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Public Interest Disclosures

by

Jason Ardit

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EXECUTIVE SUMMARY

Whistleblowers are seen as central to promoting Government transparency and democratic accountability. With their knowledge and insights into various aspects of public administration, they are able to cast light on issues that might otherwise remain in darkness.

In New South Wales, the *Protected Disclosures Act 1994* (NSW) ('the PDA') is the primary statute with respect to whistleblowing. Passed in 1994 at a time when a suite of other legislation relating to the modernisation of public administration came into effect, the PDA is designed with three core objectives in mind. The first is to build upon established procedures to create a protected disclosures framework. The second is to provide a range of protections for whistleblowers from retaliation they may be otherwise be subjected to. The third is to ensure that the allegations raised by the whistleblower receive a proper investigation.

In New South Wales, disclosures can be made relating to three key themes. The first of which is corrupt conduct, defined by the *Independent Commission Against Corruption Act 1988* (NSW) and entailing a wide range of actions, including bribery, embezzlement and fraud. Disclosures concerning corrupt conduct can be made to ICAC, which is charged with investigating the allegations raised.

The second theme is maladministration, defined as any action contrary to law, unreasonable, unjust, oppressive or discriminatory or based on improper motives. Disclosures concerning maladministration can be made to the Ombudsman in accordance with the provisions of the *Ombudsman Act 1974* (NSW), which has the authority to investigate the matter.

The third theme is serious or substantial financial waste of public monies. This may refer to the inefficient or unnecessary spending or the misappropriation of funds. Disclosures concerning serious and substantial financial waste can be made to the Auditor-General in accordance with the provisions of the *Public Finance and Audit Act 1983* (NSW).

The PDA also provides for complaints that can be made about police and local government authorities to be made to the Police Integrity Commission and Director-General of the Department of Local Government respectively.

Each agency must take appropriate steps to keep the whistleblower informed of the progress of the investigation into their allegations.

A chief criticism of the PDA is its limited remit. Specifically, the PDA does not provide an avenue for complaints to be made about risks to health, public safety or the environment, despite the public interest in allowing for disclosures of this nature.

To attract the protections afforded by the PDA, only a public official can make a disclosure. Although the delineation between public official and non-public official

can sometimes be hazy, such as the role of contractors, generally speaking only those internal to the operation of public administration are able to be whistleblowers.

Disclosures can be made to any of the abovementioned investigating authorities or relevant officials in a public authority. Additionally, disclosures can be made to a Member of Parliament or journalist, although a strict set of criteria that must be complied with before this can take place.

When making a disclosure to an investigating authority, whistleblowers must overcome a legal threshold. Specifically, a whistleblower must show or tend to show that a public authority has, is or proposes to engage in corrupt conduct, maladministration, or serious and substantial waste. The objective nature of this test means that the subjective mindset of the whistleblower is not a material consideration, notwithstanding their good intentions. This is because the intentions and genuine beliefs of the whistleblower are not considered to advance the public interest should their beliefs prove to be mistaken.

This high threshold has been criticised for the onerous hurdles it requires whistleblowers to overcome and an alternative, supplementary test has been recommended. Specifically, this test would allow a whistleblower to attract the protection of the PDA if the whistleblower has an honest belief on reasonable grounds that the disclosure concerning corrupt conduct, maladministration or serious and substantial waste, is true.

Meanwhile, before a public official can whistleblow to a Member of Parliament or a journalist, an even higher threshold must be overcome. Namely, the whistleblower must have reasonable grounds for believing that the disclosure is substantially true and the disclosure itself must be substantially true.

Central to the success of the whistleblowing process is providing whistleblowers with a range of protections. These protections can be summarised into two parts. The first concerns protections against reprisals and, as such, taking retaliatory action in the workplace against someone for whistleblowing is a criminal offence under the PDA. The second protection is indemnifying whistleblowers from any legal liabilities or civil claims they may be subject to, resulting from their whistleblowing. Although these protections go some way to mitigate the damage that may arise out of whistleblowing, and may also remove some of the disincentives to whistleblowing, these protections have been criticised for not going far enough. Allowing injunctive relief against reprisals and creating an actionable tort for whistleblowers who have suffered detrimental action are two further protections that have received widespread support.

There are also numerous examples discussed where protection is expressly not provided for, such as frivolous or vexatious allegations or when it is driven by personal grievances.

The PDA provides some room for allowing the identity of whistleblowers to remain

anonymous, although this is not an absolute right. The art is to balance the confidentiality of the whistleblower with the procedural fairness rights of the accused, together with public policy considerations of removing the disincentives to whistleblower whilst ensuring natural justice is achieved.

There is also discussion about the limited ability to evaluate the success of the PDA. This emerges from the fact that, as the PDA is an 'orphan', there is no central oversight body that can monitor its operations. There is limited data on the frequency of whistleblowing. Due to the lack of statutory requirements for agencies to report such matters and the absence of any such regulations under the Act, information on the relative success or shortcomings of the PDA and the whistleblowing process generally is scant.

Many of the matters that are reported in the media are revealed anonymously. To this end, journalists form an important role as the watchdog of misconduct by giving light to deficiencies in public administration. In doing so, however, there may be a litany of public service and secrecy provisions that a whistleblower has breached, if reporting the matter was not in strict accordance with the PDA. As such, proceedings may commence in both criminal and civil cases in which journalists are compelled to reveal the identity of their source. As the requirement to reveal a confidence is in fundamental breach with the media code of conduct, many journalists have explicitly refused to reveal their source. In claiming privilege, the Courts have historically been unsympathetic, viewing journalists' duty as little more than a self-ascribed right without authority.

In New South Wales, however, an amendment to the *Evidence Act 1995* (NSW) has allowed for the existence of privilege between journalist and source, but vests discretion in the Court when deciding if such privilege should apply. However, there is limited case law on this provision and exploration of the boundaries of this privilege is ongoing.

There are many arguments in favour and against the existence of a 'shield law'. Proponents argue that a shield law would further facilitate the disclosure of information relating to deficiencies in public administration, which can bring about positive change. Arguments against concern the denial of natural justice to those adversely affected by the whistleblowing insofar as an accused person would not have access to legal recourse if they are not aware of their accuser. The absence of procedural fairness, together with protecting the identity of the whistleblower, also raises questions of how legitimate and fair the allegations are.

Protected disclosures and shield laws form an interesting part of public administration law. Without these mechanisms, many important issues – and indeed scandals – would have never come to light, and many fundamental changes may not have occurred.

1 INTRODUCTION

Whistleblowers perform an important function in society. With their knowledge of certain matters, whistleblowers are able to cast light on important issues that may otherwise remain in darkness. Whistleblowers are important because of their ability to inform society as to the shortcomings of public administration.¹ Their willingness and ability to ‘blow the whistle’ on matters of public interest is regarded as integral to the process of governmental transparency and democratic accountability.²

But whistleblowing remains a complex and highly controversial issue. While in some respects, the actions of whistleblowers may be regarded as a heroic, duty-bound exercise with whistleblowers often sacrificing job satisfaction – or even their job itself – in pursuit of a just and seemingly ethical outcome, the flipside – and often, the reality – is that whistleblowers will be accused of disloyalty and will face associated consequences, including bullying, discrimination and even dismissal. This, in part, stems from an inherent workplace characteristic that frowns upon ‘dobbing on your workmate’ and in this regard, whistleblowing conjures up a ‘traitor or hero dichotomy’³, derided by some, lionised by others.

The object of this paper is to untangle the complex web of whistleblowing and to identify the circumstances in which whistleblowing is recognised as a public good (and in some respects, a requirement) which warrants protection and encouragement by the law. The paper also lays out the matrix of laws currently in effect in NSW with respect to whistleblowing and outlines suggested proposals for reforming the regime.

An occasional element of whistleblowing is that disclosures are made to journalists. Leaks and exposés are a common part of the media landscape which insider disclosures are critical in creating. In some circumstances, the confider is legitimately protected from action when they disclose critical information to journalists. However, the confidant may not always be protected and may in fact be compelled to reveal their sources, thus undermining the integrity and success of the process. To this end, ‘shield’ laws may exist to extend the protection from the confider to the confidant. This paper also deals with the question of affording journalists privilege and examining the current law on the issue.

1.1 What is Whistleblowing?

The ordinary legal definition of whistleblowing is:

¹ Paul Latimer and AJ Brown, *In Whose Interest? The Need for Consistency in to Whom, and about Whom, Australian Public Interest Whistleblowers can make Protected Disclosures*, Deakin Law Review, Volume 12 No 2, 2007 at p 3.

² See AJ Brown and Paul Latimer, *Symbols or Substance? Priorities for the Reform of Australian Public Interest Disclosure* in Griffith Law Review (2008) Vol 17, No 1 at p 223.

³ Paul Latimer and AJ Brown, *Whistleblower Laws: International Best Practice*, UNSW Law Journal, Volume 31(3) at p 767.

In relation to employment, the act of an employee informing the proper authorities that the employer is committing, or intends to commit, a crime, fraud or other act contrary to the public interest.⁴

An alternative and oft-cited definition is that whistleblowing is:

the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.⁵

Whistleblowers are often individuals best placed to bring attention to defects or wrongdoing in public administration. The conduct of concern may be unintentional and the result of misjudgements, mistakes or delays, or it may be intentional wrongdoing and be the result of unprofessional conduct or outright illegality.

Whistleblowing is widely regarded as an important function in civic participation deserving of legal protection and community favour. It is often described as 'vital to ensuring integrity and accountability in the public sector'⁶ and can be seen as contributing to the democratic process.⁷ As well as its importance as a conduit in pursuing such transparency, it can also be regarded as an implicit recognition of systemic defects in the regulation of public administration.

Whistleblowing is potentially a two-step process. The first of which is where the complaint is handled internally, in accordance with an agency's grievance procedures. This is considered the most ideal form of whistleblowing as it mitigates the damage to the agency and allows internal management an opportunity to address the matter.⁸ Research indicates that 97% of all whistleblowing matters commence internally, with 90% of all matters concluding internally too.⁹

However, it must be recognised that not all whistleblowers are comfortable with

⁴ *Butterworths Concise Australian Legal Dictionary* at p 459.

⁵ Marcia Miceli and Janet Near, *Blowing the Whistle: the Organisation and Legal Implications for Companies and Employees* (1992).

⁵ McMillan, J., Barbour, B. & Bevan, D., *Foreword to Public Interest Disclosure Legislation in Australia: Towards the Next Generation. An Issues Paper*, November 2006, Cth, NSW and Qld Ombudsman.

⁷ Harders, J., *Whistleblowing: counting the cost*, quoted in Bills Digest No 022/94, *Protected Disclosures Bill 1994*, NSW Parliamentary Library.

⁸ Paul Latimer and AJ Brown, *In Whose Interest? The Need for Consistency in to Whom, and about Whom, Australian Public Interest Whistleblowers can make Protected Disclosures*, *Deakin Law Review*, Volume 12 No 2, 2007 at pp 4, 10 – 11.

⁹ AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, ANU E Press, 2008 at pp28, 38.

reporting the matter internally as they may have concerns that the organisation is unable or unwilling to handle the matter appropriately. Alternatively, they have reported the matter internally but management has failed to adequately deal with it.

In this regard, there is an opportunity for complaints to be taken outside of the organisation to an external body authorised to investigate the matter. Of all whistleblowing matters, only 2.9% of complaints are taken externally to an investigatory authority in the first instance, with a total of 9.7% of complaints taken externally at any stage.¹⁰

It is difficult to differentiate where merely reporting a matter internally matures into 'whistleblowing', largely because whistleblowing is a fundamentally ill-defined and elusive concept, encompassing a broad spectrum of wrongdoings. These wrongdoings range from personal grievances best managed internally to public interest grievances that demand reporting. Given the potential confusion, whistleblowing has been referred to in this paper as only those matters that would be deemed in the public interest and potentially covered by the *Protected Disclosures Act 1994 (NSW)* ('the PDA'), which in New South Wales is the principal statute with respect to whistleblowing.

1.2 The Protected Disclosures Act 1994 (NSW)

The PDA came about at a time when a suite of other legislation designed to update and bring greater accountability to public administration in New South Wales came into effect: the *Independent Commission Against Corruption Act 1988 (NSW)*, the *Freedom of Information Act 1989 (NSW)* and the *Privacy and Data Protection Bill 1994*. It has been said that each of these Acts:

...bear upon the subject of ethics and accountability in public administration, albeit from different angles.¹¹

At the time of its enactment, the PDA built on existing arrangements to combat corrupt conduct, maladministration and substantial waste of money by providing investigative agencies (such as the Independent Commission Against Corruption and the Ombudsman) with additional powers to investigate such conduct, while at the same time establishing a system of protection for whistleblowers. There had already been some high profile, and highly controversial, whistleblowing cases relating to police corruption and cover-ups¹² which added to the sense of overall need and urgency.

¹⁰ AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, ANU E Press, 2008 at pp28, 38.

¹¹ *Protected Disclosures Bill 1994*, Bills Digest No 022/94, NSW Parliamentary Library Research Service.

¹² See for example the case of Philip Arantz who was dismissed from the police force in 1972 after informing the media that police were falsifying crime statistics in Philip Arantz, *A Collusion of Powers*, McPherson's Printing, 1993. The Fitzgerald Inquiry into illegal police activities and associated misconduct in Queensland is another notable example.

1.3 Objectives of the Protected Disclosures Act 1994

The core objectives of the PDA, as defined by the Act, can be summarised into three key parts:

- to provide a protected disclosures framework that exists to enhance and augment established procedures for making disclosures;
- to protect persons who make a disclosure from retaliation that they may otherwise be subjected to; and
- to create the architecture that facilitates a proper investigation into the content of the disclosures raised.¹³

Central to the operation of protected disclosures are three key themes the PDA emphasises as the types of behaviour it seeks to combat, namely, corrupt conduct, maladministration and serious or substantial financial waste.

2 MAKING A DISCLOSURE

2.1 Who can make a disclosure?

The PDA limits who is able to make a disclosure. To obtain protection under the PDA, the individual making the disclosure must be a public official, defined as any person employed under the *Public Sector Management Act 1988* (NSW), an employee of a State owned corporation or any of its subsidiaries, or any individual acting in public official capacity or otherwise having public official functions.¹⁴ To remove any doubt about whether area health service employees are covered by the PDA, the Act was amended in 2008 to clarify that any individual in the service of the Crown or of a public authority is a public official.¹⁵ The scope of protection is therefore limited to those internal to the public sector or closely associated with it. Although other jurisdictions have extended protection to disclosures made by 'any person' regardless if they are public sector employees or entirely external, the PDA does not extend such protection.

The reasons for limiting the protection to 'insiders' is explained by A.J. Brown:

... it is because [whistleblowers] require special legal and management protection, and special encouragement to come forward. 'Outside' members of the public do not usually need legislative protection to report wrongdoing, especially concerning services or matters that affect them personally –

¹³ *Protected Disclosures Act 1994* (NSW), s3(1).

¹⁴ *Protected Disclosures Act 1994* (NSW) ss 8(1) and 4.

¹⁵ The Hon John Aquilina MP in NSWPD, 28 November 2008 at p 12076.

because they are not normally subject to the same organisational loyalties and risks of reprisal that affect an organisation's own employees. The aim of whistleblowing laws is to compensate for these internally-based disincentives to reporting, by reducing or removing the risk that organisation members will be harassed, victimised, demoted, sacked or prosecuted by their own colleagues and management.¹⁶

It is also assumed that those with insider knowledge have greater insights and credibility to make a disclosure and, given the personal and emotional cost that whistleblowing entails, are less likely to raise grievances unrelated to a genuine public interest disclosure,¹⁷ or raise complaints merely to be mischievous or pursue personal vendettas.

However, it has also been suggested that the PDA is too restrictive in providing protection and that disclosures that are made by individuals who are in a contractual relationship with a public authority should also be eligible for protection.¹⁸ The Committee on the Independent Commission Against Corruption ("ICAC Committee") recommended in its 2009 review of the PDA that the Act be amended to clarify that volunteers and interns working in the office of a Member of Parliament are also eligible for protection.¹⁹

2.2 Who can a disclosure be made to?

The PDA also limits to whom a disclosure can be made. Recognised recipients of the disclosure include an 'investigating authority', defined as any one of a number of public authorities charged with scrutinising the practices of other public authorities. There are only a handful of investigating authorities recognised by the Act. They include the Independent Commission Against Corruption, the Auditor-General, the Police Integrity Commission, the NSW Ombudsman and the Director-General of the Department of Local Government.²⁰

In addition to investigating authorities, the PDA also enables a public official to make disclosures to the principal officer of a public authority, in turn defined as any Government agency which may be subject to an external investigation.²¹

¹⁶ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 8.

¹⁷ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at pp 8 – 9.

¹⁸ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 19.

¹⁹ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 19.

²⁰ *Protected Disclosures Act 1994* (NSW) ss 10 – 13.

²¹ *Protected Disclosures Act 1994* (NSW) s14.

Alternatively, the public official may make a disclosure to either another officer of the public authority or investigating authority to which the public official belongs or an officer of the public authority or investigating authority to which the disclosure relates. However, disclosures of this nature must be made in accordance with established procedures by the authority concerned relating to matters in which disclosures may be made.²²

The PDA sets out that an investigating authority may refer the matter to a fellow investigating authority where it is of the opinion that it is appropriate in the circumstances.²³ The ability to refer the matter in these circumstances is discretionary. However, an investigating authority *must* refer the matter to a fellow investigating authority where it is not authorised to investigate the matter concerned and it is of the opinion that it is appropriate to refer the matter to another investigating authority.²⁴

2.3 Disclosures to Members of Parliament or Journalists

The PDA authorises a public official to make a disclosure to a Member of Parliament or to a journalist.²⁵ The definition of word 'journalist' is itself defined as a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media.²⁶ Although it can be fairly assumed that this definition would cover traditional media publications, it remains to be seen if this definition extends to new and emerging forms of journalistic expression, such as alternative news websites and blogs.

The PDA provides strict criteria that must first be met before a disclosure to a Member of Parliament or journalist can be made. Firstly, the public official making the disclosure must have already made substantially the same disclosure to an investigating authority or principal officer in accordance with the provisions of the PDA. As a result of that disclosure, the relevant authority to which the disclosure was made must have done at least one of the following:

- Decided not to investigate the matter;
- Decided to investigate the matter but had not completed the matter within 6 months of the disclosure being made;
- Investigated the matter but not recommended the taking of any action in respect of the matter;

²² *Protected Disclosures Act 1994* (NSW) s14.

²³ *Protected Disclosures Act 1994* (NSW) s25(1).

²⁴ *Protected Disclosures Act 1994* (NSW) s25(2).

²⁵ *Protected Disclosures Act 1994* (NSW) s19.

²⁶ *Protected Disclosures Act 1994* (NSW) s4.

- Failed to notify the person making the disclosure within 6 months whether or not the matter is to be investigated.²⁷

In addition, the public officer who makes a disclosure to a Member of Parliament or a journalist must have reasonable grounds for believing that the disclosure is substantially true and the disclosure itself must be substantially true.²⁸ A.J. Brown and Paul Latimer state that:

In other words, it must be reasonable for the whistleblower to persist with the matter to the point of taking it into the public domain, and there must be some independent reason to believe that the additional public disclosure is vindicated.²⁹

To this end, the PDA ensures that disclosures made to publicly visible figures are only made once all other avenues have been exhausted. Further, the threshold test before making such a disclosure is very high consisting of both objective and subjective elements.

This provision of the PDA has been criticised for imposing such a demanding test and the disproportionate consequence of losing protection if the discloser fails to meet the test. To this end, both the ICAC Committee and other reviews have recommended its reform, which is outlined further below.

Given the demanding criteria that must be met before disclosures to a journalist can be made, of all whistleblowing matters, less than 1% of complaints are taken up with the media.³⁰ However, they form some of the most controversial of all whistleblowing matters as the issues raised generally receive the widest media coverage and most high-profile whistleblowing cases in recent times arose through insider leaks directly to the media.³¹ Disclosures of this nature are highly topical and are addressed later in this paper in relation to shield laws for journalists.

2.4 General Disclosure Provisions

To claim the protection afforded by the PDA, the public official who makes a

²⁷ *Protected Disclosures Act 1994* (NSW) s19(3).

²⁸ *Protected Disclosures Act 1994* (NSW) ss19(4) – (5).

²⁹ See Brown, A J and Latimer, P, *Symbols or Substance? Priorities for the Reform of Australian Public Interest Disclosure* in *Griffith Law Review* (2008) Vol 17, No 1 at p 237.

³⁰ AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, ANU E Press, 2008 at p xxv.

³¹ For example, the McManus and Harvey case relating to two *Herald Sun* journalists who published an article regarding the Government's plan to deny war veteran's a \$500 million increase in benefits in 2005.

disclosure must do so voluntarily.³² Disclosures made as a result of a duty imposed on the public official by or under legislation do not constitute a voluntary disclosure, although certain exceptions are allowed for disclosures made by members of the police service and by correctional officers.³³

3 TYPES OF DISCLOSURES

3.1 Corrupt Conduct

Information that shows or tends to show that a public authority or official has engaged, is engaged or proposes to engage in corrupt conduct may be made to the Independent Commission Against Corruption in accordance with the with the procedures set out under the *Independent Commission Against Corruption Act 1988* (NSW). In turn, sections 8 and 9 of the *Independent Commission Against Corruption Act 1988* (NSW) provide for a broad definition of what constitutes corrupt conduct. It is generally taken to mean:

... any dishonest or partial exercise of a public official's function, including any misuse of information or material for inappropriate benefit or any conduct that leads to a breach of public trust.³⁴

Conduct by a person who is not a public official, when it adversely affects the impartial or honest exercise of official functions by a public official, also comes within the definition.³⁵

The *Independent Commission Against Corruption Act 1988* (NSW) also provides a lengthy and exhaustive list of examples of corrupt conduct including, but not limited to, official misconduct, bribery, blackmail, fraud, embezzlement, obtaining or offering secret commissions and perverting the course of justice.³⁶

3.2 Maladministration

Disclosures concerning maladministration may be made to the Ombudsman in accordance with the procedures set out under the *Ombudsman Act 1974* (NSW). Similar to the requirements for reporting corrupt conduct, the public official may disclose information that shows, or tends to show, that another public official or authority has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration. Maladministration is itself defined by the PDA as

³² *Protected Disclosures Act 1994* (NSW) s9(1).

³³ *Protected Disclosures Act 1994* (NSW) ss9(2) – (5).

³⁴ *Independent Commission Against Corruption Act 1988* (NSW), s 8.

³⁵ The Audit Office of NSW, *Policy to deal with Protected Disclosures by the Audit Office in respect of other agencies pursuant to the Protected Disclosures Act 1994*, p30.

³⁶ *Independent Commission Against Corruption Act 1988* (NSW), ss 7 – 11.

action or inaction of a serious nature that is:

- (a) contrary to law, or
- (b) unreasonable, unjust, oppressive or improperly discriminatory, or
- (c) based wholly or partially on improper motives.³⁷

3.3 Serious and Substantial Waste

Lastly, disclosures concerning serious and substantial waste may be made to the Auditor-General in accordance with the rules stipulated under the *Public Finance and Audit Act 1983* (NSW). Once again, the disclosure of information must show or tend to show that there has been a serious and substantial waste of public money. Unlike the test of disclosures of corrupt conduct or maladministration, in disclosures of this kind, the waste must have *already* occurred. The PDA is silent on the definition of a serious or substantial waste of money. In its place, the Auditor-General provides the following working definition:

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources.³⁸

The Auditor-General may deal with a complaint by conducting a review as per the provisions of the *Public Finance and Audit Act 1983* (NSW).³⁹ The Auditor-General would take into account the nature and materiality of the waste in determining whether it would be deemed 'serious and substantial'. The waste itself may be absolute in nature (for example the unnecessary spending of \$500,000), may reveal a systemic weakness that allows for inefficient or unnecessary spending or may be a misappropriation or misuse of public property.⁴⁰

Although the absence of a definition may be thought to generate confusion, the Auditor-General's Office has not raised this as a concern in its operation. In fact, the current flexibility may be considered more favourable than any rigid definition.⁴¹

If the disclosure about a serious and substantial waste of money relates to local government money, then disclosures must be made to the Director-General of the Department of Local Government in accordance with the *Local Government Act*

³⁷ *Protected Disclosures Act 1994* (NSW), s11(2).

³⁸ The Audit Office of NSW, *Policy to deal with Protected Disclosures by the Audit Office in respect of other agencies pursuant to the Protected Disclosures Act 1994*, p31.

³⁹ *Public Finance and Audit Act 1983* (NSW), ss52C – 52F.

⁴⁰ The Audit Office of NSW, *Policy to deal with Protected Disclosures by the Audit Office in respect of other agencies pursuant to the Protected Disclosures Act 1994*, p31.

⁴¹ Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 28.

1993 (NSW). The public official should demonstrate the waste has already occurred and must show that either the local government authority or any of its delegates, elected councillors or members of staff has engaged in a waste of revenue, loans or other monies received or held by the local government authority.⁴²

3.4 Complaints about Police

The PDA stipulates a separate category regarding disclosures that concern police. Specifically, disclosures about police, whether they are showing or tending to show corrupt conduct, maladministration or a serious and substantial waste of money, must be made to the Police Integrity Commission (PIC) in accordance with the procedures stipulated under the *Police Integrity Commission Act 1996* (NSW). The public official making the disclosure cannot disclose further information to any other investigating authority (that is, ICAC, the Ombudsman, the Auditor-General) unless it relates to a matter referred by the PIC Inspector to the investigating authority.⁴³

3.5 Complaints about Investigating Authorities

The PDA enables disclosures to be made *about* investigating authorities although the PDA also provides that an investigating authority cannot investigate a complaint made about it. As a result, disclosures about maladministration at the Ombudsman's office will be made to ICAC, which has the authority to investigate and report on the matter.⁴⁴ Similarly, disclosures about serious or substantial waste of money at the Auditor-General's office can be made to the Ombudsman, which has the authority to investigate and report on the matter as well as the ability to engage consultants for the purpose of getting expert assistance given the subject content would presumably fall outside of its field of expertise.⁴⁵ Disclosures about the Police Integrity Commission, whether they allege corrupt conduct, maladministration or serious and substantial waste of money, either past, present or future, can be made to ICAC.⁴⁶

3.6 Comment on the threshold test for making a disclosure

The test that must be met before disclosing alleged improper conduct is similar across all three categories of permitted disclosures: the individual making the disclosure must demonstrate that the information provided *shows or tends to show* the conduct that they are alleging. Essentially, the test is an objective one and therefore, notwithstanding the bona fides of the whistleblower, he or she would not

⁴² *Protected Disclosures Act 1994* (NSW), s12B.

⁴³ *Protected Disclosures Act 1994* (NSW), s12A(3).

⁴⁴ *Protected Disclosures Act 1994* (NSW), ss13(1) – (2).

⁴⁵ *Protected Disclosures Act 1994* (NSW), ss13(3) – (4).

⁴⁶ *Protected Disclosures Act 1994* (NSW), s13(4A).

be eligible for protection under the PDA if the objective elements of the test were not satisfied.

The objective nature of the test is deliberate, as explained by then Attorney-General, the Hon. John Hannaford MLC, in his Second Reading Speech to the Legislative Assembly:

... the public interest lies in the truth of the disclosures made, rather than in the subjective reasoning of the individuals who make them.⁴⁷

In other words, the best intentions of the whistleblower do not advance the public interest if their allegations falter. Despite this, in its 2006 review of the PDA, and later reiterated in its 2009 review, the ICAC Committee indicated its disapproval with the objective test relating to the loss of a whistleblower's protection if they make an allegation which proves to be unsubstantiated. To this end, the ICAC Committee recommended that the PDA create a supplementary, subjective test. Specifically, the proposed test would afford protection where the disclosure:

[Is] made by a public official who has an honest belief on reasonable grounds that the disclosure, concerning corrupt conduct, maladministration, or serious and substantial waste, is true.

Such a change would provide 'an additional alternative protection', imposing a less onerous hurdle for a whistleblower to overcome.⁴⁸ The ICAC Committee also supported retaining the current objective test in which disclosures:

show or tend to show that a public authority or official has, is or proposes to engage in corrupt conduct, maladministration, or serious and substantial waste.

The either / or approach has been applauded as best practice⁴⁹ and the ICAC Committee also noted that such a change would more closely align the test in the PDA with equivalent tests in other public interest disclosure legislation across Australia.⁵⁰

⁴⁷ Hon. J.P. Hannaford MLC in NSWPD, 23 November 1991 at p 5636.

⁴⁸ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at pp 26 – 27.

⁴⁹ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 22.

⁵⁰ The *Whistleblowers Protection Act 1994* (QLD) requires an 'honest belief on reasonable grounds'; *Whistleblowers Protection Act 2001* (SA) requires a 'belief on reasonable grounds that the information is true'; *Public Interest Disclosure Act 2002* (TAS) requires a 'belief on reasonable grounds'; and the *Public Interest Disclosure Act 2003* (WA) also requires a 'belief on reasonable grounds'.

3.7 Complaints concerning Public Health, Safety and the Environment

Although when comparing the PDA with equivalent legislation in other States there is a fundamental commonality of purpose, certain differences are also easily apparent. One of the key criticisms of the PDA is its more limited remit. As noted, protected disclosures can only be made only about corruption, maladministration and financial waste. By way of comparison, the *Whistleblowers Protection Act 1994* in Queensland provides that:

[the Act] promotes the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector or who disclose danger to public health or safety or who disclose danger to the environment.⁵¹

In Western Australia, in the *Public Interest Disclosure Act 2003* (WA), public interest information is defined to include, *inter alia*:

an act or omission that involves a substantial and serious risk of injury to public health, prejudice to public safety or harm to the environment.⁵²

And in South Australia, the *Whistleblower Protection Act 1993* (SA) defines public interest information to include, *inter alia*:

... conduct that causes a substantial risk to public health or safety, or to the environment.⁵³

Common in all three Acts is the scope for disclosures to be made for matters relating to public health, safety and the environment, themes which are omitted from the PDA. For example, the Health Care Complaints Commission (HCCC) is not prescribed as an investigating authority to which a public official can make a protected disclosure. This is despite the HCCC being specifically established to receive and assess complaints relating to health and health care services in New South Wales. The enabling legislation, the *Health Care Complaints Act 1993* (NSW), prescribes which individuals can make a complaint to the Commission but notably excludes colleagues of a health service provider as a recognised complainant. To this end, having health-related complaints covered by the PDA would be a logical extension of the protected disclosures regime and cover the omissions of the *Health Care Complaints Act 1993* (NSW).

In its 2006 review, the ICAC Committee advised that it was 'unclear' why the HCCC is not deemed an investigating authority for the purposes of receiving and

⁵¹ *Whistleblowers Protection Act 1994* (QLD), s3.

⁵² *Public Interest Disclosure Act 2003* (WA), s3(d).

⁵³ *Whistleblower Protection Act 1993* (SA), s4(1)(a)(iv)

investigating protected disclosures but threw its support behind it becoming one.⁵⁴

4 PROTECTIONS

As noted, one of the core objectives of the PDA is to provide for a system of protections to allow and facilitate the disclosure of information. Part 3 of the PDA contains the relevant provisions relating to the protections that can be granted. These protections are organised into two parts. The first relates to protections against reprisals by criminalising conduct that amounts to retaliation against an employee that legitimately reported improper conduct. The second relates to indemnifying whistleblowers from civil action arising out of their disclosures.

4.1 Protections against Reprisals

It has been said that:

A major disincentive to blow the whistle is the possibility or probability of reprisal or retaliation.⁵⁵

To partially remove such impediments, the PDA provides that protection can be provided for whistleblowers from potential, subsequent reprisals for their actions. Specifically, a person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence. The maximum penalty for undertaking detrimental action is 50 penalty units, imprisonment for 12 months, or both.⁵⁶ Detrimental action is defined by the PDA to include actions causing or involving any of the following things:

- 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.⁵⁷

The definition of detrimental action is not entirely comprehensive. Unlike equivalent

⁵⁴ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 30.

⁵⁵ Paul Latimer and AJ Brown, *Whistleblower Laws: International Best Practice*, UNSW Law Journal, Volume 31(3) at p 791.

⁵⁶ *Protected Disclosures Act 1994* (NSW), s20(1).

⁵⁷ *Protected Disclosures Act 1994* (NSW), s20(2).

legislation in other Australian jurisdictions, the NSW Act omits 'threatening' a person with (other) detrimental action as a form of detrimental action itself.⁵⁸ Similarly, making payback complaints in retaliation for making a disclosure is also omitted and there is some support for its inclusion as prohibited conduct.⁵⁹

A notable feature of the retaliation offence is the complicated threshold test that must be met. Once detrimental action has been established, the burden then shifts to the defendant who must prove that the action was not substantially in reprisal for the person making the disclosure.⁶⁰ To this end, the onus of proof is partially reversed.⁶¹ However, the evidential burden for a prosecution to then negate a defendant's denial by demonstrating that retaliating against a colleague for making a disclosure was, in fact, a substantial reason for the detrimental action is a monumental challenge for prosecutorial authorities and explains why there is very thin case law on this matter. To date, all prosecutions that have commenced under this provision have been unsuccessful on technical grounds.⁶²

Although the list of prohibitions against actions list a wide range of overt conduct taken against an employee, it fails to capture the myriad of subtle and more likely ways in which workplace retaliation can take place, such as 'ostracism, rumours or minor changes in work assignments'.⁶³ Understandably, the ability to demonstrate that someone ignored a fellow colleague because they blew the whistle on a matter is exceptionally difficult. Arguably, the intent of the PDA is not to prohibit relatively minor workplace annoyances. This issue demonstrates that workplace retaliation is not a clear cut process with easily recognisable 'good guys and bad guys' and that any disclosure may invariably change, however delicately, the dynamics of the workplace.

Another omission of the PDA, which the Ombudsman has deemed a 'key failing', is the absence of any statutory obligation to compel senior management to protect whistleblowers or set up procedures to protect whistleblowers.⁶⁴ Requiring

⁵⁸ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 36.

⁵⁹ NSW Ombudsman, *Issues Paper: The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, April 2004 at p 17.

⁶⁰ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 38.

⁶¹ *Protected Disclosures Act 1994* (NSW), s20(1A).

⁶² Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of Evidence* 18 August 2008 in Committee on the Independent Commission Against Corruption, Discussion Paper March 2009 at p 4.

⁶³ Paul Latimer and AJ Brown, *Whistleblower Laws: International Best Practice*, UNSW Law Journal, Volume 31(3) at p 790.

⁶⁴ NSW Ombudsman, *Issues Paper: The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, April 2004 at p 12.

management to protect whistleblowers under their authority would be a logical and important first step that might prevent more serious action, such as the ones prohibited by the PDA, from occurring.

4.2 Protections against Actions

The second category of protection is effectively an indemnity that ensures that an individual who has made a disclosure is relieved from possible legal liabilities. The PDA provides a non-exhaustive list of examples of the ways in which public officials are shielded from actions or claims that might otherwise arise as a result of the protected disclosure. People who make protected disclosures are:

- immune from liability or being the subject of a claim or demand, including matters that were subject to a duty of secrecy, confidentiality or any other such restriction;
- have the right to invoke the defence of absolute privilege in respect of any publication made by any report published by an authorised recipient of the disclosure (investigating authority, journalist etc) in any subsequent proceedings for defamation;
- deemed to have not committed any offence where there is a duty to maintain confidentiality imposed by another Act;
- protected against any disciplinary action for breaking an oath, rule of law or practice to maintain confidentiality; and
- protected from disciplinary action because of the disclosure.⁶⁵

4.3 Civil Remedies

Although protections are created for a whistleblower who is the subject of a civil claim, the PDA fails to empower the whistleblower to launch a civil claim. The ICAC Committee considered this omission in both its 2006 and 2009 reviews and noted that an action regarded as serious enough to warrant criminal sanction was, surprisingly, unable to be pursued by civil action. The ICAC Committee made the salient point in its 2006 review that:

...even if a person is successfully prosecuted this will not compensate the whistleblower for the loss they may have suffered.⁶⁶

In other words, if the threat of criminal sanction itself fails to act as a sufficient deterrent to undertaking detrimental action, then the whistleblower is left entirely

⁶⁵ *Protected Disclosures Act 1994* (NSW), s21.

⁶⁶ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 42.

unprotected without an adequate means of remedy should they incur such detrimental action.

Comparatively, the equivalent whistleblower legislation in other Australian jurisdictions provides at least one avenue of civil redress for whistleblowers and in at least one instance, multiple avenues. Most jurisdictions expressly stipulate that a reprisal taken against a whistleblower is an actionable tort, a claim that can commence in a 'court of competent jurisdiction'.⁶⁷ Some other jurisdictions provide means of redress via the complaints processes of the relevant anti-discrimination bodies.⁶⁸ Queensland, meanwhile, provides an additional means of redress through its industrial relations bodies.⁶⁹

The ICAC Committee has repeatedly provided in-principle support for a right to seek damages to be provided for in the PDA,⁷⁰ although it qualified such support by suggesting any compensation awarded should be limited to actual financial loss and that punitive damages should be expressly disallowed.⁷¹ The compensation allowed could entail, not only monetary damages, but also 'rectification of [the whistleblower's] employment prospects and reinstatement if terminated'.⁷²

In addition, there have been numerous recommendations that public or investigating authorities be granted the ability to apply for injunctive relief against detrimental action, such as injunctions against termination of employment, on behalf of public officials who make a disclosure.⁷³

Injunctive relief is designed to assist individuals in taking proactive action to stop or stem detrimental action before, or while, it is occurring⁷⁴ while ensuring the individual concerned is kept in their same employment position and trajectory, notwithstanding the disclosures he or she has made. In addition, an injunction reminds authorities at the outset of a disclosure being made of the need to

⁶⁷ For example, *Whistleblowers Protection Act 2001* (VIC), s19(2).

⁶⁸ For example, *Public Interest Disclosure Act 2003* (WA), s15(4).

⁶⁹ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 40.

⁷⁰ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 27.

⁷¹ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at pp 42 – 43.

⁷² A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 38.

⁷³ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 27.

⁷⁴ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 43.

appropriately manage workplace disquiet arising from the disclosure and mitigate subsequent confrontations.⁷⁵ In some other jurisdictions, applications for an injunction can be made at the relevant industrial relations commission or court and can generally relate to the making, aiding, abetting or procuring of detrimental action.⁷⁶

4.4 Limits on Protections

Even when disclosures are made in accordance with the provisions of the PDA, there are certain prescribed circumstances in which protection is expressly not afforded. Some of these exceptions are filters designed to prevent misuse or abuse of the whistleblowing process. These include disclosures that

are made frivolously or vexatiously. In such circumstances, the authority investigating the disclosure is able to decline to investigate or discontinue its investigation.⁷⁷

The terms frivolously and vexatiously have been criticised as ‘ambiguous’ and as possessing ‘dubious utility’ when considering whether a complaint should be investigated.⁷⁸ To this end, the ICAC Committee recommended that definitions for the terms ‘frivolous’ and ‘vexatious’ be inserted into the PDA to give agencies further tools to use when identifying complainants that warrant protection.⁷⁹ In any case the provision to deny protection to complaints made on ‘frivolous’ or ‘vexatious’ grounds has also been criticised for emphasising the intent of the whistleblower in making the allegations, rather than the content of the allegations raised. It is suggested that there may be valuable information in those claims that would warrant protection, notwithstanding the motives driving the whistleblower.⁸⁰

As a point of reference, it is also interesting to note that NSW lacks certain filters found in the equivalent legislation of other jurisdictions, such as declining to investigate a complaint that is ‘trivial’ or ‘lacking in substance’.⁸¹ Such filters,

⁷⁵ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 39.

⁷⁶ *Public Interest Disclosure Act 1994* (ACT), ss 30 – 32; *Whistleblowers Protection Act 1994* (QLD), ss 47 – 49.

⁷⁷ *Protected Disclosures Act 1994* (NSW), s16.

⁷⁸ A J Brown, *Public Interest Disclosure in Australia: Towards the Next Generation*, Griffith University, November 2006 at p 24.

⁷⁹ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 35.

⁸⁰ NSW Ombudsman, *Issues Paper: The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, April 2004 at p 12.

⁸¹ For example, *Whistleblower Protection Act* (VIC)

especially the latter one, would be a useful and possibly more appropriate mechanism to dismiss minor matters without impugning the intent of the complainant as 'frivolous' or 'vexatious', that might otherwise cause offence.

Other exceptions to protections include disclosures that:

- Principally involve questioning the merits of government policy, including the policy of a local government authority;⁸²
- Are made by a public official when doing so as an exercise of a duty imposed by or under an Act,⁸³ and
- Are made solely or substantially with the motive of avoiding dismissal or other disciplinary action. The only exception to this is where the disciplinary action concerned is in reprisal for the making of the protected disclosure.⁸⁴

To distinguish complaints that are driven by personal grievances, the ICAC Committee suggested that agencies explain in their internal policies the differences in their processes between complaints that concern personal grievances and complaints that are in the public interest.⁸⁵

The PDA expressly prohibits a public official from willfully making any false statement to an authority investigating the disclosure or any statement that misleads or attempts to mislead the authority. The maximum penalty for which is 50 penalty units, 12 months imprisonment, or both.⁸⁶ To this end, not only is protection unavailable, but there is also the possibility of prosecution.

Further, the PDA restricts the granting of beneficial action in favour of a person if the purpose is to influence the person to make, to refrain from making, or to withdraw a disclosure.⁸⁷ The Ombudsman has indicated support to also prohibit beneficial treatment, be it through financial inducements or otherwise, to the whistleblower for raising the claims, lest it undermine his / her credibility.⁸⁸

⁸² *Protected Disclosures Act 1994 (NSW)*, s17.

⁸³ *Protected Disclosures Act 1994 (NSW)*, s9(2).

⁸⁴ *Protected Disclosures Act 1994 (NSW)*, s18.

⁸⁵ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 35.

⁸⁶ *Protected Disclosures Act 1994 (NSW)*, s28.

⁸⁷ *Protected Disclosures Act 1994 (NSW)*, s3(2).

⁸⁸ NSW Ombudsman, *Issues Paper: The Adequacy of the Protected Disclosures Act to Achieve its Objectives*, April 2004 at p 14.

4.5 Anonymity of Whistleblowers

The PDA provides that investigating authorities must employ discretion with respect to the identity of the whistleblower. Generally, the PDA prohibits revealing any information that might identify, or tend to identify, an individual who has made a disclosure.⁸⁹ To this extent, maintaining the anonymity of the discloser is important, but not paramount, as it is subject to certain exceptions, including:

- In circumstances where the person who has made the disclosure consents in writing that the identifying information may be disclosed;⁹⁰ or
- In circumstances where the authority investigating the matter relating to the disclosure is of the opinion that passing on the information that might identify the person who made the disclosure is necessary to investigate the matter effectively, or it is otherwise in the public interest to do so;⁹¹ or
- When disclosures are made to Members of Parliament, they retain the discretion to discuss the matter in Parliament in accordance with the ordinary rights and privileges extended to them with respect to the debates and proceedings of Parliament;⁹²
- In circumstances where it is essential that it be in the interests of natural justice that the identifying information be disclosed to a person whom the information provided by the disclosure may concern.⁹³

As procedural fairness generally operates on the premise that an individual accused of wrongdoing is able to know his or her accuser, the 'right' to remain anonymous is a tenuous right, at best. To this end, it is obvious that total anonymity is not required and, arguably, not desired anyway as providing for totally anonymous tip-offs may increase the risk of timewasters and other vexatious complainants. However, not allowing for any anonymity would generate a further disincentive to whistleblowing. It is therefore seen to be imperative that an appropriate balance is struck to ensure appropriate accountability together with the proper channels to ensure confidentiality.⁹⁴

Case studies considered by the ICAC Committee identified further problems with

⁸⁹ *Protected Disclosures Act 1994* (NSW), s22.

⁹⁰ *Protected Disclosures Act 1994* (NSW), s22(a).

⁹¹ *Protected Disclosures Act 1994* (NSW), s22(c).

⁹² *Protected Disclosures Act 1994* (NSW), s23.

⁹³ *Protected Disclosures Act 1994* (NSW), s22(b).

⁹⁴ Paul Latimer and AJ Brown, *Whistleblower Laws: International Best Practice*, UNSW Law Journal, Volume 31(3) at p 774.

maintaining confidentiality in certain circumstances. For example, where an individual working in a small agency makes a disclosure, the identity of that individual can be reasonably apparent to others in the workplace.⁹⁵

In its review, the ICAC Committee also considered a high-profile case where a whistleblower fronted the media to discuss the details of their disclosure. Despite having publicly identified themselves, the relevant agency was not able to comment on or release information that may confirm the identity of the whistleblower, creating an embarrassing situation for the agency. To this end, the ICAC Committee recommended that the confidentiality guidelines provisions of the PDA be amended to allow the confidentiality requirements to be removed when the whistleblower has voluntarily and publicly identified himself or herself.⁹⁶

5 EVALUATING THE ACT

Although an important feature in administrative governance is to monitor and report on a program, one of the major problems in evaluating the whistleblowing process emerges from a significant lack of empirical evidence to assess its operation. To date, evaluating the relative success has been mostly anecdotal, media-driven or from information gathered through submissions and hearings during the ICAC Committee's intermittent reviews.⁹⁷ An important project titled *Whistling While They Work* has also been critical in researching and analysing information related to whistleblowing.⁹⁸

One of the major reasons for this shortcoming is that the PDA has no parent agency responsible its oversight and has been described as 'an orphan' as a result.⁹⁹ The absence of a central coordinator leaves information about the operation of the PDA scattered across the various agencies assigned with responsibilities under it.

The ICAC Committee has repeatedly identified this deficiency and recommended that a Protected Disclosures Unit be established in a suitable oversight body that could collect data about protected disclosures, monitor the operation, identify

⁹⁵ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at pp 25 – 26.

⁹⁶ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 27.

⁹⁷ AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, ANU E Press, 2008 at p 25.

⁹⁸ See <http://www.griffith.edu.au/centre/slr/whistleblowing/H> for more information.

⁹⁹ Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of Evidence* 18 August 2008 in Committee on the Independent Commission Against Corruption, Discussion Paper March 2009 at p 8.

systemic issues and facilitate policy development.¹⁰⁰ In addition, the ICAC Committee called upon the Ombudsman's Office to take up responsibility for assisting agencies in developing internal procedures for dealing with disclosures, together with establishing an audit function to review an agency's approach to complaint handling.¹⁰¹

Further, agencies are not required to report on protected disclosures in their annual reports either under the PDA, the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1985*. By comparison, agencies must report on Freedom of Information requests they receive. The absence of any mandatory, public reporting requirements compounds the problem. To this end, it has been recommended that a regulation be made to compel agencies to include in their annual reports the number of disclosures received in that year, the outcomes of those disclosures and the policies and procedures in place to handle those disclosures.¹⁰²

Despite the lack of official data, research has indicated that, in NSW, some 71% of public sector employees had witnessed some form of wrongdoing in their agency. Some 11% of public sector employees had witnessed wrongdoing that may be deemed 'public interest' wrongdoing and 50% of those, or 5 – 6% of all employees, had reported such conduct.¹⁰³

Some of these figures are surprising given the tendency to assume that whistleblowing is a rare occurrence, punctuated only by periodic exposure due to media interest, but the emerging evidence suggests whistleblowing is more common than initially thought.¹⁰⁴

5.1 Regulations under the Protected Disclosures Act

To temper or vary the whistleblowing arrangements to take account of changing circumstances, the PDA allows for prescribing regulations deemed 'necessary or convenient'¹⁰⁵ although, to date, no such regulation has been prescribed. However, in 1996, then Premier The Hon. Bob Carr MP circulated a memorandum

¹⁰⁰ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 8.

¹⁰¹ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 37.

¹⁰² Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 39.

¹⁰³ AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, ANU E Press, 2008 at pp 27 – 28. Note that these figures relate to Federal public service employees.

¹⁰⁴ AJ Brown (ed), *Whistleblowing in the Australian Public Sector*, ANU E Press, 2008 at pp 27 – 28.

¹⁰⁵ *Protected Disclosures Act 1994* (NSW), s30.

to public agencies that required each one to put in place documented internal reporting procedures that provided 'clear and unequivocal' protection to employees who report corrupt conduct, maladministration or serious and substantial waste of money.¹⁰⁶

Despite this, the Ombudsman advised that following on from the Premier's memorandum, an assessment uncovered that many agencies had not adopted documented procedures and of those that did, the Ombudsman subsequently deemed many to be inadequate, requiring feedback and assistance.¹⁰⁷

In its 2006 review, the ICAC Committee considered that all parties involved would benefit from 'established, standardised and enforceable procedures as to the handling, investigation and reporting of protected disclosures'.¹⁰⁸ To achieve this end, the ICAC Committee has more recently recommended that enforceable regulations be made requiring public authorities to have internal policies that adequately assess and properly deal with protected disclosures. The ICAC Committee recommended that such guidelines should be consistent with, although not necessarily identical to, the NSW Ombudsman's *Model internal reporting policy for state government agencies*.¹⁰⁹

5.2 Review of the Act

The PDA provides that a joint committee of members of Parliament review the PDA every two years, with a report to be tabled in both Houses of Parliament as soon as is practicable after the completion of each review.¹¹⁰ The ICAC Committee is the parliamentary body charged with this review. In its 2009 review, the terms of reference called upon it to:

...inquire and report on the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament.¹¹¹

The ICAC Committee recommended in its 2006 review that the review cycle should

¹⁰⁶ Premier's Memorandum No: M96-24 *Protected Disclosures Act 1994* Public Authority Internal Reporting Systems.

¹⁰⁷ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 11.

¹⁰⁸ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 25.

¹⁰⁹ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 13.

¹¹⁰ *Protected Disclosures Act 1994* (NSW), s32.

¹¹¹ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p iii.

be extended from a two-year process to a five-year process, suggesting that the proposed time frame was more 'realistic and practicable'¹¹². The Committee also recommended that the section pertaining to the review of the PDA be subject to a sunset clause and as such, lapse after 5 years.¹¹³ This change would bring the review process in line with other principal legislation that tends to require only a one-off review at the completion of a 5-year monitoring period. Additionally, this would bring the review process into line with actual review practice as, since the commencement of the PDA, there should have been six reviews whereas only three have been completed. It should be noted, however, that this recommendation was not reiterated in the more recent 2009 review.

5.3 Responsibility of an Investigating Authority

Currently, there is no provision that expressly compels an authority investigating a disclosure to adequately and properly deal with the disclosure. Although it may be assumed that the provisions of the investigating authority's enabling legislation apply, which would ordinarily compel the relevant authority to act, this is not always the case.¹¹⁴ The ICAC Committee considered in its 2006 review that an explicit provision in the PDA that compelled an investigating authority to properly handle a disclosure made to it was warranted.¹¹⁵

At present, when an authority is investigating a matter, it must take action to keep the public official who made the disclosure informed of action taken or proposed action to be taken within six months of the public official making the disclosure.¹¹⁶ The six-month time frame has been criticised as unnecessarily long, particularly when it concerns a straightforward matter. The ICAC Committee suggested that the relevant provision of the PDA be amended so that the investigating authority keeps the complainant regularly apprised of the developments of the investigation relating to their complaint.¹¹⁷

5.4 Protected Disclosure or Public Interest Disclosure?

The title of the PDA has also attracted a fair degree of criticism for placing too

¹¹² The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 5.

¹¹³ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 12.

¹¹⁴ For example, see the *Public Finance and Audit Act 1983* (NSW), s52D that gives the Auditor-General the discretion to investigate the complaint.

¹¹⁵ The Committee on the Independent Commission Against Corruption, *Review of the Protection Disclosures Act 1994* (NSW), Parliament of NSW, November 2006 at p 31.

¹¹⁶ *Protected Disclosures Act 1994* (NSW), s27.

¹¹⁷ Committee on the Independent Commission Against Corruption, Discussion Paper, *Protection of public sector whistleblower employees*, March 2009 at p 37.

much emphasis on the individual making the disclosure rather than the public interest at hand that the disclosure aims to address. For example, the *Public Interest Disclosure Act 2002* (Tas) is distinguished from the *Protected Disclosures Act 1994* (NSW) insofar that, ostensibly, it implies that the policy objectives of the Act primarily concern matters in the public interest, rather than the individual who brought the matters to light. AJ Brown and Paul Latimer have commented on the NSW title, reminding us that:

whistleblower protection is being pursued not just for the individuals concerned, but also because of its wider public importance. The protection of whistleblowers from reprisals is not just a matter of individual justice, but is instrumental in encouraging and facilitating disclosures that are in the public interest.¹¹⁸

Further, the use of the word 'protected' itself is problematic because of the unrealistic expectations that the terminology can create. Whilst the PDA provides for certain 'protections', it is far from an absolute and comprehensive shield.

Although perhaps a largely symbolic measure, the ICAC committee concurred with this argument and in its 2006 review recommended that the name of the Act be amended to refocus its objective on facilitating disclosures that are in the public interest.¹¹⁹ However, the Committee did not reiterate its concern with the title in its 2009 review.

6 SHIELD LAWS

Shield laws are provisions in evidence legislation that give journalists special privilege in court that protects them from forced disclosures of personal information, or identifying the individuals that disclosed to them confidential information. At times, journalists may be compelled to give evidence in either criminal or civil proceedings with respect to identifying a source of information. Shield laws, where they exist, are often invoked in circumstances where a journalist has published an article using information gained from a confidential source and where exposure of that source could lead to serious consequences for the whistleblower, including prosecution.

In their profession, journalists trade confidence and discretion for information, which engenders a free flow of information. There is, however, a certain symbiosis in the relationship given that, when protecting the anonymity of the source, the journalist simultaneously protects his or her reputation.

¹¹⁸ AJ Brown & Paul Latimer, *Symbols or Substance? Priorities for the Reform of Australian Public Interest Disclosure Legislation*, Griffith Law Review (2008) Vol 17 No 1 at p 228.

¹¹⁹ Committee on the Independent Commission Against Corruption, *Review of the Protected Disclosures Act 1994*, November 2006 at p 23.

It is said that for journalists, 'loyalty to the source is paramount'.¹²⁰ The Media Alliance's Code of Ethics, the overarching, but voluntary, guide that covers Australia's journalists, provides at clause 3 that: '...where confidences are accepted, respect them in all circumstances.'¹²¹

Although entirely voluntary, in practice there is limited scope for a journalist to deviate from this rule if they wish to remain entirely compliant with the code. The only exception is provided for in a guidance clause that states that only when there are cases where there is 'substantial advance of the public interest or risk of substantial harm to people' can the rule be overridden.¹²²

It is notable that the code of ethics does not allow a specific exception that journalists may reveal their sources if compelled to by court and where failure to provide information relating to that source is deemed a contempt of court. To this end, journalists are expected to face prosecution rather than break their confidence.

6.1 Case Law

Historically, the courts have not been sympathetic when assessing a journalist's plight regarding his or her own professional and ethical obligations to maintain confidentiality in the face of prosecution. Indeed, legal history has shown that the courts have placed a greater emphasis on what is perceived more as the administration of justice than any self-ascribed duty by journalists and, to this end, a few notable cases are worth mentioning.

An early authority on the issue is *McGuinness v Attorney-General of Victoria* in which the defendant published articles which suggested that individuals were collecting funds to, essentially, bribe some Victorian Members of Parliament to vote in a certain way on upcoming Bills. When called to give evidence, the editor refused to disclose his sources. In his judgement, Rich J of the High court found:

The appellant was called upon to choose between his duty under the law to answer questions relevant to the enquiry, unless he had some lawful excuse for refusal, and what he conceived to be his duty as a pressman to his informant to maintain silence. He chose to observe the latter supposed duty...¹²³

¹²⁰ Lorraine Ingham, *Australian shield laws for journalists: A comparison with New Zealand, the United Kingdom and the United States*, [Hhttp://www.cla.asn.au](http://www.cla.asn.au)H, p 8, accessed 3 February 2009.

¹²¹ Clause 3, Media Alliance Code of Ethics at [Hhttp://www.alliance.org.au](http://www.alliance.org.au)H, accessed 20 April 2009.

¹²² Guidance Clause, Media Alliance Code of Ethics at [Hhttp://www.alliance.org.au](http://www.alliance.org.au)H, accessed 20 April 2009.

¹²³ *McGuinness v Attorney-General of Victoria* (1940) ALR 110.

Later, Rich J added:

The paramount principle of public policy is that the truth should always be accessible to the established courts of the country.¹²⁴

Similarly, *ICAC v Cornwall* concerned the refusal of a journalist to identify a police source before an ICAC hearing. The matter related to whether an underworld figure was a police informant. In considering the matter, Abadee J specifically examined clause 3 of the code of ethics and noted:

The refusal to answer questions which are relevant or to produce documents undermine the rule of law. The answers sought and the documents required were in the course of an investigation authorised and established pursuant to the powers conferred by Act of Parliament.¹²⁵

In this context, the Court commented that the code of ethics was not an authority to rely on, but in fact was ‘...drafted to operate despite the law, and perhaps intended to operate beyond it.’¹²⁶

Likewise, in *R v Budd*, a journalist was committed to gaol for refusing to name the identity of a source in a defamation suit. The Court rejected the argument that it should recognise a privilege for journalists, advising that for a journalist to refuse to name the source is: ‘...asserting some high-handed view [that] he or she is entitled to decide what is in the public interest’.¹²⁷

These decisions represent just a sample of the many cases on record that demonstrate that a privilege between journalists and their sources does not exist at the common law. However, New South Wales is unique insofar as it is the only State jurisdiction that provides a statutory privilege, albeit a qualified one, for the journalist-confider relationship, which partially overrides existing case law on the matter (see below).

6.2 Striking the Balance

Shield laws illustrate competing public interests and numerous arguments have been raised both in favour and against their enactment.

¹²⁴ *McGuinness v Attorney-General of Victoria* (1940) ALR 110.

¹²⁵ *ICAC v Cornwall* (1993) ALR 116 97 at p 124.

¹²⁶ *ICAC v Cornwall* (1993) ALR 116 97 at p 124.

¹²⁷ *R v Budd*, unreported in Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalists' Confidential Sources*, October 1994 at pp 23 – 24.

Proponents argue that by protecting the confidentiality of sources, shield laws encourage and facilitate the free flow of information, especially on matters that may be considered in the public interest.¹²⁸ The argument goes that, in the absence of such protection, regular sources of information would dry up due to concern by the source that their identity would be revealed. This argument feeds into the role of the media in general in its capacity as the fourth estate. Often seen as an independent watchdog against the exercise and excesses of public power, the media can only effectively pursue its role if its power is not fettered and if journalists are not threatened with contempt.¹²⁹ Furthering the ability of the media to investigate and report on matters from confidential sources, by removing such barriers, allows imperative information about deficiencies in public administration to be made publicly available.

On the other hand, a shield law that favours journalists impacts on other public interests. Principally, there is a public interest in the maintenance of the justice system and comfort in the knowledge that the Courts can give a lawful direction that will duly be complied with. In addition, when sources are protected from view, the veracity of the information is untested, not only diminishing its value but 'disempowering the public' to verify or challenge its truthfulness.¹³⁰ To this end, a shield law removes any effective means an individual adversely affected by the disclosed information has to pursue their civil rights, such as a defamation claim, through the Courts as well as removing the ability for that individual to check or challenge the basis of the allegation.

Another concern is that the real beneficiaries will not be well-meaning individuals acting out in the public interest, but those with political motives, seeking to leak and destabilise for personal reasons or and 'tactical advantage'.¹³¹

At the heart of the matter is the requirement to strike an effective balance between the competing interests of maintaining a journalist's confidence, on the one hand, and, broadly defined public interests, on the other. In attempting to create that balance, a journalistic privilege is provided for in the *Evidence Act 1995* (NSW) which is qualified to allow for the proper balancing of competing interests. It also maintains maximum flexibility by vesting in the Court the discretion to consider the issues before it and empowers the Court to decide which public interest triumphs.

¹²⁸ Lorraine Ingham, *Australian Shield Laws for Journalists: A Comparison with New Zealand, the United Kingdom and the United States*, Australian National University at p. 8

¹²⁹ See Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalists' Confidential Sources*, October 1994 at pp 37 – 47.

¹³⁰ Lorraine Ingham, *Australian Shield Laws for Journalists: A Comparison with New Zealand, the United Kingdom and the United States*, Australian National University at p. 8

¹³¹ Lorraine Ingham, *Australian Shield Laws for Journalists: A Comparison with New Zealand, the United Kingdom and the United States*, Australian National University at p. 8

6.3 Evidence Act Amendment

In New South Wales, the *Evidence Act 1995* (NSW) deals with the conduct of court proceedings for both criminal and civil matters. The Act deals with a number of specifically prescribed privileges, which allow a party to proceedings or a witness to refuse to disclose certain information or documents.

In 1997 the *Evidence Act 1995* (NSW) was amended to allow for 'protected confidences' to be granted privileged status. Section 126A of the *Evidence Act 1995* (NSW) defines a protected confidence as:

a means of communication made by a person in confidence to another person:

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.¹³²

In his Second Reading Speech to the Legislative Council, the then Attorney-General, the Hon. J.W. Shaw MLC, advised that the new protection would:

extend to a wide range of confidential communications and may include confidences imparted to doctors and other health professionals, journalists, social workers and in other relationships where confidentiality is an integral element...¹³³

To this end, the legislative intent that journalists would be considered by the new privilege provision was made expressly apparent.

Section 126B of the *Evidence Act 1995* (NSW), forms the main 'operative provisions'¹³⁴ of the protected confidences regime. Specifically, s126B provides that:

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

¹³² *Evidence Act 1995* (NSW), s126A(a)

¹³³ Hon. J.W. Shaw MLC in NSWPD, 22 October 1997 at p 1121.

¹³⁴ Lorraine Ingham, *Australian shield laws for journalists: A comparison with New Zealand, the United Kingdom and the United States*, [Hhttp://www.cla.asn.au](http://www.cla.asn.au)H, p 9, accessed 3 February 2009.

- (a) a protected confidence, or
- (b) the contents of a document recording a protected confidence, or
- (c) protected identity information

(2) The court may give such a discretion:

- (a) on its own initiative, or
- (b) on the application of the protected confider or confidant concerned (whether or not either is a party)

(3) The court must give such a direction if it is satisfied that:

- (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
- (b) the nature and extend of the harm outweighs the desirability of the evidence being given.¹³⁵

The privilege afforded by this new provision is not absolute but must be qualified against a set of criteria. The provision vests a certain degree of discretion in the Court when acknowledging confidences to determine whether such confidences should be protected. In considering whether or not to exclude the evidence of a protected confidence, the court must take into account:

- The probative value and the importance of the evidence in the proceeding;¹³⁶
- The nature and gravity of the offence, cause of action or defence and the nature of the subject matter of the proceeding;¹³⁷
- The availability of other evidence relating to the protected confidence;¹³⁸
- The likely effect of adducing evidence of the protected confidence, including the likelihood of harm and the nature and extent that would be caused;¹³⁹
- The means available to the court to limit the harm or extent of the harm that is likely to be caused if the evidence of the protected confidence is disclosed;¹⁴⁰

¹³⁵ *Evidence Act 1995* (NSW), s126B(3).

¹³⁶ *Evidence Act 1995* (NSW), s126B(4)(a) – (b).

¹³⁷ *Evidence Act 1995* (NSW), s126B(4)(c).

¹³⁸ *Evidence Act 1995* (NSW), s126B(4)(d).

¹³⁹ *Evidence Act 1995* (NSW), s126B(4)(e).

¹⁴⁰ *Evidence Act 1995* (NSW), s126B(4)(f).

- In criminal proceedings, whether the party seeking to adduce evidence of the protected disclosure is the defendant or the prosecutor;¹⁴¹ and
- Whether the substance of the protected confidence has already been disclosed.¹⁴²

However, the loss of privilege can be created in circumstances where:

- The person who confided the protected information consents to having the evidence adduced;¹⁴³ or
- If there are reasonable grounds to find that the protected confidence was made or documents prepared in furtherance to the commission of a fraud or other offence that renders the person liable to a civil penalty.¹⁴⁴

Although these provisions enable the court to find privilege at its own initiative, the burden of demonstrating that privilege must apply rests with the party seeking the direction to be given, that is, the journalist. The criteria inform the Court as to what factors to take into account but fall short of determining how much weight the Court must take each factor into account. To this end, the amendment has been criticised for lacking 'guidance'.¹⁴⁵

6.4 Judicial Test of s126

The advent of s126 substantially diminishes the precedential value of previous case law in New South Wales and in turn creates a whole new area of legal exploration. Perhaps the most authoritative case since s126 was introduced is *NRMA v John Fairfax Publications*. In this case, the plaintiff sought documents by, and the personal attendance of, journalists for examination in order to ascertain the identity of the person(s) who disclosed confidential information arising from matters discussed in the plaintiff's board meetings. As this conduct was deemed improper, the plaintiff sought to identify the source in order to pursue an action for breach of his or her fiduciary duty.

The Court considered the intent of the Attorney-General in amending the *Evidence Act 1995 (NSW)* to extend the scope of privileges, and expressly acknowledged

¹⁴¹ *Evidence Act 1995 (NSW)*, s126B(4)(g).

¹⁴² *Evidence Act 1995 (NSW)*, s126B(4)(h).

¹⁴³ *Evidence Act 1995 (NSW)*, s126C.

¹⁴⁴ *Evidence Act 1995 (NSW)*, s126D.

¹⁴⁵ See Stephen Odgers, *Uniform Evidence Law 7th ed.*, Thomson Lawbook 2006 at pp 556 – 560.

that privilege could, generally speaking, apply to journalists.¹⁴⁶

However, in considering whether privilege actually did apply in the circumstances of the case, Master Macready gave weight to each of the criteria set out in section 126B of the *Evidence Act 1995* (NSW) and ultimately decided:

The question is whether the disclosure is necessary in the interests of justice. The inability of the plaintiff to sue if the sources are not disclosed is obvious. This will leave the plaintiff without a remedy and the consequences of this have to be considered.

I am satisfied that the interests of justice in giving the plaintiff an effective remedy outweighs the possible harm which might be caused to the reputation of journalists and their ability to obtain information if they are forced to give details of their sources.¹⁴⁷

Although just one example, there is very little other case law on the operation of s126 and more further cases will need to be assessed to tease out the nuances of the protected confidences provision before being able to ascertain its limits.

7 CONCLUSION

Whistleblowing remains an important mechanism by which individuals with relevant insights can bring to light defects in public administration. The *Protected Disclosures Act 1994* (NSW) sets up the appropriate framework and protections but numerous reviews have stressed the need for procedures to be refined and protections strengthened. In helping to expose issues in the public interest, journalists sometimes play an important role in their capacity as watchdogs and conduits, both obtaining public interest information and facilitating its dissemination. It is said that sunlight is the best disinfectant¹⁴⁸ and the cumulative role of whistleblowers and journalists go some way to achieving this end.

¹⁴⁶ *NRMA v John Fairfax Publications* [2002] NSWSC 563 at 150 – 152.

¹⁴⁷ *NRMA v John Fairfax Publications* [2002] NSWSC 563 at 168 – 169.

¹⁴⁸ Justice Louis Brandeis, *Other People's Money, and how Bankers Use It* (914) in Paul Latimer and AJ Brown, *In Whose Interest? The Need for Consistency in to Whom, and about Whom, Australian Public Interest Whistleblowers can make Protected Disclosures*, *Deakin Law Review*, Volume 12 No 2, 2007 at p 13.