions against reprisals under the Act.
d. Proceedings for damages.
e. Right to relocate.
f. Indemnity against civil & criminal proceedings.
g. Absolute privilege against defamation
h. Anonymous disclosures allowed.
i. Protection if released to media.

A number of these provisions need further elaboration:

**5. a. Confidentiality**, and maintaining it as long as possible are fundamental to building the confidence of a whistleblower and for encouraging future whistleblowers. Should a whistleblower accuse a colleague or superior of some wrongdoing, however, natural justice demands that the accused be informed and is given the opportunity to refute the allegation. In our experience, however, as soon as the accused is informed, the issue becomes public, the cover-ups are put in place and the retributions start. It is highly desirable therefore that the investigating agency use the period when the matter is still under wraps to pursue its investigation as far as possible.

**5. b. The prohibition against reprisals** is adequate. It should be noted that a reverse ownership of proof exists for a person defending themselves against an allegation of detrimental action. This requirement should be retained.

**5. c. d. f. g. Injunctions against reprisals** and the right to institute civil proceedings for damages should be included in the Act, as well as the indemnities and privileges included in most state legislation. A section below, **Compensation for breaches of protection**, suggests further steps in respect to these protections.

**5. e. Right to relocate.** Should be available, to the extent possible in the organisation or the wider public sector. The public service is large, and can relocate officers more easily than can a private company.

**5. h. Anonymous disclosures.** Whilst acceptable, such disclosures face the obvious difficulty that they are often unsupported accusations, lacking in the detail necessary to investigate them. The agency should nevertheless permit them, while still emphasising confidentiality (within limits).

**5.i. Ability to go to the media or to a parliamentarian.** This freedom in the NSW Act is supported by this submission. It is regarded as a safeguard for whistleblowers, for once their complaints are made public any negative treatment of them is also likely to become public. There are a number of examples in NSW ...

## **6. Procedures in relation to protected disclosures**

### **6. a. Responsibilities for receiving and investigating the complaint**

The introductory paragraphs have argued that the ultimate authority on the disposition of whistleblowing issues should be a special unit, in the Office of the NSW Ombudsman or a separate agency. It would have an oversighting role and be a second line of appeal, but not normally be the office where a whistleblower would first direct his/her disclosure (unless the whistleblower wished to do so in order to avoid the opprobrium that may be generated by whistleblowing within his/her own agency).

The inquiry may receive submissions that suggest disclosure to the external agency should be the first line of approach for a whistleblower. This submission however, believes that the natural response of somebody who discovers a wrongdoing within their organisation is to sort it out internally, usually by informing their supervisor (or the manager above that supervisor). Such action is in keeping with the intrinsically communal mindset of both the whistleblower and those who condemn him/her. This writer has posed to students now for several years the problem of a new graduate entering the workforce and discovering a wrong that they believe to be unethical. The type of organisation and the actual wrongdoing varies from year to year. They have learned of the NSW Act, its protection provisions and the reasons for them, and of the possibility of going to the Ombudsman or the Independent Commission Against Corruption. Over 95% of students, however, now numbering over 500, still propose raising the issue internally. Some do not even consider it whistleblowing at this stage.

It is suggested, therefore, that the complainant can go internally or to the PID Unit. If he/she goes internally, that agency must inform the PID Unit, giving broad information— nature of the accusation, people involved, preliminary assessment, and proposed action. The PID Unit can step in to the extent that it wishes. If it takes no action, it would still be informed of progress on investigation and the action taken to finalise the case.

### **6. b. Role of the Public Interest Disclosures Unit (or Agency)**

This office would develop an overall system which would detail the role of the agencies and the role of the Unit, as set out below:

- (a) Ensure that each whistleblower knew of his/her rights in that they had the freedom to approach that office at any time, and that they had the support of the Unit. This



statement of rights and protections would be available widely, and given by each agency to any officer who makes a disclosure.

- (b) Provide the Unit with the right to work cooperatively with any agency that had reported a disclosure, including a meeting with the whistleblower, or even to taking over or reassigning the investigation if the Unit so decided. The primary investigative role, however, would be the operating agencies and departments. It is anticipated that the PID Unit's involvement with the other whistleblowing agencies in NSW would be one of statistics gathering, research and broad oversight of the handling of the complaint.
- (c) Establish and operate a public information and training arm.
- (d) Gather and publish statistics on whistleblowing in the NSW Government.
- (e) Undertake such research as was necessary and useful, and publish its findings.
- (f) Review the operation of the legislation and propose changes as often as desired and at least every six months for the first two years of operation, and every two years after that.

The PID Agency or Unit could also develop for its own use a set of guidelines which signalled the need to step in – such as previous experience with its contact person in the department, and with the department overall, the seriousness of the alleged offence, whether it was an accusation that attacked the probity of the department, or the managerial capacity of some of its senior officers, rather than the reporting of some contravention of the departmental codes or guidelines (The former is more likely to engender a cover up or retribution than the latter).

#### **6. c. The obligations of the public sector departments**

Their requirements are (i) to inform the complainant of his or her rights, as documented by the PID Unit, (ii) to pass onto the PID Unit the fact that a complaint had been made, providing the information requested by the Unit, and (iii) with the consent and cooperation of the Unit, to investigate and deal with the complaint. Their obligations would include (iv) informing the complainant of the progress of the investigation, and of its eventual outcome.

#### **7. Disclosure to a third party.**

The right to disclosure to the media is unique to NSW (for Australian legislation). This submission believes that disclosures to the media are necessary - that this component in the NSW Act should remain. In NSW, some major whistleblowing incidents have surfaced, such as the accusations against the University of NSW medical research programs only because of this clause.

There are several reasons behind this suggestion. The media itself will act as a screening device, in that it will only publicise matters of importance. The fear of legal action will also ensure that the media will only broadcast accusations that are largely provable. It is therefore acting as a whistleblowing review mechanism. Another reason is that experience to date has shown that the media is very effective in bringing public attention to the disclosures of whistleblowers, and in ensuring that discrimination against them is minimised.

The clause could be further strengthened by having a delay period of three months instead of six months. Three months is enough time for an agency, in conjunction with the PID Unit, to assess the complaint and decide the action to be taken. This recommendation is made on the

basis that the Committee may be wary of disclosure to the media. This submission, however, sees no great problem with immediate disclosure for serious matters along with internal disclosure, for it sees no other way to handle an issue which the department tries to cover up (including not informing the PID Unit).

## **8. Compensation for breaches of protection**

This section suggests that the Act provide the whistleblower the right to seek compensation for reprisals. Such clauses open the pathway for civil compensation in the Federal Industrial Commission, or through the existing courts and tribunals for the states, thus making it easier for a victimised whistleblower to pursue redress. Currently, under most State Acts, the whistleblower can only pursue criminal action. Such action to date has been unsuccessful.

The British Public Interest Disclosures Act, 1998, works on this basis, entirely differently to the state Acts in Australia. The British Act applies, in concert with employment law, to all public and private employees in Britain, with the exception of certain intelligence staff or the military forces. For a disclosure to be protected, the whistleblower must make the disclosure in good faith; needs to show some substantive basis for his/her belief; and on wider public disclosures to the media, etc. - unless there is some good reason why not - the concern should have been raised internally or with a prescribed regulator first.

In the UK, wider disclosure to the media, MPs or consumer bodies must meet one of four preconditions to trigger protection. These are that either (a) the whistleblower reasonably believed he/she would be victimised if he had raised the matter internally or with a prescribed regulator; or (b) there was no prescribed regulator and he/she reasonably believed the evidence was likely to be concealed or destroyed; or (c) the concern had already been raised with the employer or a prescribed regulator; or (d) the concern was of an exceptionally serious nature.

Whistleblowers that experience discrimination are heard by a series of Employment Tribunals throughout the country, and are awarded damages, as appropriate.

PIDA 1998 is claimed by its supporters to have reduced illegal and unethical conduct by British companies and the public sector. The possibility that a cover-up or discrimination against a person revealing wrongdoing by the organisation may end in a public case, with damages awarded against it has caused employers to actively institute internal whistleblowing reporting and protection systems.

NSW could include similar clauses in its Act.

This submission suggests therefore that the Committee investigate the British system, and recommend that similar approaches be adopted in this country. The extension of this possibility to the private sector is recommended by this submission. It would require a separate inquiry, which this Committee could recommend.

If the Committee should give this proposal further consideration, it needs be noted that further investigation of UK practices is warranted. Specifically,

1. What are the ways that the person who wants to stop the wrongdoing can stop it earlier, and avoid the reprisals, i.e. by confidential information to a supervising agency or appropriate Ombudsman, or by injunction, or by exposure to the media?
2. Is there evidence that the UK PIDA has reduced wrongdoing?
3. Is stopping of the wrongdoing and punishment of the wrongdoer (of the original action) the responsibility of the Regulatory Agency?
4. Personal grievances such as sexual harassment and bullying appear to get compensation awards. These are often not public interest issues.
5. Any studies undertaken on the percentage of people who suffer reprisals?

## **9. Rewards for reporting fraud and corruption**

The Committee should consider incorporating in the Act the payment of a percentage of the savings to a whistleblower who reports a corrupt activity that defrauds the NSW government. Those who are committed to the belief that all whistleblowers should act from pure and impersonal motives will decry such a payment. Yet rewards of a percent of savings are the processes used under the US False Claims Act, an Act regarded by many as the most effective whistleblower legislation in existence.

The existence of such a clause in the NSW Act, or a separate Act, would have saved the NSW government a considerable amount of the \$22million lost in the recent RailCorp scams. While a strengthening of the protections currently available might have encouraged one of the many who knew of these scams to come forward, it does appear that the management of RailCorp was so inept, and the corruption so widespread that even a stronger Act may not have been effective. The payment of a percentage of savings, however, would have been a huge inducement for one or more persons to open up.

## **10. Percentage whistleblowers who suffer retribution**

The Committee may receive a submission from contributors to the Whistle While They Work (WWTW) project at Griffith University. Among the many useful findings and recommendations that the project will likely make may possibly be the statement that only 22% of whistleblowers will suffer retribution.

This submission believes that that even at this apparently low level, the percentage who suffer retribution is still too high. However, it urges caution in interpretation of the WWTW figure. People who report theft or damage of assets, or put forward suggestions that correct a badly managed function (safety issues for instance) may consider themselves whistleblowers in the study's questionnaires, but they would not be punished, for they are acting to the benefit of the parent organisation. Some are even rewarded, through suggestion boxes for instance.

The study's definition of whistleblowing also includes interpersonal conflicts (which this submission rejects as, with exceptions, they are not in the public interest), which again will distort the retribution percentage. This writer's experience is that if the whistleblowing is damaging to the organisation or to the reputation of its middle to senior managers, the

organisation will go to extraordinary lengths to cover up, and to silence (or ignore) those who try to bring it into the open.

## **11. Whistleblower support as an administrative function**

This submission concludes by emphasising that the role of a separate whistleblower unit is primarily administrative; and that it needs staff with institutionalised people-to-people skills as much as legal expertise. Most whistleblowers are acting contrary to long ingrained behavioural patterns in that they are rejecting the organisation that employs and pays them. Even for those potential whistleblowers who have come to suspect the motives or intentions of a senior officer, exposing that wrongdoing is still a very large step. It comes often as a complete surprise that the organisation turns on them. Whistleblower after whistleblower has testified that they expected support, even reward, but have experienced the opposite. The whistleblower support unit has to work within this environment, with these sorts of problems, and with people who often quite distraught by the situation in which they find themselves.

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August 18, 2008

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On behalf of Whistleblowers Australia.