

INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

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Date received: 13/11/2008

Our reference : ED08/2026
Contact : Tim Rogers

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

Dear Mr Terenzini

13/11/08

I refer to your letter dated 20 October 2008 seeking a submission from the Department of Environment and Climate Change (DECC) and attendance at the public hearings for the inquiry into the protection of public sector whistleblower employees.

I understand that the purpose of the inquiry is to inquire into and report on the effectiveness of current laws, practices and procedures in protecting whistle blower employees who make allegations against government officials and members of Parliament.

The Department of Environment and Climate Change has developed and promoted specific guidelines and procedures to facilitate disclosures and ensure the necessary safeguards are in place. These procedures are available on DECC's intranet website and are further outlined in the attached submission to the inquiry.

DECC has received few approaches under the *Protected Disclosures Act 1994*. Since 2003 when the Department of Environment and Conservation was formed there have been six disclosures. In managing these disclosures DECC has not experienced any problems with the application of the Act.

I confirm that the DECC representatives who will give evidence at the inquiry on 24 November 2008 are Tim Rogers, Executive Director Departmental Performance Management and Communication and Catherine Donnellan, Director Corporate Governance.

If you have any queries regarding this matter, please do not hesitate to contact me or have your staff contact Tim Rogers

Yours sincerely



JOE WOODWARD
Acting Director General

Enclosure

The Department of Environment and Conservation NSW is now known as
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Department of **Environment & Climate Change** NSW



DEPARTMENT OF ENVIRONMENT AND CLIMATE CHANGE

SUBMISSION

INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

1. Introduction

The Executive of the Department of Environment and Climate Change (DECC) is conscious of its responsibility to ensure that fair and ethical policies, systems and procedures are in place for all aspects of DECC's work. Equally important is the need to have effective and accessible mechanisms for identifying and responding to potentially unethical or corrupt conduct or practices as they arise.

To retain community, stakeholder and Government confidence DECC maintains the commitment to having a good ethical framework and culture that staff understand and support to foster and sustain DECC's good public standing.

2. DECC policies and procedures

Consistent with its strong commitment to ensuring an ethical workplace, DECC has developed and published policies and processes to facilitate the reporting of suspicions of corrupt conduct, maladministration, or serious and substantial waste of public money.

Guidance material – *Making a Protected Disclosure* helps staff make protected disclosures in accordance with the *Protected Disclosures Act 1994*. The guidance is available on DECC's website and is attached to this submission.

DECC has developed a *Code of Ethical Conduct* which describes the ethical framework which guides the actions, decisions and behaviour of DECC employees. This Code also references the DECC guidance *Making a Protected Disclosure*.

The guidance is also referred to in DECC's *Fraud and Corruption Prevention Strategy*. This strategy details DECC's approach to the prevention, detection, reporting and investigation of fraud and corruption. It also identifies activities that may be susceptible to fraud and corruption.

All of these policies are readily accessible by staff on the DECC intranet site.

DECC has an online induction course for new employees where all of these policies and guidelines are introduced and explained.

A series of short training courses on a range of ethics related issues including protected disclosure is being prepared as a refresher for staff.

DECC undertakes a comprehensive Fraud and Corruption Assessment every three years to identify areas within the agency where there are potential

risks of fraud and corruption. The last was undertaken in 2005-06 and an agency-wide general risk assessment was undertaken in 2007-08. A Fraud and Corruption Risk Assessment is being considered for 2008-09.

DECC has processes in place to report allegations of fraud and corruption, and these matters are referred to ICAC or independently investigated by the Internal Audit Bureau as appropriate. Allegations of fraud /corruption, together with actions taken, are reported quarterly to the DECC Internal Audit Committee.

3. DECC experience in managing protected disclosures

Internal disclosures are made to DECC's disclosure coordinator - the Director Corporate Governance, a *nominated disclosure officer* (all Directors and above), or the Director-General.

Since 2003 DECC has received 6 protected disclosures. These have been fairly evenly spaced and there is no trend.

Although the information about how to make a protected disclosure is widely available and referenced, the small number of disclosures does not provide a basis for making recommendations about the system.

In DECC's view, the Act is a viable mechanism for encouraging staff to report suspected incidences of corrupt conduct, maladministration and serious and substantial waste. The existence of the Act and the accessibility for staff to the safeguards it provides are key components of DECC's Fraud and Corruption Control Strategy.

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DECC is strongly committed to an ethical workplace. Corrupt conduct, maladministration or serious and substantial waste of public money must be reported. Consistent with this requirement, DECC has developed the policies and processes described in this document to help staff make a protected disclosure under the Protected Disclosures Act 1994.

A protected disclosure is a statement or report made to a reporting officer about DECC or its staff engaging in corrupt conduct, maladministration or serious and substantial waste of public money. A person who makes a protected disclosure is entitled by law to protection from any detrimental action that might be taken in reprisal.

DECC is committed to the Protected Disclosures Act and will take all reasonable steps to support staff who make a protected disclosure.

This policy and the protected disclosure reporting system complement existing communication channels between supervisors and staff. You are encouraged to continue to raise appropriate matters at any time with your supervisor, but as an alternative you have the option of making a protected disclosure.

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Object of the Act

The purpose of the Act is to ensure that staff who wish to make disclosures under the legislation receive protection from reprisals, and that the matters raised in the disclosures are properly investigated. The Act encourages and facilitates the disclosure of corrupt conduct, maladministration and serious and substantial waste in the public sector. This is achieved by:

- Setting up procedures for making disclosures concerning such matters;
- Protecting people from reprisals that might otherwise be inflicted on them because of these disclosures; and
- Providing for those disclosures to be properly investigated and dealt with.

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Disclosures Protected Under the Act

The Act sets some important threshold for protection. To be protected, a disclosure must:

- Be made voluntarily
- Be made to the DECC's Disclosure Coordinator (Director Corporate Governance), nominated Disclosure Officers (all Directors and above) or the Director General, or to an Investigating Authority under the Act, such as the Independent Commission Against Corruption, Ombudsman or the Auditor- General. A "disclosure" to any other party does not generally provide protection to officers in that circumstance.
- Show or tend to show corrupt conduct, maladministration, or serious and substantial waste of public money

by DECC or any of its staff (see Attachment A for definitions).

A disclosure that meets these requirements would still be protected even if, upon investigation, the allegations were found to be unsubstantiated.

Any disclosure that is found to be:

- frivolous or vexatious;
- focussed on the merits of government policy;
- made in order to avoid dismissal or other disciplinary action is not a protected disclosure under the Act.

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DECC's Protected Disclosure Reporting System

You can make an internal disclosure to the following officers:

- The Director Corporate Governance (DECC's disclosure coordinator);
- A nominated Disclosure Officer (all Directors and above);
- The Director General.

If you are contemplating making a disclosure and are concerned about publicly approaching these officers, you may request a meeting in a discreet location away from the workplace. Alternatively you may prefer to contact an external body – the Ombudsman, the ICAC or the Auditor-General – as described below.

Anonymous reports will be accepted. However, it is preferable that reports are not made anonymously so that you can be contacted if further information or clarification is required.

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Roles and Responsibilities of DECC Staff

We all have a part to play in the system:

Staff

We must all report known or suspected incidents of corrupt conduct, maladministration or serious and substantial

waste. We also have an important role to play in supporting those who have made legitimate disclosures. We must not take part in any victimisation or harassment of people who make disclosures and we must protect and maintain the confidentiality of people who have made disclosures.

Supervisors/Managers

If you are a supervisor or manager you must establish systems in your work area that will minimise the risk of corruption, maladministration and waste. If you become aware a staff member has made a protected disclosure, you are also responsible for maintaining the confidentiality of all staff involved, and taking steps to ensure that disclosing staff are not disadvantaged. Any concerns about these issues should be directed to the Director Corporate Governance.

Disclosure Officers

Disclosure officers are responsible for receiving and forwarding disclosures and supporting you through the stages of the protected disclosure reporting system. If you wish to make a disclosure, the disclosure officer will:

- Clearly explain the process to you and what will happen in relation to any information received.
- When requested, make arrangements to ensure that the disclosure can be made privately and discreetly (if necessary, away from the workplace).
- Provide you with impartial advice.
- Summarise in writing any verbal disclosure, and have you date and sign the document.
- Forward disclosures to the Director Corporate Governance for assessment.
- Take all necessary and reasonable steps to ensure that your identity and the identity of any person who is the subject of a disclosure, are kept confidential.
- Support you and protect you from victimisation, harassment or any other form of reprisal.

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Protected Disclosure Coordinator

The protected disclosure coordinator (the Director Corporate Governance) has a pivotal role in the protected disclosure

reporting system. The coordinator is not only another avenue for you to make a disclosure, but the main contact point for advice and assistance about the system, and the person most likely to arrange and oversight investigation of the matter.

The protected disclosure coordinator may undertake all the functions of a disclosure officer, as listed above. In addition, the coordinator will:

1. Impartially assess each disclosure to determine whether it appears to be a protected disclosure within the meaning of the Act and to determine the appropriate action to take, such as:

- (a) no action/decline to investigate;
- (b) allocate responsibility for dealing with the disclosure to an appropriate person;
- (c) a preliminary or informal investigation;
- (d) a formal investigation;
- (e) commence a disciplinary process;
- (f) refer the matter to an Investigating Authority for investigation or other appropriate action (Note: corrupt conduct must be reported to the ICAC); or
- (g) refer the matter to the police (if a criminal matter);

2. Consult with the Director General (unless the protected disclosure relates to actions or omissions by the Director General).

3. Be responsible for carrying out or coordinating any internal investigation arising out of a disclosure, subject to the direction of the Director General in carrying out her functions.

4. Report to the Director General on the findings of any investigation and recommended remedial action, except where the complaint involves the Director General.

5. Advise you of the outcome of the process.

6. Report actual or suspected corrupt conduct in a timely manner in order for DECC to comply with the Independent Commission Against Corruption Act 1988.

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The Director General

Disclosures may also be made directly to the Director General. The Director General may undertake all the functions of a disclosure officer or the disclosure coordinator as listed above. In addition the Director General will:

- Receive reports from the disclosure coordinator on the findings of any investigation and any recommendations for remedial action, and determine what action should be taken.
- Take all necessary and reasonable steps to ensure that your identity and the identity of any person who is the subject of a disclosure, are kept confidential.
- Have primary responsibility for protecting staff who make disclosures, or provide information to any internal or external investigation of a disclosure, from victimisation, harassment or any other form of reprisal.
- Be responsible for implementing organisational reform identified as necessary following investigation of a disclosure.
- Report criminal offences to the Police and actual or suspected corrupt conduct to ICAC.

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Alternative Avenues for Disclosures

You are encouraged to raise matters within DECC using the channels described above, but as an alternative, you may contact any of the Investigating Authorities under the Act (ie ICAC, Ombudsman, or the Auditor-General). Contact details are as follows:

Independent Commission Against Corruption

Information and advice concerning exposure and prevention of corruption in the NSW public sector. ICAC focuses on

systemic corruption and may be contacted in regard to protected disclosures relating to corruption and maladministration.

Telephone - 02 8281 5999
Freecall - 1800 463 909
Email - icac@icac.nsw.gov.au
Fax - 02 9264 5364

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NSW Ombudsman

The Ombudsman examines protected disclosures relating to maladministration of government services in NSW and complaints about implementation of the Protected Disclosures Act.

Telephone - 02 9286 1000
Freecall - 1800 451 524 (free call for country callers)
Email - nswombo@ombo.nsw.gov.au
Fax - 02 92893 2911

Auditor-General

The Auditor-General examines protected disclosures relating to serious and substantial wastage of public money.

Telephone - 02 9275 7100
Email - mail@audit.nsw.gov.au
Fax - 02 9275 7200

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Disclosure to Journalists or Members of Parliament

Disclosures made to a journalist or a Member of Parliament will only be protected if the following conditions are met:

- You must have already made substantially the same disclosure through DECC's protected disclosure reporting system or to ICAC, the Ombudsman or the Auditor-General.
- The information provided in the disclosure is substantially true.
- The disclosure coordinator, the Director General or the investigating authority has:
 - (a) decided not to investigate the matter; or
 - (b) decided to investigate the matter but not completed the investigation within six months of the original disclosure; or
 - (c) investigated the matter but has not recommended any

(d) failed to notify you within six months of the disclosure whether the matter is to be investigated.

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Protection Available Under The Act

Protection Against Reprisals

The Act provides protection by imposing penalties on a person who takes 'detrimental action' against another person substantially in reprisal for a protected disclosure. Penalties can be imposed by means of fines and/or imprisonment. 'Detrimental action' means action causing, comprising or involving any of the following:

- Injury, damage or loss;
- Intimidation or harassment;
- Discrimination, disadvantage or adverse treatment in relation to employment;
- Dismissal from, or prejudice in, employment; and
- Disciplinary proceedings.

If you believe that detrimental action is being taken against you substantially in reprisal for making a disclosure in accordance with this policy, you should immediately bring your concerns to the attention of the Director General.

If you feel that reprisals for a disclosure made internally to DECC are not being effectively dealt with, you should contact ICAC. If your disclosure was made to an external investigating authority (eg ICAC, the Ombudsman or the Auditor-General), that body will either deal with the allegation or provide you with advice and guidance.

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Protection Against Actions

You cannot be subjected to an action, claim or demand for making a protected disclosure. This provision applies despite any duty of secrecy or confidentiality or any other restriction on disclosure by a public official. Under the Act you have a defence of absolute privilege in proceedings for defamation. However, these protections

only apply when your disclosure meets the conditions attached to a protected disclosure.

Confidentiality

The Act requires DECC, staff to whom protected disclosures are made or referred, and investigating authorities not to reveal information that might identify or tend to identify the person who made the disclosure. The exceptions to this confidentiality requirement are where:

- You consent in writing to the release of that information.
- It is essential, with regard to the principles of natural justice, that the identifying information be revealed to the person concerned by the information provided by the disclosure.
- The disclosure officer investigating authority believes that disclosure of the identifying information is necessary to investigate the matter effectively.
- Disclosure is otherwise in the public interest.

Decisions about natural justice, effective investigation and public interest will be made by the Disclosure Coordinator. In all cases you will be consulted before such a decision is made. Note: If you need further guidance on any of these points, you should contact ICAC, the Ombudsman, the Auditor-General or DECC's Director Corporate Governance.

Freedom of Information Exemption

Under the Freedom of Information Act 1989, a document is exempt from release if it contains matters relating to a protected disclosure.

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Rights of Staff Who Are Subject to a Disclosure

If you are the subject of a disclosure your rights will also be protected. The investigation will follow the principles of procedural fairness also known as natural justice. Procedural fairness has two elements, the right to be heard and the right of an impartial decision. These rights include the following:

- The confidentiality of your identity in relation to a disclosure will be protected and maintained (where this is possible and reasonable).
- The disclosure will be assessed and acted on impartially, fairly and reasonably.
- Investigations will be undertaken as discreetly as possible.

Before any decision or document is finalised regarding the investigation process, you have the right to be:

- Informed as to the substance of the allegations.
- Informed as to the substance of any adverse comment that may be included in a document arising out of any investigation.
- Given an opportunity to put your case (either orally or in writing) to the persons carrying out the investigation.

Note: If the matter proceeds to formal disciplinary action, you will be informed of details of that process and your rights and entitlements.

Where the allegations have been investigated you will be formally advised of the outcome.

Where the allegations are clearly wrong or unsubstantiated, you will be supported by DECC. The nature of the support will be appropriate to the circumstances of the case.

For more information on investigations, see [DECC's policy and approach for managing external complaints and allegations](#).

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Investigator

The Director General will appoint an appropriately skilled investigator to conduct the investigation. The investigator will have no conflict of interest relating to the matter and be independent of the work area involved.

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Notification of Action Taken or

Proposed

If you make a protected disclosure you must be notified, within six months of the disclosure being made, of the action taken or proposed to be taken. The disclosure coordinator is responsible for this notification unless responsibility has been allocated to another officer by the Director General.

The notification will include a statement of the reasons for the decision made or action taken, or action proposed to be taken. The notification will include sufficient information to enable the person who made the disclosure to assess whether the *circumstances permit disclosure to a Member of Parliament or a journalist.*

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Conclusion

DECC does not tolerate corrupt conduct, maladministration or a serious and substantial waste of public money, and is committed to the aims and objectives of the Protected Disclosures Act.

The protected disclosure reporting system is designed to assist staff to report such matters. A staff member who makes a protected disclosure will not be disadvantaged and will be supported through all stages of the process.

If you have any questions about the processes described in this document please feel free to contact the Director Corporate Governance.

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Definitions

Under the Protected Disclosures Act 1994, a disclosure will only be protected if it 'shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money'. These key concepts are defined as follows:

'Shows or tends to show'

Definitions of 'show' provided by the Ombudsman include 'to prove; demonstrate; plead as a reason or cause;

to produce, as facts in an affidavit or at a hearing; to make evident by appearance, behaviour, etc'.

It will be necessary to do more than merely allege. Matters must be stated which, if substantiated, amount to the relevant conduct, or tend to do so. Material supporting a disclosure will be assessed to determine its adequacy for the purpose of the Act before a decision is made as to whether it appears that a disclosure is protected.

Corrupt Conduct

The Independent Commission Against Corruption Act 1988 defines corrupt conduct to include the 'dishonest or partial exercise of official functions by a public official'. Corrupt conduct can take many forms. Taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

Maladministration

The Protected Disclosures Act defines 'maladministration' as conduct that involves action or inaction of a serious nature that is:

- Contrary to law (including decisions or actions contrary to lawful and reasonable orders from a person so authorised, breaches of natural justice or procedural fairness); or
- Unreasonable (including decisions or actions inconsistent with adopted policy or guidelines; serious delay; wrong, inaccurate or misleading advice leading to detriment; failure to rectify mistakes); or
- Unjust (including decisions or actions not justified by any evidence, that are irrational or unconscionable); or
- Oppressive (including decisions or actions that involve an abuse of power, intimidation or harassment; that are punitive, harsh, cruel or offensive); or
- Improperly discriminatory (including decisions or actions that involve failure to perform duties impartially and equitably; distinctions not authorised by law, or failure to apply a distinction authorised by law); or
- Based wholly or partly on improper motives (including decisions or

actions for a purpose other than that for which the power was conferred; for personal gain or in bad faith.

Serious and Substantial Waste

The Auditor-General defines 'serious and substantial waste' as the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss or wastage of public resources. In addressing any complaint of serious and substantial waste regard will be had to the nature and materiality of the waste.

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Wastage of public resources can be further described in the following terms:

Absolute: serious and substantial waste might be regarded in absolute or dollar terms where the waste is regarded as significant.

Systemic: the waste indicates a pattern resulting from a system weakness.

Material: the serious and substantial waste is material in terms of DECC's overall expenditure, or the waste in regard to a particular item of expenditure is material to such an extent so as to affect DECC's capacity to perform its primary functions.

Material by nature not amount: the serious and substantial waste may not be material in financial terms but may be significant by nature. That is, it may be improper or inappropriate (alternatively, this type of waste may constitute 'maladministration' as defined in the Protected Disclosures Act).

Waste can take many forms. For example:

- Misappropriation or misuse of public property, due to the absence of appropriate safeguards.
- The purchase of unnecessary, inadequate, or overly expensive goods and services.
- Overstaffing or overgrading of positions; responsibilities or skills being paid for that are no longer required.
- Programs not achieving their objectives, with the costs involved being clearly ineffective and inefficient.

It can result from such things as:

- The absence of appropriate safeguards to prevent theft or misuse of public property.
- Purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose; and where the lowest price is not obtained for comparable goods or services.

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