

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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Date received: 10/11/2008



ICAC COMMITTEE

10 NOV 2008

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THE AUDIT OFFICE
OF NEW SOUTH WALES

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OUR REFERENCE

D0834621

YOUR REFERENCE

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

7 November 2008

Dear Mr Terenzini

Inquiry into the protection of public sector whistleblower employees

I refer to your letter of 14 October 18 July 2008 seeking information on the Audit Office's policies, practices and procedures relevant to the committee's inquiry.

The Auditor-General is, under the *Protected Disclosures Act 1994*, an investigating authority for disclosures concerning serious and substantial waste. I have attached copies of the relevant Audit Office policies and procedures.

The table below summarises the number, outcome and administrative burden of protected disclosures over the last 5 years.

Year ended 30 June	Assessed as not serious & substantial	Audit Office Investigation	Referred to Ombudsman	Referred to ICAC	Assessment underway	Costs \$
2008	14	1	2	2	1	26,731
2007	8	-	3	4	-	7,510
2006	11		4*	1*	-	61,501
2005	16	1	1*	6*	-	143,285
2004	13	1	2	-	-	36,054

* One disclosure referred to both Ombudsman and ICAC

The Audit Office has noted that allegations of waste tend to be caused by maladministration or possible corrupt conduct. In such instances the disclosure can be referred to other investigating authorities, in accordance with the Act. However I recommend that the Committee consider the merits of establishing one investigating authority, say the Ombudsman, to receive all disclosures. A single "gateway" would also assist the management of complaints that have been sent to several investigating authorities.

The Audit Office has had no internal protected disclosures over the last 5 years. I have attached copies of the relevant Audit Office policies and procedures.

Yours sincerely



Peter Achterstraat
Auditor-General

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THE AUDIT OFFICE
OF NEW SOUTH WALES

Policy

**to deal with Protected Disclosures received by the Audit
Office in respect of other agencies pursuant to the**

Protected Disclosures Act 1994

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1. Purpose of the Policy

This Policy provides relevant information about the Protected Disclosures Act and establishes procedures for the handling of disclosures. These specifically concern corrupt conduct, maladministration or serious and substantial waste of public money made to the Audit Office by a public official in respect of a government agency.

Internal matters relating to the Audit Office are to be handled by the Deputy Auditor-General.

This policy is supported by procedures outlined in a document titled *Procedures to deal with Protected Disclosures received by the Audit Office in respect of other agencies pursuant to the Protected Disclosures Act 1994*. Policy and Procedures have operated from 1 September 1997.

2. Objectives of the Protected Disclosures Act

The *Protected Disclosures Act 1994 (the Act)* commenced on 1 March 1995.

The Act aims to encourage and facilitate the disclosure by public officials, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector.

The Act is to ensure that public officials who wish to make disclosures under the legislation receive protection from reprisals, and that the matters raised in the disclosures are investigated.

A disclosure under the Act may occur notwithstanding that a public official, for example, made an allegation by way of a casual remark to an investigating authority concerning corruption, maladministration and serious and substantial waste which was not intended as a formal disclosure pursuant to the Act.

3. Statement of Intent

The Audit Office is one of the five investigating authorities defined by the *Protected Disclosure Act 1994* for referral of matters by public officials relating to corrupt conduct, maladministration or serious and substantial waste of public money.

The Auditor General, subject to the provisions of the *Public Finance and Audit Act 1983*, may conduct an inspection, examination or audit of "serious and substantial waste" of public money.

The Audit Office:

- is committed to the aims and objectives of the *Protected Disclosures Act*
- will support public officials who make disclosures which identify corrupt conduct, maladministration, or serious and substantial waste of public money
- will take all reasonable steps to avoid identifying officials who make such disclosures, and to provide protection to such officials from any detrimental action in reprisal for the making of the disclosure
- will treat all complaints, which do not meet the criteria for protection under the Protected Disclosures Act, with similar confidentiality and care.

4. Definitions

4.1 Corrupt Conduct

"*Corrupt conduct*" is defined in the *Independent Commission Against Corruption Act 1988* (sections 8 and 9).

The definition used in the Act is intentionally quite broad - corrupt conduct is defined to include the dishonest or partial exercise of official functions by a public official. Conduct by a person who is not a public official, when it adversely affects the impartial or honest exercise of official functions by a public official, also comes within the definition.

Corrupt conduct can take many forms, ie taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

4.2 Maladministration

"*Maladministration*" is defined in the *Protected Disclosures Act* as conduct that involves action or inaction of a serious nature that is:

- contrary to law
- unreasonable, unjust, oppressive or improperly discriminatory
- based wholly or partly on improper motives (section 11).

4.3 Serious and Substantial Waste

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources.

In addressing any complaint of serious and substantial waste regard will be had, to the nature and materiality of the waste.

The following delineation may be of assistance to public officials and/or public authority.

Absolute - serious and substantial waste might be regarded in absolute terms where the waste is regarded as significant, for example \$500,000.

Material - the serious and substantial waste is/was material in terms of the public authority's expenditure or a particular item of expenditure or is/was material to such an extent so as to effect a public authority's capacity to perform its primary functions.

Material By Nature Not Amount - the serious and substantial waste may not be material in financial terms but may be significant by nature. That is it may be improper, inappropriate, systematic or systemic waste of public money / resources [alternatively, this type of waste may constitute "*maladministration*" as defined in the *Protected Disclosures Act*].

Waste can take many forms, for example:

- misappropriation or misuse of public property
- the purchase of unnecessary or inappropriate goods and services
- too many personnel being employed in a particular area, incurring costs which might otherwise have been avoided
- personnel being remunerated for skills that they do not have, but are required to have under the terms or conditions of their employment
- programs not achieving their objectives and therefore the costs being clearly not effective and not efficient.

Waste can result from such things as:

- the absence of appropriate safeguards to prevent the theft or misuse of public property
- purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose
- purchasing practices where the lowest price is not obtained for comparable goods or services.

5. Protection Under the Act

A disclosure made to the Auditor-General is protected under the Act if the disclosure conforms to the Act and in particular shows or tends to show corrupt conduct, maladministration, or serious and substantial waste (of public money) and is made voluntarily. The disclosure must be substantially true.

A disclosure is not protected under the Act if it is made by a public official in the exercise of a duty imposed by or under an Act. Protection is also not available for disclosures which:

- are made frivolously or vexatiously
- primarily question the merits of government policy
- are made solely or substantially with the motive of avoiding dismissal or other disciplinary action.

It is an offence to wilfully make a false or misleading statement when making a disclosure.

5.1 Legal Liability

The Act provides that a person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making a disclosure.

This provision has effect despite any duty or secrecy or confidentiality or any other restriction on disclosure by a public official.

A person who has made a protected disclosure has a defence of absolute privilege in proceedings for defamation.

A person who has made a protected disclosure is taken not to have committed any offence against an Act which imposes a duty to maintain confidentiality with respect to any information disclosed.

5.2 Penalties under the Act

The Act provides protection by imposing penalties on a person who takes “detrimental action” against another person substantially in reprisal for a protected disclosure. Detrimental action can comprise or involve any of the following:

- injury, damage or loss
- intimidation or harassment
- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from, or prejudice in, employment
- disciplinary proceeding.

5.3 Identification of Complainant

The Act requires investigating authorities, public authorities and public officials to whom protected disclosures are made or referred, not to disclose information that might identify or tend to identify the person who made the disclosures.

The exceptions to the confidentiality requirement are where:

- the person consents in writing to the disclosure of that information
- it is essential, having regard to the principles of natural justice that the identifying information be disclosed to a person whom the information provided by the disclosure may concern
- the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively
- disclosure is otherwise in the public interest.

Confidentiality aspects are discussed more fully within the *Procedures to deal with disclosures received by the Audit Office in respect of public authorities (other than the Audit Office) pursuant to the Protected Disclosures Act 1994*.

5.4 Freedom of Information Act 1989

Under the Freedom of Information Act 1989, a document is exempt from release if it contains information the disclosure of which would disclose matters relating to a protected disclosure within the meaning of the Act.

6. Alternative Avenues For Disclosures

Disclosures made to a journalist or a Member of Parliament will only be protected if certain conditions are met. Those conditions are:

- ↳ the person making the disclosure to a journalist or Member of Parliament must have already made substantially the same disclosure through the internal reporting system or to the Auditor-General or to an investigating authority in accordance with the Act
- ↳ the public official must have reasonable grounds for believing the disclosure is substantially true and the disclosure must be substantially true
- ↳ the investigating authority, public authority or officer to whom the matter was originally referred has:
 - ◇ decided not to investigate the matter
 - ◇ decided to investigate the matter but not completed the investigation within 6 months of the original disclosure
 - ◇ investigated the matter but not recommended any action in respect of the matter
 - ◇ failed to notify the person making the disclosure, within 6 months of the disclosure, of whether the matter is to be investigated.

7. Roles and Responsibilities

The Auditor-General and the Disclosure Coordinator have the primary responsibility to ensure that in handling complaints referred to the Audit Office, the provisions of the *Protected Disclosures Act 1994* and the *Public Finance and Audit Act 1983* are :

- complied with and
- complaints are adequately investigated.

The Disclosure Coordinator acts as a clearing house for disclosures and a provider of advice. The functions of the Disclosure Coordinator and the Investigating Officer are discussed in more detail within the *Procedures for Handling Protected Disclosures*.

The Assistant Auditor-General (PAB) is currently appointed as the Disclosure Coordinator.

8. Rights of a Person the Subject of a Disclosure

The rights of a person the subject of a disclosure should also be safeguarded. In this regard:

- persons who receive disclosures in accordance with this Policy are obliged to:
 - ↳ protect/maintain the confidentiality of the identity of persons the subject of the disclosures (where this is possible and reasonable)
 - ↳ assess disclosures impartially
 - ↳ act fairly to persons the subject of disclosures

- disclosures will be investigated as discreetly as possible, with a strong emphasis on maintaining confidentiality both as to the identity of the complainant and any person the subject of a disclosure
- where an investigation does not substantiate disclosures, the fact the investigation/enquiry has been carried out, the results of the investigation, and the identity of persons the subject of the disclosures should be kept confidential, unless the person(s) the subject of the disclosures agree(s) otherwise
- before any decision / determination / report / memorandum / letter or the like is made or finalised, any person, the subject of a disclosure (whether protected disclosures under the Act or otherwise), which is investigated and against whom an adverse comment will be made, has the right to -
 - ↳ be informed as to the substance of the allegations
 - ↳ be informed as to the substance of any adverse comment that may be included in a report / memorandum / letter or the like arising out of any such investigation
 - ↳ be given a reasonable opportunity to put their case (either orally or in writing) to the persons carrying out the investigation for or on behalf of the authority
- where the allegation in a disclosure has been investigated, and the person the subject of the allegations is aware of the substance of the allegations, the substance of any adverse comment, or the fact of the investigation, then he or she should be formally advised as to the outcome of the investigation, regardless of the outcome.

9. Notification to the Complainant

The Audit Office will:

- acknowledge receipt of the complaint within two weeks where the complainant can be identified
- advise the complainant of any action to be taken in regard to the complaint after an assessment has been made of the complaint
- advise the complainant of the result of any audit or investigation undertaken.

10. Reporting

Reporting the result of an investigation under the Protected Disclosures Act 1994 is to comply with the requirements of the reporting provisions contained in Section 52E of the PF&A Act.

Attachment 2



THE AUDIT OFFICE
OF NEW SOUTH WALES

Procedures

**to deal with disclosures received by the Audit Office in
respect of public authorities (other than the Audit Office)
pursuant to the**

Protected Disclosures Act 1994

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Introduction

The following procedures apply to disclosures made by a public official pursuant to the *Protected Disclosure Act 1994* in respect of agencies other than the Audit Office.

Unless otherwise directed by the Auditor-General, all complaints by a public official (or anonymous persons) of corrupt conduct, maladministration or serious and substantial waste of public money, are to be referred to the Assistant Auditor-General Performance Audit who is to instigate appropriate action in accordance with the Policies and Procedures applicable to these complaints.

1. Roles and Responsibilities

1.1 The Auditor-General

The Auditor-General is to approve what, if any, action is to be taken in respect of complaints received.

1.2 The Assistant Auditor-General (Performance Audit Branch)

The Assistant Auditor-General (PAB) is the person responsible for the administration of the Act and procedures for the handling of complaints relating to other government agencies.

This position is currently designated as the Disclosure Coordinator

1.3 Definition

The word '*examination*' in this document embraces any or all of the following words and the meanings associated with them:

- inspection
- examination
- audit
- investigation.

1.4 The Disclosure Coordinator

The functions of the Disclosure Coordinator are to :

- oversight the flow of information and communication
- act as a clearing house for all disclosures pursuant to the Act
- assess each disclosure, or to arrange for an assessment, to recommend the appropriate action to be taken in relation to the disclosure
 - ✦ advise, consult and recommend to the Auditor-General as to whether the complaint is to be regarded as a disclosure in terms of the Act and the action to be taken in regard to a disclosure, for example
 - ◇ decline to investigate and take no further action
 - ◇ decline to investigate but refer to Financial Audit branch for information purposes
 - ◇ decline to investigate but refer to Independent Commission Against Corruption and/or NSW Ombudsman for assessment
 - ◇ make further, limited, enquiries
 - ◇ carry out a full investigation
 - ◇ refer to the police if a criminal matter

- where further investigation is approved, report to the Auditor-General on the findings of any examination and recommend the manner of reporting (to Parliament or to the authority concerned) and the eventual closure of the matter where appropriate
- take all reasonable steps to ensure that the identity of the complainant, and any person the subject of the disclosures, is kept confidential
- take all reasonable steps to ensure that the complaint is dealt with impartially, fairly to both the complainant and any person the subject of the complaint, competently, quickly, and in a discreet manner
- support persons who make disclosures and actively protect complainants from victimisation, harassment or any other form of reprisal
- report actual or suspected corrupt conduct to the Auditor-General in a timely manner to enable the Auditor-General to comply with the *ICAC Act*
- maintain adequate management information of disclosures to facilitate reporting to Parliament.

1.5 The Investigating Officer

The Auditor General may approve an examination be undertaken by any person within the Audit Office.

An examination should be undertaken in accordance with the policy and procedures of the Audit Office.

The Investigating Officer is to:

- ensure the provisions of the Act are complied with
- be responsible for acting upon disclosures in accordance with Audit Office policy and practice
- liaise with the complainant during the course of any examination and to explain generally to a public official who has made a complaint what will happen in relation to the information received
- make arrangements when requested to ensure that disclosures can be made privately and discreetly (if necessary away from the workplace)
- record in writing details of any disclosure received orally (and where possible require the person making the disclosure sign the document) and other details received during the course of the investigation
- plan, conduct and report on the examination
- deal with disclosures impartially
- take reasonable steps to ensure that the identity of the person making a disclosure, and the person the subject of a disclosure, remain confidential
- support any person who makes a disclosure and protect him/her from victimisation, harassment or any other form of reprisal
- record action to date on the relevant file of the examination and forward the file to the Disclosure Coordinator on a two-monthly basis for review.

2. Registration

The Disclosure Coordinator is to ensure that all disclosures received by the Audit Office are recorded and registered in the system maintained within the Performance Audit Branch.

The system is to provide for the recording of the following information:

- date of receipt of complaint
- date acknowledgment letter sent to complainant
- source of referral
- reference number / identification (TOPS)
- file number
- organisation name
- status of complaint
- date complainant advised of progress.
- cost of the examination

In respect of each complaint, a file is to be opened that should contain, among others:

- details of the complaint
- assessment decisions in regard to the complaint, for example, was the complaint made by a public official?
- all correspondence
- any other information relevant to the complaint or investigation thereof
- relevant checklists for the assessment / examination phase of the complaint.

All Audit Office (hard copy) files are to be stamped prominently CONFIDENTIAL.

3. Acknowledging Receipt of a Disclosure

Receipt of a complaint will be acknowledged within 14 working days where the complainant can be identified and in terms to indicate that the complaint is being assessed for compliance with the Act. The acknowledgment should indicate that the complainant will be notified of the outcome of that assessment process and proposed action.

In advising a complainant of the receipt of the complaint, care should be taken not to indicate that the complaint will be a protected disclosure under the Act, although the complaint is being treated as such by the Audit Office until it is determined otherwise. The letter of advice should include wording similar to the following:

"Thank you for your letter of [date]___concerning [complaint]. The matter must first be assessed, after which we will determine what, if any, further inquiries may be appropriate. In the interim, your complaint will be dealt with as a protected disclosure unless determined otherwise. We will advise you further in due course."

If the complaint is not a disclosure under the Protected Disclosures Act the letter should advise the complainant of this fact, and advise that the Audit Office will treat it with the same confidentiality as if it were a protected disclosure.

4. Detailing the Complaint

It is desirable that the disclosure be in written form even if it is necessary for the Investigating Officer to transcribe it and where possible arrange for the complainant to sign the complaint. This reduces the chance of subsequent dispute about the precise nature of the disclosure.

It may be necessary to question the complainant more closely about his/her allegations and the evidence he/she has or can point to as supporting those allegations. These discussions should be documented.

It is important to be discreet about arranging further questioning, bearing in mind the requirement to avoid identifying the complainant. It is important to be careful about the time and venue of interviews.

In asking for further information it should be remembered that the complainant is likely to feel under considerable strain. The complainant may react badly to a line of questioning which gives the impression of serious scepticism about the initial disclosure.

Again it is desirable to obtain a signed record of any additional information obtained.

5. Assessment of Disclosures

5.1 Introduction

The assessment of a disclosure should include a check to determine whether the disclosure (has been made):

1. voluntarily
2. by a public official (even if they have since ceased to be a public official)
3. to the Auditor General or to another investigating authority
4. shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money (unsupported allegations are unlikely to be sufficient to meet the requirements of the Act)
5. was not made substantially to avoid disciplinary action
6. was not made frivolously or vexatiously
7. does not primarily question the merits of government policy.

5.2 Referral of Case For External Review Or Investigation

If a disclosure is to be referred to another relevant investigating authority, the choice will usually be between the following authorities:

- ICAC - for matters involving corrupt conduct
- Police Service - for matters involving any criminal conduct
- NSW Ombudsman - for maladministration
- Department of Local Government (DLG) - for matters involving general council management, serious and substantial waste of council money, breaches of the *Local Government Act* and related Acts
- Police Integrity Commission - for matters involving corrupt conduct or other serious misconduct by police.

Any complaint of corrupt conduct must be referred to the ICAC even if the complaint is examined by the Audit Office.

5.3 Confidentiality Requirements

Section 22 of the Act requires investigations, public authorities and their officers to whom a protected disclosure is referred, not to disclose information that **might identify or tend to identify** the person who made the disclosure.

The requirement has clear implications with respect to who should be told about a protected disclosure. As a general rule, only those who need to know should be told about the disclosure in order to ensure that the investigation is effective.

The capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the complainant should always be considered. It should be impressed on those who are told about the disclosure their strict legal requirement to maintain confidentiality.

The Act provides that a complainant can waive in writing his/her right to confidentiality.

The Act also provides that disclosure of information that might identify a person who has made the protected disclosure may be made where:

- natural justice (procedural fairness) require identifying information to be disclosed to a person the subject of the investigation
- the investigating authority consider that identifying information must be disclosed to investigate the matter effectively; or
- it is otherwise in the public interest to do so.

If it is considered that any of these circumstances apply, the basis on which the investigation formed the opinion to disclose identifying information should be documented. The Investigating Officer should also notify the complainant of their intention to so disclose.

It should be impressed upon the complainant to be circumspect in the information given to colleagues, as well as in relation to their conduct in the presence of colleagues, so as not to prejudice the confidentiality of their disclosure. It should be explained to complainants that this is important:

- for their own protection
- for the integrity of any investigation or informal enquiry that may be or is being carried out so as to respect the rights of the person(s) the subject of the disclosure.

5.4 Result of Assessment

The Investigating Officer is to recommend to the Disclosure Coordinator the action proposed, who is to obtain the Auditor-General's approval for any further action.

5.5 Notification to the Complainant

The complainant is to be notified of the result of the assessment of the disclosure and any further action intended.

In terms of section 27. of the Act a complainant must be notified, within 6 months of the protected disclosure being made, of the action taken or proposed to be taken in respect of the disclosure. The Disclosure Coordinator is responsible for notifying the person who made the disclosure.

The notification provided at this point in time should contain sufficient information to demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of the disclosure and should include a statement of the reasons for the decision made.

Notification to the complainant, that no action is to be taken, enables the complainant to disclose the matter to a Member of Parliament or a journalist and retain protection under the Protected Disclosures Act (refer section 19). See also Section 7 of this document

6. Examination of a Disclosure

6.1 Planning

Once a decision has been approved to examine a complaint, planning should commence.

Consideration needs to be given to clarifying key issues from the allegations, the scope of the investigation, likely findings, start and finish date of the investigation and a budget of time and costs.

An important consideration is that the cost of the examination would normally not be out of proportion to the estimate of the alleged waste unless there exists a compelling reason for the matter to be investigated, for example, an issue of probity.

The plan for the examination should be prepared by the Investigating Officer and submitted to the Disclosure Coordinator for approval.

At the time of planning the examination there may be no certainty as to the extent or significance of the findings that will arise from the process. Consequently, at the time of planning the examination, there can be no certainty as to the appropriate reporting format (unless at the planning stage it is decided to undertake a performance audit).

Nevertheless, if the Preliminary Assessment recommends further examination, every effort is required at this time to anticipate and indicate the reporting approach.

6.2 Conducting the Examination

The examination should be conducted in accordance with the plan.

Costs of the examination should be charged to the TOPS number allocated.

6.3 Reporting the result of an examination

After completing the examination, a report is to be submitted to the Disclosure Coordinator. The minimum contents of such a report should include:

- the allegations
- findings arising out of the examination, including a summary of all relevant facts and evidence gathered in the course of examination
- the conclusions/opinion reached and basis/reason thereof
- recommendations

The Disclosure Coordinator is to arrange for a report to be submitted to the Auditor-General along the lines outlined above, but including his/her recommendation as to progress the finalisation of the complaint as well as the external reporting arrangements to be followed.

In making the recommendation, the Disclosure coordinator is to have regard to:

- the requirements of section 52E of the Public Finance and Audit Act as well as procedural fairness/natural justice which is discussed later in Section 11.

The following is a guide for recommending external reporting:

- the complaint is not supported/substantiated -
 - include it in statistical reporting only (Section 12 refers) and/or
 - report the case as part of a summary of disclosures received. The summary report may be included in any report tabled by the Auditor-General or can be a standalone report.
- the complaint is found to be justified, but is minor in nature with no major import outside the agency -
 - report the case as part of a summary of disclosures received, or
 - report the case either as a stand-alone report or as part of any other report to be tabled by the Auditor-General. The report in these cases would contain particulars relating to the case and needs to comply with Section 52E of the PF&A Act.
- the complaint is found to be justified and is major in nature/of significance to other agencies.
 - report the case as a stand-alone report. The report would need to contain particulars relating to the case and comply with Section 52E of the PF&A Act.

Note:

If the complaint concerns the Chief Executive, the report must be made to the responsible Minister; if it concerns the Minister it must be made to the Premier. Requirements concerning the timing and inclusion of responses are similar to the requirements for Performance Audits, and are specified in section 52E of the PF&A Act.

The report under this section is subject to the “28 day clearance” requirements but a “28-day” copy is not required to be provided to the Minister and Treasurer.

7. Notification to the Complainant

At the conclusion of the audit/investigation the Disclosure Coordinator will notify the complainant of the outcome thereof.

Sufficient information is to be provided within the notification to assure and enable the complainant to make an assessment as to whether appropriate action has been taken by The Audit Office in regard to the disclosure.

In the absence of sufficient information the complainant may be encouraged to make the same disclosure to a Member of Parliament or a journalist in terms of section 19 of the Act.

8. Access to Information

Access to files and working papers should be restricted to authorised persons only.

9. Managing the Complainant

9.1 Introduction

It is in the interests of all directly concerned that a disclosure is dealt with properly, appropriately, quickly and discreetly. This includes the interest of the agency concerned, its Chief Executive and senior staff, and any person the subject of a disclosure, as well as the complainant.

An essential element of the response by a public authority to a protected disclosure is the treatment or management of the complainant.

Experience indicates that complainants often:

- have unrealistically high expectations
- believe they have been ignored or not taken seriously
- believe their disclosures are not being dealt with properly and appropriately, or within reasonable periods of time
- have been kept in the dark about progress and / or outcomes.

9.2 Managing Expectations

If a complainant develops unrealistically high expectations, dissatisfaction invariably results with either:

- the way in which the public authority or relevant public officials has dealt with the disclosure
- the outcome of any investigation or other action.

Complainants should be asked to outline their expectations of what should happen to their disclosure and what the outcome should be. If these expectations seem unrealistic, the reasons for this assessment should be fully and clearly explained to the complainant at the outset.

As part of the process of managing complainant expectations, it is important to advise the complainant of either:

- the reasons why no action, or action that does not meet their expectations, is to be taken in regard to a disclosure, or
- what action is proposed to be taken in regard to the disclosure

All advice provided to the complainant should be in writing a copy of which is to be retained on the file.

9.3 Ensuring Confidentiality

The confidentiality provisions of section 22 of the Act should be explained to the complainant. Confidentiality aspects have been discussed in 5.3 *Confidentiality Requirements*.

9.4 Providing Support

Complainants should be advised of the legal protection available under the Act and about any support and / or protection that is available from or through the agency or relevant public officials.

10. Managing a Person the Subject of a Disclosure

It is important to manage the reaction of persons the subject of the disclosures.

Unnecessary communication of the identity of a person who is the subject of a disclosure, or the subject matter of such disclosure, might damage that person, even though a subsequent investigation might totally exonerate them.

A person the subject of disclosures should be given, at an appropriate stage, the chance to hear and answer the substance of the allegations. Natural justice requires no less.

Normally preliminary inquiries should be conducted before approaching a person the subject of a disclosure. The purpose of such enquiries would be to test the veracity of the allegations in the first instance.

11. Procedural Fairness / Natural Justice

If disciplinary or other action is recommended against any person and that person was not afforded procedural fairness in the formulation of the recommendation, this deficiency invites legal action to quash implementation of the recommendation.

There is a presumption that the rules or principles of procedural fairness (ie natural justice) must be observed in exercising statutory power which could affect the rights, interests or legitimate expectations of individuals. It would be wise to assume that the rules apply in such circumstances, whether or not the power being exercised is statutory.

The courts emphasise the need for flexibility in the application of the rules for procedural fairness, depending on the circumstance of each individual case.

Depending on the circumstances which do apply, procedural fairness might require public authorities and relevant public officials to:

- inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for adverse comment in respect to them
- provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise
- hear all parties to a matter and consider all submissions
- make reasonable enquiries or investigations before making a decision
- ensure that no person decides their own case or a case in which they have a direct interest
- act fairly and without bias in making decisions.

Where adverse comment about a person is to be included in a report that is to be presented to an agency or its chief executive, or is to be made public, the person affected should be given an opportunity to comment beforehand.

Such comments should be considered before the report is finalised and presented to the agency or its chief executive, or made public.

With reference to the obligation on chief executives (referred to as principal officers in the ICAC Act) to report suspected corrupt conduct, the principles of procedural fairness / natural justice would not require that the subject of a disclosure be informed when such a referral is made to the ICAC.

12. Statistics and Reporting

In respect of protected disclosure referrals relating to agencies in the NSW public sector which are dealt with by the Audit Office, other than complaints relating to the Audit Office, the protected Disclosure Coordinator is to arrange for the following statistics to be maintained for possible inclusion in the Audit Office's Annual Report:

- number of complaints/disclosures received
- number of complaints/disclosures classified as '*protected disclosures*' under the *Protected Disclosures Act 1994*
- the number of complaints/disclosures by category defined on assessment form
- the hours and cost associated with complaints/disclosures received
- number of agencies/portfolios affected by complaints classified as protected disclosures

13. Errors to be Avoided

Page 29 of the Criminal Justice Commission publication *Exposing Corruption - A CJC Guide to Whistleblowing in Queensland*, published in October 1996 lists the following organisational errors which have the capacity to affect the relationship between the complainant and the investigating authority.

- fail to observe the confidentiality of a disclosure by having information pass through a series of hands with few checks as to who has, or who should view the material.
- tell anyone who asks about the details and investigation of the disclosure.
- report to the work group who the complainant is, what the allegations are, and whom they are about.
- interpret natural justice to mean that a person has an immediate right to know when a disclosure has been made about them and who made it.
- always as a first step, ask the subject officer about the allegation.
- forward the disclosure and action on it through the chain of command so that as many people know about the matter as possible.
- forewarn the person who is the subject of an allegation in plenty of time about the allegations and provide them with investigation details.
- allow personal biases about the personality of the complainant to influence the assessment of a disclosure
- do not take seriously the concerns expressed by a complainant about the possibility of reprisal.
- ignore potential conflicts of interest when deciding who should assess or investigate the disclosure.
- allow political considerations to influence the assessment of a disclosure or the findings of an investigation.
- delay the investigation for as long as possible so that any evidence of wrongdoing can be altered or destroyed.

Attachment 3

COMPLAINT PRELIMINARY ASSESSMENT BUSINESS RULES

The following rules apply when conducting preliminary assessments:

- ✓ The Disclosures Coordinator, currently the Assistant Auditor-General Performance Audit, is responsible for ensuring a preliminary assessment is conducted for all protected disclosures.
- ✓ The preliminary assessment may be conducted by the Disclosures Coordinator, or delegated.
- ✓ The preliminary assessment template and data sheet are available to assist in conducting assessments. Their use is not mandatory
- ✓ To be considered a protected disclosure a complaint must be made by a public official about the conduct of another public official or the activities of a public authority.
- ✓ If the person who made the complaint is anonymous or the status of the complainant is unknown then matter is still considered a protected disclosure.
- ✓ If the complaint was made while a person was a public official then it is a protected disclosure, even if the person is no longer a public official.
- ✓ If the complaint is about the conduct of a person while that person was a public official then it is a protected disclosure, even if the person is no longer a public official.
- ✓ All matters must be assessed in terms of serious and substantial waste by a public official or public authority. For a definition of serious and substantial waste refer to the NSW Ombudsman's guidelines on protected disclosures.
- ✓ The Audit Office can only investigate disclosures about public authorities covered by the *Public Finances and Audit Act* (ie. schedules 2 & 3). For example, the Audit Office cannot investigate disclosures alleging waste in local government.
- ✓ Matters which show or tend to show corrupt conduct must be referred to the ICAC (there is a statutory obligation to report corruption and it is an offence not to do so).
- ✓ Matters which show or tend to show maladministration should be referred to the NSW Ombudsman. Note that the Ombudsman cannot investigate complaints that relate to employment.
- ✓ Do not send correspondence to a complainant's work address as this may identify the complainant. Where possible, contact the complainant and request an alternative address.
- ✓ Similarly, do not leave telephone messages at a complainant's place of employment. Just call again later.

COMPLAINT - PRELIMINARY ASSESSMENT
(please refer to the Preliminary Assessment Business Rules for
guidance on conducting assessments)

File:

Name of complainant:

Contact address:

Date received by AO:

Date of first disclosure:

(if different to above)

Other agencies notified:

Is the complaint a protected disclosure:

(see data sheet under "source:")

Organisation(s) concerned:

Portfolio (see data sheet):

Issue(s) (see data sheet):

SUBSTANCE OF COMPLAINT

BACKGROUND

OTHER ORGANISATIONS NOTIFIED

ASSESSMENT

RECOMMENDATION(S) (see data sheet)

Name of Assessment Officer

Title of Assessment Officer

Date

PD COORDINATOR COMMENT
(if assessment was delegated)

AUDITOR-GENERAL

PROTECTED DISCLOSURE - DATA SHEET

SOURCE (identify status of complainant)

The complaint is a protected disclosure if the complainant is:

- ☐ A public official
- ☐ Anonymous
- ☐ Status unknown

The complaint is **not** a protected disclosure if the complainant is:

- ☐ A former public servant (eg. complaint first made after termination of employment)
- ☐ A private citizen (ie. works for a private sector organisation or is unemployed)

PORTFOLIO (identify relevant portfolio group)

Portfolio	Examples of Agencies
<input type="checkbox"/> LAW ENFORCEMENT	Police, Attorney-General, Juvenile Justice, Corrective Services
<input type="checkbox"/> TRANSPORT	RTA, STA, Sydney Ferries, Transport Coordination Authority, Roads
<input type="checkbox"/> HEALTH	Department of Health, Ambulance Service, Area Health Services
<input type="checkbox"/> EDUCATION	Department of Education & Training, Universities
<input type="checkbox"/> ENVIRONMENT AND PLANNING	Urban and Transport Planning, Sustainable Natural Resources, Agriculture, EPA, Fisheries, Forestry, Lands, Mineral Resources, State and Regional Development, National Parks and Wildlife Service
<input type="checkbox"/> COMMUNITY SERVICES	Community Services, Ageing, Disability Services, Housing
<input type="checkbox"/> CENTRAL AGENCIES	Premiers, Treasury
<input type="checkbox"/> UTILITIES	Sydney Water, Hunter Water, Energy Australia, Integral Energy
<input type="checkbox"/> COMMERCE	WorkCover, Industrial Relations, Fair Trading, Public Works and Services, Information Technology
<input type="checkbox"/> LOCAL GOVERNMENT	Councils
<input type="checkbox"/> OTHER	

ISSUE(S) (identify one or more relevant issue)

- ☐ CONSULTANTS
- ☐ CONTRACTING OUT
- ☐ CORRUPTION
- ☐ DISPOSAL/SALE OF ASSETS
- ☐ EMPLOYMENT - dismissal/redundancy
- ☐ EMPLOYMENT - management issues (overtime, salaries, performance)
- ☐ EMPLOYMENT - recruitment/promotion
- ☐ FRAUD
- ☐ FUNDING ARRANGEMENTS
- ☐ MALADMINISTRATION
- ☐ PURCHASING
- ☐ TENDERING
- ☐ TRAVEL (expenses, vehicles)
- ☐ OTHER
- ☐ USE OF RESOURCES (equipment/material)

RECOMMENDATION (you must identify one of the following four outcomes)

- ☐ NO FURTHER ACTION
- ☐ REFER TO FINANCIAL AUDIT FOR INFORMATION/RELEVANT ACTION
- ☐ INCORPORATE INTO PERFORMANCE AUDIT (EXISTING/TRIGGER FOR NEW AUDIT)
- ☐ TAO TO INVESTIGATE OR CONDUCT FURTHER ENQUIRIES

Other recommendations which may also be relevant to this matter:

- ☐ REFER TO ICAC
- ☐ REFER TO OMBUDSMAN
- ☐ A LETTER BE FORWARDED TO THE COMPLAINANT DETAILING THE OUTCOME OF THE ASSESSMENT (ATTACHED).

Internal Reporting Policy

The Protected Disclosures Act 1994

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1. Purpose of the Policy

This Policy establishes an internal reporting system for the reporting of disclosures by Audit Office personnel of corrupt conduct, maladministration or serious and substantial waste of public money by The Audit Office or its staff.

This policy is designed to complement normal communication channels between supervisors and staff. Staff are encouraged to continue to raise appropriate matters at any time with their supervisors, but as an alternative, have the option of making a protected disclosure in accordance with this policy.

The policy is supported by the *Procedures to deal with disclosures received by the Audit Office in respect of the Audit Office pursuant to the Protected Disclosures Act 1994*.

2. Statement of Intent

The Audit Office does not tolerate corrupt conduct, maladministration or serious and substantial waste of public money.

The Audit Office:

- is committed to the aims and objectives of the *Protected Disclosures Act*
- will support staff who make disclosures which identify corrupt conduct, maladministration, or serious and substantial waste of public money

will take all reasonable steps to provide protection to staff who make such disclosures, from any detrimental action in reprisal for the making of the disclosure.

3. Objectives of the Protected Disclosures Act

The *Protected Disclosures Act 1994 (the Act)* commenced on 1 March 1995.

The Act aims to encourage and facilitate the disclosure by public officials, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector.

The Act is to ensure that public officials who wish to make disclosures under the legislation receive protection from reprisals, and that the matters raised in the disclosures are investigated.

A disclosure under the Act may occur notwithstanding that a public official, for example, made an allegation by way of a casual remark to an investigating authority concerning corruption, maladministration or serious and substantial waste which was not intended as a formal disclosure pursuant to the Act.

In the context of this Internal Reporting Policy a similar remark to one of the officers nominated within the policy (to whom disclosures can be made) would constitute a disclosure pursuant to the Act.

4. Definitions

4.1 Corrupt Conduct

“*Corrupt conduct*” is defined in the *Independent Commission Against Corruption Act 1988* (sections 8 and 9).

The definition used in the Act is intentionally quite broad - corrupt conduct is defined to include the dishonest or partial exercise of official functions by a public official. Conduct by a person who is not a public official, when it adversely affects the impartial or honest exercise of official functions by a public official, also comes within the definition.

Corrupt conduct can take many forms, ie taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

4.2 Maladministration

"*Maladministration*" is defined in the *Protected Disclosures Act* as conduct that involves action or inaction of a serious nature that is:

- contrary to law
- unreasonable, unjust, oppressive or improperly discriminatory
- based wholly or partly on improper motives (section 11).

4.3 Serious and Substantial Waste

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources.

In addressing any complaint of serious and substantial waste regard will be had, to the nature and materiality of the waste.

The following delineation may be of assistance to public officials and/or public authority.

Absolute - serious and substantial waste might be regarded in absolute terms where the waste is regarded as significant, for example \$500,000.

Material - the serious and substantial waste is/was material in terms of the public authority's expenditure or a particular item of expenditure or is/was material to such an extent so as to effect a public authority's capacity to perform its primary functions.

Material By Nature Not Amount - the serious and substantial waste may not be material in financial terms but may be significant by nature. That is it may be improper or inappropriate [alternatively, this type of waste may constitute "*maladministration*" as defined in the *Protected Disclosures Act*].

Waste can take many forms, for example:

- misappropriation or misuse of public property
- the purchase of unnecessary or inappropriate goods and services
- too many personnel being employed in a particular area, incurring costs which might otherwise have been avoided
- personnel being remunerated for skills that they do not have, but are required to have under the terms or conditions of their employment
- programs not achieving their objectives and therefore the costs being clearly not effective and not efficient.

Waste can result from such things as:

- the absence of appropriate safeguards to prevent the theft or misuse of public property
- purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose
- purchasing practices where the lowest price is not obtained for comparable goods or services.

5. Protection Under the Act

Disclosures are protected under the Act if they:

- are made -
 - ↳ to the Personnel Manager, Deputy Auditor-General or Auditor-General
 - ↳ in accordance with, and to persons identified within, this Internal Reporting Policy
 - ↳ to one of the investigating authorities nominated in the Act
 - ↳ to a member of Parliament or to a journalist
 - ↳ to the principal officer of a public authority.
- show or tend to show corrupt conduct, maladministration, or serious and substantial waste (of public money) by The Audit Office including any of its staff
- are made voluntarily.

A disclosure is not protected under the Act if it is made by a public official in the exercise of a duty imposed by or under an Act. Protection is also not available for disclosures which:

- are made frivolously or vexatiously
- primarily question the merits of government policy
- are made solely or substantially with the motive of avoiding dismissal or other disciplinary action.

It is an offence, however, to wilfully make a false or misleading statement when making a disclosure.

5.1 Legal Liability

The Act provides that a person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making a disclosure.

This provision has effect despite any duty or secrecy or confidentiality or any other restriction on disclosure by a public official.

A person who has made a protected disclosure has a defence of absolute privilege in proceedings for defamation.

A person who has made a protected disclosure is taken not to have committed any offence against an Act which imposes a duty to maintain confidentiality with respect to any information disclosed.

5.2 Penalties under the Act

The Act provides protection by imposing penalties on a person who takes “detrimental action” against another person substantially in reprisal for a protected disclosure. Detrimental action can be comprise or involve any of the following:

- injury, damage or loss
- intimidation or harassment
- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from, or prejudice in, employment
- disciplinary proceeding.

Any member of staff who believes that “detrimental action” is being taken against them substantially in reprisal for the making of an internal disclosure to the Auditor-General or in accordance with this Policy should bring the allegations to the attention of the Auditor-General as soon as possible.

If a member of staff who made an internal disclosure feels that such reprisals are not being effectively dealt with by The Audit Office, that person should contact the ICAC and or the Ombudsman.

A disclosure made to an external investigating authority, will either be dealt with by that body or advice will be given to the person concerned.

Detrimental action can also be the basis of an appeal to the Government and Related Employees Administrative Tribunal (GREAT).

5.3 Identification of Complainant

The Act requires investigating authorities, public authorities and public officials to whom protected disclosures are made or referred, not to disclose information that might identify or tend to identify the person who made the disclosures.

The exceptions to the confidential requirement are where:

- the person consents in writing to the disclosure of that information
- it is essential, having regard to the principles of natural justice that the identifying information be disclosed to a person whom the information provided by the disclosure may concern
- the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively
- disclosure is otherwise in the public interest.

Confidentiality aspects are discussed more fully within the *Procedures to deal with disclosures received by the Audit Office in respect of the Audit Office pursuant to the Protected Disclosures Act 1994*.

5.4 Freedom of Information Act 1989

Under the Freedom of Information Act 1989, a document is exempt from release if it contains information the disclosure of which would disclose matters relating to a protected disclosure within the meaning of the Act.

6. Reporting under the Internal Reporting Policy

The persons or positions to whom internal disclosures can be made in accordance with the Internal Reporting Policy are:

- the Auditor General, contact number (02) 9285 0101
- the Deputy Auditor-General, contact number (02) 9285 0102
- the Personnel Manager, contact number (02) 9285 0112

7. Alternative Avenues For Disclosures

Alternative avenues available to staff for making a protected disclosure under the Act (other than by means of the internal reporting system established under this Policy for the purpose of the Act) are as follows:

- ↳ to one of the investigating authorities under the Act (that is the ICAC, Ombudsman or Police Integrity Commission (PIC), or Inspector of the PIC, the principle officer of a public authority).

A disclosure made to a journalist or a Member of Parliament will be protected if certain conditions described by section 19 of the Act are met. Those conditions are:

- ↳ the person making the disclosure to a journalist or Member of Parliament must have already made substantially the same disclosure through the internal reporting system or to the Auditor-General or to an investigating authority in accordance with the Act
- ↳ the public official must have reasonable grounds for believing the disclosure is substantially true and the disclosure must be substantially true
- ↳ the investigating authority, public authority or officer to whom the matter was originally referred has -
 - ◊ decided not to investigate the matter
 - ◊ decided to investigate the matter but not completed the investigation within 6 months of the original disclosure
 - ◊ investigated the matter but not recommended any action in respect of the matter
 - ◊ failed to notify the person making the disclosure, within 6 months of the disclosure, of whether the matter is to be investigated.

8. Roles and Responsibilities

This Internal Reporting Policy places responsibilities upon people at all levels within the Audit Office.

All personnel are encouraged to report known or suspected incidences of corrupt conduct, maladministration or serious and substantial waste in accordance with this Policy.

All employees of The Audit Office have an important role to play in supporting those who have made legitimate disclosures.

Employees must abstain from any activity that is or could be perceived to be victimisation or harassment of persons who make disclosures. Further, all personnel should protect/maintain the confidentiality of any person known or suspected to have made a disclosure.

Management of The Audit Office has a responsibility to ensure that the provisions of the Protected Disclosures Act are :

- complied with
- complaints are adequately investigated and
- no person within The Audit Office is subject to reprisal action as a result of having made a protected disclosure.

9. Rights of a Person the Subject of a Disclosure

The rights of a person the subject of a disclosure will also be safeguarded. In this regard:

- a person who receives a disclosure in accordance with this Policy is obliged to -
 - ✎ protect / maintain the confidentiality of the identity of persons the subject of the disclosures (where this is possible and reasonable)
 - ✎ assess disclosures impartially
 - ✎ act fairly to persons the subject of disclosures
- a disclosure will be investigated as discreetly as possible, with a strong emphasis on maintaining confidentiality both as to the identity of the complainant and any person the subject of a disclosure
- where an investigation does not substantiate disclosures, the fact the investigation / enquiry has been carried out, the results of the investigation, and the identity of a person the subject of a disclosure will be kept confidential, unless the person(s) the subject of the disclosures requests otherwise
- before any decision / determination / report / memorandum / letter or the like is made or finalised, any person, the subject of a disclosure (whether protected disclosures under the Act or otherwise), which is investigated by or on behalf of an authority, has the right to -
 - ✎ be informed as to the substance of the allegations
 - ✎ be informed as to the substance of any adverse comment that may be included in a report / memorandum / letter or the like arising out of any such investigation
 - ✎ be given a reasonable opportunity to put their case (either orally or in writing) to the persons carrying out the investigation for or on behalf of the authority

- where the allegation in a disclosure has been investigated by or on behalf of an authority, and the person the subject of the allegations is aware of the substance of the allegations, the substance of any adverse comment, or the fact of the investigation, then he or she should be formally advised as to the outcome of the investigation, regardless of the outcome
- whether the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person the subject of the disclosure is entitled to the support of the authority and its senior management.

10. Notification to the Complainant

The Audit Office will:

- acknowledge receipt of the complaint within two weeks where the complainant can be identified
- advise the complainant of any action to be taken in regard to the complaint after an assessment has been made of the complaint
- advise the complainant of the result of any audit or investigation undertaken.

In terms of section 27. of the Act a complainant must be notified, within 6 months of the protected disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

The notification provided to the person who made the disclosure should contain sufficient information to:

- demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of the disclosure. This should include a statement of the reasons for the decision made on or action taken in response to the disclosure.
- to enable the complainant to make an assessment as to whether the circumstances listed in section 19. of the Act (relating to disclosures to Members of Parliament and journalists) apply, that is whether:
 - a decision was made not to investigate the matter
 - a decision was made to investigate the matter, but the investigation was not completed within 6 months of the original decision being made
 - the matter was investigated but no recommendation was made for the taking of any action in respect of the matter.

Without such information it would be difficult for the complainant to be able to properly assess whether it is appropriate or warranted to make a disclosure to a Member of Parliament or journalist.

11. Dealing with a Disclosure

The procedures for dealing with an internal disclosure pursuant to the Protected Disclosures Act are, in substance, the same as the procedures for dealing with a disclosure to The Audit Office by a public official external to the Audit Office.

Those procedures are detailed within the *Procedures to deal with disclosures received by the Audit Office in respect of the Audit Office pursuant to the Protected Disclosures Act 1994*.

Procedures

**to deal with disclosures received by the Audit Office in
respect of the Audit Office pursuant
to the**

Protected Disclosures Act 1994

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Introduction

The following procedures apply to disclosures received by the Audit Office in respect of Audit Office staff pursuant to the *Protected Disclosure Act 1994*.

A complaint may be made to the Auditor General, Deputy Auditor-General or Personnel Manager.

All complaints are referred to the Auditor-General, who will decide what, if any, action is to be taken.

Unless otherwise directed by the Auditor-General, all internal complaints of corrupt conduct, maladministration or serious and substantial waste of public money, are to be managed by the Deputy Auditor-General who is to instigate appropriate action in accordance with the Policies and Procedures applicable to these complaints.

1. Roles and Responsibilities

1.1 The Auditor-General

The Auditor-General (A-G) is to approve what, if any, action is to be taken in respect of complaints received.

1.2 The Deputy Auditor-General

The Deputy Auditor-General (DA-G) will assume the role of "Disclosures Co-ordinator". The Disclosures Co-ordinator is the person responsible for the administration of the Act and procedures for the handling of internal complaints. Responsibilities include:

- ◆ acknowledge the complaint and notify the complainant of progress with the complaint at key intervals throughout the audit/investigation
- ◆ act as a clearing house for all internal disclosures pursuant to the Act
- ◆ assess each disclosure, or to arrange for an assessment, to recommend the appropriate action to be taken in relation to the disclosure
 - advise, consult and recommend to the A-G, as to whether the complaint is to be regarded as a disclosure in terms of the Act and the action to be taken in regard to a disclosure, for example
 - the appropriate person to take responsibility for dealing with the disclosure
 - referral to another investigating authority for investigation or other appropriate action
 - referral to the police if a criminal matter
 - be responsible for either carrying out or coordinating/monitoring an audit/investigation arising out of a disclosure
 - report to the Auditor-General, on the findings of any audit or investigation conducted by the Disclosure Coordinator or Investigating Officer and recommend the manner of reporting (to Parliament or to an investigative authority) and the eventual closure of the matter where appropriate
- ◆ take all reasonable steps to ensure that the identity of the complainant, and any person the subject of the disclosures, is kept confidential

- ♦ take all reasonable steps to ensure that the complaint is dealt with impartially, fairly to both the complainant and any person the subject of the complaint, competently, quickly, and in a discreet manner
- ♦ support persons who make disclosures and actively protect complainants from victimisation, harassment or any other form of reprisal
- ♦ report actual or suspected corrupt conduct to the Auditor-General in a timely manner to enable the Auditor-General to comply with the *ICAC Act*
- ♦ maintain adequate management information of disclosures to facilitate reporting to Parliament.

1.3 The Investigating Officer

The Auditor-General may approve an audit/investigation be undertaken by any person within the Audit Office. Where it is considered by the Auditor-General that the Office does not have the expertise to conduct the investigation, an external investigator eg a forensic accountant, may be appointed as the investigating officer

An audit/investigation should be undertaken in accordance with these procedures.

The Investigating Officer is to:

- ♦ ensure the provisions of the Act are complied with
- ♦ be responsible for acting upon disclosures in accordance with Audit Office policy and practice
- ♦ liaise with the complainant during the course of any audit/investigation and to explain generally to them what will happen in relation to the information received
- ♦ make arrangements when requested to ensure that disclosures can be made privately and discreetly (if necessary away from the workplace)
- ♦ record in writing details of any disclosure received orally (and where possible require the person making the disclosure sign the document) and other details received during the course of the investigation
- ♦ plan, conduct and report on the audit/investigation
- ♦ deal with disclosures impartially
- ♦ take reasonable steps to ensure that the identity of the person making a disclosure, and the person the subject of a disclosure, remain confidential
- ♦ support any person who makes a disclosure and protect him/her from victimisation, harassment or any other form of reprisal
- ♦ record action to date on the relevant file of the audit/investigation and report on progress to the Disclosure Coordinator on a regular basis.

2. Registration

The Disclosures Coordinator is to ensure that all disclosures received by staff are recorded and registered.

The system is to provide for the recording of the following information:

- ◆ date of receipt of complaint
- ◆ date acknowledgment letter sent to complainant
- ◆ reference number / identification (acorn)
- ◆ brief description of the complaint
- ◆ status of complaint
- ◆ date complainant advised of progress.
- ◆ cost of the audit/investigation

3. Acknowledging Receipt of a Disclosure

Receipt of a complaint will be acknowledged within 14 working days where the complainant can be identified and in terms to indicate that the complaint is being assessed for compliance with the Act. The acknowledgment should indicate that the complainant will be notified of the outcome of that assessment process and proposed action.

In advising a complainant that the complaint appears to comply with the provisions of the Act, care should be taken to indicate that the complaint is being treated as a protected disclosure. The letter of advice should include the following:

"Thank you for referring the issue of [complaint]. The matter is being assessed at present and you will be notified within four weeks of the proposed action, if any, to be taken. In the interim, your complaint will be dealt with as a protected disclosure unless determined otherwise."

4. Detailing the Complaint

It is desirable that the disclosure be in written form even if it is necessary for the Investigating Officer to transcribe it and where possible arrange for the complainant to sign the complaint. This reduces the chance of subsequent dispute about the precise nature of the disclosure.

It may be necessary to question the complainant more closely about the allegations and the evidence supporting those allegations. These discussions should be documented.

It is important to be discreet about arranging further questioning, bearing in mind the requirement to avoid identifying the complainant. It is important to be careful about the time and venue of interviews.

In asking for further information it should be remembered that the complainant is likely to feel under considerable strain. The complainant may react badly to a line of questioning which gives the impression of serious scepticism about the initial disclosure.

Again it is desirable to obtain a signed record of any additional information obtained.

5. Assessment of Disclosures

5.1 Introduction

Information received which relates to a possible protected disclosure needs to be assessed to check that it is genuine and that improper or illegal conduct is likely to have occurred.

Some of the initial issues to consider are:

Is the information trivial, frivolous or vexatious?

Some information provided is so trivial or insignificant as not to merit investigation. In some cases these matters are generated by personal animosities or other motives which have nothing to do with concern about the integrity of the Office or its staff.

In some cases it may be necessary try to separate the information provided from the information provider's motives for supplying it. For example, are they reporting it to avoid being disciplined themselves? Is the matter a payback?

Simply because the information provider is known to have a strong dislike of the subject person does not mean that the matter can be ignored or summarily dismissed.

It just means more caution should be taken when accepting the accuracy of the information supplied. In such circumstances evidence independent of the information provider which supports the information would be useful.

How long ago did the alleged misconduct occur?

An alleged incident may be so old that the likelihood of proving it is so remote as not to justify an investigation. In cases such as this, witnesses may have disappeared, died or have a faded memory of the incident. Documents may have been destroyed or lost. The conduct complained of may be so minor that even if it could be proved, no punitive action would now follow. As a general rule, the less serious the matter and the older it is, the more likely it is that it should be dismissed at the assessment stage.

How much specific evidence is there to support the information provided?

The more specific the allegation and the more evidence to support it, the more likely it will be acted on. Unsupported allegations are unlikely to be sufficient to meet the requirements of the Act.

However, in some cases the information may be no more than someone's suspicions about what might have occurred or be occurring. In such instances, the type of conduct involved, the frequency of information received about it, and whether they are connected with other matters, should be considered. eg. if a number of similar but general allegations have been received about the same employee or section, this matter may be worth doing something about.

How serious is the matter and what significance does it have for the Office?

The 'seriousness' of a matter can depend on a number of factors, including:

- ◆ the possible risks to the Office and its staff
- ◆ the monetary amounts or other benefits involved
- ◆ the number of staff said to be involved
- ◆ the frequency of suspected misconduct

5.2 Referral of Case For External Review Or Investigation

If a disclosure is to be referred to another relevant investigating authority, the choice will usually be between the following authorities:

- ◆ ICAC - for matters involving corrupt conduct
- ◆ Police Service - for matters involving any criminal conduct
- ◆ NSW Ombudsman - for maladministration

Any complaint of corrupt conduct must be referred to the ICAC even if the complaint is investigated internally.

5.3 Confidentiality Requirements

Section 22 of the Act requires public authorities and their officers to whom a protected disclosure is referred, not to disclose information that might identify or tend to identify the person who made the disclosure.

The requirement has clear implications with respect to who should be told about a protected disclosure. As a general rule, only those who need to know should be told about the disclosure in order to ensure that the investigation is effective.

The capacity of those who might be told about the disclosure to cause, directly or indirectly, detrimental action towards the complainant should always be considered. It should be impressed on those who are told about the disclosure their strict legal requirement to maintain confidentiality.

The Act provides that a complainant can waive (in writing) their right to confidentiality.

It also provides that natural justice (procedural fairness) may require:

- ◆ identifying information to be disclosed to a person the subject of the investigation
- ◆ the investigating authority may consider identifying information must be disclosed to investigate the matter effectively; or
- ◆ it is otherwise in the public interest to do so.

If it is considered that any of these circumstances apply, the basis on which the investigation formed the opinion to disclose identifying information should be documented. The Investigating Officer should also notify the complainant of their intention to so disclose.

It should be impressed upon the complainant to be circumspect in the information given to colleagues, as well as in relation to their conduct in the presence of colleagues, so as not to prejudice the confidentiality of their disclosure.

It should be explained to complainants that this is important:

- ♦ for their own protection
- ♦ for the integrity of any investigation or informal enquiry that may be or is being carried out so as to respect the rights of the person(s) the subject of the disclosure.

5.4 Result of Assessment

The Investigating Officer is to recommend to the A-G the action proposed. The A-G will approval any further action.

5.5 Notification to the Complainant

The complainant is to be notified of the result of the assessment of the disclosure and any further action intended.

In terms of section 27 of the Act a complainant must be notified, within 6 months of the protected disclosure being made, of the action taken or proposed to be taken in respect of the disclosure. The Disclosure Coordinator is responsible for notifying the person who made the disclosure.

The notification provided at this point in time should contain sufficient information to demonstrate that adequate and appropriate action was taken, or is proposed to be taken, in respect of the disclosure and should include a statement of the reasons for the decision made.

6. Audit/Investigation of a Disclosure

6.1 Planning

Once a decision has been approved to audit/investigate a complaint, planning should commence. The plan should establish the focus and terms of reference (the limits) of the investigation and help organise, manage and review the investigation process.

It should include:

- *an accurate description, so far as is possible, of the protected disclosure*
- *the objectives of the investigation:*
 - identify, if not already known, the alleged wrongdoer
 - identify those facts which need to be established in order to prove (or disprove) the alleged misconduct
 - identify the means by which those facts can be established
 - collect all necessary evidence required to establish the alleged misconduct
 - identify the need for changes to systems, personnel, policies and procedures.
- *the scope of the investigation and the strategies to be used*
- *details of the preliminary assessment*
- *the resources needed*
- *the time frame.*

As far as possible, the plan should include a program or timetable for the completion of specific tasks.

The investigation plan is to be prepared by the investigating officer and submitted to the Auditor-General for approval.

6.2 Conducting the Audit

The audit/investigation should be conducted in accordance with the plan.

6.3 Workpapers

The workpapers should contain all material about the investigation, including the original allegation and any evidence collected during the preliminary assessment. The information should be in chronological order with a dated index or running sheet for all new material added. The workpapers may be subpoenaed in civil or criminal proceedings. They may also be used in disciplinary proceedings. It is important therefore that they are kept secure and maintained in an orderly fashion.

File notes of all discussions, phone calls and interviews and the dates and times these took place also need to be included in the workpapers.

Other information may include:

- information or evidence received from witnesses or other organisations
- reports provided by experts
- copies of all witness statements
- transcripts of records of interviews
- progress reports
- final investigation report.

External consultants engaged by the Office are also required to maintain adequate workpapers. The Audit Office may also, upon completion of the investigation review these work papers to ensure that the procedures agreed to in the plan have been followed and that sufficient appropriate evidence has been obtained.

All workpapers are kept by the Office at the conclusion of the investigation.

6.4 Progress Reports to The Auditor-General

The Auditor-General is to be kept informed of the status and progress of the investigation on a regular basis by the designated investigator. These reporting requirements should be agreed with the Auditor-General at the commencement of the investigation.

6.5 Reporting

At the end of the investigation, a final report will be prepared for the Auditor-General. The report should include the results of the investigation and any recommendations for referrals, disciplinary action or prosecutions that should be taken or any prevention action that needs to be undertaken.

The report should consist of two sections.

The first section should cover the facts relating to the investigation. A suggested structure is:

- covering memo/executive summary
- background (scope of the investigation, sources of information, methodology)
- results of inquiries
- conclusion
- recommendations (disciplinary action and such).

The second section should cover general issues raised by the investigation. For example:

- comments on any perceived adverse repercussions for the Office
- if and why correct procedures were not followed
- the need for new procedures or controls to prevent future problems
- recommendations for systems improvement.

In drafting any report it is important to bear in mind the requirements of section 38B(1A) of the *Public Finance and Audit Act* as well as procedural fairness / natural justice. This is discussed later.

7. Notification to the Complainant

At the conclusion of the audit/investigation the Disclosure Coordinator will notify the complainant of the outcome thereof.

Sufficient information is to be provided within the notification to assure and enable the complainant to make an assessment as to whether appropriate action has been taken by the Office in regard to the disclosure.

In the absence of sufficient information the complainant may be encouraged to make the same disclosure to a Member of Parliament or a journalist in terms of section 19 of the Act.

8. Access to Information

Access to files and working papers should be restricted to authorised persons only.

9. Managing the Complainant

9.1 Introduction

It is in the interests of all directly concerned that a disclosure is dealt with properly, appropriately, quickly and discreetly.

An essential element of the response to a protected disclosure is the treatment or management of the complainant.

Experience indicates that complainants often:

- ♦ have unrealistically high expectations
- ♦ believe they have been ignored or not taken seriously
- ♦ believe their disclosures are not being dealt with properly and appropriately, or within reasonable periods of time
- ♦ have been kept in the dark about progress and / or outcomes.

9.2 Managing Expectations

If a complainant develops unrealistically high expectations, dissatisfaction invariably results with either:

- ♦ the way in which the Office has dealt with the disclosure
- ♦ the outcome of any investigation or other action.

Complainants should be asked to outline their expectations of what should happen to their disclosure and what the outcome should be. If these expectations seem unrealistic, the reasons for this assessment should be fully and clearly explained to the complainant at the outset.

As part of the process of managing complainant expectations, it is important to advise the complainant of either:

- ♦ the reasons why no action, or action that does not meet their expectations, is to be taken in regard to a disclosure, or
- ♦ what action is proposed to be taken in regard to the disclosure

All advice provided to the complainant should be in writing a copy of which is to be retained in the workpapers.

9.3 Ensuring Confidentiality

The confidentiality provisions of section 22 of the Act should be explained to the complainant. Confidentiality aspects have been discussed 5.4 *Confidentiality Requirements*.

9.4 Providing Support

Complainants should be advised of the legal protection available under the Act and about any support and / or protection that is available.

10. Managing a Person the Subject of a Disclosure

It is important to manage the reaction of persons the subject of the disclosures.

Unnecessary communication of the identity of persons or the subject matter of such disclosures, might damage those persons reputation, even though a subsequent investigation might totally exonerate them.

A person the subject of disclosures should be given, at an appropriate stage, the chance to hear and answer the substance of the allegations. Natural justice requires no less.

Normally preliminary inquiries should be conducted before approaching a person the subject of a disclosure. The purpose of such enquires would be to test the veracity of the allegations in the first instance.

11. Procedural Fairness / Natural Justice

If disciplinary or other action is recommended against any person and that person was not afforded procedural fairness in the formulation of the recommendation, this deficiency invites legal action to quash implementation of the recommendation.

There is a presumption that the rules or principles of procedural fairness (ie natural justice) must be observed in exercising statutory power which could affect the rights, interests or legitimate expectations of individuals. It would be wise to assume that the rules apply in such circumstances, whether or not the power being exercised is statutory.

The courts emphasise the need for flexibility in the application of the rules for procedural fairness, depending on the circumstance of each individual case.

Depending on the circumstances which do apply, procedural fairness might require the Office to:

- ♦ inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for adverse comment in respect to them
- ♦ provide people with a reasonable opportunity to put their case, whether in writing, at a hearing or otherwise
- ♦ hear all parties to a matter and consider all submissions
- ♦ make reasonable enquiries or investigations before making a decision
- ♦ ensure that no person decides their own case or a case in which they have a direct interest
- ♦ act fairly and without bias in making decisions.

Where adverse comment about a person is to be included in a report, the person affected should be given an opportunity to comment beforehand.

Such comments should be considered before the report is finalised and presented to the Auditor-General or made public.

With reference to the obligation under the ICAC Act to report suspected corrupt, the principles of procedural fairness / natural justice would not require that the subject of a disclosure be informed when such a referral is made to the ICAC.

12. Statistics and Reporting

The issue of statistics and reporting was considered by the Joint Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission in its recent review of the *Protected Disclosures Act*.

In its September 1996 report on that review, the Committee recommended that all public authorities should be required to report to the Parliamentary Joint Committee undertaking the biannual review of the Act (as required by section 32 of the Act).

The committee recommends that each report by a public authority should contain particulars of:

- ♦ the number of identified protected disclosures received
- ♦ the number of referrals received
- ♦ the number of investigations undertaken and outcomes
- ♦ the resources used to deal with protected disclosures
- ♦ training and education initiatives undertaken to improve staff awareness and understanding of the *Protected Disclosures Act 1994*
- ♦ measures of support provided to employees who have made, or intend to make, a protected disclosure, for example, counselling and support officers
- ♦ internal reporting systems
- ♦ policies and procedures for receiving and managing protected disclosures and for protecting employees who have made disclosures from reprisals
- ♦ any specific authority code which explains the importance of protected disclosures to the *ethical framework of the organisation*.

The above statistics are maintained by the Disclosure Coordinator.

13. Errors to be Avoided

Page 29 of the Criminal Justice Commission publication *Exposing Corruption - A CJC Guide to Whistleblowing in Queensland*, published in October 1996 a list of the following organisational errors which have the capacity to affect the relationship between the complainant and the investigating authority.

- ♦ fail to observe the confidentiality of a disclosure by having information pass through a series of hands with few checks as to who has, or who should view the material.
- ♦ tell anyone who asks about the details and investigation of the disclosure.
- ♦ report to the work group who the complainant is, what the allegations are, and whom they are about.
- ♦ interpret natural justice to mean that a person has an immediate right to know when a disclosure has been made about them and who made it.
- ♦ always as a first step, ask the subject officer about the allegation.
- ♦ forward the disclosure and action on it through the chain of command so that as many people know about the matter as possible.
- ♦ forewarn the person who is the subject of an allegation in plenty of time about the allegations and provide them with investigation details.
- ♦ allow personal biases about the personality of the complainant to influence the assessment of a disclosure
- ♦ do not take seriously the concerns expressed by a complainant about the possibility of reprisal.
- ♦ ignore potential conflicts of interest when deciding who should assess or investigate the disclosure.
- ♦ allow political considerations to influence the assessment of a disclosure or the findings of an investigation.
- ♦ delay the investigation for as long as possible so that any evidence of wrongdoing can be altered or destroyed.