

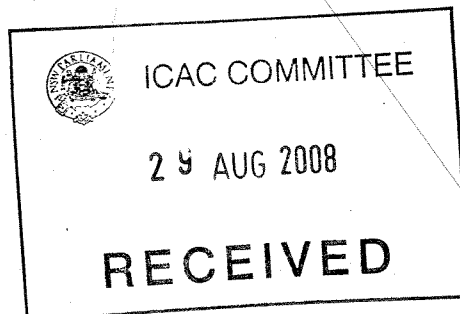
INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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28 August 2008

Mr Frank Terenzini MP
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Against Corruption
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Dear Mr Terenzini

Re: Inquiry into the protection of public sector whistleblower employees

Please find attached a submission relating to your Inquiry.

If you have any questions, please do not hesitate to contact either myself or my Deputy, Chris Wheeler.

Yours sincerely

A handwritten signature in black ink that reads "B. A. Barbour".

Bruce Barbour
Ombudsman

Enc

SUBMISSION TO THE INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

Does the *Protected Disclosures Act* achieve its objective?

The objects provision in s.3 of the PD Act sends an important message that the Act is intended to encourage and to facilitate the disclosure, “*in the public interest*”, of serious issues affecting the conduct of public officials and the provision of government services.

The object provision sets out three mechanisms by which the objective of the Act is to be achieved.

Does the Act enhance and augment established provisions for making disclosures?

The first method is by:

“...*enhancing and augmenting established procedures for making disclosures concerning such matters.*”

The procedures that were currently established at the time the Act commenced for making such disclosures were those under the *Ombudsman Act* and the ICAC Act. While the Act did create two further mechanisms (ie, the opportunity to make disclosures about serious and substantial waste to the Audit Office and for disclosures to be made in accordance with an internal policy that agencies had the discretion to establish for the purposes of the Act), the Act did not enhance or augment the then current established procedures. If anything, the Act narrowed the procedures for making such disclosures by imposing various conditions that had not previously applied, such as:

- that disclosures of information concerning the categories of conduct covered by the Act “*shows or tends to show*” (there was previously no such requirement on complaints to the ICAC or the Ombudsman alleging corrupt conduct or maladministration, even if made by a public official)
- that the disclosure did not concern the merits of government policy (s.17)
- by stating that the motive of the complainant would be important in various respects, for example if the disclosure was not made frivolously or vexatiously or was made substantially for the purpose of avoiding disciplinary action (s.18).

It could be said, however, that the Act did enhance what were the then established procedures by providing for the protection and referral of disclosures made to investigating authorities that were not within their jurisdiction.

Section 8(1)(a) of the PD Act relevantly provides that to be protected by the Act a “*disclosure*” must be made “*to an investigating authority*”.

Section 15(1) relevantly provides that:

“*A disclosure is protected by this Act if it is made ... to an investigating authority and is referred (whether because it is not authorised to investigate the matter under the relevant investigation Act or otherwise) by the investigating authority under Part 4 to another investigating authority or to a public official or public authority.*” (emphasis added)

Section 25 relevantly provides that:

- “(1) *An investigating authority **may refer any disclosure concerning an allegation of corrupt conduct, maladministration or serious and substantial waste that is made to it** by a public official to another investigating authority or to a public official or public authority considered by the authority to be appropriate in the circumstances, for investigation or other action.*
- (2) *The investigating authority **must refer** such a disclosure if:*
- (a) ***it is not authorised to investigate the matter concerned under the relevant investigation Act, and***
 - (b) *it is of the opinion that another investigating authority or some public official or public authority may appropriately deal with the matter concerned.”*
(emphasis added)

Sections 8, 15(1) & 25 of the PD Act clearly contemplate that disclosures made to an investigating authority which it is not authorised to investigate under its own Act will still be protected and can be referred to another investigating authority or a public authority which does have jurisdiction to investigate the issue. (This is discussed in Part F of the Ombudsman’s *Protected Disclosures Guidelines* at 8.4.1 – 8.4.2).

Does the Act protect whistleblowers from reprisals?

The second method by which the objective of the Act is to be achieved is stated to be by:

“...protecting persons from reprisals that might otherwise be inflicted on them because of those disclosure...”

The Act establishes a number of provisions to protect people who have made disclosures, including:

- preventative provisions: such as protection against actions (s.21), a confidentiality guideline (s.22), and absolute privilege in defamation (s.27 & Schedule 1 to the *Defamation Act*)
- re-active provisions: primarily being the protection against reprisals (s.20).

By their very nature, there is no way to measure the effectiveness of the preventative protections, however, in our view, they are likely to have been effective and certainly send a strong message.

In relation to the effectiveness of the reactive protections, while none of the five prosecutions so far under s.20 of the *Protected Disclosures Act* (or s.206 of the *Police Act*) have been successful, this was primarily due to technical and evidentiary issues. In our view this provision serves a valid purpose by sending a very strong message, particularly in association with the reverse onus of proof in s.20(1A) of the Act.

Does the Act provide for disclosures to be properly dealt with?

The third stated method by which the Act is to achieve its objective is by:

“...providing for those disclosures to be properly investigated and dealt with.”

Unfortunately, the Act contains no provisions which are intended or would have the effect of providing for disclosures to be properly investigated and dealt with. This is an issue which we have previously raised in our submission to your Committee's review of the *Protected Disclosures Act*. It is also an issue that is discussed in the Chapter of the report on the Whistling While They Work project entitled *Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*.

Are the different tests in the PD Act appropriate?

What tests are in the Act?

The current PD Act contains both objective and subjective tests to determine whether a disclosure is protected:

- objective tests in the sense that the answer can be determined from the content of the disclosure
- subjective tests in the sense that the answer depends on the state of mind/knowledge of the person making the disclosure.

What are the objective tests?

There are two objective tests in the Act:

- 1) a requirement that disclosed information "*shows or tends to show*" the conduct/ circumstances alleged (see ss.10(b), 11(1)(b), 12(1)(b), 12A(1)(b) & (2), 12B(1)(h), 12C(1)(b) & (3), 13(1) & (4A) 14(1) & 2(b)), and
- 2) a requirement that the disclosure must in fact be "*substantially true*" (see s.19(5)).

The first test applies to all disclosures made to investigating authorities, principal officers or officers constituting a public authority, or to another officer of a public authority in accordance with an internal operating policy.

Both tests apply to disclosures made to an MP or a journalist (see s.19(2) & (5)).

What is the subjective test?

There is one subjective test in the PD Act, being that a public official must have "*reasonable grounds for believing*" that a disclosure is substantially true (s.19(4)). This test only applies to disclosures made to MPs or journalists (along with both the objective tests).

Why should there be different tests?

The reasons why it may be appropriate for different tests to apply relate to implementation issues. Where a disclosure is made to an investigating authority or public authority, certain obligations are imposed on that authority, ie, to keep the identity of the person who made the disclosure confidential (s.22) and to notify that person of the action taken or proposed (s.27). It is therefore important that such authorities can make an immediate objective assessment as to whether the disclosure is in fact a disclosure to which the Act applies. Such decisions must be made without the benefit of any assessment of the state of mind of, the information known to, or the motives of the whistleblower.

On the other hand, where a disclosure is made to an MP or journalist, the Act imposes no obligations on the recipient. The only reason why an assessment would need to be made as to whether such a disclosure is a disclosure to which the Act applies would be where a whistleblower wishes to rely on the protections of the Act in legal or disciplinary proceedings. In such circumstances, a subjective test may be appropriate for a court, tribunal, etc, through questioning of the complainant.

What should be the coverage or scope of the PD Act?

What are the issues?

There are two issues about the coverage or scope of the PD Act that warrant some reconsideration:

- firstly, who can make a disclosure, and
- secondly, what can disclosures be made about.

Who should be able to make a protected disclosure?

It has been argued on occasion that maybe the scope of the Act should be expanded to include all members of the public. However, it has never been shown that there is any need to expand the protections of the Act to cover the public generally. Certainly from the experience of this office, in over 30 years of operation we are aware of very few allegations that complainants have suffered detrimental action in reprisal for the making of a complaint to an agency about the agency or its staff. In these rare cases, the detriment was generally alleged to have been caused by non-public officials in the context of, for example, neighbourhood disputes, development disputes and the like. Further, we have not noticed any reluctance of members of the general public to complain about the conduct of public officials or public authorities due to any concerns about possible reprisals.

At present, disclosures can only be made by 'public officials' as defined in the Act. As government has over time divested itself of responsibilities for the direct provision of public services, this model becomes more and more out of step with the circumstances of the provision of such services. Given that the object of the *Protected Disclosures Act* is to facilitate disclosures, the first question to consider is who needs protection and what is the nature of the protection they need to facilitate the making of disclosures?

In relation to the offence provision in s.20 of the Act, this would be of no assistance to members of the public making disclosures about public officials and public authorities as they have no employment relationship that could be jeopardised. The only persons who would benefit from the protection provisions in s.20, particularly if it were to be expanded to include contractual relationships with government, would be public officials and government contractors. To ensure that the objective of the Act can be properly achieved, there is therefore a strong argument to extend its coverage to include any person in an employment or contractual relationship with government.

In relation to the confidentiality provision in s.22 of the Act, as most complaints by members of the public are about matters that concern them personally, they would not benefit from the confidentiality provision because their identity would necessarily either be known at the outset or would need to be disclosed to allow the matter to be properly dealt with. On the other side of the coin, one of the practical problems with expanding the coverage of the Act to cover the public generally would be that this would have a significant detrimental impact on the work of the Ombudsman (and any other complaint handling organisation that might be covered by the legislation). Expanding the coverage of the Act in this way would, depending on any threshold test of seriousness, extend the confidentiality obligations in the PD Act to many complaints received by the Ombudsman from members of the public. This would be in circumstances where there is no perceived need for such confidentiality, and where confidentiality would seldom be an option given

that the complainant is likely to be directly involved in the matters the subject of complaint. This is the problem that occurred in Western Australia, necessitating an interpretation of the WA Act that it only applies where a person explicitly states an intention that their disclosure is being made under that Act. This presupposes a level of knowledge about the Act that members of the general public are unlikely to have.

The only protections in the PD Act that might possibly, at least in theory, be relevant to encourage members of the public to complain would be the defences against actions generally and defamation in particular. However:

- apart from the possibility that on one or two occasions council staff may have taken defamation proceedings against a complainant (we have heard rumours to this effect but have not been directly involved in any matter where this has occurred), we are not aware of such actions being taken against members of the public by agencies or public officials in reprisal for a complaint, and
- such protections are already available to any person who complains to an investigating authority under the PD Act (and also in relation to complaints to most other statutory bodies with a complaint handling role).

What should disclosures be able to be made about?

Given that the object of the Act is to facilitate disclosures in the public interest, there are certain issues which could be considered for inclusion of the Act:

- firstly, serious dangers to the environment, and
- secondly, serious risks to public health and safety.

Certainly these issues are addressed in several other PID legislation around Australia, and are recommended for inclusion in such legislation in reports arising out of the *Whistling While They Work* research project.

What are the statutory protection for complainants generally?

The need to include statutory protections for complainants has long been identified as an important element of legislation that establishes rights for the making of complaints. Over and above the protections provided in Part 3 of the *Protected Disclosures Act 1994*, provisions for the protection of complainants can be found in the following Acts:

- *Anti Discrimination Act 1977* (s.50)
- *Community Services (Complaints, Reviews and Monitoring) Act 1993* (ss.40, 47)
- *Defamation Act 2005* (s.27 & Sched 1, Items 1,2,9,15,18,19,25,26,27,28)
- *Health Care Complaints Act 1993* (ss.94C, 98)
- *Health Records and Information Privacy Act 2002* (s.70)
- *Independent Commission Against Corruption Act 1988* (ss.93, 94)
- *Ombudsman Act 1974* (s.37)
- *Police Act 1990* (s.206)
- *Police Integrity Commission Act 1996* (ss.113, 114), and
- *Privacy and Personal Information Protection Act 1998* (s.66A).

The scope and formulation of most of these provisions vary widely, however, broadly speaking the protections in these Acts are either:

- preventative: providing that no action can be taken or providing a defence should an action be taken, or
- reactive: providing that certain conduct is a criminal offence.

While we are only aware of a limited number of actions that have been instituted pursuant to such offence provisions (all in relation to s.19 of the *Protected Disclosures Act* or s.206 of the *Police Act*), we are of the view that such provisions send a strong message and have a significant preventative impact.

Should there be a new approach to the drafting of public interest disclosure legislation?

In our previous submissions to the three statutory reviews of the *Protected Disclosure Act* conducted so far, we have made a number of recommendations to improve the Act without suggesting changes to its basic approach and format. However, this might be an appropriate time for reconsideration of the whole approach to the drafting of the PD Act.

Are the eligibility criteria in PID legislation an anomaly?

Most PID legislation around Australia impose eligibility criteria to limit the people and the circumstances where the protections of the Act will be available. In the NSW *Protected Disclosures Act* (PD Act), for example, there are a wide range of content, procedure and motive related criteria to be met before a disclosure is protected under that Act. This is justified on the basis that the protections in the PD Act are very powerful or special and should only be available to certain people in certain limited circumstances.

The anomaly in NSW is that almost exactly the same protections are provided without question to any member of the public or any public official who makes a complaint to the Ombudsman, the ICAC or the PIC.

What this means in practice is that any complaint from a public official to the Ombudsman/ICAC/PIC has equivalent protections to those in the PD Act, without the need to meet the eligibility criteria in that Act. Further, a complaint to the Ombudsman/ICAC/PIC from any member of the public has those same protections without the need to meet any eligibility criteria at all. If nothing else this demonstrates that the protections in the NSW PD Act are not that special. One unfortunate implication of this is that it is in the interests of public officials in NSW to make disclosures directly to the Ombudsman/ICAC/PIC and not to their agency (particularly where they are uncertain as to whether the subject matter of their disclosure is sufficiently serious to be covered by the PD Act).

The current position in relation to most NSW legislation that establishes rights to complain is set out in the attachment to this submission. The situation is overly complex and confusing, and clearly in great need of standardisation and simplification. How any public officials or members of the public would know the most appropriate place, and in various cases the eligibility criteria, to make a disclosure is open to question.

Should there be a presumption that a disclosure is protected?

If the general proposition is accepted that in a democracy the public (including public officials) have a right to complain, provisions that put limits on this right should be minimised.

The purpose of eligibility criteria (including the specification of reporting avenues) should be to ensure that the right to complain/report, what is done with the information, and reliance on the protections provided by the legislation, are not misused by complainants/reporters.

This objective could be achieved by dropping most eligibility criteria from such legislation and instead emphasising such requirements as:

- the allegation must be made to a person or body with jurisdiction to deal with it
- the allegation is not to be made public by the complainant/reporter unless certain requirements are met, eg the disclosure was initially made to a person or body with jurisdiction to deal with it, and there is reasonable evidence that the person or body has not dealt with it appropriately
- should the matter go to court, the complainant/reporter can demonstrate that he or she has reasonable grounds to believe the allegations to be true
- wilful false statements are not protected, and the making of such statements, or attempts to mislead, are a criminal offence.

Should the focus of PID legislation move from what is protected to what is not protected?

Another issue is that the current focus of PID legislation around Australia is on what is protected. If as stated earlier it is accepted that people have a right to complain, then maybe the focus of all complaint related legislation, including PID legislation, should be on what is not protected. In other words, maybe we should now move to a situation where there is a presumption that a complaint/disclosure will be protected unless certain circumstances apply. For example, protection would not be provided, or would be lost, where:

- the complaint contains wilful false statements of a material nature
- the complainant misleads or attempts to mislead the recipient in any material respect
- the complaint is clearly made for an improper purpose, with an improper motive, eg, to defame
- the complainant wilfully fails to assist any investigators dealing with the complaint
- the complainant fails to keep the complaint confidential, and makes the complaint public other than in circumstances allowed for in the legislation (eg, where substantially becomes the same complaint/report has been made to a relevant agency and no action or insufficient action has been taken after a specified time).

Should there also be a focus in PID legislation on the obligations on recipients of disclosures?

A second focus of such legislation should be on the obligations on the recipients of complaints/disclosures, for example:

- to have appropriate policies and procedures in place
- to deal with the matter appropriately
- to inform the complainant/reporter as to the outcome of their complaint/disclosure
- to protect the confidentiality of both the complainant and the subject of disclosure, where and while such an approach is both practicable and reasonable.

Is there a need for standardisation or amalgamation of equivalent aspects of complaint legislation?

The time has come for consideration to be given to the possibility of standardising or amalgamating equivalent aspects of complaint legislation in NSW to provide, for example, that anybody who makes a complaint/disclosure in good faith to any public body can rely on certain standard protections re harassment, prejudice in employment, defamation, civil actions, etc.

In relation to public sector whistleblowers, the focus of PID legislation should then be on what to do with disclosures and the people who make them, ie ensuring disclosures are properly dealt with and whistleblowers are properly managed and protected in the workplace.

What is the need for and what should be the roles of an oversight agency?

What are the key problems with the current implementation of the Act?

There are a number of key problems with the current implementation of the *Protected Disclosures Act* which could be addressed through the establishment of an appropriately resourced oversight body. These problems include:

- (1) there is no government organisation with ownership of the Act – with responsibility to make sure that the Act is working effectively
- (2) there is far too little information available to determine how the Act is working, for example:
 - how many disclosures are made each year and to which agencies
 - the nature of those disclosures
 - whether they indicate any systemic issues
 - how well those disclosures were dealt with either generally or by particular agencies, and
 - how things could be improved, etc
- (3) while some of the larger organisations have the ability to designate and train specific staff to perform protected disclosure type roles, for most organisations the receipt of a protected disclosure is a rare event for which they have no staff who are appropriately trained or experienced
- (4) there is no prosecuting body for offences under the Act.

What are the possible roles that could be performed by an oversight body?

A body with the function to oversight the implementation of the *Protected Disclosures Act* could have the following functions:

- (1) Notifications:
 - **being notified of all protected disclosures made to NSW agencies**
 - **being informed by agencies as to how disclosures were dealt with and resolved**
- (2) Investigations:
 - providing advice to agencies in relation to investigations they are undertaking
 - **oversighting investigations undertaken by agencies**
 - **taking over investigations from agencies**
- (3) Protection of whistleblowers – internal witness support and management:
 - providing advice in relation to the protection of whistleblowers/internal witnesses
 - **providing remedial action for a person who has suffered detriment**
 - **determining legitimate compensation needs of people who have suffered detriment**
 - **prosecuting for breaches of the PD Act**

- (4) Training:
- promoting the objects of the legislation, including public education
 - providing training for public officials charged with responsibilities under the Act
- (5) Procedures and guidelines:
- **publishing model procedures for the administration of the legislation, with which agencies' internal processes must be consistent**
 - publishing guidelines to assist agencies in the implementation of the legislation
- (6) Reviews/monitoring/evaluation:
- **preparing an annual report to Parliament each year on the operation of the legislation**
 - **undertaking annual reviews of the legislation**
 - keeping disclosure handling systems within agencies under review.

Depending on which roles it is thought appropriate to be performed by an oversight body, a number would require statutory power/authorisation, for example those listed above in bold.

Examples of models that could be used for such an oversight function would be the Ombudsman's oversight function in relation to police complaints (see Part 8A, *Police Act 1990*) and the Ombudsman's oversight role in relation to allegations concerning child protection in the workplace (see Part 3A, *Ombudsman Act 1974*).

The powers of the Ombudsman under the above mentioned oversight provisions include:

- being notified of complaints/allegations (subject to class and kind agreements with various agencies under which it is agreed that certain matters need not be notified or can be notified by schedule)
 - being able to give advice to an agency as to how a matter should be dealt with
 - assessing the standard of agency investigations and their outcomes to see if they are reasonable
 - taking over a matter or an investigation where it is deemed appropriate to do so in the public interest (eg, in particularly sensitive matters or where an agency has demonstrated an inability to do so properly)
 - keeping complaint handling systems under review.
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PROTECTIONS FOR COMPLAINANTS

Complaints/ Reports	Act	Eligibility Criteria	Criminal Offence for det action, etc	Reverse onus of proof	Absolute privilege	Protection from actions	FOI exemption for agency or issue
Any person	Ombo Act	-	✓	✓	✓	✓	✓
Any person	ICAC Act	-	✓	✓	✓	✓	✓
Any person	PIC Act	-	✓	✓	✓	✓	✓
Public officials	PD Act	✓ (Numerous)	✓	✓	✓	✓	✓
FOI applicants	FOI Act & Ombo Act	-	** ✓	** ✓	** ✓	** ✓	** ✓
Any person	CS-CRAMA Act & Ombo Act	✓ (Genuine concern)	✓	** ✓	** ✓	** ✓	** ✓
Public officials	Pub Fin & Audit Act	✓ (Public officials)	*** ✓	*** ✓	*** ✓	*** ✓	✓
Public officials	LG Act – s.429A	✓ (Public officials)	*** ✓	*** ✓	*** ✓	*** ✓	*** ✓
Police	Police Act	-	✓	In part	-	-	-
Any person	HCC Act	-	✓	-	✓	-	✓
Any person	PIIP Act	*-	-	-	✓	✓	✓
Any person	HRIP Act	*-	In part	-	✓	✓	✓
Any person	ADB Act	-	-	-	✓	-	-
Any person	Legal Prof Act	-	-	-	✓	-	✓
Any person	LG Act – s.460	✓ (Stat dec)	-	-	-	-	-

* 6 month time limit

** As for *Ombudsman Act*

*** As for PD Act