

**Submission  
No 41**

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

**Organisation:**

**Name:** Mr Ben Blackburn

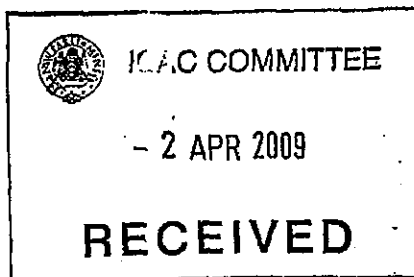
**Telephone:**

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*Partially Confidential*

1 April 2009



Mr Ben Blackburn

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

Dear Chair and Committee Members,

**RE: INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER  
EMPLOYEES – DISCUSSION PAPER**

I write this submission following the Chair's invitation to respond to the Committee's *Protection of Public Sector Whistleblower Employees: Discussion Paper*, published on 12 March 2009.

I would like to begin by firstly congratulating all of the government agency representatives, organisations, advocacy groups and individuals who have contributed to this inquiry process.

After close examination of all listed proposals tabled for discussion and public consultation, I am firmly of the view that the overwhelming majority of proposals are aimed at improving current legislative and administrative protections for public sector whistleblower employees, are sensibly legible, well constructed and worthy of the ICAC Committee's support.

**PROPOSAL 1:** a) That a Protected Disclosures Unit be established in a suitable oversight body to:

- monitor the operational response of public authorities (other than investigating authorities) to the *Protected Disclosures Act 1994* (the Act);
- act as a central coordinator for the collection and collation of statistics on protected disclosures;
- publish an annual report containing statistics on disclosures;
- identify systemic issues or problems with the operation of the Act;
- develop reform proposals for the Act; and
- monitor and report on trends in the operation of the Act, based on information received from public authorities in relation to the management and outcomes of all disclosures received.

b) That the Ombudsman's Office should be responsible for:

- providing advice in relation to protected disclosures to public officials and public authorities;
- auditing the internal reporting policies and procedures of public authorities;
- coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities; and
- providing advice on internal education programs to public authorities.

**- Support in Principle -**

**This is a satisfactory proposal which still falls short in a critical area of reform.**

**The New South Wales Government has unfortunately not acted upon similar recommendations tabled previously in good faith to improve the *Protected Disclosures Act 1994*.**

**The establishment of a '*Protected Disclosures Unit*' is not only necessary and justified; it ought to serve as the central pillar of reforming the protection of public sector whistleblower employees in New South Wales.**

**As was recommended in the last review by the same Committee in 2006, the Ombudsman should be given the power to intervene and take control of stalled investigations within New South Wales Government departments and agencies.**

**PROPOSAL 2:** That, pursuant to section 30 of the, enforceable regulations on protected disclosures be made requiring public authorities (including local government authorities) to have internal policies that adequately assess and properly deal with protected disclosures, and to provide adequate protection to the person making the disclosure.

These protected disclosure regulations should require the internal policies to be consistent with, but not necessarily identical to, the NSW Ombudsman's "Model internal reporting policy for state government agencies" and its "Model Internal Reporting Policy for Councils" as outlined in the NSW Ombudsman's *Protected Disclosure Guidelines*, 5th Edition.

**- Support -**

**PROPOSAL 3:** That the *Protected Disclosures Act 1994* be amended to provide that, in addition to public officials, disclosures that are made by people who are in contractual relationships with public authorities are eligible for protection.

**- Support -**

**PROPOSAL 4:** That the *Protected Disclosures Act 1994* be amended to make it clear that, in addition to public officials, disclosures made by volunteers and interns working in the office of a Member of Parliament are eligible for protection.

**- Support -**

**This is a particularly important reform proposal which highlights the inept lack of protection and inherent failure of the current *Protected Disclosures Act 1994*.**

**It is appropriate that any volunteer or intern performing work experience duties in the office of a Member of Parliament be made legally eligible for protection under the *Protected Disclosures Act 1994* should they observe or be witness to any criminal and/or corrupt conduct, which they subsequently disclose.**

**This is a strong proposal worthy of the Committee's unanimous support.**

**PROPOSAL 5:** That the *Protected Disclosures Act 1994* be amended to provide that in order to attract protection, disclosures must:

- Show or tend to show that a public authority or official has, is or proposes to engage in corrupt conduct, maladministration, or serious and substantial waste; or

- Be made by a public official who has an honest belief on reasonable grounds that the disclosure, concerning corrupt conduct, maladministration, or serious and substantial waste, is true.

**- Support -**

**PROPOSAL 6:** That the *Protected Disclosures Act 1994* be amended to provide for applications, by public or investigating authorities, for injunctions against detrimental action on behalf of public officials.

**- Support -**

**PROPOSAL 7:** That the *Protected Disclosures Act 1994* be amended to provide for a public official to claim for civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.

**- Support in Principle -**

**However, the term 'substantially' as phrased in this proposal unnecessarily weakens its impact and could open the door to legal manipulation in questioning the weight or level of reprisal taken against whistleblower employees.**

**Any action, however miniscule or seemingly insignificant, of reprisal by a public sector official against a public sector whistleblower should be considered a serious breach of the *Protected Disclosures Act 1994* and dealt with as such.**

**PROPOSAL 8:** That section 22 of the *Protected Disclosures Act 1994* be amended to remove the requirement for confidentiality in cases where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.

**- Support -**

**PROPOSAL 9:** That section 22 of the *Protected Disclosures Act 1994* be amended to clarify that the confidentiality guidelines apply to a public official who has made a protected disclosure, in addition to the relevant investigating and/or public authorities investigating the disclosure.

**- Support -**

**PROPOSAL 10:** That the *Protected Disclosures Act 1994* be amended to provide that detrimental action taken substantially in reprisal for a protected disclosure is a disciplinary offence for all public officials.

**- Support in Principle -**

**This reform proposal sends a clear message to all public sector officials, that detrimental actions taken in reprisal against whistleblowers will not be tolerated.**

However, as with proposal 7, the term 'substantially' as phrased in this proposal unnecessarily weakens its impact and could open the door to legal manipulation in questioning the weight or level of reprisal taken against whistleblower employees.

Any action, however miniscule or seemingly insignificant, of reprisal by a public sector official against a public sector whistleblower should be considered a serious breach of the *Protected Disclosures Act 1994* and dealt with as such.

**PROPOSAL 11:** That the *Protected Disclosures Act 1994* be amended to provide a detailed, stand-alone definition of a public authority along the lines of Schedule 5(2) of the *Whistleblowers Protection Act 1994* (Queensland).

**- Support -**

**PROPOSAL 12:** That section 14 of the *Protected Disclosures Act 1994* be amended to clarify that, to be protected by the Act, disclosures by public officials that show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money may be made to an appropriate public authority or investigating authority where the public official honestly believes it is the appropriate authority to receive the disclosure.

**- Support -**

**PROPOSAL 13:** That the *Protected Disclosures Act 1994* be amended to include definitions for "vexatious" and "frivolous" complaints, as provided for in section 16 of the Act, to enable agencies to more easily identify complaints that are not eligible for protection.

**- Reject -**

**This is an unsatisfactory proposal which will act as an unwanted disincentive to potential public sector whistleblowers, reinforcing cynical perspectives that whistleblowers are often ostracised and treated like villains by their colleagues.**

**PROPOSAL 14:** That public authorities include in their Protected Disclosures policies advice:

- that complaints made substantially to avoid disciplinary action, or made vexatiously or frivolously, are not eligible for protection under the provisions of the *Protected Disclosures Act 1994*; and
- specifying appropriate avenues for resolving grievance and performance related issues.

**- Reject -**

**This is a flawed proposal which, in my view, serves as nothing more than a disincentive to disclosure.**

**As was pointed out by Dr A.J. Brown, Senior Lecturer at Queensland's Griffith University, in the Issues Paper presented as part of the three-year collaborative 'Whistling While They Work' national research project (2005-2008):**

***"... 'vexatious' can be assumed to mean 'vexing' or intended to make trouble, which again is a poor basis for excluding what may be a difficult, but nevertheless legitimate and serious allegation".***

**PROPOSAL 15:** That section 27 of the *Protected Disclosures Act 1994* be amended to require agencies that receive a protected disclosure to keep the public official who has made the disclosure informed as to developments in relation to their disclosure.

**- Support -**

**PROPOSAL 16:** That the *Protected Disclosures Act 1994* be amended to require public authorities to report on protected disclosures, along the lines of what is required for freedom of information applications under section 69 of the *Freedom of Information Act 1994*. This reporting requirement could take the form of a protected disclosures regulation requiring a public authority to publish in their annual report the following information on protected disclosures (as per Clause 10 of the Freedom of Information Regulation):

1. the number of disclosures made in the past 12 months;
2. *outcomes*;
3. policies and procedures;
4. year-on-year comparisons; and
5. the organisational impact of investigations of disclosures.

To ensure consistent reporting, the NSW Ombudsman's *Protected Disclosure Guidelines* could be revised to include an Appendix setting out a pro-forma for agency reporting of information on protected disclosures for annual reports, with the protected disclosures regulation requiring public authorities to adopt this pro-forma.

**- Support -**

As I stated in my introduction, the overwhelming majority of these proposals are a step in the right *direction in improving the protection of public sector whistleblower employees*, sensibly legible and with the exception of proposals 13 and 14, largely worthy of the ICAC Committee's support.

In conclusion, I wish to acknowledge the hard work and dedication shown by Members of the New South Wales Legislative Assembly and Legislative Council on the ICAC Committee who supported the establishment of such an important inquiry and I wish the Chair and all remaining Committee Members well during their deliberations and in the development of the Committee's findings and recommendations outlined in it's final report to the New South Wales Government.

Yours sincerely,

  
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**Ben Blackburn**