

**Submission
No 47**

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

Organisation: Independent Commission Against Corruption
Name: The Hon Jerrold Cripps QC
Position: Commissioner
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ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Frank Terenzini
Chair, Committee on the ICAC
Parliament House
Macquarie Street
SYDNEY NSW 2000

FAXED
15:00

Our Ref: 207/0131

Dear Mr Terenzini

RE:DISCUSSION PAPER ON PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

Thank you for providing the Commission with an opportunity to comment on your discussion paper on proposed changes to the protection provided to public sector whistleblower employees. A submission which addresses each proposal is attached.

I would be happy to provide any further information about these issues that the Committee may require.

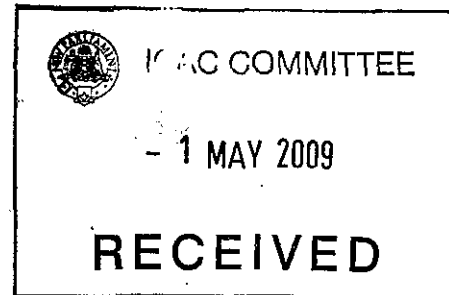
Yours sincerely



The Hon. Jerald Cripps QC

Commissioner

1 May 2009



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- Proposal 1 The Commission supports the proposal that a Protected Disclosure Unit be established in a suitable oversight body, and that the Ombudsman's Office should continue to provide an educative, advice and auditing role in this area.
- Proposal 2 The Commission supports this proposal, and considers that regulations requiring agencies to have adequate and consistent internal policies about protected disclosures could help to encourage and protect whistleblower employees.
- Proposals 3 and 4 In terms of the categories of persons who may make protected disclosures, the Commission supports these proposals which would extend the protection to persons in contractual relationships with public authorities and to volunteers and interns working in offices of members of Parliament.
- Proposal 5 The Commission supports this proposal in principle, as it aims to protect disclosures that are genuinely made but are eventually found not to involve corrupt conduct, maladministration or serious and substantial waste. However, the suggested wording would require a public official to form a belief about whether or not the allegations are "true", which in the Commission's view may not be immediately apparent. In line with the equivalent Queensland legislation, the Commission suggests that the second part of this proposal should read:
- Be made by a public official who has an honest belief on reasonable grounds that the disclosure tends to show corrupt conduct, maladministration, or serious and substantial waste.
- Proposal 6-8 The Commission supports these proposals which would allow public or investigating authorities to make application for injunctions to prevent reprisals against public officials, provide for public officials to claim civil damages for detrimental action and remove the confidentiality requirement where public officials voluntarily and publicly identify themselves as having made a protected disclosure.
- Proposals 9-10 The Commission supports these proposals which would clarify that the confidentiality guidelines in the *Protected Disclosures Act 1994* (PDA) apply to public officials who make protected disclosures, as well as to those to whom the disclosures are made, and provide that reprisal action against a whistleblower is a disciplinary offence for all public officials.
- Proposal 11 The Commission supports proposal 11 that a detailed, stand-alone definition of a public authority be included in the PDA, in similar terms to the Queensland whistleblower legislation.
- Proposal 12 The Commission supports this proposal, which would protect public officials who make a disclosure to a body which the official honestly believes is an appropriate authority to receive the disclosure.
- Proposal 13 This proposal suggests that definitions of "frivolous" and "vexatious" complaints should be included in the PDA. The Commission notes that a number of Acts across Australia include provisions about persons who make

vexatious or frivolous complaints, without a definition being given of those terms. Often providing a detailed definition is not helpful and may in fact encourage legal disputes, as it is difficult to include every type of issue that might lead to a complaint being classified by an agency as frivolous or vexatious in a definition, and some conduct might inadvertently be excluded.

The Commission considers that it would be more helpful to follow the second option canvassed by the Committee, namely that the NSW Ombudsman could provide education and guidance to agencies about this issue.

Proposal 14

The Commission supports this proposal that public authorities should include in their policies advice about the exclusion of vexatious and frivolous complaints or complaints made to avoid disciplinary action from the protection of the PDA.

Proposal 15

The Commission does not support the proposal that section 27 of the PDA be amended to require agencies to keep a public official who has made a disclosure informed about developments in relation to their disclosure. It will often be the case that it is not possible to keep a public official informed on an ongoing basis about developments in the investigation of their disclosure without prejudicing the investigation. In the Commission's view, the current requirement to notify a person who has made a protected disclosure of the action taken or proposed to be taken within 6 months provides sufficient notification by agencies to whistleblowers. If the Committee intends to proceed with this recommendation, the Commission considers that investigating authorities should be excluded from the provisions of any such amendment.

Proposal 16

The Commission supports in general terms the proposal that the PDA should be amended to require authorities to provide more detailed information in their annual reports about the number and outcome of protected disclosures received by their agencies.