Submission No 13

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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SUBMISSION

Australian Press Council
Submission to the NSW Parliamentary Committee on the Independent Commission Against Corruption
The Protection of Public Sector Whistleblowers

Executive Summary

The Australian Press Council calls on the government of New South Wales to reform the *Protected Disclosures Act 1994* in order to strengthen the protection of public employees who make public interest disclosures in the following terms:

1. Section 19 of the Act should be amended in order to provide for public interest disclosures to the media or a parliamentarian to be protected in the following circumstances:
   - Where the officer making the disclosure honestly believes, on reasonable grounds, that to make the disclosure along internal channels would be futile or could result in victimisation, OR
   - Where the officer making the disclosure honestly believes, on reasonable grounds, that the disclosure is of such a serious nature that it should be brought to the immediate attention of the public, OR
   - Where the officer making the disclosure honestly believes, on reasonable grounds, that there is a risk to health or safety, OR
   - Where internal disclosure has failed to result in prompt investigation and corrective action.
2. Section 19(3) of the Act should be amended so as to remove or significantly shorten the period of time which a public official is required to wait after making an internal disclosure before approaching the media.
3. The scope of the protection provided by the Act should be extended to encompass employees of private organisations who are contracted to provide services to or on behalf of the NSW government.
4. The Act should be amended by the insertion of a section which provides a right to claim compensation for loss or injury suffered as a result of making a public interest disclosure, including disclosures made to the public via the media.
5. The Act should be amended by the insertion of section which obligates a public agency to promptly investigate any matter which comes to its notice by way of a public interest disclosure, and to publish the results of that investigation, together with any recommendations for rectifying action, when the investigation is complete.

The Australian Press Council congratulates the NSW government on being the only government in Australia which has passed legislation making provision for public interest disclosures to the media. The *Protected Disclosures Act 1994* is unique in Australia in its inclusion of journalists as a class of persons to whom public disclosures may be made. However, although NSW is in advance of other governments in this respect, the legislation does not go far enough.

The Australian Press Council recognizes that the effective administration of government necessitates a certain degree of confidentiality. But the mechanisms which enforce confidentiality in government must be balanced by mechanisms which protect the rights of whistleblowers where they act in the public interest. The *Public Disclosures Act 1994* only goes so far toward establishing such a balance. The Act needs to be revised in order to strengthen the protection provided to whistleblowers and thereby encourage public officers to report instances of maladministration.

The Press Council appreciates the fact that the NSW *Public Disclosures Act* includes protections which are not available in other jurisdictions and, in this respect, the reforms which the government of NSW have already put into effect should be acknowledged. However, there are certain features which are absent from the Act which should be included and, without which, whistleblowers cannot be regarded as having sufficient protection.

Firstly, while the it is an offence under the Act to take reprisal action against whistleblowers, and the Act also provides immunity from prosecution and from liability with respect to public interest disclosures, the Act does not make provision for compensation for loss or injury suffered by the whistleblower. Officers who are subject to victimisation after having made public interest disclosures are likely to suffer psychological injury, including anxiety or depression, and may also suffer financial loss resulting from inability to work. One important reason why employees are reluctant to report maladministration is that they fear damage to their career, whether by termination or loss of opportunities for advancement. While employees may, in some instances, have recourse to workers compensation or expensive tortious actions, it would be preferable if the Act made specific provision for compensation with respect to loss or injury suffered as a result of making a public interest disclosure.

Second, the scope of the protection afforded by the *Protected Disclosures Act* is confined to whistleblowers themselves, not to third persons who may be affected. Where a family member or close associate of the whistleblower is employed within the same organization as the whistleblower there is the potential for reprisal action to be taken against that associate in order to bring pressure upon the whistleblower. At present, it is not clear that such reprisal against a third party falls within the scope of section 20 of the Act. That section should be revised by the insertion of a clause which states that reprisal against a third person who is an associate of the whistleblower is an offence.

Third, the scope of the protection under the Act is confined to "public officials". While the definition of "public official" is broad, and includes individuals "having public official functions or acting in a public official capacity", it is not clear that all private contractors who provide services to government bodies, or their employees, are entitled to protection for making public interest disclosures. In the context of an increasing level of "contracting out" of government services it is imperative that private contractors and their employees who make public interest disclosures are protected. Contractors who report instances of maladministration by government agencies may find their contracts terminated without just cause and they may suffer financial loss as a result. Contractors who fear such unfair termination of their contracts will be understandably reluctant to report instances of corruption or wrongdoing. Workers who are employed by a contractor rather than by the government directly are particularly vulnerable to unfair termination or discrimination in employment, yet they may have specific knowledge of malfeasance by either the employer or the organizations for whom services are provided. To address this problem, the Act should be amended, either by the insertion of a clause into the definition of "public official" to include private contractors who provide services to government agencies and their employees, or by altering section 8 to include contractors who provide such services and their employees as a class of persons who are eligible for protection under the Act.

The Press Council is particularly concerned with the provisions in section 19 of the Act. While section 8 provides for public interest disclosures to be made to journalists as well as members of parliament, section 19 restricts such disclosures to be made only in certain circumstances. To be eligible for the protection available under the Act, a disclosure can only be made to a journalist after it is first made to a public or investigative authority and that authority has either failed to complete an investigation within six months, investigated but failed to take any action, or failed to notify the person who has made the disclosure of the decision to investigate within a period of six months.

The Press Council is of the view that six months is an excessive period of time to expect a whistleblower to wait before being entitled to approach the media. In this period there may well be ongoing maladministration leading to waste or misappropriation of funds or risk to health or safety, or damage to the environment. Where a contractual relationship is involved, a six month delay may result in the government becoming committed to a course of action which cannot be altered without expensive legal action. If wrongdoing is occurring which might be stopped by action in response to a disclosure, such action should be taken promptly and, in many instances, only media interest will stimulate prompt action.

For these reasons, the Press Council believes that, in many instances, a whistleblower who has knowledge of maladministration should be able to make a disclosure directly to the media, without first having to go through internal government procedures, and still receive the protection afforded by the *Protected Disclosures Act*.
In order to facilitate disclosures to the media, the Press Council believes that section 19 of the Act should be amended in order to provide for public interest disclosures to the media or a parliamentarian to be protected in the following circumstances:

- Where the officer making the disclosure honestly believes, on reasonable grounds, that to make the disclosure along internal channels would be futile or could result in victimisation, OR
- Where the officer making the disclosure honestly believes, on reasonable grounds, that the disclosure is of such a serious nature that it should be brought to the immediate attention of the public, OR
- Where the officer making the disclosure honestly believes, on reasonable grounds, that there is a risk to health or safety, OR
- Where internal disclosure has failed to result in prompt investigation and corrective action.

As a concomitant to the right to make disclosures to the media, the Press Council believes that any legislation which aims to encourage the making of public interest disclosures should also establish an obligation, on the part of those officers or agencies who receive such disclosures, to act upon them and to make the outcome of such action known to the general public. To this end, the Act should be amended by the insertion of section which requires a public agency to promptly investigate any matter which comes to its notice by way of a public interest disclosure, and to publish the results of that investigation, together with any recommendations for rectifying action, when the investigation is complete.
Governments frequently see whistleblowers in a negative light, as a nuisance or even as a threat. Irritating though they might sometimes be, whistleblowers should be regarded as a valuable resource that has the potential to ensure that problems are rectified before they become intractable. The conservative view, that whistleblowers should be restricted to making public interest disclosures only to government officers, fails to recognise the fact that the whistleblower is often a product of an organisation that has failed to operate as it should, with both efficiency and integrity. In a dysfunctional administrative environment, the whistleblower may be justified in the view that internal reporting mechanisms are not only fruitless, but their utilization would jeopardise his or her personal position. In such circumstances, only the ability to approach the media can ensure that the disclosure will result in action prompted by public debate. For this reason a public interest disclosure legislation that does not adequately provide for disclosure to the media will be unsatisfactory.