

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

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Date received: 26/11/2008

Partially Confidential

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To the Committee on the Independent Commission Against Corruption.

November 2008.

Introduction

In my submission the Protected Disclosures Act 1994 (the Act) is entirely inadequate for the purpose of encouraging and facilitating disclosures in the public interest and should be fundamentally overhauled in the ways I suggest below.

The submission addresses what I consider to be the most pressing in wanting to persuade the Committee that the Act could, with appropriate amendments like those set below, actually operate to satisfy its public interest purposes.

A. 'Encourage and facilitate' in the public interest [s.3(1)]

A1. True to its name, not its purpose.

The, public interest purposes set out in s.3 of the Protected Disclosures Act NSW 1994 (the Act) are generally not evident in the rest of the provisions of the Act, because they concern themselves with defining and constraining the nature and effect of 'protected' disclosures, rather than encouraging and facilitating public interest disclosures or disclosures 'in the public interest'. That is, I think the Act is and has remained true to its name and not it's objects or purposes.

You see disclosures in the public interest or public interest disclosures are not defined. Only 'protected' disclosures' are defined: defined to mean disclosures that satisfy the 'applicable requirements of Part 2' of the Act, which Part, most importantly, does not refer to or rely on a disclosure being in the public interest.

I think it fair to say that in the absence of any other definition, Part 2 effectively defines a disclosure under the Act as a 'protected disclosure' made in accordance with other and related acts like that of the Ombudsman (s.10). Which is to say that the provisions of the Act are for the most part, inconsistent with its object, because the Act defines the 'character' of a disclosure by what gives it its protected status rather than by its purpose.

In its operation and effect the Act has been drafted to encourage and facilitate 'protected disclosures': a particular conception that is not necessarily a disclosure in the public interest or in the public's interest in encouraging and facilitating whistleblowing.

Therefore as a first step and to ensure that the Act *actually* satisfies its public interest purpose, the Act:

1. should be renamed the Public Interest Disclosures Act (PID act),
2. re-drafted to ensure that disclosures made under the Act are interchangeably referred to as disclosures in the public interest or public interest disclosures, and
3. a public interest test should be applied in determining and dealing with all other aspects in amending *and then* implementing the Act so as to give full effect to the stated purposes of the Act in the public interest.

A2. Public interest disclosures, in the Public Interest.

An ordinary person and potential whistleblower should be able to just apply a public interest concept or test to any given set of circumstances to be able to use and rely on the Act. They should be able to determine whether or not those circumstances disclose matters, which if disclosed would serve the public's interest of having the alleged wrongdoing stopped and put to rights.

An ordinary person should also be able to distinguish between a public

interest disclosure for the purposes of the Act and a disclosure that is confined (only) to a personal grievance or workplace complaint.

This could easily be achieved by drafting a provision based on just two requirements. One, whether the conduct and circumstances as alleged and disclosed by the whistleblower is, *prima facie*, *contrary to or not* in the public interest. And two whether the public interest disclosure is made pursuant to the act.

A suggestion as to the wording is as follows:

For the purposes of this Act a public interest disclosure is a disclosure where:

- (a) the conduct and circumstances alleged and disclosed by the whistleblower are *prima facie contrary to and not in* the public interest and
- (b) the disclosure is made pursuant to this Act.

The phrase '*contrary to and not in*' is expressed in the negative, because it would impose *a wider more objective appreciation of what lies in the public interest on the assessor and avoid the very human temptation to exclude all but the assessor's personal preferences.*

The, second question, whether the disclosure was made pursuant to the act should be resolved by an assessment of whether or not, based on all of the circumstances, the disclosure *generally* conformed with the requirements of the act.

This conception is easily understood in society and can be readily applied in a court.

Using a test like this: one that is *assumes* the truth of the whistleblower's disclosure for the purpose of establishing whether or not the conduct and circumstances (eg. apparent medical research fraud) is or is not in the public

interest, avoids the need to do anything other than to sit quietly, think and ask yourself the question. That is, only thought, not investigation, is required as a preliminary matter.

A3. Protect the person, not the disclosure.

The separate question of whether or not the whistleblower should be afforded protection under the Act could be drafted in such a way as to build on the above assessment (item A2 above) so as to include the following three requirements that the disclosure was (1) substantially a public interest disclosure, (2) as defined by the act and 93) made with the honest belief as to its truth.

Note the use of the word 'substantially' is intended to recognise and allow for the situation in which, a public interest disclosure may contain some element of a grievance or workplace complaint, it is still 'substantially' a public interest disclosure and so, deserving of protection. "*Substantially*" is preferred, because it raises concepts of quantity and proportion as well as those of essential or fundamental character or purpose.

This would strike the right balance between what is reasonable and more likely than not to achieve the overriding purpose of the Act of 'encouraging and facilitating' the public's interest in actually protecting the whistleblower, not the disclosure.

A4. There should be a presumption as to protection.

I would argue there are very good reasons why there should be a presumption as to protection: that is only resolved, if it ever needs to be resolved at all, at the point at which the whistleblower seeks to raise it as a bar to litigation under s.21 of the Act.

That is, at all times before and leading up to that point, that endgame: each and every player in the process should be working from a position that any and all available protection is to be afforded in the public interest, because it would work towards preventing reprisals that might otherwise be inflicted.

There is little to be gained and a lot to be lost in continuing with the present arrangement: one which allows for the ill informed and ungenerous souls with an overly legalistic approach to life to avoid or even deny doing what I suggest is obviously reasonable, sensible, practical, *likely to be effective its application in terms of the public interest purposes set up by the Act.*

A5. The public has an interest in the private sector.

Even if, in 1994 the legislature could have been forgiven for not appreciating that the public interest extended much more widely than government spending and accountability, the same can't be said now. Not after extensive outsourcing and privatisation of public assets. Not after seeing the enormous public havoc and harm caused by for example the HIH, OneTel, AWB and now, the sub prime mortgage scandals. The public thinking has changed as we have come to fully appreciate just how much an ethical, accountable and properly run public **and** private sector is *in the public interest*. And just how inappropriate and inadequate the existing Act is in encouraging and facilitating disclosures that serve that public interest.

The legislature should consider extending the application of the Act to include disclosures from a 'whistleblower' or 'any person' in the public interest: although I suggest the Act should not define 'a person' to include particular categories like corporate and other employees, contractors and agents as it is unnecessary and may prove counter productive by encouraging and facilitating delay, and litigation as to whether or not a particular person is a whistleblower or 'person' for the purposes of the act.

In other words the Act needs to be as broad in its application as it can be, and

allow disclosures from a 'whistleblower' or 'a person', otherwise it is a brake on the public's interest in getting a public interest disclosure looked at and sorted in a timely way.

B. Section 3(1)(a): enhancing and augmenting (existing) procedures.

B1. Separating public interest disclosures from personal grievances.

In the intervening years since the Act took effect existing complaints handling systems for grievances or workplace complaints have been adapted to accommodate 'protected disclosures' without ensuring that public interest disclosures (PIDs) were handled separately and differently from workplace complaints. For example, I have seen mediation used for both: mediation is entirely *inappropriate* to resolve a public interest disclosure.

More importantly those implementing & using the system were not educated about the significance of the 'public interest' in making a disclosure. The result has been that both streams have suffered at the hands of people who were untrained, ill informed and or indifferent to the distinctions to be drawn between the two streams. It has been a serious failure in public education and has worked against the objects of the Act.

Legislation and a stand alone agency (PIDA) should be put in place to ensure that all the users are educated about the fundamental distinction to be drawn between a *public* interest disclosure and a *personal* grievance or self interested complaint and why it matters that they get it right.

B2. The 'Confidentiality Guideline' under s.22

Section 22 of the Act recognises the difference between a public interest disclosure and a self-interested complaint or grievance by requiring the investigating authority not to routinely disclose information that 'might identify or tend to identify' the whistleblower, as they might in the ordinary course of

dealing with complaints. Because the circumstances a whistleblower complains about usually do not personally involve the whistleblower.

That is, it is mostly not necessary and the agency needs to be constrained from inadvertently treating PIDs like their other disclosures or complaints, without first making a proper assessment and, if the public interest requires it, obtaining the whistleblower's consent so to do.

Section 22 should operate as an effective constraint on the agency so as to (1) protect whistleblowers from reprisals, which otherwise might be inflicted and (2) to condition the method of investigation.

Sloppy, lazy thinking and work should not be a reason for inadvertently exposing a whistleblower to unnecessary risk. That is, the investigative agency should be required to fully inform the whistleblower as to their reasons and reasoning (using the alleged facts) for wanting the whistleblower's consent and it must be couched as a formal request for consent. Not as I have seen it: where the agency simply informed it would not be proceeding with an investigation unless it could reveal the whistleblower's identity. This amendment should be drafted in such a way as to ensure the issue of identity is never used as a precondition to the investigation proceeding.

This failure in thinking and public policy has resulted in some quite perverse outcomes in the workplace, where whistleblowers are routinely encouraged to accept that the only way they can be protected is by keeping the entire matter, from the point of making the disclosure, strictly confidential. In practice it has even been imposed as requirement on the whistleblower: not the employer and sometimes, even as a requirement to keep everything strictly confidential under threat of possible disciplinary action.

I understand that this sort of policy action has emerged out of woolly headed thinking about how best to progress the investigation of person grievances. It is wrong thinking both in terms of grievances and public interest disclosures. And it can and does have the effect of completely isolating the whistleblower

from their support base and puts them at risk of a tardy, possibly vindictive employer. It allows an unhealthy level of secrecy and false innuendo to develop, because in the effect, both groups are being treated as if they had been charged and bailed, on condition they don't approach anyone involved in the matter. This is wrong, contrary to the public interest and a complete failure in public education and policy.

Finally the reader should appreciate that section 22 is supposed to operate to protect whistleblowers **from** reprisals and in large part, s.22 makes it the whistleblower's call. And that's as it should be.

Also that neither section 22 or any other part of the Act requires the whistleblower to keep the disclosure confidential. And that's how it should remain: if whistleblowing is to become the norm.

That is, the Act should require the employer or other agency to encourage the whistleblower to be open and confident in the knowledge that the employer or agency will act consistently with its obligations under the Act to protect them from the reprisals that otherwise might be inflicted. That's how it should be.

Note finally that section 22 is the only preventative protection available under the Act, but it has never been understood or put forward as that. It should be. It is an urgent public and professional education issue.

B3. Pro active ways to educate and promote the objects of the Act.

The Act could and should *require* an employer and or investigative body to take a principled *and public position* in dealing with a PID or an alleged reprisal.

I can envisage a **system of public disclosure** *requiring* the receipt of a PID to be disclosed on the basis that it is in the public interest to do so. A system that: *routinely required* the authority or agency to issue a formal notice or

circular in general terms, with copy to the whistleblower, but with sufficient identifying information to disclose the nature of the PID or any other milestone as follows.

For example: (1) a public interest disclosure lodged pursuant to the PID act, concerning possible medical research fraud is being investigated; (2) all staff are reminded that reprisals taken against a person believed to have made the PID could be held criminally liable for an offence under s.20 of the Act and (3) [a general warning that] reprisal action will not tolerated in any circumstances.

Another example, to apply in regard to alleged reprisals might be: (1) a personal grievance about bullying lodged pursuant to s.20 of the Act is being investigated; (2) all staff are reminded that reprisals taken against a person believed to have made a PID could be held criminally liable for an offence under s.20 of the Act and (3) [a general warning that] reprisal action will not tolerated in any circumstances.

Another example is the final outcome of the investigation itself, including the reasons, outcomes and any other matter arising, where it would be in the public interest to do so.

It would resonate with all of those involved and send a clear signal to the whistleblower's detractors to pull their nose in before it was too late and reassure those who, (like the whistleblower but for different reasons) had been feeling cornered, feeling that their employer could not be trusted to do the right thing for the right reasons. It is a method as old as time itself **and** one that would serve to keep the authority or agency from straying, when it needed it most.

C. Section 3(1)(b): 'protecting persons from reprisals'.

The Act does nothing to satisfy the terms of s.3(1)(b) in 'protecting persons from reprisals', unless you still take the view after nearly 13 years that a

deterrent (alone) will suffice. That ostracism, harassment, constructive and actual dismissal and all the things between are not reprisals. Because the existing protections, although worthy, do not protect persons **from** reprisals: because they all assume, with one exception, what I would call an end game. An end game in which, (eg) a whistleblower is the victim (and the witness) in a police prosecution under s.20 or is being sued for defamation or breach of confidence.

Even so those protections are important and should remain and be augmented to include other more relevant 'end game' protections like (1) standing to bring a civil suit in damages and (2) a claim for compensation as a victim of a (s.20) crime. Both would be effective, as a deterrent **and** by putting things to rights in the event the Act failed in its to operation and effect, to protect the whistleblower **from** reprisals.

But the Act must be amended to satisfy s.3(1) so as to actually provide protection **from** reprisals consistent with s.3(1)(b), because there are none presently.

The starting point might be to ensure that s.22 operates properly as the preventative protection I think it was intended to be (see above, under item 2).

The second is to allow a whistleblower (or a PIDA) to seek and obtain injunctive relief, to restrain 'any' person from taking the reprisals that 'otherwise might be inflicted' *in the public interest and based on the usual precautionary principles of avoiding harm*. A court should be able to apply a penalty against the employer or other in the event the whistleblower is granted relief. That is, the public interest must be upfront and centre in the court's considerations.

The third need is for an employer or investigative body to take a formal, principled *and public position*, on being made aware of possible reprisal actions having been inflicted and at the end; when the wrongdoing disclosed by the public interest disclosure has been investigated and fully dealt with

(see under C above).

These and other amendments like them would also operate together as a deterrent and as a powerful incentive for the employer or a dedicated Public Interest Disclosure Agency (see C above) to take the required proactive, principled & transparent action at the coal face, in 'protecting a person *from* reprisals that otherwise might be inflicted.'

D. Section 3(1)(c): providing for disclosures to be properly investigated.

The Act does not actually provide for disclosures to be properly investigated at all, so it shouldn't come as a surprise that:

(1). Disclosures are languish for one reason or another until considered no longer relevant; when the whistleblower has been sacked or moved off the payroll, onto the workers compensation insurer's list of claimants.

(2). The decision to investigate is often wrongly predicated on the whistleblower's bona fides, credibility and poor performance record (real or imagined).

(3). Investigating authorities often disclose the whistleblower's identity when there is no need and no permission (s.22) so to do.

(4). The investigation usually ignores any sense of imminent harm, even though on the face of it, further or continuing harm is more likely than not.

(5). It is usually so ineptly done and so inadequate in its result, it necessarily raises a suspicion that it amounts to a cover-up, which can in turn prove a useful distraction for those wanting to derail further investigations.

...

The Act must be amended to provide a set of criteria for the investigation of public interest disclosures that are defined in terms of the public interest and geared to regulate [under threat of a penalty] things like: what may not influence or be taken into account (eg. whistleblower's bona fides), in deciding whether or not to proceed with an investigation, including the whistleblower in the investigation process, set out the investigative duties in terms of methodology and procedures (eg. s.22), timelines, the requirement to provide decisions and reasons and for any formal decisions, with those decisions to be subject to review, based on whether the decision was both reasonable and served the public interest.

E. Qui tam actions are just another way.

The Committee should give consideration to introducing Qui tam actions.

Please note Qui tam actions pursuant to the USA False Claims Act (FCA) have established and existing precedents in our law. They rely on a 12th century English common law action, which allowed a person to sue as a relator, that is, he sued for the Crown as much as he sued for himself.

The FCA also utilises current common law concepts of punitive damages, in allowing a court to treble the amount falsely claimed against the government when determining the judgment amount as a penalty for a breach of the Act. The court can award a whistleblower between 15-20% of the judgment amount in compensation for the risk of taking the action: the balance is paid to the Government.

In short, there is no inherent obstacle to the inclusion of a qui tam or relator action in Australian law and research readily available on the internet, indicates the FCA is considered to be one of the most effective tools in the history of the USA, for recouping government finances.

I envisage a provision to the Act that encourages, facilitates and allow public interest disclosures to be made by a whistleblower or person to either:

1. an employer or third party including an MP or journalist or
2. where, the public interest disclosure relates to a false claim having been made against the government,
3. as a relator in a qui tam action filed in a court of competent jurisdiction.

The Act should adapt the rest of the FCA 'system' to our jurisdiction and also extend the matters able to be disclosed in the public interest to include public health, safety, environmental harm and to allow for future categories not now apparent.

F. Remove restriction to making a disclosure to an MP or journalist.

In my observation the existing time based restrictions have seldom served the public interest. They have tended to protect wrongdoers from accountability, by providing them with opportunities to cover their tracks and avoid an investigation. That is, time based restrictions have tended to operate mainly as a delaying mechanism and have failed to encourage and facilitate the timely in-house rectification of wrongdoing by the accused agency, contrary to what you might have thought might have been the result.

...

...

... The lesson is that the opportunity to do the right thing, when there is a vested interest is not enough to drive proper decisions. The possibility of embarrassment, of being seen to be culpable generally drives the issue underground and into cover-up, not timely investigation and resolution.

I believe a time based restriction or indeed any restriction on making disclosures to third parties is not warranted: not by the history and not by any cockeyed notion that organisational actors will see sense if they are given an opportunity and will not just do nothing, hoping that the whole issue will just go away over the next six months if they give the whistleblower a hard time.

God forbid but if it was the view of the Committee that a time based restriction should be retained, I would recommend a 'public interest test' be applied, together with a mandatory process that restricts and takes account of the natural tendency to want to do nothing, particularly when embarrassment threatens. That is, a carrot, but with conditions.

A system that required the agency to do a preliminary prima facie assessment as to the degree of urgency and nature of the disclosure to determine whether and why a six month delay to media or political exposure would not be contrary to the public interest. The assessment would be carried out (only) by senior well qualified personnel, within say three to five days and assume (for the purpose) that the disclosure (allegations) was essentially correct. The

agency would be required to notify the whistleblower of its decision and reasons for the decision in writing, in 7 days taken from the date of their receipt of the disclosure. Need will drive efficiency.

In the event the whistleblower took the same or substantially the same disclosure immediately, to an MP or journalist, the agency would be able seek restraining orders and it should bear the onus, of establishing that its decision was not contrary to the public interest and that it had complied with the process in a reasonable time. Why? Because the authority has the information and it should be *obliged* to open itself to scrutiny in the public interest.

In the event the agency failed to notify its decision within 14 days, the whistleblower would be at liberty to take the public interest disclosure immediately to the media or a parliamentarian, without suffering a potential loss of protections under the act.

If on receiving the notice and reasons, the whistleblower determined that disclosure to another and different agency or body would have been more appropriate in the first instance, the whistleblower would be entitled to lodge it with another body, without losing protection under the act. For example, a disclosure may at first glance appear suitable for an agency like the ICAC, but in hindsight appear more appropriate for the Ombudsman.

In my submission if an agency is properly motivated with the sort of measures set out above it will want to correct identified wrongdoing and take immediate steps to do that; but the motivation has to be there, so the Act needs to take account of both the history and human frailty. I believe a process, which puts the public interest front and centre like this, will do that.

G. A dedicated Public Interest Disclosure Agency (PIDA).

I generally support the Committee's recommendation in the last Report for the creation of a separate agency to administer and enforce the Act, but not as a part of any other existing authority. I will call it the Public Interest Disclosure Agency or PIDA, for this purpose.

I do not support a PIDA being responsible for the investigation of the public interest disclosures **as well as** alleged reprisals. I believe the former should be left with the existing investigative agencies referred to in the Act, which have the qualities and experience to do that job well, if not also required to support and protect a whistleblower.

I see a PIDA being restricted to those things that directly support the whistleblower, which would mean for example, it would work as a clearing house and registry for public interest disclosures made pursuant to the act, could and should investigate and litigate the alleged reprisals, be at liberty to seek injunctive relief, where the public interest required it and have responsibility for public education, research and monitoring the handling of public interest disclosures in accordance with the act and report to Parliament so as to encourage and facilitate disclosures in the public interest.

Another reason why I say a PIDA should be restricted in what it can investigate, is because the role of fully supporting a whistleblower can be fundamentally opposed to need of an investigator/prosecutor to ensure that there is not so much as a hint or suggestion that the whistleblower's evidence (in relation to the public interest disclosure) might have been compromised by the protection and support he or she has been afforded by the PIDA in its supportive function. This potential for conflict is real and would effectively tie the hands of a PIDA and defeat the overriding supportive purposes of a PIDA.

In my experience perception can be everything and here, it would be fatal for other reasons too. When a whistleblower realises that no one appears to be responsible for his support and protection other than doing what it takes to safeguard his evidence for the trial, he becomes increasingly agitated, perhaps even sick, and will want to drop out of the process with the

knowledge that the risks are all his. I think it won't work: that a regulator's role is obviously and fundamentally incompatible with whistleblower support and protection.

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November 2008.