

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

Organisation:

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Partially Confidential

SUMMARY

Proposal 5

- Comments from report 12/53 of ICAC Committee
- Rights of respondent
- Procedural fairness
- Rigour of investigation
- “honest belief” tested by objective criteria of “reasonable grounds” by the investigator
- statistics cited in previous review
- consideration of respondent’s rights and welfare

Proposal 14

- statistics on vexatious complaints
- deterrence

Protection of public sector whistleblower employees: Discussion Paper

I wish to address Proposal 5 and Proposal 14. of the List of Proposals

In addressing the effectiveness, fairness and administration of the Protected Disclosures Act 1994, there is a subtext which ignores the treatment of those accused of wrong doing. In Report No 12/53 of the Committee on the ICAC, there is a recurring theme that the act has been used to air personal grievances. It is surprising and wrong that those who are the victims of frivolous or vexatious complaints are rarely mentioned.

The former Minister for Planning, The Hon Frank Sartor stated in his submission (received 10 Feb 2006) to the previous review,

Consideration should be given as to how best to prevent any potential abuse of the system by people wishing to air grievances that are of a lesser nature.

In the submissions to that committee, there is an ongoing theme concerning “grievances ‘dressed up’ as allegations”.

I refer to Annexure 5 from p 73

It is suggested that Section 16 of the Act be strengthened to provide greater deterrence against frivolous or vexatious disclosures

Minister for Lands - received 19 July 2005

The experience across NSW Health is that a significant number of protected disclosures tend on review to be grievances ‘dressed up’ as allegations...

NSW Health Submission - received 23 August 2005

Many complaints and allegations lodged as protected disclosures are workplace grievances.

DG DET- received 29 August 2005

A problem that has been identified by the Department is the intentional or mistaken misuse of the PD Act, in relation to allegations of harassment or as a means to air internal grievances...

Minister Sartor- Minister for Planning -received 10 Feb 2006

The committee is no doubt mindful of the fact for all every false or vexatious allegation there is an employee who may be seriously impacted. As Dr Wagener said in his submission "the respondent to a protected disclosure is treated like a criminal". (p46)

Indeed a respondent appears to have fewer rights or protections than a person charged with a criminal offence.

I have personal experience of the need to administer the Protected Disclosures Act 1994 with the greatest rigour and transparency. If not there may be significant negative consequences for the person against whom allegations are made. There is also needless waste of money and a diversion of resources from areas where there may be real corrupt conduct, maladministration or waste.

I note on page 33 of the Discussion Paper that Mr Marley, the Protected Disclosures Coordinator for DET states that the assessment of the accusation "involves meeting with the person". This seems an extremely ineffective and useless way of proceeding. One's first thought is that the complainant would say that, wouldn't

he? I would consider some objective investigation of the basic facts of the accusation would be more productive.

The notion that a complainant may have "an honest belief" must be tested by "reasonable grounds". This surely must involve some checking of the veracity of the claims, otherwise time and money is wasted on personal grievances or irrational accusations. Some preliminary investigation into the credibility of the complainant and an examination of the documentary evidence is vital to establish the basis to investigate fully.

In the submissions by NSW departments to the previous review, it is worth looking at the numbers that are cited. Of those which mentioned the use of the act it is found that

Dept of Community Service states "minimal involvement with this legislation"

Sydney Catchment Authority- between 1999 and 1 September 2005 - 1 case

Blacktown Council -1 in two years

Ministry of Transport - between 28 April 2003 and 5 September 2005 - 3 cases

Rail Corp- "In the last 18 months alone RailCorp has received 22 protected disclosures.

In a small number of cases, once the circumstances were revealed it was recommended to the person making the report that the matter be classified as a Protected Disclosure and treated as such."

Department of the Environment - in 12 months - 1 case

Department of Education- "During 2004, 39 per cent (41 cases) of complaints registered..."

Taking into account the size of the DET, on this evidence it seems that the DET Audit Branch has an extraordinarily high level of protected disclosures - from all one hundred and one (101) complaints, forty-one (41) are Protected Disclosures. This strongly supports the notion that very inadequate investigation is made before the respondent is accused.

In the previous review the respondent has little or no voice. The Ombudsman's Fact Sheet gives little guidance and is open to many interpretations

BE FAIR TO ANY PERSON WHO HAS BEEN ACCUSED OF WRONGDOING

The process of finding out the truth of allegations should be impartial. This means you do not take sides and do not have a preconceived outcome in mind.

Any person who has been accused of wrongdoing must be given an opportunity to put forward their response to any allegations made against them. However, he or she does not have the right to have any information about who has made the allegations (except where the matter results in disciplinary or criminal proceedings).

Thus "honest belief" must be rigorously tested by "on reasonable grounds", that is by the investigating authority.

Proposal 14

A question that should be answered is how many vexatious or frivolous complaints have been made. If there is a perception that there will be no consequences for making such a complaint there is no deterrent to doing so. This evidence should also be made available to the public.

In addition, appropriate investigation in most cases may involve contact with the supervisor in the public authority and this would instigate procedures for dealing with workplace issues.