

PARLIAMENT OF NEW SOUTH WALES



# Committee on the Independent Commission Against Corruption

Protection of public sector whistleblower employees

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## Terms of reference

That the Committee on the Independent Commission Against Corruption, which is a joint statutory committee, inquire into 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.

*Legislative Assembly Votes and Proceedings*, No 79, Thursday 26 June 2008, item 22  
*Legislative Council Minutes*, No 62, Thursday 26 June 2008, item 37

# Functions of the Committee

## *Independent Commission Against Corruption Act 1988*

### **64 Functions**

- (1) The functions of the Joint Committee are as follows:
  - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
  - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
  - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
  - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the Joint Committee:
  - (a) to investigate a matter relating to particular conduct, or
  - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
  - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

## Chair's foreword

On 26 June 2008, both Houses of the New South Wales Parliament resolved to refer to the Committee an inquiry on protected disclosures laws and procedures (often referred to as 'whistleblower' laws) in the New South Wales public sector. The terms of reference for the inquiry were:

That the Committee on the Independent Commission Against Corruption, which is a joint statutory Committee, inquire into 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.

The inquiry was referred to the Committee, pursuant to s.64(1)(e) of the *Independent Commission Against Corruption Act 1988*, which reads:

- (1) The functions of the Joint Committee are as follows:
  - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
  - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
  - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
  - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
  - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

The Committee received 64 submissions and took evidence from 34 witnesses over 4 days of hearings.

What became apparent very early in the process was that although the Protected Disclosures Act was enacted in 1994, the regime and associated procedures to protect people who came forward to disclose wrongdoing was never really given the attention and ownership it perhaps deserved. Changes made over the years were minor and peripheral. The intention of the original legislation sought to gather existing protections found in various Acts of Parliament, which resulted in a complicated procedure for reporting. It also set a high eligibility criteria for individuals seeking protection that served as a disincentive for potential whistleblowers. The centre piece of the legislation created a criminal offence provision, s.20, which made it an offence to take detrimental action against someone that was substantially in reprisal for making a disclosure.

In addition to these issues however, the take up and application of the regime was by far the greatest issue that became apparent during the inquiry. Apart from the NSW Ombudsman's Office playing an active role in producing guidelines and advising agencies and members of the public about protected disclosures, the inquiry found that there was no central body to administer the Act or collect statistics about the system of protected disclosures in New South Wales.

Further, in the absence of any consolidated statistical information collated by a central agency, the Committee did not have access to any objective data about the operation of the scheme, including the extent to which public officials have sought the protections available under the Protected Disclosures Act and the resulting outcomes. Consequently, the Committee relied



upon empirical data available through the *Whistling While They Work* national research project and the findings of that particular project to help identify the main areas for reform.

All of these issues meant that it was very difficult to make a determination about the effectiveness of the protected disclosure laws and procedures.

As the Chair presiding I can confidently and proudly say that the Committee has produced a report containing recommendations that, if adopted, will substantially transform the system of protected disclosures in New South Wales. Apart from setting up a central monitoring and coordination body to oversee the administration and application of the regime, the two key pillars of this transformation focus firstly on the level of protection for the person reporting wrongdoing and secondly, the system in place to deal with those who take action in reprisal against those who have made the disclosure – commonly referred to as 'detrimental action'.

Firstly, the Committee's reforms address the need for greater ownership of the protected disclosures legislation, establishing a focused oversight system, providing for evidence based policy development and ongoing evaluation of the scheme, clearer direction for policy reform and collection of information over the long term about how the scheme is operating and how the protections are being used. Secondly and more specifically, the recommendations comprehensively cover simplifying the protection criteria, strengthening statutory and administrative protections, simplifying the system for officials wanting to make disclosures and ensuring responsibility for prosecutions.

This means that for public officials and parliamentary employees, including electorate officers, the making of a disclosure in the workplace about wrongdoing will necessarily attract consideration and treatment at a level which is substantially higher than the case at present. In practical terms, the 'whistleblower' who makes a protected disclosure will be given confidentiality and will now know that their employer will have a mandatory system in place for assessing and investigating the disclosure. Disclosures will be assessed against the less stringent criteria of 'honest belief on reasonable grounds', to determine eligibility for protection. The public official will know that, in appropriate circumstances, their employer will be able to apply for an injunction against detrimental action pending an investigation. This is in addition to the employer being able to take disciplinary action against an employee for taking such action. The whistleblower will have available to them recourse through civil damages for detrimental action taken against them. Finally, should they wish to pursue a prosecution under s.20 of the Act, the Director of Public Prosecutions will be the prosecuting authority, alleviating the need for a private prosecution. Penalty provisions for reprisal offences will be increased to provide for a maximum penalty of imprisonment for two years, up from the current one year maximum.

It is very pleasing to be able to report that all 31 recommendations for reform proposed in this report were adopted unanimously and have the total support of the Committee. The report is largely a consensus document. There was also agreement amongst Committee members that the reforms proposed were mainly aimed at getting the system of protected disclosures up and running so that at the five year review mark, an accurate picture can be presented and if necessary, further reforms can be put forward to again improve the system. Many of the recommendations have been formulated with this in mind.

It must be recognised however that reforming the legislative framework by creating extra protections for whistleblowers and increasing penalties against detrimental action is only one remedy for the problems identified during the Committee's inquiry. Cultural change is also essential if the protections available to public officials under the scheme are to be fully realised. Ultimately, it is a matter for individual agencies to ensure that they have in place the policies, practices and procedures necessary to underpin a supportive work environment in which

Chair's foreword

employees can come forward with disclosures of corrupt conduct, maladministration and serious and substantial waste in the public interest.

I would be remiss in my duty if I did not deal with a particular aspect of this inquiry which served to give it a unique character. Chapter 1 of the report deals with the conduct of the inquiry and has been written to meet the legitimate expectations of openness and transparency about the inquiry process. This was especially important for this inquiry given the specific issues and questions on which members of the Committee were continually divided. This chapter sets out how the Committee dealt with these specific issues.

The question that the reader may ask is: How could a Committee that is unified in its adoption of the reforming recommendations that are contained in a consensus document be continually divided on certain procedural jurisdictional issues relating to the conduct of the inquiry?

The answer lies in the immediate background to the inquiry and the expectation, which developed before the inquiry commenced, that the Committee was charged with investigating certain particular 'whistleblowing' cases and particular allegations. These expectations were created during parts of the parliamentary debates and were reinforced by media reporting. These expectations, therefore, filtered into the deliberations of the Committee. It is also recognised that certain expectations were created about the task that the Committee was asked to carry out, that is, the terms of reference. It is further acknowledged that certain misconceptions have existed about the actual role of the Committee, its statutory basis and its jurisdiction.

The *Independent Commission Against Corruption Act 1988*, under which the Committee is established, gives it no authority to investigate particular conduct. Such matters are outside the Committee's jurisdiction and should be investigated by the appropriate authorities. If allegations concern a criminal offence they are a matter for the police. In the context of this inquiry, it should be noted that the Ombudsman may investigate the conduct of a public authority relating to employment matters, where the matters arise from the making of a protected disclosure.

The Committee was not asked to conduct an investigation into any particular case or cases relating to any particular individual or individuals and their specific claims or allegations. If this was the case then firstly the terms of reference would have been different and secondly, the inquiry would have been referred to another Committee appropriately constituted and with the jurisdiction to conduct such an inquiry. This is demonstrated by the fact that after receiving legal advice to confirm that the Committee could properly conduct the inquiry according to its statutory powers and functions, no member of the Committee sought to refer the matter back to the Parliament for further consideration on any particular difficulties. There was no impediment that prevented the Committee from conducting the inquiry as referred by the Houses.

The way in which the Committee dealt with the issue of obtaining evidence on individual whistleblowers' issues and experiences is fully set out in chapter 1 of the report. Departing from the Committee's statutory functions on this occasion in order to consider matters outside its jurisdiction would fundamentally undermine the integrity of the Committee and the procedures under which it operates. The Committee cannot submit to pressures that would result in the trouncing of proper and established practices and procedures, the result of which would take the conduct of the inquiry outside the law and beyond the terms of reference set by the Parliament.

A transparent account of the Committee's decision-making in relation to the conduct of the inquiry is provided in the minutes attached to the report. It will obviously be a matter for the

reader to make their own judgement regarding this aspect of the inquiry in the context of the particular issues that are raised above.

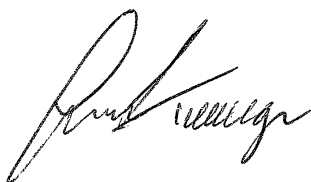
In summary, this report contains substantial reform proposals contained in its 31 recommendations that will serve to set up an optimal system of 'whistleblower' laws, practices and procedure that can be administered and applied over the next five years. Particularly, it is envisaged that with a central coordinating and monitoring body it will be the case that by the time the first major review period is reached, there will be ample information, empirical data and expertise available to make accurate evaluations and assessments about the system of protected disclosures in New South Wales. In addition, the role of the statutory based Steering Committee will enable a unique approach to the strategic development of the scheme. The important role of this newly formed Steering Committee cannot be understated. Whilst the Committee has already referred several issues arising from this inquiry to this committee, its work over the next five years may well result in further major reforms to the protected disclosures regime. It is envisaged that at the five year review mark, the question of progressing to a totally separate administering body will be one of the issues for discussion.

Interested stakeholders, government departments and independent statutory bodies made substantial contributions to the inquiry. On behalf of the Committee, I would like to express our appreciation for the efforts of all of the participants in the inquiry process. The Committee values the viewpoints that were put to it in submissions and evidence, and it has endeavoured to present to the Parliament and the public of New South Wales a reform package commensurate with the importance of the inquiry assigned to it.

In particular, the Committee is deeply indebted to the *Whistling While They Work* project, led by Dr A J Brown. This study proved to be an invaluable resource for the Committee, especially with regard to the data on individual experiences and issues of whistleblower employees.

Whilst the inquiry was conducted by the elected members of Parliament and the report is a product of their work and commitment, all members on this Committee have been extremely well served by the highly committed and dedicated parliamentary staff that assisted in this inquiry. As the Chair and on behalf of all members of the Committee, I wish to sincerely thank staff members, including Dora Oravec for her enormous commitment in researching and assistance in putting together the report, Emma Wood for her work in research and providing briefings for the Committee members and Amy Bauder for general support. I should also thank Jasen Burgess and Carly Sheen for their assistance during the time they were part of the staff.

Finally, I need to especially thank and acknowledge the Committee Manager, Ms Helen Minnican, for professionalism, perseverance and forbearance above and beyond the call of duty throughout the course of this inquiry. In the true tradition of a highly professional parliamentary officer, her assistance in providing advice and guidance on matters of committee practice and procedure proved to be both crucial and invaluable during what was without a doubt, a very challenging but rewarding experience.



Frank Terenzini MP  
Chair

## List of recommendations

**RECOMMENDATION 1:** That the NSW Ombudsman's Office be funded, resourced and empowered to perform the following oversight functions in relation to the protected disclosures scheme:

### Monitoring function

- (a) Collect and collate statistics regarding protected disclosures, current policies and agency compliance with statutory requirements, based on agency reporting.
- (b) Publish on an annual basis the information gathered as part of its monitoring function.
- (c) Monitor the operational response of public authorities (other than investigating authorities) to the *Protected Disclosures Act 1994*.
- (d) Monitor and report, as considered necessary, on trends in the operation of the *Protected Disclosures Act 1994*, based on information received from public authorities in relation to the management and outcomes of all disclosures received.

### Audit function

- (e) The NSW Ombudsman conduct a regular protected disclosures audit and report to Parliament on the findings of the audit and any recommendations for reform. (The audit could be conducted on a staged basis if necessary.)
- (f) The NSW Ombudsman's audit would encompass:
  - Checking agency compliance with the proposed statutory reporting requirements of the *Protected Disclosures Act 1994*.
  - Checking agency compliance with the proposed internal policy requirements of the *Protected Disclosures Act 1994*.
  - Arriving at an assessment of the quality of protected disclosures investigations by public sector agencies.

### Education and advisory function

- (g) That the NSW Ombudsman's Office be responsible for:
  - Providing advice in relation to protected disclosures to public officials and public authorities.
  - Evaluating the internal reporting policies and procedures of public authorities.
  - Coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities.
  - Providing advice on internal education programs to public authorities. ....72

**RECOMMENDATION 2:** That the effectiveness of the oversight system proposed by the Committee, and the functions of the NSW Ombudsman's Office within that scheme, be reviewed after a five year period with a view to assessing whether there is a need for an alternative oversight model. (see Recommendation 7). ....72

**RECOMMENDATION 3:** That the *Protected Disclosures Act 1994* be amended to require the Premier, as the relevant Minister, to provide a response to the NSW Ombudsman's protected disclosures audit report, addressing any specific recommendations by the NSW Ombudsman, and for the response to be tabled in Parliament. ....72

**RECOMMENDATION 4:** That the *Protected Disclosures Act 1994* be amended to change the name of the Act to the Public Interest Disclosures Act. ....80

**RECOMMENDATION 5:**

- (a) That the *Protected Disclosures Act 1994* be amended to:
- Make the Protected Disclosures Steering Committee a statutory advisory body with the role of providing advice to the Premier, as the relevant Minister, on issues arising for investigating authorities and other agencies surrounding the operation of the Act, and possible areas for reform.
  - Provide that the NSW Ombudsman publish in his protected disclosures audit reports (see Recommendation 1), an account by the Steering Committee of its activities and any recommendations it has made for reform during the audit reporting period.
- (b) That, in *responding* to the NSW Ombudsman's audit reports, the Premier be required under the *Protected Disclosures Act 1994* to address any recommendations of the Steering Committee.
- (c) Provide that the Steering Committee be consulted by the Premier on any legislative proposals going before Cabinet, subordinate legislation, or any administrative instrument that affects the operation of the *Protected Disclosures Act 1994*. ..... 81

**RECOMMENDATION 6:** That, as a matter of some priority, the Protected Disclosures Steering Committee, consider the findings and recommendations of the *Whistling While They Work* project and report on the policy implications of the reports for the protected disclosures scheme in New South Wales and also identify possible areas for reform. .... 81

**RECOMMENDATION 7:** That the *Protected Disclosures Act 1994* be amended to provide that the NSW Ombudsman may provide a special report to Parliament, as he or she considers necessary, on systemic issues or other problems identified with the operation of the *Protected Disclosures Act 1994*, and suggested legislative reform. .... 81

**RECOMMENDATION 8:** That the *Protected Disclosures Act 1994* be amended to require the Premier, as Minister with administrative responsibility for the relevant legislation, to table in Parliament a response to any special report of the NSW Ombudsman, and for the response to address each recommendation for reform.

(The Committee notes in making the recommendations for special and audit reports by the NSW Ombudsman on protected disclosures that the parliamentary oversight committee dedicated to the NSW Ombudsman's Office has the capacity to examine such reports and report to Parliament on any matter considered necessary.) ..... 81

**RECOMMENDATION 9:**

- (a) That section 32 of the *Protected Disclosures Act 1994* be amended to remove the need for a biennial review of the Act and to provide for a parliamentary committee to undertake a review of the Act five years from the implementation of the recommendations contained in this report.
- (b) That the need for ongoing review of the legislation by a parliamentary committee be one of the issues subject to examination in the next parliamentary committee review, and that the report on the review include a recommendation to Parliament on this question, in light of progress made in reforming the scheme and the implementation of the new roles proposed for the NSW Ombudsman and the Protected Disclosures Steering Committee.
- (c) That the next parliamentary committee review of the Act in five years time examine:

List of recommendations

- i. the extent to which the amendments proposed by the Committee have successfully addressed the problems with the protected disclosures scheme identified during this inquiry;
- ii. whether the structures in place to support the operation and future direction of the protected disclosures scheme remain appropriate, including —
  - the need to establish a separate body dedicated to overseeing the investigation of disclosures and the operation of the protected disclosures scheme; and,
  - if such a need exists, the extent of the role and functions to be performed by such a body and the powers it should be able to exercise.....81

**RECOMMENDATION 10:** That the *Protected Disclosures Act 1994* be amended to require public authorities (including local government authorities) to have internal policies that adequately assess and properly deal with protected disclosures, and to provide adequate protection to the person making the disclosure. As far as is practicable, the internal policies should be consistent with the NSW Ombudsman’s ‘Model internal reporting policy for state government agencies’ and its ‘Model internal reporting policy for councils’ as outlined in the NSW Ombudsman’s *Protected Disclosures Guidelines*. .....87

**RECOMMENDATION 11:**

- (a) That the *Protected Disclosures Act 1994* be amended to require public authorities to publish in their annual reports the following information on protected disclosures:
  - i. the number of disclosures made in the past 12 months
  - ii. outcomes
  - iii. policies and procedures
  - iv. year-on-year comparisons
  - v. organisational impact of investigations of disclosures
- (b) That the NSW Ombudsman review the appropriateness of the above categories of information and data in consultation with the Protected Disclosures Steering Committee, and recommend amendments to the Act if the categories are considered to be inadequate. ....94

**RECOMMENDATION 12:** That, to ensure consistent reporting and to give agencies assistance, the NSW Ombudsman include in its *Protected Disclosures Guidelines* an Appendix setting out a model for agency annual reporting of information on protected disclosures, with the *Protected Disclosures Act 1994* requiring public authorities to adopt this model.....94

**RECOMMENDATION 13:** That the *Protected Disclosures Act 1994* be amended to expressly provide that detrimental action taken substantially in reprisal for a protected disclosure is misconduct, subject to disciplinary action, for all public officials.....98

**RECOMMENDATION 14:** That the *Protected Disclosures Act 1994* be amended to put beyond doubt that a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both, be included in the definition of ‘public official’ under the Act.....121

**RECOMMENDATION 15:** That the *Protected Disclosures Act 1994* be amended to put beyond doubt that disclosures about a member of Parliament:

- (a) concerning maladministration, made to the NSW Ombudsman, or to the Clerk of the Legislative Assembly, the Clerk of the Parliaments or the Executive Manager of the

Department of Parliamentary Services, in accordance with the NSW Parliament's current policies and procedures; and

- (b) concerning serious and substantial waste of public money, made to the Auditor-General;

are eligible for protection under the Act..... 121

**RECOMMENDATION 16:** That the Parliament of New South Wales consider updating its Protected Disclosures policy, Parliamentary Staff Code of Conduct and Code of Conduct for Members' Staff to include a statement that detrimental action is a disciplinary matter for staff, as well as a criminal offence under section 20 of the *Protected Disclosures Act 1994*.

..... 125

**RECOMMENDATION 17:** That the Parliament of New South Wales consider amending its Protected Disclosures policy to make explicit that post-employment assistance and entitlements available to members' staff should not be varied or reduced because the making of a protected disclosure formed part of the circumstances which led to the termination of their employment. .... 125

**RECOMMENDATION 18:** That the Departments of the Legislative Assembly, Legislative Council and Parliamentary Services, consider providing, as far as practicable, the following information on protected disclosures in their annual reports:

- (a) the number of disclosures made in the past 12 months  
 (b) outcomes  
 (c) policies and procedures  
 (d) year-on-year comparisons  
 (e) organisational impact of investigations of disclosures. .... 126

**FINDING 1:**

- (a) That while the Parliament of New South Wales has protected disclosures policies and procedures in place, there may be scope for further improvements to these through:
- Educational initiatives for parliamentary employees and, as far as is practicable, other individuals located within the offices of members of Parliament.
  - A comprehensive review of existing policies, procedures and codes of conduct relevant to the making and handling of protected disclosures.
  - A review of induction programs to ensure such programs provide adequate information about protected disclosures policies, internal reporting systems and support mechanisms for individuals wishing to make disclosures.
- (b) Further, that the administrative structures of the Parliament of New South Wales have changed significantly since the commencement of the inquiry and that the Department of Parliamentary Services has commenced a number of initiatives relating to the above measures.

The Committee encourages DPS's initiatives in this regard and draws the attention of the Parliament of New South Wales to the best practice models currently available through the NSW Ombudsman's Office and the national *Whistling While They Work* research project, and initiatives in other Parliaments..... 126

**RECOMMENDATION 19:** That the Parliament of New South Wales review its current policies, procedures and codes of conduct for volunteers and interns relating to protected disclosures, including reviewing induction programs to ensure they provide adequate information and support on protected disclosures..... 127

**RECOMMENDATION 20:** That the *Protected Disclosures Act 1994* be amended to provide that, in order to be eligible for protection, disclosures must be made by a public official who has an honest belief on reasonable grounds that the disclosure tends to show corrupt conduct, maladministration, or serious and substantial waste. ....134

**RECOMMENDATION 21:** That the *Protected Disclosures Act 1994* be amended to provide that a public official is eligible for protection, if the official makes a disclosure to a public authority or investigating authority, in the honest belief that it is an appropriate authority to receive a disclosure concerned with such conduct. ....137

**RECOMMENDATION 22:** That the *Protected Disclosures Act 1994* be amended to provide that, in addition to public officials, disclosures that are made by individuals who are in contractual relationships with public authorities are eligible for protection. ....153

**RECOMMENDATION 23:** That section 16 the *Protected Disclosures Act 1994*, which provides for disclosures made on frivolous or other grounds, be repealed. ....160

**RECOMMENDATION 24:**

- (a) That agency protected disclosure policies include advice that complaints made substantially to avoid disciplinary action are not eligible for protection and that it is an offence to wilfully make false statements to or mislead, a public authority, investigating authority or public official, in making a disclosure, pursuant to section 28 of the *Protected Disclosures Act 1994*.
- (b) Further, that the policies should also indicate appropriate avenues for resolving grievances and performance issues. ....160

**RECOMMENDATION 25:** That the NSW Ombudsman's guidelines on 'Managing information arising out of an investigation' May 2009, be used as a guide for agencies in circumstances where a public official who has made a protected disclosure seeks information about the status of the matters they have raised, prior to the expiration of the six month statutory notification period provided for in section 27 of the *Protected Disclosures Act 1994*. ....163

**RECOMMENDATION 26:**

- (a) That the *Protected Disclosures Act 1994* be amended to provide for applications by public or investigating authorities for injunctions against detrimental action, on behalf of a public official who has made a protected disclosure.
- (b) That the Steering Committee consider the feasibility of providing for applications for injunctions against detrimental action by public officials who have made a protected disclosure, based on the effectiveness of such provisions in other jurisdictions. ...179

**RECOMMENDATION 27:** That the *Protected Disclosures Act 1994* be amended to provide for a public official to claim civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure. ....185

**RECOMMENDATION 28:** That section 22 of the *Protected Disclosures Act 1994* be amended to:

- (a) remove the requirement for confidentiality where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.
- (b) clarify that the confidentiality guidelines apply to a public official who has made a protected disclosure, in addition to the relevant investigating and/or public authorities investigating the disclosure. ....188



**RECOMMENDATION 29:** That the *Protected Disclosures Act 1994* be amended to provide that the Office of the Director of Public Prosecutions is the nominated prosecuting authority for offences under section 20 of the Act, and that these matters be referred to the Office of the Director of Public Prosecutions to undertake or supervise any prosecutions. .... 192

**RECOMMENDATION 30:** That the Office of the Director of Public Prosecutions be fully consulted by the Department of Premier and Cabinet on any proposed amendment, which would give effect to the Committee’s recommendations 29 and 31, in regard to the prosecution of offences under the *Protected Disclosures Act 1994*. .... 192

**RECOMMENDATION 31:** That section 20(1) of the *Protected Disclosures Act 1994*, which provides that it is an offence to take detrimental action against a person, if the action is substantially in reprisal for the person making a protected disclosure, be amended to provide a maximum penalty of 100 penalty units or imprisonment for two years, or both. 195

## Executive summary

### *Introduction*

At the commencement of the inquiry, the Committee found the existing protected disclosures scheme in New South Wales to be inadequate and unnecessarily complex. The legislation posed too many obstacles to the protection of whistleblower employees. Further, the lack of meaningful information and data about the operation of the scheme meant that it was impossible for the Committee to make an assessment about the effectiveness of the current protections available to whistleblower employees. So from the outset, the Committee found itself examining issues that should have been resolved a long time ago. It also was evident that the Protected Disclosures Act had no owner to champion its development. As an 'orphan' piece of legislation, it had a history of piecemeal amendment, rather than being subject to any substantive reform agenda. Consequently, the Committee had to start at the very beginning when establishing the baseline for its inquiry.

### *Inquiry outcomes*

The Committee has examined wide-ranging issues concerning the current scheme for protection of whistleblower employees who make allegations against government officials and members of Parliament. Based on the evidence, submissions and other information considered by the Committee, a package of legislative and administrative reforms are proposed, aimed at overhauling the protected disclosures scheme in New South Wales.

In the Committee's view, the scheme is in need of comprehensive reform and new policy direction if it is to retain public confidence and support, and if employees are to feel encouraged to report serious misconduct and wrongdoing in the public interest. Cultural change is an essential part of the reform agenda. Achieving cultural change is necessary to ensure that employees wanting to make disclosures are confident of receiving protection, confident that their disclosure will be investigated, assured that reprisals will not be tolerated and confident that wrongdoers will be prosecuted.

The Committee recommends changing the name of the Act to the Public Interest Disclosures Act, as a positive measure aimed at emphasising the public interest in making disclosures, which also is in keeping with the spirit of many of the changes the Committee has recommended in this report. However, no single piece of legislation can overcome all of the problems associated with a protected disclosures scheme, which is why cultural change in public authorities is of such significance. The Committee shares the view of the Deputy Commissioner of the ICAC, that it is a management responsibility to set the tone in relation to protected disclosures. There needs to be a real commitment from management to see disclosures as a valuable management tool.

Senior management should, and should be seen to, support and protect employees making disclosures. The focus should be on 'problem conduct' not 'problem employees' and management actions need to reflect this change in attitude. Management's emphasis should be on investigating the conduct that is disclosed. The Committee's report highlights the raft of measures available to public authorities to improve the handling of disclosures and the protection of employees making disclosures. These measures are extensive and include risk management and professional support services.

While there is a public sector wide statutory framework in place, and agencies have implemented relevant policies and practices, it is apparent to the Committee that there is

scope to improve the scheme substantially. At present there is no coherent and unified direction for the whistleblowing scheme in New South Wales.

A long-term view should be taken on the future of the scheme and the protection it affords public officials making disclosures. The current scheme does not seem to have moved past the initial implementation phase in any major way. The proposals made by the Committee aim to put in place an optimal scheme for guaranteeing protection and effective investigation. By collecting and systematically collating information on the operation of the scheme, it should be possible to achieve a long-term plan for its future direction.

A period of five years from the implementation of the Committee's proposed reforms should be an adequate period from which to gauge whether the reforms have acted as a catalyst for significant improvements to the scheme. It should enable a detailed view of how the protected disclosures scheme is operating and whether there is a need for an alternative, more focussed oversight system. One available model would be the recent scheme established in relation to public access to government information, including the establishment of a separate oversight body. The Committee has recommended that the oversight system be one of the matters considered by a parliamentary review of the protected disclosures scheme.

#### *Committee recommendations*

In terms of the protections afforded employees making disclosures, the Committee has proposed the following measures:

- Strengthening the protections available for whistleblowers through more effective detrimental action provisions involving increased penalties, DPP responsibility for prosecutions, and making detrimental action a disciplinary matter (as well as a criminal offence);
- Making access to the institutions and apparatus of protection easier and less complicated;
- Providing for injunctions and civil damages;
- Simplifying and clarifying particular provisions of the current legislation to assist and encourage whistleblowing in the public sector, in particular, providing for a disclosure to be protected if it is made in the honest belief on reasonable grounds that it tends to show corrupt conduct, maladministration or serious and substantial waste;
- Extending the protections available under the PDA to cover contractors, engaged in providing services across the public and private sector interface.

Other measures aimed at improving the effectiveness of the scheme include:

- Coordinated oversight and monitoring of the operation of the protected disclosures scheme to ensure agencies and departments properly deal with disclosures and afford protection to whistleblower employees;
- Mandatory and standardised agency policies and practices, to encourage reporting and protection of whistleblowers;
- Clearer policy direction and legislative reform for the protected disclosures scheme.

The approach advocated by the Committee is to promote common strategies that would facilitate internal reporting within the public sector and effect cultural support for disclosures in the public interest. The operation of these strategies is set against a public sector wide

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statutory framework for the protection of whistleblowers and guidelines for agency policies and practices. While some strategies may be specific to each employment context, the aim is to develop common 'best practice' standards for the reporting and handling of disclosures of corrupt conduct, maladministration and serious and substantial waste in the public sector and to protect the employees making such disclosures.

Recommendations have also been made in relation to protected disclosures made by employees against members of Parliament, which was part of the terms of reference for the inquiry. The NSW Parliament currently has policies in place in relation to protected disclosures and the Committee has suggested a number of additional measures for the consideration of both Houses. The Department of Parliamentary Services (DPS) has indicated that the Parliament's protected disclosures policies are to be reviewed as part of a wider review of the Parliament's policy governance framework. New training initiatives for Electorate Officers to Members of the Legislative Assembly and secretaries/research assistants to Members of the Legislative Council have been undertaken since the commencement of the Committee's inquiry. These initiatives are intended to promote greater awareness of the internal reporting avenues available to such employees.

The Committee's inquiry has benefited from recent research into whistleblowing. The *Whistling While They Work* research project was conducted at a national level and has provided the Committee with valuable empirical data on which to base the recommendations contained in this report. Interest across different levels of government in integrity systems also has provided momentum for reform in the area of whistleblower protection. Some of the key findings and recommendations of the WWTW project, of relevance to the Committee's inquiry, include:

- The important role played by whistleblowers in terms of public integrity is often recognised by their organisations and governments in general.
- On the other hand, less than 2% of public interest whistleblowers were estimated by the project as receiving active support from an organised agency program, over a recent three-year period.
- More than half of all public interest whistleblowers were estimated by the project as suffering a stressful experience, with approximately a quarter reporting reprisals or mistreatment.
- 70% of agencies surveyed did not have procedures for assessing the risks of reprisal when their staff blew the whistle, and only 3% of surveyed agencies were rated by the project as having reasonably strong whistleblowing procedures, when assessed against the Australian Standard.
- Major reform is needed including: operational systems used to manage whistleblowing, expansion of support programs, new public sector oversight and coordination arrangements, and legislative reform that encompasses recognition of the role of public whistleblowing.<sup>1</sup>

It is the Committee's view that policy reforms associated with the protected disclosures scheme should be evidence-based. Combined with coordinated oversight and transparent operation of the scheme, such policy development should support greater public sector accountability and better standards of conduct by public officials. Protecting those

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<sup>1</sup> Griffith University, 'World-leading whistleblowing study reveals better protection needed', Media release, 9 September 2008, <<http://www.griffith.edu.au/centre/slr/whistleblowing/docs/whistleblowing-launch-mediarelease9sept.doc>>

employees who come forward to make disclosures of corrupt conduct, maladministration and serious and substantial waste of public money is integral to achieving this end.

The amendments in the report are a consolidation of the reforms proposed by parliamentary committees in previous reviews of the *Protected Disclosures Act 1994*; reforms that had the support of members of the Government, Opposition and cross-bench, as well as important stakeholders. The Committee has built on earlier proposals by resolving some outstanding issues. Significantly, there is consensus between the NSW Police Force and the Office of the Director of Public Prosecutions that the Office will be responsible for prosecutions of offences for detrimental action, pursuant to s.20 of the Act. It is hoped that this will help to overcome any problems in successfully prosecuting detrimental action offences. Also, providing that detrimental action may be a disciplinary matter should make it easier to deal with reprisals.

### *Conduct of the inquiry*

One of the obligations of the Committee in reporting to Parliament is to give a transparent, objective account of committee proceedings. From the outset, the inquiry presented significant procedural and jurisdictional issues. The main source of debate and division among the members of the Committee was the extent of the Committee's jurisdiction to inquire into particular claims and specific allegations. The task of conducting an investigation to assess the facts and weigh evidence in a specific case and to make determinations and findings about particular conduct was not open to the Committee, given both the terms of reference for the inquiry and the Committee's jurisdiction. It was outside the scope of the inquiry to conduct separate and individual investigations into particular events and conduct, in order to assess whether a person's claim or allegations properly constituted a 'whistleblower' situation. Nevertheless, the Committee considered all of the submissions made to it by individuals as being pertinent to the inquiry.

Despite the divisions that occurred within the Committee, the inquiry was conducted in accordance with parliamentary law, practice and procedure, and there is a public interest in fully outlining the processes involved in the Committee's decision-making and the matters taken into consideration. Important principles were consistently applied on these narrow questions of procedure, which were the subject of debate between members of the Committee. Media coverage of the inquiry also formed an important backdrop to the Committee's proceedings.

The first chapter of the report outlines in detail the range of procedural matters considered by the Committee and the outcome on certain issues and questions. It also gives prominence to significant precedents that occurred during the course of the inquiry. Of particular note was the giving of evidence to the Committee by the Clerks of both Houses of the NSW Parliament and the President of the NSW Legislative Council. It is understood this was the first occasion on which the officers of both Houses have been invited to provide evidence in relation to a parliamentary committee inquiry.

Some of the jurisdictional and procedural questions were complex and grounded in parliamentary law and practice. Key issues concerning the scope of the inquiry and the Committee's statutory functions were also the subject of legal advice obtained from the Crown Solicitor. A complete record of the Committee's decision-making in respect of the inquiry is contained within the minutes attached to the report.

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Under s.68(7) of the *Independent Commission Against Corruption Act 1988*, a question arising at a meeting of the Committee shall be determined by a majority of the votes of the members present and voting. The Committee's deliberations were marked by repeated divisions on questions concerning the jurisdictional limits on the inquiry, specifically, the extent of the Committee's jurisdiction to examine and investigate particular conduct and to review decisions in relation to specific claims and allegations. The division within the Committee on these issues also had implications for decision-making on the selection of witnesses and the publication of submissions.

It is relevant to note that the Committee typically functions in a bipartisan way. The extent of the divisions that occurred on procedural and jurisdictional questions during deliberations relating to the inquiry is unprecedented.

It is anticipated that the Committee will be criticised for its handling and publication of submissions from certain individuals. While the Committee decided to publish some submissions in part and to treat some submissions as confidential documents, on procedural fairness and jurisdictional grounds, all submissions in their entirety were distributed to the membership of the Committee and taken into account. The reasons for these decisions are fully explained in the report.

Specific allegations of particular serious misconduct, which are matters the Committee regularly receives, have traditionally been referred to the appropriate law enforcement authorities or investigative bodies. In keeping with this practice, the Committee will support requests made to it by an appropriate law enforcement or investigating authority for access to submissions and other committee documents received during the inquiry, if that is considered necessary to enable investigation of specific allegations. Investigating such conduct itself would undermine the integrity and credibility of the Committee on the ICAC as a long-standing parliamentary oversight committee, operating in accordance with its statutory functions and jurisdictional limits. Unfortunately, the expectation that the Committee could investigate particular conduct, and claims and allegations, was set prior to the Committee's receipt of the inquiry referral and it was impossible for the Committee to meet such expectations.

The Committee expresses its appreciation to all those who made oral or written submissions to the inquiry.

*Conclusion*

This report provides a program of major reform for the protected disclosures scheme in New South Wales, which is generally supported by the membership of the Committee. It would be most regrettable if the achievements of the Committee as a result of the inquiry, and hence any opportunity for reform, was overshadowed because the focus solely fell on the division among Committee members on certain jurisdictional and procedural issues.

The Committee welcomes the Government's response to the findings and recommendations contained within the report.

# Chapter One - Introduction and conduct of the inquiry

## Background to the referral

- 1.1 The Committee commenced its inquiry into the protection of public sector whistleblower employees following a referral from both Houses on 26 June 2008. The background to the referral, which forms an important context to the conduct of the inquiry, is outlined below.

## Legislative Council motions and rulings

- 1.2 On 4 June 2008, the Hon Trevor Khan MLC gave a notice of a motion in the Legislative Council that a select committee be appointed to inquire into and report on 'the effectiveness of current laws, practices and procedures in protecting government and parliamentary employees who make allegations against government officials and parliamentarians, with particular reference to the treatment of Ms Gillian Sneddon.'<sup>2</sup> Ms Sneddon was previously employed by the Legislative Assembly as an electorate officer in the office of the former Member for Swansea, Mr Milton Orkopoulos.
- 1.3 In a ruling given later that day, the President of the Legislative Council, the Hon Peter Primrose MLC, advised that he had concerns the motion contravened the principle of sole cognisance of the Houses, and the principle of comity and mutual respect between the Houses, as the motion sought the appointment of a Council select committee to investigate the Assembly's treatment of Ms Sneddon. In his statement, the President commented:
- It is both well established and recognised that the Legislative Council and Legislative Assembly are equal and sovereign Houses of Parliament. As such they have sole cognisance of their operations, including complete autonomy, subject to constitutional constraints, in regard to their procedures, consideration of business, questions of privilege and contempt. This principle is, by convention, extended to the delivery of services to members and the administration of finances and staffing matters.<sup>3</sup>
- 1.4 The President concluded that 'a committee of this House should not investigate the proceedings in the other House, even where members of that House are willing to appear and give evidence voluntarily. Such matters are properly investigated by the Legislative Assembly as the sole arbiter of its own procedures and proceedings.'<sup>4</sup> Consequently, the President ruled the notice of motion out of order and recommended that Mr Khan consult with the Clerk to amend his motion in order that it comply with the principles referred to in his ruling.<sup>5</sup>
- 1.5 In his amended notice of motion Mr Khan moved that the select committee inquire into:
- a) the handling of information provided by Ms Gillian Sneddon, a former electorate office secretary, in relation to the conduct of Milton Orkopoulos, including information provided to police and other persons, but excluding any dealings

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<sup>2</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 4 June 2008, p. 8100.

<sup>3</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 4 June 2008, p. 8100.

<sup>4</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 4 June 2008, p. 8101.

<sup>5</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 4 June 2008, p. 8101, see also, Legislative Council of New South Wales, *Procedural Highlights no. 26*, January to June 2008, p. 8.

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between Ms Sneddon and office holders and officers of the Legislative Assembly, and

- b) the effectiveness of current laws, practices and procedures in protecting government and parliamentary employees who make allegations against government officials and parliamentarians. ...<sup>6</sup>

- 1.6 On 5 June 2008, the Hon Amanda Fazio MLC took a point of order on a motion that standing orders be suspended to allow Mr Khan's motion be called on forthwith.<sup>7</sup> Ms Fazio stated that it was improper for the House to consider the motion, as it raised a matter that was *sub judice* and related to the Legislative Assembly, therefore not complying with the principle of comity between the Houses. Following debate on the point of order, the President stated that he would rule on the point of order after consideration of previous rulings and the arguments raised by members.<sup>8</sup>
- 1.7 Members were given the opportunity to make verbal submissions on the point of order on 17 June 2008, following a request from Mr Khan, who submitted that the issue of whether matters raised during an inquiry are *sub judice* was a matter for the committee Chair and the select committee to consider and determine.<sup>9</sup>
- 1.8 On 18 June 2008, the President ruled against upholding the point of order on the issue of *sub judice* but did uphold the point of order in relation to the principle of comity between the Houses. The President ruled that Mr Khan's amended notice of motion was, therefore, out of order.<sup>10</sup>
- 1.9 On 26 June 2008, Mr Khan moved that a Legislative Council select committee be appointed to 'inquire into 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, but not in relation to actual and alleged conduct of any particular person which involves matters which are the sole cognisance of the Legislative Assembly.'<sup>11</sup>
- 1.10 During debate on 26 June 2008, Rev the Hon Fred Nile MLC moved that the motion be amended to refer the inquiry to the Committee on the Independent Commission Against Corruption, rather than establishing a select committee. The motion as amended was agreed to and was forwarded to the Legislative Assembly with a request for that House to agree to a similar resolution.<sup>12</sup>
- 1.11 The Leader of the House in the Legislative Assembly, Mr John Aquilina, subsequently moved a similar motion that:
- The Committee on the Independent Commission Against Corruption, which is a joint statutory committee, inquire into 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.<sup>13</sup>

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<sup>6</sup> Legislative Council Notice Paper, No 55, Thursday 5 June 2008, p. 2450.

<sup>7</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 4 June 2008, p. 8241; Legislative Council of New South Wales, *Procedural Highlights no. 26*, January to June 2008, p. 8.

<sup>8</sup> NSW Parliamentary Debates, Legislative Council, Thursday 5 June 2008, p. 8240.

<sup>9</sup> NSW Parliamentary Debates, Legislative Council, Tuesday 17 June 2008, p. 8398.

<sup>10</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 18 June 2008, p. 8621.

<sup>11</sup> NSW Parliamentary Debates, Legislative Council, Thursday 26 June 2008, p. 9429.

<sup>12</sup> NSW Parliamentary Debates, Legislative Council, Wednesday 26 June 2008, p. 9431; Legislative Council of New South Wales, *Procedural Highlights no. 26*, January to June 2008, p. 8.

<sup>13</sup> Legislative Assembly Votes and Proceedings, No 79, Thursday 26 June 2008, item 22 and Legislative Council Minutes, No 62, Thursday 26 June 2008, item 37.



1.12 The Legislative Assembly agreed to the motion put by Mr Aquilina.

## Jurisdictional and procedural issues

### Terms of reference

1.13 The terms of reference for the inquiry as resolved by both Houses of Parliament presented certain jurisdictional questions for the Committee on the Independent Commission Against Corruption. The following section of the report provides an explanation of the issues that the Committee considered at various stages of the inquiry.

1.14 The legislation establishing the Committee on the ICAC (the Committee) outlines those matters the Committee is required by statute to examine and inquire into. Under Part 7 of the *Independent Commission Against Corruption Act 1988* (ICAC Act) the Committee has the following functions:

#### 64 Functions

(1) The functions of the Joint Committee are as follows:

- (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
- (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
- (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
- (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
- (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

(2) Nothing in this Part authorises the Joint Committee:

- (a) to investigate a matter relating to particular conduct, or
- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
- (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

1.15 In terms of the Committee's function at s.64(1)(e) to inquire into any question *in connection with its functions*, which is referred to it by both Houses of Parliament, it is relevant to note that any referral made to the Committee would still need to fall within the parameters of the Committee's jurisdiction as provided under the Act.

1.16 House of Representatives Practice states:

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In respect of their formal proceedings committees are microcosms and extension of the Houses themselves, limited in their power of inquiry by the extent of the authority delegated to them ...<sup>14</sup>

1.17 Further,

The range of matters a committee is able to investigate or inquire into is restricted by the terms of reference contained in the relevant standing or sessional orders or resolution of appointment (or Act, in the case of a statutory committee).<sup>15</sup>

1.18 As a long-standing statutory based parliamentary committee, established in 1988 at the same time as the ICAC, the Committee has a specific oversight role in relation to the Commission. It was not created for the purpose of the current inquiry, which moves beyond the usual traditional oversight role performed by the Committee in accordance with the ICAC Act. The current inquiry, therefore, had to be carried out by the Committee pursuant to the statutory functions and powers conferred by the statute.

1.19 Given that the Committee's functions under the ICAC Act are primarily concerned with oversight of the ICAC and the ICAC Inspector in the performance of their functions, the terms of the inquiry referral appeared to raise certain jurisdictional questions. The first question concerned the validity of the referral and whether it would involve examination of matters outside the Committee's jurisdiction. The construction of s.64(1)(e) of the Act necessitates that *any* question referred to the Committee by the Houses must be 'in connection with its functions'.

1.20 The resolution as passed by both Houses required a wide-ranging inquiry into whistleblowing legislation, practices and procedures, rather than aspects of whistleblowing as they may concern the ICAC or the ICAC Inspector. Therefore, the referral appeared to encompass issues that, from a narrow interpretation of the ICAC Act, may have been interpreted as matters not directly connected with the statutory functions of the Committee.

1.21 Also, it appeared that the resolution was predicated on the basis that review of the protected disclosures legislation is a specific 'function' of the ICAC Committee. However, the ICAC Committee's previous review of the *Protected Disclosures Act 1994*, was conducted pursuant to s.32 of that Act, which requires both Houses to resolve on the particular joint committee to conduct the review. The Committee has no specific function under the ICAC Act to undertake such a review. These questions would not have arisen had the inquiry referral been made not to the ICAC Committee, but to a joint select committee, established specifically for that purpose, and for the membership of the current ICAC Committee to have been appointed to that committee.

1.22 Any problems concerning the validity of the referral meant that the Committee could be *ultra vires* in conducting the inquiry. Questions also may have been raised about the extent to which the proceedings of the Committee attracted parliamentary privilege. These issues, in turn, raised questions about whether the Committee should formally accept the terms of the reference or seek an amendment to the resolution.

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<sup>14</sup> Harris I C (ed), *House of Representatives Practice*, 5th ed, Department of the House of Representatives, Canberra, 2005, p. 621.

<sup>15</sup> Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, p. 649.

- 1.23 Another difficulty raised by the terms of reference concerned the extent to which the statutory provisions governing the Committee applied to the referred inquiry. Normally a resolution of both Houses appointing a joint select or joint standing committee would include details of the functions, membership, powers and procedures of the committee.<sup>16</sup> However, in the case of the Committee on the ICAC these details are all specified in the ICAC Act. Part 7 of the ICAC Act makes specific provision for certain aspects of the ICAC Committee's operations. However, some of these specific provisions do not apply to parliamentary committees established by resolution of the House, for example, the confidentiality provisions and the limits on the Committee's jurisdiction. Under the specific jurisdictional prohibitions contained in s.64(2) of the ICAC Act, the Committee is not authorised:
- (a) to investigate a matter relating to particular conduct, or
  - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
  - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.
- 1.24 If the referral was made in accordance with s.64(1)(e) of the ICAC Act, that is, in connection with the statutory functions of the Committee, then there would be no question that the Committee would conduct the inquiry in accordance with Part 7 of the ICAC Act and the jurisdictional exclusions found at s.64(2) would clearly apply.
- 1.25 The resolution referring the inquiry did not stipulate that the Committee was to investigate any claims or allegations and it could not be inferred from the referral that such examination was intended by both Houses. Moreover, even if the referral had stated that particular claims and allegations should be examined, the statutory exclusions still appeared to prevent the Committee from undertaking such investigations.
- 1.26 Another source of some difficulty related to the terminology used in the referral resolution, which is not consistent with the terms of the current whistleblower legislation in New South Wales. The *Protected Disclosures Act 1994* (PDA) does not use the term 'whistleblower'. It provides for a scheme to afford protection to 'public officials' making disclosures, in accordance with the provisions of the Act. The term 'public official' is defined in the PDA as:
- a person employed under the *Public Sector Management Act 1988*, an employee of a State owned corporation, a subsidiary of a State owned corporation or a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority, and (without limitation), includes a member of the Police Service, a PIC officer or a PICI officer.
- 1.27 The extent to which the PDA affords protection to a parliamentary staff member also required clarification. Parliamentary officers and electorate staff are not employed under the *Public Sector Employment and Management Act 2002*. The Presiding Officers employ the staff of their respective Houses and together employ the staff of the Department of Parliamentary Services.<sup>17</sup>

<sup>16</sup> Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, p. 628.

<sup>17</sup> Russell D Grove (ed), *NSW Legislative Assembly Practice, Procedure and Privilege*, 1st ed, 2007, p. 32; the Joint Departments have since come under the Department of Parliamentary Services (DPS) following organisational changes within the administration of the NSW Parliament.

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- 1.28 In view of the significant nature of the various jurisdictional issues posed by the resolution of both Houses, the Committee resolved on 3 July 2008, to seek urgent legal advice from the Crown Solicitor on its jurisdiction to conduct the inquiry and the implications for the inquiry of the provisions of the ICAC Act relating to the Committee.<sup>18</sup> Advertising the inquiry to call for submissions from the public was deferred until the next Committee meeting scheduled for 9 July, pending receipt of the Crown Solicitor's advice.
- 1.29 As per the established protocol, the Clerk of the Legislative Assembly, as requested by the Committee, sought legal advice from the Crown Solicitor. The formal advice received by the Clerk was distributed to the Chair and the members in summary form, again as per the established protocol. It is noted at this point that certain Committee members voiced concern that the advice was provided to the Chair and Committee members in this form.

### Legal advice obtained by the Committee

- 1.30 The first advice from the Crown Solicitor was received on 9 July 2008. At that point, the Committee resolved to seek further advice from the Crown Solicitor on the implications of s.64(2) of the ICAC Act for the conduct of the inquiry.<sup>19</sup> In the interim, the inquiry was advertised. The second legal advice was provided on 21 July 2008. The salient points of the Crown Solicitor's advice to the Committee follow.

### The jurisdiction of the Committee to conduct the inquiry

- 1.31 The functions of the Committee are provided for in s.64 of the ICAC Act and the Houses cannot impose a function on the Committee by way of a resolution agreed to by both Houses. The Houses may refer a permitted question to the Committee pursuant to the function at s.64(1)(e) of the ICAC Act 'to inquire into any question in connection with [the Committee's] functions which is referred to it by both Houses of Parliament, and report to both Houses on that question'. This particular function is the only one that enables the Houses to initiate an inquiry, the scope of which is limited to enquiring into a question that is 'in connection with' the Committee's functions.
- 1.32 The phrase 'in connection with' has been held to mean 'having to do with' and these words have been interpreted widely by the courts as requiring merely a relation between one thing and another; and not necessarily requiring a causal relationship. The nature of the relationship encompassed by the phrase 'in connection with' depends on the statutory context in which the words appear. A question referred by both Houses in accordance with s.64(1)(e) need only have 'a connection with a function of the Committee'. It does not need to be 'about' a function of the Committee or be connected to the 'exercise' of a Committee function.
- 1.33 The Crown Solicitor considered that the question that had been referred by the Houses might also be said to be in connection with the function of the Committee found at s.64(1)(d) of the ICAC Act, (that is, the effectiveness of whistleblower protection may be relevant to trends in corrupt conduct and changes to functions and procedures of the ICAC and the Inspector.) Consequently, there was a sufficient connection between the referred question and the Committee's function at s.64(1)(d) of the ICAC Act.

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<sup>18</sup> See Appendix Three, Minutes of meeting no. 13 on 3 July 2008.

<sup>19</sup> See Appendix Three, Minutes of meeting no. 14 on 9 July 2008.

- 1.34 The question referred also may be considered to be in connection with the Committee's function in s.64(1)(b) of the ICAC Act. The referred question did not seem to be in connection with any other function of the Committee. Section 32 of the PDA does not have the effect of conferring the review of that Act on the ICAC Committee as this function must be conferred elsewhere.<sup>20</sup>
- 1.35 Therefore, the Crown Solicitor concluded that in conducting the inquiry the Committee would be acting within its statutory powers.

### **The effect of the statutory limitations found at s.64(2) of the ICAC Act, including particular matters**

- 1.36 The Crown Solicitor further advised that the inquiry is subject to s.64(2) of the ICAC Act. He noted that the matters referred to in the resolution from both Houses were expressed in fairly general terms in that no particular incident, government official or member of Parliament was referred to.<sup>21</sup> Referring to previous advices from his office, the Crown Solicitor commented that the intention of s.64(2) appears to be that investigations, inquiries and findings in relation to particular matters are the function of the ICAC, whilst monitoring and reviewing of the exercise generally by the ICAC of its functions falls to the Committee.<sup>22</sup>
- 1.37 The Crown Solicitor envisaged that during the course of the inquiry, the Committee may receive submissions referring to particular incidents, government officials or members of Parliament, as foreshadowed in the Parliamentary debates. He advised that the Committee would not be able to investigate any matter relating to a particular conduct.<sup>23</sup>
- 1.38 The interpretation of s.64(2) of the ICAC Act given by the Crown Solicitor in an earlier advice was that:
- Para (a) of s.64(2) provides nothing in Pt 7 authorises the PJC to investigate "a matter relating to particular conduct". If a matter has some relation to particular conduct the PJC cannot investigate that matter. The PJC is therefore not intended to be an investigator so far as particular conduct is concerned. Para (c) of s.64(2) provides nothing in Pt 7 authorises the PJC to "reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint". ... "reconsideration" of a determination or a decision would include examining and weighing the evidence before the Commissioner and considering the Commissioner's stated belief about the significance of the evidence, and the Commissioner's motives in reaching a decision. Those matters were, in my predecessor's opinion, ones which the PJC was precluded by s.64(2)(c) from investigation.<sup>24</sup>
- 1.39 However, the argument could be made that the statutory limitations found at s.64(2) of the ICAC Act do not prevent the Committee from examining the conduct of particular investigations of the ICAC, provided the Committee does so for the limited purpose of reviewing how the ICAC exercises its functions. In doing so, the Committee would need to take care not to contravene s.64(2)(b) and (c), and these limitations also apply when reporting to Parliament in respect of a question referred to it under s.64(1)(e) or on a matter pursuant to s. 64(1)(b).<sup>25</sup>

<sup>20</sup> The Houses pass a resolution to confer the review of the PDA on a specific parliamentary committee.

<sup>21</sup> Advice from the Crown Solicitor, dated 9 July 2008.

<sup>22</sup> CSO ref ICC077.14 para 4.3

<sup>23</sup> Advice from the Crown Solicitor, dated 9 July 2008.

<sup>24</sup> CSO ref:ICC077.14

<sup>25</sup> Advice from the Crown Solicitor, dated 21 July 2008.

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- 1.40 Certain members of the Committee sought at various times throughout the inquiry, to have the minutes of deliberative meetings published. However, these motions were defeated due to concerns amongst members that the release of this information during the course of an inquiry was unprecedented and that this course of action may prejudice the course of the inquiry.
- 1.41 It should also be noted that it is open to members of the Committee during the course of an inquiry to move a motion for the Committee to consider having the inquiry or a matter returned to the Parliament for further consideration and debate.

**The Committee's power to examine decisions made by agencies other than the ICAC**

- 1.42 The Crown Solicitor also noted that the question referred to the Committee by both Houses was 'not expressed to be limited to the effectiveness of laws that relate to the Commission or to the practices and procedures of the Commission with respect to whistleblowing employees'.<sup>26</sup> The efficient operation of *other* laws, practices and procedures could be relevant to the assessment of the effectiveness of laws, practices and procedures applicable to whistleblowers who disclose to the ICAC. Such other laws, practices and procedures may have an even more direct connection with the function of the Committee in relation to corrupt conduct and the ICAC.<sup>27</sup>
- 1.43 The advice indicated that the PDA provides for various types of protected disclosures, for example, disclosures to the NSW Ombudsman, Auditor-General, PIC, Director-General of the Department of Local Government and the ICAC and PIC Inspectors. A disclosure about corrupt conduct could be made to a body other than the ICAC and at a later stage be referred to the ICAC. Consequently, the effectiveness of other relevant laws could impact on potential investigations by the ICAC and thus on corrupt conduct. ICAC can also refer disclosures about corrupt conduct to other bodies. The laws, practices and procedures applicable to those other persons and bodies relating to whistleblowers could have an impact on corrupt conduct.
- 1.44 With respect to any inquiry into laws, practices and procedures applicable to agencies other than the ICAC, the Crown Solicitor gave some consideration to the limits on the Committee's jurisdiction under the ICAC Act. He considered it relevant that only s.64(2)(c) makes reference to the ICAC. The Committee had been previously advised by the Crown Solicitor that although s.64(2)(a) does not define 'corrupt conduct' and s.64(2)(b) does not explicitly refer only to ICAC decisions, there could be little doubt that these two sections are confined to ICAC investigations under the ICAC Act and to particular complaints about corrupt conduct under the ICAC Act.<sup>28</sup> However, the Crown Solicitor now advised the Committee that the safer course would be to proceed on the basis that s.64(2)(a) prohibits the Committee from investigating *any* matter relating to particular conduct, which need not be corrupt conduct. This interpretation is consistent with the functions of the Committee being confined to examination or inquiry into general matters and not particular acts or omissions.<sup>29</sup>
- 1.45 On this question, the Crown Solicitor concluded that the questions referred to the Committee by both Houses would not seem to necessitate inquiry into or consideration of a particular decision made in relation to a particular whistleblower

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<sup>26</sup> Advice from the Crown Solicitor, dated 21 July 2008.

<sup>27</sup> Advice from the Crown Solicitor, dated 21 July 2008.

<sup>28</sup> Advice from the Crown Solicitor, dated 9 September 1991.

<sup>29</sup> Advice from the Crown Solicitor, dated 21 July 2008.

investigation. Even if this interpretation were not correct, the Crown Solicitor advised that any entitlement of the Committee to consider decisions by a body other than ICAC would be subject to the legislative provisions governing that body. For example, the statutory limitations on the Committee on the Office of the Ombudsman and PIC under the *Ombudsman Act 1974*, indicate that the oversight committee under that Act cannot consider decisions of the NSW Ombudsman in relation to investigation. Likewise, the ICAC Committee would not be able to investigate or reconsider decisions by the NSW Ombudsman.<sup>30</sup>

### Relevant provisions under the ICAC Act

- 1.46 In relation to the confidentiality provisions found at s.70 of the ICAC Act, the Crown Solicitor stated that these provisions would apply in respect of the whistleblowing inquiry should a person give evidence in accordance with this section of the Act.<sup>31</sup>

### Committee deliberations on the scope of the inquiry

- 1.47 With regard to the scope of the inquiry and the Committee's jurisdiction to examine claims and allegations about particular conduct, it is relevant to note two resolutions passed by a majority of the Committee members present and voting at a meeting on 13 November 2008. The resolutions drew on the advice provided by the Crown Solicitor.
- 1.48 The following resolution was passed in relation to the scope of the inquiry:
- That the Committee's inquiry into the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament, will focus on:
- a. the adequacy of the protections available to employees who make bona fide disclosures about maladministration, illegality, corrupt conduct, misconduct and the misuse of public funds in the public sector, including reports about members of Parliament;
  - b. the capacity of the *Protected Disclosures Act 1994* and other relevant legislation, such as the legislation governing the investigative authorities, the *Defamation Act 2005* and the *Occupational Health and Safety Act 2000*, to provide protection for employees who make such disclosures;
  - c. the value of internal disclosures as a management tool and the efficacy of the internal reporting systems currently in place within the public sector for employees to make disclosures and receive protection;
  - d. particular considerations in relation to the making of disclosures by employees about members of Parliament;
  - e. trends in relation to disclosures made by employees concerning the conduct of government officials and members of Parliament;
  - f. measures to improve the protections available to employees in the public sector who make such disclosures.

The Committee is authorised to inquire into general matters but not particular acts, omissions or decisions made in relation to a particular whistleblower investigation.

- 1.49 During the discussion on the motion, which had been put by the Chair, Mr Terenzini clarified that the resolution did not prevent the Committee from calling individual

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<sup>30</sup> Advice from the Crown Solicitor, dated 21 July 2008.

<sup>31</sup> Advice from the Crown Solicitor, dated 9 July 2008.

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witnesses. A proposal to amend the resolution to put this beyond doubt was defeated. After further discussion the original motion was put to the vote and carried by a majority of the Committee members present.<sup>32</sup>

- 1.50 The Committee's jurisdiction to examine particular conduct, and specific claims and allegations, was the subject of another resolution, also passed at the same deliberative meeting following a division. The resolution as carried was:

That the inquiry terms of reference are general in scope, and do not make reference, to a particular incident, government official or member of Parliament. Moreover, in accordance with the statutory limitations on the Committee's jurisdiction found at s.64(2) of the *Independent Commission Against Corruption Act 1988*, the Committee can only make use of particular matters for the limited purpose of carrying out its general monitoring and review role, for example, to obtain relevant information to illustrate how disclosures are handled or to determine if protections during investigations need strengthening.

The Committee is not an investigator of particular conduct and any examination of submissions from individuals concerning their experiences must exclude:

- a. examining and weighing evidence;
- b. considering the significance of evidence and the motivation behind a decision, and;
- c. asking questions about the basis of, and the reasons for, findings made in a particular matter.

The Committee cannot canvass findings or decisions, or consider a decision a second time with a view to changing or amending that decision.

## Conduct of the inquiry

### Submissions received

- 1.51 Submissions to a parliamentary committee inquiry must be relevant to the terms of reference contained in the referral resolution. A parliamentary committee would normally consider the submissions made to an inquiry and, in the case of those considered to be outside the terms of reference, resolve this to be the case. The author of a submission determined to be outside jurisdiction would then be advised of the committee's decision by letter.
- 1.52 The Committee advertised for submissions on 30 July 2008. A total of 64 submissions were received in relation to the inquiry, including those submissions made in response to the Discussion Paper discussed below. A full list of the submissions made to the inquiry and their publication status is attached at Appendix 1.
- 1.53 The Committee formally received all of the submissions made to it as being relevant to the inquiry. However, submissions that contained details of claims and unsubstantiated allegations against third parties raised significant procedural issues. Determining their evidentiary value also proved to be a problematic exercise. While the submissions received by the Committee were a useful barometer of individual opinion, the extent to which they could be referred to as case studies in any objective sense was limited.

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<sup>32</sup> See Appendix Three, Minutes of meeting no. 19 on 13 November 2008.



- 1.54 As noted previously, the Committee is not an investigative body and has no jurisdiction to investigate particular conduct or to review decisions made in relation to the investigation of particular conduct. It followed that the Committee was not in a position to use the submissions as the basis for any direct correlations between claims and allegations, and specific practices, policies or statutory provisions. Nevertheless, the Committee did consider these submissions to inform itself about individual perspectives.
- 1.55 A number of submissions to the inquiry also concerned allegations that had been the subject of extensive investigation by independent bodies such as the ICAC; some had been subject to lengthy litigation. It was not the role of the Committee to revisit the decisions of these bodies or the courts. Nor was it clear where industrial proceedings resulted from 'whistleblowing' as distinct from other employee actions. Some of the submissions concerned allegations about matters falling within the jurisdiction of independent statutory bodies that, unlike the Committee, have responsibility for the investigation of such matters.
- 1.56 Of the 21 individuals who made submissions to the inquiry:
- 7 made an original submission and a submission in response to the discussion paper
  - 15 claimed to be whistleblowers (1 from interstate)
  - 2 claimed they had been unfairly accused of wrongdoing by a whistleblower and 1 individual wrote on behalf of someone who was accused of wrongdoing by a whistleblower
  - 3 made comments on whistleblower protection without claiming to be whistleblowers.
- 1.57 The three main initiatives taken by the Committee to counter the problems with individual submissions were:
- To produce a Discussion Paper identifying issues and proposed areas for reform, which was distributed to all of the agencies and individuals who made submissions to the inquiry.
  - To rely on the empirical data available from the national *Whistling While they Work* project as a means of confirming those problem areas in need of reform that were referred to in submissions.
  - To take evidence from groups who represent or advocate for whistleblowers or who provide them with services.
- 1.58 In this way the Committee tried to present an accurate and balanced perspective on relevant issues. The absence of any accurate local data and statistics about the operation of the scheme in New South Wales was a fundamental problem with the information available to the Committee and a number of recommendations have been made to overcome this deficiency in any future review of the protected disclosures scheme.
- 1.59 Other procedural issues relating to the submissions received by the Committee, such as procedural fairness and the publication of submissions, are dealt with in detail at paragraph 1.64 of this report.

### **Contact with submission authors**

- 1.60 All submission authors were provided with a standard acknowledgement letter advising them to contact the Committee if they wished to have their submission, or part thereof, treated in confidence. With the exception of submission 56, where the author sought suppression of their name, the individuals who made submissions to the inquiry generally did not seek to do so on a confidential basis. The author of submission 56, despite seeking confidentiality and to have their name suppressed, also indicated that their submission could be published if references to a specific local council were removed. Similarly, the author of submission 20 requested confidentiality sufficient for protection against any consequent action.
- 1.61 A number of individuals sought clarification about the implications of making a submission and whether they could be subject to legal action on the basis of anything contained in their submission, in the event that it was made public. In one case, the author of submissions 24, 24A and 54 gave conflicting messages about the status they desired for their submissions, expressing concern for their safety and possible action against them if the fact of their submission was made known. However, the same individual also said they were prepared to give evidence.
- 1.62 One submission author published widely in the media and on the web the fact of their submission and the nature of the issues it raised. In doing so, they called into question the motivation of certain members of the Committee, and the independence and integrity of the inquiry process.

### **The Discussion Paper**

- 1.63 In March 2009, the Committee released a discussion paper, aimed at identifying the major issues and areas for reform that had arisen during the inquiry and to canvass proposals for legislative change to the PDA and improvements to the protection of whistleblower employees. Comments on the proposals were sought from inquiry participants, relevant departments, organisations, political parties and all of the individuals who had made earlier submissions to the inquiry.
- 1.64 Members of the Committee expressed concern about the inquiry not being able to take evidence from individuals who had made submissions setting out specific claims and allegations. These individuals may have gained the impression that they were being ignored. It is important to note, however, that all submissions from individuals were made available to the Committee for consideration and were taken as pertinent to the inquiry.
- 1.65 Members of the Committee considered that it would have been desirable to receive evidence from an individual who could have provided a relevant case study to demonstrate the effectiveness or otherwise of the protected disclosures legislation. However, this was not clearly discernible from the submissions received.
- 1.66 In publishing the Discussion Paper, the Committee attempted to overcome some of the difficulties in relation to submissions made by individuals about their claims and allegations. Having considered these submissions, the Committee focussed the discussion on proposals for administrative and policy reforms with the potential to obviate difficulties presently encountered with the legislative scheme and its operation in the public sector.
- 1.67 A very limited number of case studies were included in the Discussion Paper. They were included to highlight the use that could be made of injunction powers and

difficulties experienced in maintaining whistleblower confidentiality. The Committee's approach in using this information was to highlight specific systemic issues raised, without delving into the investigation of particular allegations or findings in relation to these matters.

- 1.68 Of the total 64 submissions received by the Committee, seven individuals who had made original submissions also made submissions in response to the Discussion Paper. Where individuals responded to the Discussion Paper, they indicated a reasonable level of support for the Committee's proposals. The specific responses made are reflected throughout the relevant sections of the report dealing with the various proposals.

### Confidentiality and the publication of submissions

- 1.69 One of the criticisms, as reported in the media during the inquiry, concerned allegations of censorship by the Committee in respect of certain submissions made to the inquiry.<sup>33</sup> In view of the seriousness of these allegations, the following account of the Committee's decision-making in relation to publication of submissions and other documents has been provided as a measure of transparency.

#### Relevant Parliamentary practice and procedure

- 1.70 Procedural advice provided to the Committee in respect of the handling and publication of submissions drew on the practice and procedures of House of Representatives and Senate parliamentary committees and NSW Legislative Assembly practice. Ultimately, any decision to depart from usual practice would be a question for a committee to determine, in light of all of the relevant circumstances, including public interest considerations.
- 1.71 The confidentiality and publication of submissions, like all Committee records and documentation, are matters for the Committee and decisions in this regard are made in accordance with parliamentary practice and procedure, standing orders and statutory requirements. The NSW Legislative Assembly's *Practice, Procedure and Privilege* notes that:
- ... once a submission has been received by a committee it must not be published or otherwise disclosed in that form without the committee's authorisation. ...
- ... Authors may request to keep all or part of their submission confidential. However, it is the prerogative of the committee as to whether such a request is agreed to as there may be instances where the committee is of the view the public interest is better served by publishing the information.<sup>34</sup>
- 1.72 Under Legislative Assembly Standing Order 297:
- S.O.297 Committees - no disclosure unless authorised**
- 297.** A Member or any other person shall not disclose evidence, submissions or other documents and information presented to the committee which have not been reported to the House unless such disclosure is first authorised by the House or the committee.
- 1.73 In the case of the Committee on the ICAC regard must also be had to the confidentiality provisions found at s.70 of the ICAC Act, which override the Standing Orders. This section of the ICAC Act applies to *evidence*, or documents which are to be given or are *given in evidence* (emphasis added). However, the term 'evidence' is

<sup>33</sup> Joanne McCarthy, "Orkopoulos victim asks what has ALP got to hide", *The Herald*, 8 August 2009.

<sup>34</sup> Russell D Grove (ed), *NSW Legislative Assembly Practice, Procedure and Privilege*, 1st ed, 2007, p. 233.

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not defined within the statute and the NSW Legislative Assembly has not moved towards defining the term to include written submissions and documents, as well as oral evidence. Therefore, both authorities, that is, the ICAC Act and Standing Orders, are clear on the point that it is a matter for the Committee to determine whether or not information provided to it *in evidence* is to be treated confidentially.<sup>35</sup> The handling of other submissions and documents received or obtained outside of the hearing process would be in accordance with Standing Orders and parliamentary practice and procedure. The publication of evidence and other records still needs to be authorised by the Committee pursuant to Standing Order 297.<sup>36</sup>

### Adverse mention

- 1.74 Issues of procedural fairness arose in relation to several submissions received by the Committee from individuals. *Odgers' Australian Senate Practice*<sup>37</sup> notes that unless there are strong reasons to withhold publication, committees normally authorise the publication of submissions received. One circumstance in which the publication of submissions may be limited by a committee is to enable individuals to respond to allegations made against them.<sup>38</sup>
- 1.75 Oversight committees administered by the NSW Legislative Assembly have not, as a matter of practice, published submissions that contain unsubstantiated allegations against third parties. Where a committee considers that the publication of such allegations is necessary for the performance of its functions and the conduct of an inquiry, procedural fairness would necessitate giving affected individuals an opportunity to respond to the allegations and for this response to similarly be published.<sup>39</sup>

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<sup>35</sup> The Crown Solicitor's interpretation of what comprises evidence in the context of s.70 of the ICAC Act is akin to the construction given to s.27 of the *Defamation Act 2005*, which specifies the grounds on which a defence of absolute privilege can be claimed for the publication of a defamatory matter. This particular provision is intended to give greater clarity to the defence of "absolute privilege" by capturing the various ways in which parliamentary committees may publish potentially defamatory matter. Section 27(2) delineates between the publication of matter *while giving evidence* before a parliamentary body, and the publication of matter *while presenting or submitting* a document to the body, as follows:

#### **s.27 Defence of absolute privilege**

- (1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.
- (2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:
- (a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):
- (i) the publication of a document by order, or under the authority, of the body, and
  - (ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law, and
  - (iii) the publication of matter while giving evidence before the body, and
  - (iv) the publication of matter while presenting or submitting a document to the body, or

...

the matter is published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section, or

...

<sup>36</sup> The main difference is that under the statute, the provisions of which override Standing Orders, certain procedures come into play where the witness/submitter requests confidentiality. These procedures do not apply to committees operating in the absence of statutory requirements.

<sup>37</sup> Evans Harry (ed), *Odgers' Australian Senate Practice*, 12th ed, Department of the Senate, Canberra, 2008, pp. 389, 422.

<sup>38</sup> Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, p. 676.

<sup>39</sup> Evans Harry (ed), *Odgers' Australian Senate Practice*, 12th ed, 2008, p. 422.

1.76 The Senate has adopted resolutions<sup>40</sup> that require an individual to be advised of evidence that reflects adversely on them and to be given a ‘reasonable opportunity’ to respond. The Senate committees treat evidence as including written statements and submissions, as well as oral presentations at hearings. While Senate rules do not define the meaning of evidence that reflects adversely on another person, certain general principles of interpretation apply:

The rules do not apply to evidence merely on the basis that it is contrary to other evidence. ... evidence adverse to another witness’s case does not fall within the application of the rules. The rules deal with adverse “reflections”, that is, evidence which reflects adversely “on a person” (including an organisation) rather than on the merits or reliability of an argument or opinion. **To bring the rules into operation, a reflection on a person must be reasonably serious, for example, of a kind which would, in other circumstances, usually be successfully pursued in an action for defamation.** Generally, a reflection of poor performance (for example, that relevant matters have been overlooked) is not likely to be viewed as adverse. On the other hand, a statement that a professional person lacks the ability to understand an important conceptual or practical aspect of their profession and, therefore, is not a reliable witness, would be regarded as an adverse reflection. **Reflections involving allegations of incompetence, negligence, corruption, deception or prejudice, rather than lesser forms of oversight or inability which are the subject of criticism in general terms, are regarded as adverse reflections.** Mere disagreement with another person’s views, methodology or premises is not considered as an adverse reflection (emphasis added).<sup>41</sup>

1.77 Other grounds on which evidence may not be published by Senate committees includes:

- Evidence irrelevant to a committee’s inquiry – such evidence may be returned to the submitter or retained but not considered by the Committee.
- Evidence alleging criminal conduct, which is being or could be investigated – in which case, submitters may be invited to approach the relevant law enforcement authorities.
- Evidence that is *sub judice* – in which case submitters may be invited to put the evidence before the courts in any criminal trial or civil action in progress.<sup>42</sup>

1.78 Similarly, it is the practice of the House of Representatives that:

Evidence which committees would normally take in private and not publish because of possibly adverse effects includes: evidence which might incriminate the witness, commercial-in-confidence matters, classified material, medical records and evidence which might bring advantage to a witness’s prospective adversary in litigation. ... Other reasons for private hearings could include evidence likely to involve serious allegations against third parties, a matter which is sub judice or a matter on which a Minister may otherwise claim public interest immunity. When a witness makes an application for a private hearing, the committee decides the issue on the balance of the public interest and any disadvantage the witness, or a third party, may suffer through publication of the evidence.<sup>43</sup>

<sup>40</sup> Evans Harry (ed), *Odgers’ Australian Senate Practice*, 12th ed, 2008, p. 420, resolutions agreed to by the Senate on 25 February 1988, nos 1(11) to (13).

<sup>41</sup> Evans Harry (ed), *Odgers’ Australian Senate Practice*, 12th ed, 2008, p. 420. Application of the right-of-reply procedure is not affected by the fact that a person against whom adverse evidence is given is notorious, or has had ample opportunity to respond to allegations through public controversy, p. 421.

<sup>42</sup> Evans Harry (ed), *Odgers’ Australian Senate Practice*, 12th ed, 2008, p. 421.

<sup>43</sup> Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, p. 677.

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- 1.79 Twenty-one, just under a third of the submissions received by the Committee, were from individuals, of which approximately half contained potentially defamatory material, adverse comment or specific allegations. If the Committee were to publish submissions containing such comment it would need to satisfy itself that:
- On balance, the public interest favoured publication of the confidential submissions.
  - Publication of the submissions, including the adverse comments, was essential in order for the Committee to undertake the inquiry and carry out its functions.
  - The submissions and adverse comments were completely relevant to the inquiry and within jurisdiction.<sup>44</sup>
- 1.80 While the Committee had accepted all submissions on the ground that they were pertinent to the inquiry, the Committee divided on the questions of publishing submissions containing adverse comment or specific allegations, and on whether to take evidence about the specific claims or allegations.
- 1.81 As a result, the more reasonable course in a practical sense, both jurisdictionally and procedurally, was to treat such submissions on a confidential basis and, where possible, remove the adverse comment so that the remainder of the submission could be published and as much information as possible could be placed in the public domain.
- 1.82 Although certain submissions were not published, or were published only in part, they were not withheld from the inquiry or the members of the Committee, who received the submissions in their entirety.

### The publication of submissions

- 1.83 At its meeting on 14 May 2009, the Committee resolved to keep some submissions confidential and to publish the remaining submissions either in whole or in part. The resolution states that the publication orders were made ‘on the basis of the following considerations:
- where matters are outside jurisdiction,
  - where matters contained unsubstantiated allegations about third parties, and
  - where authors have requested confidentiality’ (the Committee concurred with the requests made).
- 1.84 It is relevant to note that the omissions proposed to submissions for the purpose of publication were not arbitrary or subjective and were made on the basis of the three considerations outlined above.
- 1.85 This meant that, even if an individual had no objection to their submission being published any one of the reasons cited may have led to the submission being treated confidentially, either in whole or in part. For some submissions more than one consideration applied. Further, all submissions were treated in the same way and the publication orders proposed were reviewed internally.
- 1.86 Also, it is important to understand that the omissions were *only for the purpose of publication*. The submissions were not altered for any other purpose and the full

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<sup>44</sup> For a discussion of House of Representatives’ practice in relation to the considerations that may be taken into account for limiting publication of evidence and Committee documents, see: Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, pp. 666-7, 676-9; also see Evans Harry (ed), *Odgers’ Australian Senate Practice*, 12th ed, 2008, pp. 402-3, 420-5.

versions are retained in the Committee's records. The submissions in their entirety were provided to all Committee members who were not precluded from using the information contained within the submissions to inform themselves about matters within jurisdiction from the perspectives of the individuals.

- 1.87 The submissions to be published in part were posted on the Committee's website. Following internal review, in the case of submissions 5, 7 and 9 a number of minor additions were made to the information that was to be published, in keeping with the underlying principles for publication. The documents were posted on the website in part as per the resolution of 14 May 2009.
- 1.88 The status of the submissions received by the Committee is contained in a table at Appendix 1. In total ten submissions were kept confidential and thirteen were published in part.
- 1.89 The Committee resolved for the names of two authors, those responsible for submissions 24, 24A and 54, and submission 56, to be suppressed.<sup>45</sup> (The author of submission 56 had requested that their name be suppressed and the author of submission 54 had expressed concerns for their personal safety). However, having reviewed the publication orders previously passed, the Committee resolved on 11 August to publish submissions 54 and 56 in part, approving a number of omissions to remove identifying information for the purpose of publication.<sup>46</sup> This recommendation was made in the interest of publishing as much information from submissions as was possible.
- 1.90 At later meetings, the Committee also passed three other resolutions to keep certain information confidential. The requests agreed to by the Committee were as follows:
- A request by the NSW Police Force that a section of their answers to questions on notice, received by the Committee on 20 April 2009, be treated as confidential because it pertained to a matter on appeal before the District Court and publication of the information was not considered to be in the best interests of the victim in the matter.<sup>47</sup>
  - A section of the information provided by the Office of the DPP, dated 27 May 2009, which the DPP sought to be treated as confidential on the grounds that publication might disclose details that would identify the victim.<sup>48</sup>
  - A section of the transcript of evidence from Mr Bob Falconer, STOPline, requested by the witness to be kept confidential in order to protect the identity of a particular individual.<sup>49</sup>

### **Publishing the names of authors who made confidential submissions**

- 1.91 If a parliamentary committee has ordered a submission to be treated confidentially then the practice usually adopted is for the submission to be given a number in any Committee records and documentation but all of the submission, including the name of the author, is kept confidential and not published. Reasons for such an approach may include: the need to protect submission authors and other individuals; the nature

<sup>45</sup> See Appendix Three, Minutes of meetings nos 27 and 28 on 14 May and 11 August 2009.

<sup>46</sup> See Appendix Three, Minutes of meeting no 28 on 11 August 2009.

<sup>47</sup> E-mail from Professional Standards Command on 3 June 2009; see Appendix 3, Minutes of meeting no 28 on 11 August 2009.

<sup>48</sup> E-mail from the DPP on 11 August 2009; see Appendix 3, Minutes of meeting no 28 on 11 August 2009.

<sup>49</sup> E-mail from Mr Falconer on 17 August 2009; see Appendix 3, Minutes of meeting no 29 on 3 September 2009.

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of the subject matter and whether it is relevant to the inquiry; minimising the extent to which inquiries generate potential for personal injury, or the involvement of the Committee in disputes that are irrelevant to its functions.<sup>50</sup>

- 1.92 Committees of the Senate and House of Representatives have had occasion to publish submissions without any personal identifying material, for example, by omitting the names of individuals and other details that may identify the author or third parties. This allows for views to be expressed while still protecting an individual's privacy.<sup>51</sup> Notations used on the basis of publication orders made by a committee may include 'confidential', where the submission is completely confidential, or 'name withheld', where the author's name is not made public.
- 1.93 The names of those individuals whose submissions are completely confidential are not normally disclosed by parliamentary committees. For this Committee's inquiry, observing the practice of not publishing the names of submission authors would raise a number of practical matters for the Committee:
- It would be difficult to discuss in any detail the origins of this inquiry and the issues committee members sought to raise as part of the inquiry.
  - Members of the Committee would be curtailed in the contributions they may wish to make in the take note debate on the report, particularly those members who wish to discuss their motions of dissent from resolutions, as the minutes attached to the report would be edited to remove the names of submission authors not called to give evidence.
  - Given the subject matter of the inquiry, keeping the names of certain submission authors confidential, particularly when they have not sought confidentiality, may be seen to be an attempt to limit their participation in an inquiry that is aimed at trying to improve protection for whistleblowers.
  - To a large extent, the question of keeping the names of submission authors confidential becomes irrelevant where individuals have stated publicly that they have made submissions to the inquiry.
- 1.94 Consequently, the Committee decided that in the circumstances it would depart from usual practice and publish the names of submission authors, excluding the two individuals whose names were suppressed for the reasons stated at paragraph 1.89.

## Public hearings

- 1.95 Evidence during the initial stages of the inquiry was taken from the Deputy Ombudsman, Mr Chris Wheeler, and the Deputy Commissioner of the ICAC, Ms Theresa Hamilton, as representatives of two key investigative authorities under the PDA. The NSW Ombudsman's Office also plays a prominent role in publishing guidelines on the legislation.
- 1.96 Public hearings were held on 18 August 2008, 24 November 2008 and 1 December 2008, involving witnesses from departments, organisations and investigating

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<sup>50</sup> House of Representative Committees have allowed witnesses to be identified by a number to protect their privacy and the privacy of their families. House of Commons Committees have on occasion taken evidence from witnesses whose names were not divulged to prevent private injury arising from publication. Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, p. 678 and Evans Harry (ed), *Odggers' Australian Senate Practice*, 12th ed, Canberra, 2008, pp. 389, 402-3, 420-5.

<sup>51</sup> See Evans, Harry (ed), *Odggers' Australian Senate Practice*, 12th ed, 2008, p. 424 and Harris I C (ed), *House of Representatives Practice*, 5th ed, 2005, p. 676.



authorities including the ICAC, the NSW Ombudsman, the Audit Office of New South Wales, RailCorp, the University of New South Wales, the NSW Legislative Assembly, the NSW Legislative Council and Whistleblowers Australia.

- 1.97 The Committee held a final public hearing on 11 August 2009, taking evidence from the ICAC, the NSW Ombudsman, and STOPline (a private sector company engaged by organisations wanting to use a third party to receive internal reports and disclosures from employees). A list of all witnesses who appeared before the Committee can be found at Appendix 2. Transcripts of evidence from the Committee's public hearings are available on the Committee's website at [www.parliament.nsw.gov.au/icac](http://www.parliament.nsw.gov.au/icac).
- 1.98 The Committee wishes to thank the organisations, agencies and individuals who made submissions and gave evidence as part of the inquiry.

### Individual witnesses

- 1.99 There was ongoing disagreement between members of the Committee on the overarching question of the Committee's jurisdiction to examine particular conduct and the most appropriate way to utilise individual submissions. This is where the Committee fundamentally disagreed.
- 1.100 One of the questions on which the Committee repeatedly divided was whether or not to take evidence from particular individuals who had made submissions. Motions were put that the Committee should hear from three particular individuals and that 'as a matter of principle' the Committee should hear evidence from 'some relevant individual whistleblower employees'. However, as previously noted, the Crown Solicitor had advised that the Committee was unable to investigate any matter relating to particular conduct. Some of the procedural considerations relating to the publication of submissions, for example, issues of procedural fairness in relation to specific allegations, also applied to the taking of evidence. Further, there was the question of how best to obtain a range of opinion that would accurately reflect 'whistleblower employee' views and experiences. On the whole, the submissions themselves largely did not relate to the effectiveness of whistleblower legislation but simply told of particular events and grievances, and made wide and sweeping allegations.
- 1.101 One difficulty associated with submissions received by the Committee in relation to particular allegations or claims arose from the Committee's inability to distinguish between workplace grievances and disclosures by whistleblowers in the generally accepted sense.
- 1.102 The *Whistling While They Work* (WWTW) project drew 'an important distinction between wrongdoing that can be considered resolved when an affected individual considers it resolved (personal or private interest) and wrongdoing that threatens wider organisational and/or public integrity, above and beyond any outcomes for affected individuals (public interest).' The project indicated that 'conventionally, whistleblowing refers to the latter category'.<sup>52</sup> With regard to the Committee's inquiry, drawing such distinctions around the particular details contained in submissions was a problematic exercise.
- 1.103 As Mr Bob Falconer, STOPLINE, commented in his evidence:

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<sup>52</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector: enhancing the theory and practice of internal witness management in public sector organisations*, ANU E press, September 2008, p. 9.

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**Mr JONATHAN O'DEA:** ... Do you think we should be listening to whistleblower employees?

**Mr FALCONER:** I think it would be a great idea, but I am not sure how you would gauge a sample. I mentioned A. J. Brown's report before. That was a three-year effort of a huge number of people and organisations. I think they have got the running on this, the feeling of whistleblowers. I think there is enough research there in that, and there is a fair bit overseas. I have alluded to some of it. I do not want to make this too esoteric, but some of the stuff I have put in that paper, there is plenty of research about but, with all due respect, how would you find them and who would you call? ...<sup>53</sup>

1.104 In essence, the Committee was not in a position to determine whether or not those individuals who stated that they were 'whistleblowers' actually had made disclosures in accordance with the PDA, as distinct from allegations or claims made in other circumstances.

1.105 The Deputy Ombudsman, Mr Chris Wheeler, referred to the difficulties associated with obtaining a reasonable sample for the WWTW project:

**Mr JONATHAN O'DEA:** Recognising again that there will be different categories of employees, different types of employees, and that some would be more appropriate to speak with, potentially, than others, how important do you think it is for us to understand the perspective of legitimate whistleblowers?

**Mr WHEELER:** One of the significant problems we had in the Whistling While They Work research is to talk to and get responses from whistleblowers and trying to do it in such a way that we had a reasonable sample. One way, of course, was to advertise within agencies saying, "If you are a whistleblower we have got a form here", and we did it in such a way that there was a double-blind situation and there would be no identification. But that is a self-selected list of people who have a particular issue. So we also then went through our databases of the watchdog bodies and those agencies to identify all the other whistleblowers, and then, again using ways that were ethically sound, we indirectly approached those people to see if they would be prepared to be involved to fill out questionnaires, to be interviewed.

In that way we managed to get a broader sample than we would have otherwise, because if you just go out and say you are willing to talk to whistleblowers you will have a self-selected group and it will be primarily people who have not had a good experience, not the ones who have had. The research, for example, has shown that most people who identify as having made an internal disclosure were actually reasonably satisfied by the process, whereas if you were to talk to Whistleblowers Australia their view is that whistleblowers, almost by definition, are not. So getting a balanced sample would be extremely difficult. We had enough trouble and we were using, as I say, five universities with 16 case study agencies that were cooperating with us fully.<sup>54</sup>

1.106 In deliberations on 29 September 2008 and 7 May 2009, Mr Khan sought to have the Committee call three particular individuals, Mr Blackburn, Ms Sneddon and Mr Patrick to give evidence. These motions were not successful. Mr O'Dea moved on 7 May 2009 that 'as a matter of principle the Committee should hear oral evidence from some relevant individual whistleblower employees as part of [the] inquiry.' The majority of members voted against agreeing to Mr O'Dea's motion.

1.107 When the Committee convened on 11 August 2009 and discussed certain procedural issues relating to the decisions taken on 14 May in respect of the publication of

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<sup>53</sup> Mr Bob Falconer, Chairman, STOPline, *Transcript of evidence*, 11 August 2009, pp. 12-3.

<sup>54</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 11 August 2009, p. 27.

submissions, Mr O'Dea moved that the Committee advise the NSW Parliament that it was not 'investigating the case of, or hearing oral evidence from, Ms Gillian Sneddon.' Following discussion the majority of the Committee members voted against Mr O'Dea's motion.<sup>55</sup>

1.108 The empirical data and research available through the national WWTW project became a valuable independent and authoritative source of information for the Committee about the views and experiences of employees who make disclosures. The attached table from the WWTW project 2008 report indicates the wide extent to which the project canvassed opinion across agencies, jurisdictions and positions through extensive surveys. The report notes that 'this large body of empirical research has been instrumental in developing a new overview of how public sector whistleblowing is managed'.<sup>56</sup> During the project 8 surveys were conducted to obtain data on individual experiences and institutional practices. Of a total 23,177 surveys distributed to employees across jurisdictions, 7,663 or 33% of participants responded.<sup>57</sup>

**Table 1: Quantitative research instruments, *Whistling While They Work* project<sup>58</sup>**

Short title	Full title	No of items	No of participating agencies					Total surveys	Total responses	Response rate
			Cth <sup>a</sup>	NSW	Qld	WA	Total			
1 Agency survey	Survey of Agency Practices and Procedures (2005)	42	73	85	83	63	<b>304</b>			
2 Procedures assessment	Assessment of Comprehensiveness of Agency Procedures (2006-07)	24	56	60	31	28	<b>175</b>			
3 Employee survey	Workplace Experiences and Relationships Questionnaire (2006-07)	50	27	34	32	25	<b>118</b>			
	Surveys distributed		5 545	8 324	6 343	2 965	--	23 177	7 663 <sup>b</sup>	33%
	Responses		2 307	2 561	1 729	1 007	--			
	(Procedures assessment and employee survey)		(25)	(31)	(29)	(17)	<b>(102)</b>			
4 Internal witness survey <sup>c</sup>	Internal Witness Questionnaire (2006-07)	82	4	4	4	3	<b>15</b>	455	240	53%
5 Case-handler survey <sup>c</sup>	Managing the Internal Reporting of Wrongdoing Questionnaire (2007)	77	4	5	4	3	<b>16</b>	1 651	315	19%
6 Manager survey <sup>c</sup>	Managing the Internal Reporting of Wrongdoing Questionnaire (2007)	77	4	5	4	3	<b>16</b>	3 034	513	17%
7 Integrity agency survey	Survey of Integrity Agency Practices and Procedures (2007)	45	5	5	3	3	<b>16</b>			
8 Integrity	Managing Disclosures	75	3	3	3	3	<b>12</b>	304	82	27%

<sup>55</sup> See Appendix Three, Minutes of meeting no 28 on 11 August 2009.

<sup>56</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector: enhancing the theory and practice of internal witness management in public sector organisations*, ANU E press, September 2008, p. 15; see Table 1.2, p. 16.

<sup>57</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 16.

<sup>58</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 16.

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Short title	Full title	No of items	No of participating agencies					Total surveys	Total responses	Response rate
			Cth <sup>a</sup>	NSW	Qld	WA	Total			
case-handler survey	by Public Employees Questionnaire (2007)									

<sup>a</sup> Throughout [the WWTW] report, Commonwealth figures include a range of Australian Public Service (APS) and non-APS, unless otherwise indicated.

<sup>b</sup> Includes 59 responses for which jurisdiction/agency unknown.

<sup>c</sup> Written questionnaire response to be followed up with quantitative interview in willing cases (case study agencies).

1.109 The WWTW survey methodology resulted in practical treatment of whistleblowing issues:

**CHAIR:** You talked about the difficulty of getting a sample, and it sounds to me as though the Whistling While They Work project has carried out extensive work in getting a relevant, reliable sample of people who have whistleblown and that a committee like this could use that report quite accurately, from what you are saying and what Mr Falconer was saying, in getting a very accurate impression and indication of the experience of whistleblowers, is that right?

**Mr WHEELER:** I think that would be entirely correct. Also, I need to point out that the research, apart from about 170-something agencies that were involved in a lot of it, it focused on four agencies in each jurisdiction—16 in all case study bodies—and did a lot of very detailed research within those bodies. So it built in the perspective of a range of some police services, some large government agencies, health areas, small councils, big councils—there was a range of sizes, a range of types of agencies and they were intimately involved in the research and in the development of the reports that have come out of it, particularly if I may refer to the draft of the second report, which is being called the "Whistling While They Work: Towards Best Practice Whistleblowing Programs". ... That was based a lot on the work with those case study agencies to make sure it was practicable.<sup>59</sup>

1.110 In respect of the particular allegations and complaints made in submissions to the inquiry, the Committee's jurisdiction and functions dictate that it cannot investigate matters relating to particular conduct or reconsider decisions made in relation to a particular investigation or complaint. The Committee regularly receives such claims and allegations and its practice in relation to such matters made to it *at any time*, has been to forward such allegations to the most relevant law enforcement or investigative bodies for any investigation considered necessary.

1.111 The Committee would support a request made by an appropriate investigative or law enforcement authority for access to submissions or other information concerning specific allegations, which were received or obtained by the Committee in relation to the inquiry. Such material could be made available on the authorisation of the Committee or the House to the relevant authorities, if this is considered necessary to enable the investigation of the allegations.

Evidence from the Clerks of the NSW Legislative Assembly and Legislative Council

1.112 The situation with respect to protection for employees who make allegations against members of Parliament was a specific element in the terms of reference for the inquiry. Consequently, the Committee members considered that it was necessary to

<sup>59</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 27.

obtain information from the parliamentary officers responsible for the administration of the NSW Parliament concerning relevant policies, practices and procedures.

- 1.113 On 29 September 2008, the Committee resolved to request that the Clerks and Presiding Officers of each House give evidence in relation to the inquiry. As the Committee is a joint statutory committee administered by the NSW Legislative Assembly, the Standing and Sessional Orders of that House govern the calling of officers and members of the NSW Parliament. Pursuant to Standing Order 326, the Committee Chair may make a written request to a member or an officer of the Legislative Assembly to attend as a witness but, if the member or officer refuses the only action open to the Committee is to report the refusal to the House:

**Attendance requested**

**326.** The Chair of a committee may request in writing a Member or officer of the House to attend a hearing as a witness. If the Member or officer refuses, the committee shall take no action other than to report the refusal to the House. An officer means a member of staff employed solely by the Speaker.

- 1.114 Standing Order 327 states that if a Committee wishes to request a member or officer of the Legislative Council to give evidence, a message must be sent to the Council seeking leave:

**Request for Council attendance**

**327.** If the House or a committee, upon request wishes to examine a Member or officer of the Council, a message shall be sent requesting the Council to grant leave.

- 1.115 Therefore, the Committee is only permitted to request the attendance of a member of either House or a staff person employed by the Presiding Officers as a witness; it cannot compel the attendance of such individuals.
- 1.116 The Committee's delegated authority under the Legislative Assembly's Standing Orders did not require the Committee to seek the leave of that House to make such a request to a member or officer of the Assembly. However, in keeping with the Standing Orders and principles of exclusive cognisance and comity, referred to earlier in this chapter, leave of the Legislative Council was a prerequisite for the examination of a member or officer of that House.

**Written invitation to the NSW Legislative Assembly**

- 1.117 On 14 October 2008, the Chair of the Committee wrote to the Clerk of the Legislative Assembly, Mr Russell Grove, informing him that after careful consideration the Committee had identified the Parliament of New South Wales as one of the bodies that it wished to hear evidence from when it next conducted public hearings in late November and early December. The Chair noted the terms of Standing Order 326 and, on behalf of the Committee, formally requested Mr Grove to attend for the purpose of giving evidence in relation to the inquiry. The Chair also sought Mr Grove's assistance in providing the Committee with any information on those policies, practices and procedures applicable to the Department of the Legislative Assembly, which related to the subject of the Committee's inquiry. In accordance with the resolution of the Committee, the Chair forwarded the Committee's request for evidence and a submission from the Department of the Legislative Assembly to the Hon Richard Torbay MP, in his capacity as Speaker.
- 1.118 On 14 November 2008, the Clerk of the Legislative Assembly wrote to the Chair enclosing information relevant to the Committee's inquiry. Mr Grove indicated that he

was available to attend a hearing as a witness on 1 December 2008 'to answer questions in relation to the administration of the 'whistleblower' policy as it pertains to the New South Wales Parliament.' Mr Grove further advised:

While it is noted that the Speaker has not been specifically asked to appear before the Committee he is prepared to be represented by the President as his Joint Presiding Officer and by myself in relation to matters particular to the Legislative Assembly. If the Committee has any issues of further concern, the Speaker is prepared to take questions on notice if that is the wish of the Committee or to assist in any other way.

1.119 Mr Russell Grove attended to give evidence to the Committee on the afternoon of 1 December 2008.

### **Written invitation to the NSW Legislative Council**

1.120 On 17 October 2008, Mr Terenzini wrote to the President of the Legislative Council, the Hon Peter Primrose MLC, explaining that in order to give effect to the Committee's resolution he needed to advise both Mr Primrose and the Clerk of the Parliaments, Ms Lynn Lovelock, of the Committee's request for assistance in similar terms to the request made to Mr Torbay and Mr Grove. In the absence of any apparent local precedents in relation to the Assembly's Standing Order 327, the Chair also sought advice from the President as to the most appropriate way to approach the matter.

1.121 In his reply, dated 22 October 2008, Mr Primrose noted that 'the issue of comity and mutual respect between both Houses is very much an issue whenever a Presiding Officer or officer of either House is invited to participate in a committee hearing administered under the standing orders of a different House'. The President went on to note the following comments made by the Clerk of the Senate in 2003, to which Mr Primrose had referred when giving a ruling earlier in 2008:

The various houses of parliaments generally follow the principle that one house cannot inquire into proceedings in another house.

The basis in law for this would be the immunity of parliamentary proceedings from impeachment or question in any other place, the Bill of Rights 1689, article 9 immunity which adheres to all of the Australian parliaments, and which is interpreted as applying to each individual house.

This does not affect political comment on events in other houses, but formal inquiries into other houses' proceedings are avoided. It would obviously be difficult properly to conduct bicameral relations within a jurisdiction, or federal relations between jurisdictions, in the absence of this rule, so it is a matter of comity apart from any question of law.

Unlike the other possible limitations considered here, this restriction applies regardless of whether witnesses and documents are summoned. Thus, a committee of one house does not hold an inquiry into events occurring during the course of proceedings in another house, and does not take evidence on such a matter from a member of the other house, even if the member appears and gives evidence voluntarily.

1.122 The President highlighted the distinction between the Committee's request and circumstances in which a Legislative Assembly committee sought to examine office holders in the Legislative Council on a matter under its administration. The Committee on the ICAC is a joint committee, comprising members of both Houses, and as such the President advised that it was not necessary for a Legislative Council member or officer to obtain the leave of the House in order to voluntarily provide evidence to the Committee, despite Standing Order 327.

1.123 However, the President also drew the Committee's attention to the following comments in *Odger's Australian Senate Practice*, concerning the appearance of members before committees:

This informal procedure of appearance by invitation [from the committee chair] is used only in cases where members are offering their views on matters of policy or administration under inquiry by Senate Committees. The procedure has not been used in cases where the conduct of individuals may be examined, adverse findings may be made against individuals or disputed matters of fact may be under inquiry. For such cases it is considered that the formal message and authorisation to appear should be employed.

1.124 Having noted that the request from the Committee related to the provision of evidence concerning the policies, practices and procedures applicable to the Department of the Legislative Council, the President accordingly advised that it would be sufficient for the Chair to send a written invitation to both himself and Ms Lovelock without the need for messages to be exchanged. He noted that this was also consistent with current House of Commons practice as required by s.5 of the *Parliamentary Evidence Act 1901*, which provides:

**s.5 Members of Parliament**

The attendance of a Member of the Council or Assembly to give evidence before the Council or Assembly or a committee shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons.

1.125 The Hon Peter Primrose MLC and Ms Lynn Lovelock subsequently appeared to give evidence at the public hearing on the morning of 1 December 2008.

**Submission from the Department of Parliamentary Services**

1.126 During the course of the Committee's inquiry organisational changes within the administration of the NSW Parliament led to the creation of a new department called the Department of Parliamentary Services. The responsibilities of the new Department included policy matters relevant to the subject of the Committee's inquiry. As a result, the Committee resolved on 11 August 2009 to request advice from the Department of Parliamentary Services. The Committee sought to clarify the exact process by which the NSW Parliament's protected disclosures policy would be reviewed and, if necessary, amended in light of the recent organisational changes.

1.127 The Committee specifically requested advice from Mr Brian Ward, the Executive Manager of the Department of Parliamentary Services, on:

- the current status of the NSW Parliament's protected disclosures policy, including any recent or proposed changes to the policy; and
- the process by which such a policy would be reviewed and adopted throughout the NSW Parliament.<sup>60</sup>

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<sup>60</sup> See Appendix Three, Minutes of meeting no 28 on 11 August 2009.

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1.128 Mr Ward's advice was received on 3 September 2009 and is discussed in detail at paragraphs 7.34 and 7.35 of the report.



## Chapter Two - Public sector statutory framework and standards

2.1 This chapter outlines the current statutory protections for public officials making disclosures in accordance with the *Protected Disclosures Act 1994* (PDA) and other relevant statutes, before examining common law avenues available to public sector employees. The Committee then discusses the administrative protections that are commonly available to whistleblowers in the public sector.

### Background

- 2.2 Protections available to whistleblowers are commonly divided into two categories: statutory and administrative protections.<sup>61</sup>
- 2.3 *Statutory protections* usually address the following issues:
- Protection from any potential actions – for example, defamation, or any disciplinary or criminal prosecution for unauthorised disclosure of information.
  - Criminalisation of detrimental action taken against a whistleblower.
  - Confidentiality provisions.
  - Availability of civil, industrial or other remedies if detriment is suffered.
  - Availability of injunctions or interventions to prevent the taking of detrimental action.
- 2.4 Legislation also provides the framework for the application of the protection scheme, by stating its objectives and prescribing relevant matters, such as the types of employees or individuals that are eligible for protection and the way in which disclosures are to be made in order to attract statutory protection.
- 2.5 *Administrative protections* relate to the practices, procedures and policies that an agency implements to manage protected disclosures. These administrative measures embody an agency's articulation and promotion to its employees of the practical application of the protection scheme. Therefore, while administrative protections necessarily reflect the protections established by statute, they can also build on the statutory protections through the development of procedures to manage elements of the internal policy regime, for example, proactive internal reporting and prevention of detrimental action. The policies and procedures put in place by agencies also underpin the cultural environment in which disclosures are made.
- 2.6 Research conducted during the national *Whistling While They Work* (WWTW) research project has pointed to the preference of whistleblowers to make disclosures internally.<sup>62</sup> Adequate administrative protections are, therefore, important in protecting and encouraging public sector whistleblowers to disclose wrongful conduct.

<sup>61</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 41; Brown A J, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation, An Issues Paper*, Sydney, NSW Ombudsman, November 2006, p. 34.

<sup>62</sup> The employee survey undertaken as part of the project found that the bulk of whistleblowing recorded by the survey started (97%) and ended (90%) as an internal process, while 4% of employees blew the whistle to an external watchdog agency. The report noted that 'although this data was based on current employees only, the proportion was unlikely to increase significantly': see Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 83, 86-93.

## Outline of New South Wales statutory protections

- 2.7 The PDA provides for a statutory whistleblower protection scheme that seeks to utilise elements of the existing New South Wales accountability framework in providing for the protection of disclosures of corrupt conduct, maladministration and serious and substantial waste. The objects of the Act include to facilitate disclosures by 'enhancing and augmenting established procedures for making disclosures concerning such matters'.<sup>63</sup>
- 2.8 In addition to their functions under the PDA, existing accountability agencies, such as the ICAC, the NSW Ombudsman and the Auditor-General, have prescribed roles as investigating authorities and can receive, assess and investigate disclosures related to their existing jurisdictional spheres, in accordance with the legislative provisions they currently operate under. Public officials can also make disclosures internally to dedicated officers within their agency, in accordance with relevant procedures for dealing with reports of certain types of conduct. For example, a public official with a disclosure relating to corrupt conduct can make the disclosure to the ICAC, in accordance with the *Independent Commission Against Corruption Act 1988* (ICAC Act), in addition to being able to report the conduct internally within their agency.
- 2.9 During debate on the second reading of the Bill, Mr Don Page MP outlined the way in which the Bill sought to build on existing accountability mechanisms in providing protection to whistleblowers:

In the development of the bill it was recognised that any proposal to provide legislative protection to whistleblowers had to take account of current administrative mechanisms for the investigation and prevention of corruption, maladministration and substantial waste.

Whistleblowing was not considered to be an end in itself; rather, protection of this kind necessarily required incorporation into the existing structures and operations of the named investigating authorities. Consequently, a disclosure must be made to an existing authority: the Independent Commission Against Corruption in the case of corruption, the Ombudsman in the case of maladministration, or the Auditor-General in the case of substantial waste of public funds.

... one of the principal objectives of the bill is to utilise existing accountability structures, thereby avoiding the unnecessary creation of a new administrative body to deal exclusively with matters relating to whistleblowers.<sup>64</sup>

### *Protected Disclosures Act 1994*

#### Protection against reprisals

- 2.10 Section 20 of the PDA criminalises detrimental action taken against any person substantially in reprisal for that person making a protected disclosure. Most jurisdictions within Australia have made reprisals against whistleblowers a criminal offence.<sup>65</sup>
- 2.11 Detrimental action means action causing, comprising or involving any of the following:
- injury, damage or loss

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<sup>63</sup> *Protected Disclosures Act 1994*, s.3(1)(a)

<sup>64</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, pp. 5013-4.

<sup>65</sup> South Australia and the Commonwealth do not make reprisals a criminal offence.

- intimidation or harassment
- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from, or prejudice in, employment
- disciplinary proceeding.<sup>66</sup>

2.12 An offence under s.20 involves detrimental action taken *substantially* in reprisal for a person making a protected disclosure, in other words, action taken primarily as a result of an individual having made a disclosure. Dr A J Brown, suggests that this, in part, attempts to address the difficult task of proving that detrimental action was taken because of the disclosure rather than for some other reason.<sup>67</sup>

2.13 In proceedings for an offence under this section there is a partial reversal of the onus of proof. Section 20(1A) provides that once detrimental action has been established, the burden lies upon the defendant to prove that the action taken was not substantially in reprisal for the person making a protected disclosure. Proceedings for an offence under s.20 may be instituted within two years after the offence is alleged to have been committed.<sup>68</sup>

2.14 The effectiveness of s.20 is difficult to assess, given the limited number of prosecutions that have commenced under the provision. The Deputy Ombudsman, Mr Chris Wheeler, indicated to the Committee that all prosecutions commenced to date in New South Wales, under s.20 of the PDA or s.206 of the *Police Act 1990* (Police Act), have been unsuccessful on technical grounds.<sup>69</sup> In surveying Australian anti-reprisal offences as part of the WWTW project, Dr A J Brown commented that the lack of attempted prosecutions is a 'major problem' in terms of assessing the strengths and weaknesses of the current statutory provisions. Dr Brown also noted that the limited number of prosecutions that have been considered or commenced, in Queensland and New South Wales, have been aborted or dismissed due to technicalities, such as delay or a failure to caution the suspect.<sup>70</sup>

### Protection against actions

2.15 The PDA provides protection from any potential legal liabilities that a person may face if they make a protected disclosure. No action, claim or demand may be made against them for making a disclosure.

2.16 Section 21(2) provides that this provision has effect despite any duty of secrecy or confidentiality or restriction of disclosure imposed upon the person.

2.17 Section 21(3) provides examples of the ways in which a person who makes a disclosure is to be protected. The person:

- has a defence of absolute privilege in proceedings for defamation<sup>71</sup>

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<sup>66</sup> PDA, s.20(2)

<sup>67</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 36.

<sup>68</sup> PDA, s.20(3)

<sup>69</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 6.

<sup>70</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 38.

<sup>71</sup> The *Defamation Act 2005* also provides that a defence of absolute privilege applies to the publication of a matter that is published to or by a public official or authority (as defined in the PDA) of a disclosure made to the official or authority in relation to an allegation of corrupt conduct, maladministration or serious and substantial waste of public money or local government money, if the publication is for the purpose of investigating the allegation: see Sch 1 cl 26.

Public sector statutory framework and standards

- does not commit an offence against an Act that imposes a duty upon that person to maintain confidentiality
- does not breach an obligation by way of oath, rule of law or practice to maintain confidentiality
- is not liable to disciplinary action because of the disclosure.

### **Confidentiality guidelines**

2.18 Section 22 of the PDA provides that investigating authorities or public officials that receive or are referred a protected disclosure are not to disclose information that might identify or tend to identify the person who has made the disclosure.

2.19 The above obligation does not apply if:

- the person consents in writing, or
- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person the disclosure concerns, or
- disclosure of the identifying information is necessary to investigate the matter or it is in the public interest to do so.

### **Eligibility for protections under the PDA**

#### *How and to whom disclosures must be made*

2.20 The PDA provides that in order to be protected, disclosures must be made by a public official. Disclosures must also be made voluntarily in order to be protected. Disclosures that are made by an official in the exercise of a duty imposed on them by another Act are defined as not having been made voluntarily under s.9 of the PDA.

2.21 In order to attract the protection of the PDA, disclosures made by public officials must concern corrupt conduct, maladministration, or serious and substantial waste in the public sector.<sup>72</sup>

2.22 Disclosures by public officials must be made to:

- The ICAC, in accordance with the ICAC Act, if they are concerning corrupt conduct.
- The NSW Ombudsman, in accordance with the *Ombudsman Act 1974* (Ombudsman Act), if they concern maladministration.
- The Auditor-General, in accordance with the *Public Finance and Audit Act 1983*, if they concern serious and substantial waste.
- The Director-General of the Department of Local Government, in accordance with the *Local Government Act 1993*, if they concern serious and substantial waste in local government.
- The Police Integrity Commission (PIC), in accordance with *Police Integrity Commission Act 1996* (PIC Act), if they concern corrupt conduct, maladministration or serious and substantial waste of public money by a police officer.<sup>73</sup>

2.23 The definition of a public official is:

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<sup>72</sup> PDA, ss.3, 10, 11, 12, 12A, 12B. For a definition of corrupt conduct see Part 3 of the ICAC Act; for a definition of maladministration see s.11(2) of the PDA; serious and substantial waste is not defined under the PDA.

<sup>73</sup> PDA, ss.10, 11, 12, 12A, 12B

- A person employed under the *Public Sector Employment and Management Act 2002* (PSEM Act).
- An employee of a state owned corporation or the subsidiary of a state owned corporation or a local government authority.
- Any other individual having public official functions or acting in a public official capacity whose conduct and activities may be investigated by an investigating authority.<sup>74</sup>

2.24 The definition includes an individual in the service of the Crown or a public authority, a member of the Police Service, a PIC officer or an officer of the PIC Inspector. The definition was amended in 2008 in order to remove doubt about the application of the PDA to area health service staff.<sup>75</sup>

#### *Objective and subjective tests*

2.25 The PDA provides that, in order to attract protection, a disclosure must satisfy two objective tests:

- For disclosures made to the investigating authorities and principal officers of public authorities: the information disclosed must show or tend to show the relevant type of conduct (for example, corrupt conduct).
- For disclosures made to a member of Parliament or a journalist: the disclosure must be substantially true.<sup>76</sup>

2.26 Disclosures made to a member of Parliament or a journalist must also satisfy a subjective test: in making the disclosure public officials must have reasonable grounds for believing the disclosure is substantially true.

2.27 Further, the PDA requires that a public official making a disclosure to a member of Parliament or a journalist must have already made substantially the same disclosure to an investigating authority or public authority, and the authority to whom the disclosure was made must have decided not to investigate; or not completed the investigation within six months of the original disclosure being made; or investigated the matter but not recommended any action to be taken in respect of the matter; or failed to notify the person making the disclosure whether the disclosure would be investigated within six months of the disclosure being made.<sup>77</sup>

#### *Other threshold tests*

2.28 Section 14(1) of the PDA provides that to attract protection, disclosures by public officials to the principal officer of, or officer constituting, a public authority, the disclosure must show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money by the authority or its officers, or by another public authority or its officers.

2.29 Under the PDA, disclosures referred by an investigating authority or public official to another authority or official are protected. An investigating authority must refer a disclosure if it is not authorised to investigate the matter under the relevant investigation Act, and it is of the opinion that another authority or official may

<sup>74</sup> The investigating authorities, pursuant to s.4 of the PDA are the ICAC, the PIC, the Ombudsman, the PIC and ICAC Inspectors, the Auditor-General, and the Director-General of the Department of Local Government.

<sup>75</sup> PDA, s.4, and Legislative Assembly Hansard, 28 November 2008, p. 12076.

<sup>76</sup> PDA, ss.10(b), 11(1)(b), 12(1)(b), 12A(1)(b), 12B(1)(b), 12C(1)(c), 13(1) (3) (4A), 14(1), 19(5).

<sup>77</sup> PDA, ss.19(2) to (4)

appropriately deal with the matter. For example, if a disclosure about maladministration was made to the ICAC, because the Commission investigates matters concerning corrupt conduct, then pursuant to s.25 of the PDA, the Commission can refer the disclosure to the NSW Ombudsman who does have jurisdiction to investigate disclosures concerning maladministration.<sup>78</sup>

### *Limits on protections*

2.30 Authorities may decline to investigate, or stop investigating, matters raised by a disclosure that the authority considers to have been made frivolously or vexatiously under s.16(1) of the PDA. Such disclosures do not attract the protections contained within the PDA. In addition, disclosures that are made solely or substantially to avoid dismissal or other disciplinary action do not attract protection.<sup>79</sup> Similarly, under s.17, disclosures that principally involve questioning the merits of government policy (including the policy of a local government authority) are not protected by the PDA.

### Protections under other New South Wales legislation

2.31 The protected disclosures regime established by the PDA built on existing accountability regimes. Consequently, other New South Wales legislation also provides for certain protections that are relevant to public sector whistleblowers. The Committee briefly outlines these provisions in the section below.

### **Independent Commission Against Corruption Act, Ombudsman Act and Police Integrity Commission Act**

2.32 The ICAC Act, Ombudsman Act and PIC Act include criminal offences for the following:

- Using, causing or inflicting, violence, punishment, damage, loss or disadvantage on any person who provides assistance to the ICAC, NSW Ombudsman or PIC.<sup>80</sup>
- Dismissal from employment, or prejudice in employment, of any person who provides assistance to the ICAC, NSW Ombudsman or PIC.<sup>81</sup>

2.33 The ICAC Act, Ombudsman Act and PIC Act also provide the same statutory protections as found in the PDA for those who make disclosures in accordance with each of their respective Acts.<sup>82</sup>

### **Public Sector Employment and Management Act**

2.34 Under the PSEM Act certain public officials are subject to disciplinary offences if they engage in misconduct. Misconduct as defined in s.43(1) includes:

- Taking any detrimental action (within the meaning of the PDA) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act.
- Taking any action against another officer that is substantially in reprisal for an internal disclosure made by that officer.

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<sup>78</sup> PDA, s.25(1) and (2)

<sup>79</sup> PDA, s.18

<sup>80</sup> ICAC Act, s.93; Ombudsman Act, s.37(4); PIC Act, s.113.

<sup>81</sup> ICAC Act, s.94; Ombudsman Act, s.37(5); PIC Act, s.114.

<sup>82</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008 p. 14.

## Government and Related Employees Appeal Tribunal Act

2.35 Section 24 of the *Government and Related Employees Appeal Tribunal Act 1980* (GREAT Act) provides certain public officials with a right to appeal to the Government and Related Employees Appeal Tribunal about disciplinary actions on the basis that they were made substantially in reprisal for a protected disclosure.

## Police Act

2.36 Section 206 of the Police Act makes it a criminal offence for a New South Wales police officer to take detrimental action against another New South Wales police officer or former police officer, which is substantially in reprisal for the other officer making a protected allegation of misconduct or criminal activity.

## Occupational Health and Safety Act

2.37 Section 8 of the *Occupational Health and Safety Act 2000* (OH&S Act) places a statutory obligation on employers to ensure the health, safety and welfare at work of all employees. Any contravention of s.8 is a criminal offence. Employers are obliged, amongst other things, to:

- Ensure that systems of work and the working environment of the employees are safe and without risks to health.
- Provide such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work.
- Provide adequate facilities for the welfare of the employees at work.

## Freedom of Information Act

2.38 Under the *Freedom of Information Act 1989* (FOI Act) a document is exempt from release if it contains matters relating to a protected disclosure.<sup>83</sup>

## Civil remedies

2.39 In New South Wales, employers have a common law duty of care to support and protect whistleblower employees. In February 2001, the District Court in *Wheadon v State of NSW*<sup>84</sup> awarded \$664,270 in damages to a police officer who claimed that his employer was in breach of its duty of care for failure to provide proper care and support and to prevent victimisation and harassment. In *Wheadon* the police officer made a statement to an officer of the Internal Affairs section of the NSW Police alleging corruption on the part of a senior officer. He subsequently received death threats by criminals in the area and was transferred to a one-man station. He claimed he was subject to stress, harassment and victimisation. The accumulation of stress caused him to suffer psychiatric illness.<sup>85</sup>

2.40 The breaches found by the court included:

- failing to conduct a proper and **adequate investigation** of allegations made **by** the plaintiff as well as of allegations made **against** the plaintiff

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<sup>83</sup> *Freedom of Information Act 1989*, Sch 1 cl 20(d)

<sup>84</sup> *Wheadon v State of NSW* (unreported, DC (NSW), Cooper J, No 7322/88, 2 February 2001)

<sup>85</sup> See NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, pp. 57-8. Information also cited in 'Duty of care owed to "whistleblowers"', *Client Newsletter*, Crown Solicitor's Office, March 2001, pp. 2-3.

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- failing to provide the plaintiff with a system of **pro-active protection** (which would include taking active steps to prevent or stop victimisation and harassment)
- failing to give **support and guidance** to the plaintiff
- failing to provide the plaintiff with a form of **pro-active assistance** (failing to appreciate that officers who are in need of welfare assistance very often do not realise that they need it, or they feel embarrassed about asking for it)
- failing to assure the plaintiff that he had done the right thing.<sup>86</sup> (original emphasis)

2.41 In all jurisdictions other than the Commonwealth and New South Wales, a person who suffers detriment is entitled to seek damages by way of tort action.<sup>87</sup> In South Australia and Western Australia an action for victimisation under equal opportunity legislation is also available.<sup>88</sup>

## Other jurisdictions

2.42 Whistleblower legislation in Australian jurisdictions is not consistent or standardised. Statutory provisions that prescribe the types of protection available to whistleblowers, eligibility for protection, the way disclosures are to be dealt with and oversight of the schemes, vary greatly across jurisdictions. As is the case in New South Wales, other statutory protections in addition to those provided in specific whistleblowing legislation may also be available.

2.43 The national WWTW research project examined the adequacy of current Australian whistleblower legislation and concluded that, while each jurisdiction has some elements of a best practice model, all have problems.<sup>89</sup> The table below includes some of the project's rankings of specific aspects of whistleblower legislation across jurisdictions, as of 2006.

**Table 2: WWTW ranking of statutory provisions in Australian jurisdictions in 2006<sup>90</sup>**

	ACT 1994	Cth 1996	SA 1993	Tas 2002	Qld 1994	Vic 2001	WA 2003	NSW 1994
<b>Legal protections</b>								
Relief from liability	2	0	2	1	3	3	1	3
Loss of protection	0	2	2	0	2	1	1	2
Anti-reprisal offences	1	0	0	1	1	1	1	2
Civil remedies	2	0	2	2	2	2	2	0
Industrial & equitable remedies	1	2	2	1	3	1	2	1

<sup>86</sup> NSW Ombudsman, *Public sector agency fact sheet no 23: Whistleblowing*, February 2006, p. 2, <<http://www.ombo.nsw.gov.au/publication/PDF/factsheets/Whistleblowing.PDF>>, accessed 1 July 2009.

<sup>87</sup> *Whistleblowers Protection Act 1993* (SA) s.9(2)(a); *Whistleblowers Protection Act 1994* (Qld) s.43(1); *Public Interest Disclosure Act 1994* (ACT) s.29; *Whistleblowers Protection Act 2001* (Vic) s.19; *Public Interest Disclosures Act 2002* (Tas) s.20; *Public Interest Disclosure Act 2003* (WA) s.15(1); *Public Interest Disclosure Act 2008* (NT) s.16. See also Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 272.

<sup>88</sup> *Whistleblowers Protection Act 1993* (SA), s 9(2)(b); *Public Interest Disclosure Act 2003* (WA), s 15(4).

<sup>89</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 4.

<sup>90</sup> Source: Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. ii-iii. The rankings for the Commonwealth, ACT and NT Bills have been omitted – the NT has since enacted a Public Interest Disclosure Act.



	ACT 1994	Cth 1996	SA 1993	Tas 2002	Qld 1994	Vic 2001	WA 2003	NSW 1994
Injunctions & intervention	2	1	1	2	3	2	1	1
<b>Management of whistleblowers</b>								
Internal disclosure procedures	2	1	0	0	2	3	3	0
Confidentiality	1	0	2	1	3	1	3	3
Information	2	1	2	3	2	2	2	2
Reprisal risk, prevention etc	2	0	0	0	2	0	0	0
<b>Receipt, handling &amp; investigation of disclosures</b>								
Receipt mechanisms	2	0	2	2	3	2	3	2
Obligation to investigate	3	3	1	3	2	3	3	1
Independent review of discretions	1	1	1	3	1	3	2	1
Clearinghouse for investigations	1	1	1	3	2	3	2	1
Coordinated investigation systems	2	0	2	0	2	0	3	2
Public reporting requirements	2	2	0	3	3	3	2	0
<b>Misuse provisions</b>								
False/misleading offence	1	1	0	2	3	2	2	2
Subjective/objective test	2	1	2	0	2	0	2	2
Entirely policy disputes	0	1	1	1	3	1	1	0
Entirely personal grievance	2	0	1	2	2	2	2	2
Vexatious	2	2	1	2	1	2	2	3
Discretion not to investigate	2	1	1	3	1	2	3	1
<b>Role of public integrity agencies</b>								
Internal witness management	1	1	1	1	1	1	1	1
Reprisals & compensation	2	1	1	1	2	1	1	1
Monitoring, research, policy	1	1	1	2	1	2	2	1

**Key:** 3=current best practice      1=not applicable/law is silent or weak  
2=provisions adequate/conventional      0=current major problem or problematic omission

## Recent developments

2.44 The Commonwealth is the only Australian jurisdiction to have no standalone whistleblower protection legislation, with whistleblower protection provisions being found in the *Public Service Act 1999* and the *Parliamentary Service Act 1999*. Following a referral by the Attorney-General, the House of Representatives Standing Committee on Legal and Constitutional Affairs recently conducted an inquiry into a whistleblower protection scheme for the Commonwealth public sector. The Committee recommended, as a matter of priority, the introduction of a Public Interest Disclosure Bill, which would have the purpose of promoting accountability and integrity in public administration. The Committee recommended that the Bill be guided by the following principles:

- it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
- people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;

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- people have a responsibility to raise those concerns in good faith;
- governments have a right to consider policy and administration in private; and
- government and the public sector have a responsibility to be receptive to concerns which are raised.<sup>91</sup>

2.45 The Federal government is yet to respond to the Committee's recommendations.

2.46 The ACT government conducted a review of its legislation in 2004, with the aim of improving its whistleblower protection scheme.<sup>92</sup> The Public Interest Disclosure Bill was presented to the ACT Parliament in June 2006, however, the Bill lapsed after the 2008 ACT election.

2.47 The Northern Territory's *Public Interest Disclosure Act 2008* was assented to in December 2008, following a review process and the release of a discussion paper. The Act, which commenced on 31 July 2009, provides for the protection of persons making disclosures about serious public sector misconduct, as well as establishing a framework for the investigation of disclosures.<sup>93</sup>

## Administrative protections

### Guidelines for dealing with disclosures

#### Standards Australia

2.48 The Australian Standard for whistleblower protection programs states that the following elements are essential to an effective protection program:

- Structural elements:
  - Commitment
  - Whistleblower protection policy
  - Resources
- Operational elements:
  - Appointment of a designated protection officer
  - Appointment of a designated investigation officer
  - Independence of the protection and investigation officers
  - Establishment of reporting mechanisms
  - Confidentiality
  - Communication with the whistleblower
  - Investigation
  - Immunity from disciplinary action

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<sup>91</sup> Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector, Report of the Inquiry into whistleblowing protection within the Australian Government public sector*, Canberra, February 2009, p. xix,

<<http://www.aph.gov.au/house/committee/laca/whistleblowing/report/fullreport.pdf>>, accessed 13 July 2009.

<sup>92</sup> ACT, Legislative Assembly Hansard, 8 June 2006, pp. 1911-3.

<sup>93</sup> *Public Interest Disclosure Act 2008* (NT), s.3 and second reading speech, 22 October 2008, Northern Territory Legislation database, <<http://notes.nt.gov.au/dcm/legislat/Acts.nsf/830a91a0fb6c1fed6925649e0009c237/25ad2f6c76ff1421692574ea000d7747?OpenDocument>> accessed 30 June 2009

- Reporting by investigation and protection officer to CEO
- False reporting by persons purporting to be whistleblowers
- Unauthorised release of information
- Codes of conduct
- Maintenance elements:
  - Education and training
  - Visibility and communication
  - Review
  - Accountability.<sup>94</sup>

## NSW Ombudsman

### *Protected Disclosures Guidelines*

2.49 The NSW Ombudsman's *Protected Disclosures Guidelines* identify the following steps that management can take to develop sound processes for dealing with protected disclosures:

- adopting an internal reporting policy
- assessing and investigating disclosures
- incorporating protected disclosure processes into the agency's code of conduct
- taking steps to ensure an ethical culture.<sup>95</sup>

2.50 The NSW Ombudsman's Guidelines also state that, in line with the Premier's model contract for chief and senior executives, performance based contracts for senior public sector executives should contain a standard provision 'requiring them to ensure that procedures for dealing with protected disclosures are implemented and fostered within their agency and that support is available to staff who have made or intend to make a protected disclosure.'<sup>96</sup>

### *Model internal reporting policy*

2.51 The NSW Ombudsman's Guidelines recommend that the following items should be included in agency internal reporting policies:

1. A statement of commitment to an ethical and accountable culture (signed by principal officer/CEO)
2. The purpose of the policy: statement of benefits and importance to the agency of having a whistleblowing mechanism, including the agency's view of the importance of whistleblowing and the protection of whistleblowers
3. The objects of the Act
4. What disclosures are protected
5. Whether reports can be made anonymously
6. Sanctions for making false or vexatious allegations
7. To whom and how whistleblowing concerns can be directed internally
8. Selecting a disclosure coordinator and nominated disclosure officers

<sup>94</sup> Standards Australia International, AS 8004-2003 *Whistleblower Protection Programs for Entities*, Sydney, June 2003, p. 8-12.

<sup>95</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 43.

<sup>96</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 43.

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9. To whom, how and when whistleblowing concerns can be directed externally
10. A statement that reporting will be kept confidential, where this is possible and appropriate
11. A commitment to protect whistleblowers
12. Assessment of the risk of reprisal
13. Formal procedures for responding to reprisals, including rights to request positive action by the agency
14. The rights of persons the subject of a disclosure
15. A description of investigative processes that may be used
16. A guarantee of feedback
17. An undertaking to regularly review the policy.<sup>97</sup>

2.52 The NSW Ombudsman's Guidelines also contain a model internal reporting policy for state government agencies and local councils to use when developing their internal reporting policies. The NSW Ombudsman recommends that internal reporting systems should be adopted as a policy by agencies and widely published.<sup>98</sup>

### Development of agency standards for dealing with disclosures

- 2.53 The PDA does not require agencies to implement internal processes for dealing with disclosures. However, following the PDA's enactment, the Department of Premier and Cabinet (DPC) issued a memorandum, which directed agencies to implement documented reporting procedures 'that provide clear and unequivocal protections to employees who make protected disclosures' and to submit to the DPC an outline of the steps taken to inform staff of the relevant procedures and to implement the procedures.<sup>99</sup>
- 2.54 The DPC's Personnel Handbook contains a Model Code of Conduct for agencies, which encourages public sector employees to report corrupt conduct, maladministration and waste. The Model Code also includes information on internal and external avenues for making a protected disclosure, and outlines supervisors' obligations to make staff aware of internal reporting procedures.<sup>100</sup>

### Reviews of internal reporting policies

2.55 Following the release of the Premier's Memorandum, the NSW Ombudsman wrote to agencies requesting a copy of their internal reporting policy. The NSW Ombudsman's Office then assessed the adequacy of the policies against certain criteria. The Deputy Ombudsman advised the Committee that the assessment showed most agencies had not adopted a policy and, where they had, the policies were often inadequate. After its initial assessment, the NSW Ombudsman provided feedback to agencies and assessed revised versions of policies, in addition to developing a model policy for agencies. According to Mr Wheeler, more recent analysis of agency policies conducted during the WWTW project resulted in suggested improvements to agency

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<sup>97</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 4.

<sup>98</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 3.

<sup>99</sup> Department of Premier and Cabinet, *M96-24 Protected Disclosures Act 1994 Public authority internal reporting systems*, <[http://www.dpc.nsw.gov.au/publications/memos\\_and\\_circulars/ministerial\\_memoranda/1996/m1996-24](http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/1996/m1996-24)>, 19 November 1996, accessed 8 January 2009.

<sup>100</sup> Department of Premier and Cabinet, *Personnel Handbook*, Chapter 8, pp. 5-6, <[http://www.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0018/738/PH\\_Chapter\\_8.pdf](http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0018/738/PH_Chapter_8.pdf)>, accessed 22 June 2009

policies, which the NSW Ombudsman would include in its revised *Protected Disclosures Guidelines*.<sup>101</sup> The revised guidelines were subsequently published in April 2009.

- 2.56 The Department of Local Government (DLG) reviews the performance of local councils. The DLG's Promoting Better Practice Review Program assesses the effectiveness and efficiency of council operations through a review of relevant information and data, followed by the provision of feedback to councils. The Review includes an assessment of protected disclosures policies and procedures. In November 2008, the DLG advised the Committee that seventy-four of the 152 New South Wales councils had been reviewed. Eight of the reviewed councils had not had protected disclosures policies in place. Seven of these councils had adopted a policy in response to the Department's review.<sup>102</sup>

### **Inquiry participants' policies**

- 2.57 Submissions received by the Committee indicate that agencies participating in the inquiry have developed protected disclosures policies, in line with the NSW Ombudsman's model internal reporting policy, which inform staff of their rights under the PDA in addition to detailing the investigation processes and the relevant agency contacts. The Committee notes, however, that the agency policies and codes provided during the inquiry varied in terms of detail and comprehensiveness. It has been difficult for the Committee to determine the implementation and efficacy of administrative protections, in the absence of more detailed data on disclosures that are investigated within agencies and local councils, and the outcomes of such investigations. In the absence of such information the Committee has considered the available national research data on this area.

### **Whistling While They Work project**

- 2.58 The WWTW research project included a survey that aimed to collect data on the comprehensiveness of agency policies and procedures in relation to whistleblowing. A cross-section of agencies from the Commonwealth, New South Wales, Queensland and Western Australian public sectors participated in the survey.
- 2.59 While 76% of the 304 agencies surveyed stated that they had internal disclosure procedures of some kind, only 175 agencies provided copies of written procedures to the research project. An analysis of the written procedures received showed that they focussed on encouraging employees to make disclosures and on how disclosures should be investigated, rather than on whistleblower protection. Only 54% of agencies had procedures or systems in place for providing 'active management support' to whistleblowers.<sup>103</sup> The study noted that '[i]n other words, procedures tend to be geared towards meeting the interests of the organisation rather than the needs of the employees who come forward with reports.'<sup>104</sup>

<sup>101</sup> Mr Chris Wheeler, *Transcript of evidence*, 18 August 2008, pp. 2-3.

<sup>102</sup> Mr Ross Woodward, Deputy Director-General, Department of Local Government, *Transcript of evidence*, 24 November 2008, p. 13 and Department of Local Government, *Submission 27*, p. 6 and Answers to questions taken on notice at 24 November hearing, pp. 1-2.

<sup>103</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 206-8, 245-60.

<sup>104</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 250.

- 2.60 Although agency procedures were found to be uniformly weak across all jurisdictions, New South Wales agencies had the highest average scores for the comprehensiveness of their procedures.<sup>105</sup>
- 2.61 The project also found that larger agencies tended to have more comprehensive procedures, and that those agencies with comprehensive procedures had higher staff awareness of the procedures. Finally, the study identified a strong correlation between comprehensive procedures and better treatment of whistleblowers by management and, to a lesser extent by co-workers, suggesting that ‘when an agency has comprehensive procedures, there is more likely to be a positive outcome in terms of treatment and protection for the person who reported’.<sup>106</sup>
- 2.62 The WWTW project concluded that legislation requiring agencies to develop procedures and systems is needed. The study developed several principles for best practice legislation, which included the requirement for agencies to establish internal procedures that cover receiving, recording and investigating disclosures, and for protecting whistleblowers and safeguarding their privacy.<sup>107</sup> The second WWTW project report, released in draft form in July 2009, identifies five fundamental elements of ‘better practice’ agency whistleblower programs, and contains checklists for key aspects of each element.<sup>108</sup>
- 2.63 The table below summarises legislative requirements for internal whistleblower procedures in Australian jurisdictions. The Committee discusses agency protected disclosures policies and procedures in chapter 6.

**Table 3: Legislative requirements for internal disclosure procedures**<sup>109</sup>

Legislation	Agency procedures for			Agency procedures must follow model code/guidelines
	How disclosures can and should be made	Investigation of and action on disclosures	Protection of people as a result of disclosures	
SA 1993	Nil			
Qld 1994	Contemplated, but not required	Nil	Required	Nil
NSW 1994	Contemplated, but not required	Nil	Nil	Nil
ACT 1994	Required	Required	Required	Nil
Cth 1999	Required	Required	Nil	Nil
Vic 2001	Required	Required	Required	Ombudsman guidelines
Tas 2002	Contemplated	Nil	Nil	Nil
WA 2003	Nil		Required	Commissioner guidelines

<sup>105</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 249. 60 of the agencies surveyed were NSW agencies, while 56 were Commonwealth, 31 Queensland and 28 Western Australia.

<sup>106</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 255-7.

<sup>107</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 286.

<sup>108</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work: towards best practice whistleblowing programs in public sector organisations*, Second report of the Australian Research Council Linkage Project, Draft report, July 2009, pp. 1-2, <<http://www.griffith.edu.au/centre/slr/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 18 September 2009.

<sup>109</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 268.

### **Recommendation of Standing Committee on Legal and Constitutional Affairs**

2.64 As part of its inquiry into a whistleblower protection scheme for the Commonwealth public sector, the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended that legislation be introduced to provide for whistleblower protection in the federal public sector. The Committee recommended that the proposed Public Interest Disclosure Bill provide that agency heads be obliged to establish appropriate public interest disclosure procedures for their agencies; report to the Commonwealth Ombudsman on the use of the procedures; and delegate staff to receive and act on disclosures, where appropriate.<sup>110</sup>

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<sup>110</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. xxii.

## Chapter Three - Discussion paper proposals and responses

### Introduction and overview of issues for reform

- 3.1 In this chapter, the Committee gives an overview of some of the areas identified by inquiry participants as requiring reform. The Committee then discusses the proposals put forward in its discussion paper and provides a summary of responses to the proposals.
- 3.2 In summary, the following areas for reform were raised during the inquiry:
- Oversight and coordination of the protected disclosures framework, including monitoring agency responses and current public sector standards, and collecting data to assess the efficacy of the framework.
  - Standardised internal agency policies that outline protected disclosures procedures and the protections available to staff making disclosures.
  - Eligibility for protection for certain types of employees, such as contractors, and volunteers and interns working for members of Parliament.
  - Clarifying and simplifying how and to whom disclosures may be made.
  - Current statutory protections not providing for applications for injunctions to prevent detrimental action and claims for damages if detrimental action is taken.
  - Transparency and accountability in relation to agencies' receipt and management of disclosures.
- 3.3 In response to the issues raised by inquiry participants, the Committee published a discussion paper, outlining several proposals for reform aimed at improving legislative and administrative protections for public sector whistleblower employees. Following the publication of the discussion paper, the Committee sought submissions in response to its proposals. The responses received by the Committee are outlined below.

### Proposals for reform

#### A protected disclosures unit (proposal 1)

- 3.4 The Committee noted that the lack of central oversight and coordination of the existing whistleblower protection scheme in New South Wales has been identified as an area for reform on previous occasions, with three previous Committee reviews of the PDA recommending the establishment of a Protected Disclosures Unit within the NSW Ombudsman's Office. The reviews recommended that the Unit perform the following roles:
- Oversighting the operation of the PDA.
  - Providing an advisory role to agencies and public officials in relation to protected disclosures.
  - Monitoring the conduct of investigations arising out of protected disclosures by public authorities.
  - Coordinating the collection, collation and publication of statistics on protected disclosures in New South Wales.



- Providing relevant education and training to public authorities.<sup>111</sup>

3.5 The Committee proposed the allocation of the oversight of the PDA to a unit in a suitable oversight body, with the NSW Ombudsman's Office continuing to have an educative role in relation to protected disclosures.

### Responses to the proposal

3.6 The NSW Ombudsman's Office expressed support for the proposal and commented that the oversight role would be most effectively performed by one body, and that this would also be in line with previous recommendations for the establishment of the unit.

3.7 In terms of the location of the unit, the NSW Ombudsman's Office noted that three previous reviews of the PDA have recommended that the unit be established in the NSW Ombudsman's Office, and that almost all cases that may constitute serious and substantial waste or corrupt conduct would come within the scope of the NSW Ombudsman's jurisdiction.<sup>112</sup> The NSW Ombudsman also referred to the recommendation of the recent Standing Committee on Legal and Constitutional Affairs inquiry into whistleblowing protection in the Australian public sector, that the proposed federal whistleblower scheme be jointly overseen by the Commonwealth Ombudsman and the Public Service Commissioner. The NSW Ombudsman noted that there is no New South Wales equivalent body to the Public Service Commissioner and that the NSW Ombudsman's Office is the only general jurisdiction integrity agency in New South Wales.<sup>113</sup>

3.8 STOPline commented that agencies should have ownership of their whistleblower education and training programs, and that the NSW Ombudsman's proposed role should not reflect a generic, whole of government approach that does not allow for education programs to be tailored to the culture of individual agencies.<sup>114</sup> STOPline further commented that appropriate persons, who are appointed for the purpose, should also be permitted to receive disclosures, as the involvement of a third party would improve whistleblowers' perception of the confidentiality and impartiality of the disclosure process.<sup>115</sup>

3.9 Submissions received from the ICAC and Ms Margaret Penhall-Jones indicated general support for the proposal that there should be a unit in an appropriate body.<sup>116</sup> The Commission submitted that it supported 'the proposal that a Protected Disclosure Unit be established in a suitable body, and that the NSW Ombudsman's Office should continue to provide an educative, advice and auditing role in this area.'<sup>117</sup>

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<sup>111</sup> See Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, recommendation 1; Committee on the Office of the Ombudsman and PIC, *Second Review of the Protected Disclosures Act 1994*, August 2000, recommendations 3 and 4; Committee on the Independent Commission Against Corruption, *Review of the Protected Disclosures Act 1994*, November 2006, report 12/53, recommendation 9.

<sup>112</sup> NSW Ombudsman, *Submission 40*, p. 4.

<sup>113</sup> NSW Ombudsman, *Submission 40*, pp. 3-4.

<sup>114</sup> STOPline, *Submission 43*, pp. 3-4.

<sup>115</sup> STOPline, *Submission 43*, pp. 2-3.

<sup>116</sup> Independent Commission Against Corruption, *Submission 47*, p. 1, Ms Margaret Penhall-Jones, *Submission 52*, p. 1.

<sup>117</sup> ICAC, *Submission 47*, p. 2.

- 3.10 The Liberal/National parties submitted that the NSW Ombudsman's Office is the most appropriate agency to perform the unit's oversight role, noting that this would be in line with previous Committee recommendations.<sup>118</sup> Ms Cynthia Kardell supported formalisation of and funding for the educative and advisory role currently performed by the NSW Ombudsman's Office, while noting that the proposed unit should act as a clearinghouse for public interest disclosures, and have oversight of the investigating authorities.<sup>119</sup>
- 3.11 The Department of Education and Training did not support the proposal, stating that:
- The NSW Ombudsman and ICAC currently have the power and capacity to oversight investigations involving a protected disclosure.
  - A specialist oversight unit would add administrative burdens to a system that is currently administratively cumbersome.<sup>120</sup>
- 3.12 The Department suggested that the protected disclosure oversight roles of the NSW Ombudsman and ICAC should instead be clarified with respect to both agencies.<sup>121</sup>
- 3.13 The Ministry of Transport supported the proposal, and suggested that agencies investigating disclosures should be able to voluntarily report to the oversight unit on any disclosure, without breaching confidentiality, 'to allow the agency to demonstrate probity and transparency in its processes (similar to what is now done in respect of ICAC).'<sup>122</sup>
- 3.14 NSW Health also supported the proposal, and suggested that the oversight function should be performed by the NSW Ombudsman, given the training and education role it has undertaken in relation to protected disclosures:
- Since 1995, the Ombudsman has produced guidelines to assist public officials in State Government Departments and agencies in the implementation of their obligations under the Protected Disclosures legislation. The Ombudsman has also facilitated training workshops covering the Protected Disclosures Act for NSW Health staff. The proposal to establish a Protected Disclosures Unit within the Ombudsmans Office is a logical extension of this role and is supported.<sup>123</sup>
- 3.15 The NSW Police Force submitted that there would be minimal impact on the Force if the unit were established in the ICAC, as the NSW Police Force does not report to the Commission on sworn or unsworn employees.<sup>124</sup>
- 3.16 The Committee's comments and recommendations regarding the oversight of protected disclosures are contained in chapter 4.

### Regulations requiring the development of internal policies (proposal 2)

- 3.17 The Committee proposed that regulations could be enacted, pursuant to s.30 of the PDA, requiring agencies and local councils to have internal reporting systems in place, which would:
- Facilitate the making of disclosures and protect whistleblowers when they make disclosures.

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<sup>118</sup> NSW Liberal/National parties, *Submission 48*, p. 1.

<sup>119</sup> Ms Cynthia Kardell, *Submission 52*, p. 1.

<sup>120</sup> Department of Education and Training, *Submission 44*, p. 1.

<sup>121</sup> Department of Education and Training, *Submission 44*, p. 1.

<sup>122</sup> Ministry of Transport, *Submission 62*, p. 1.

<sup>123</sup> NSW Health, *Submission 57*, p. 1.

<sup>124</sup> NSW Police Force, *Submission 61*, p. 2.

- Require agencies to assess and deal with disclosures, in accordance with internal policies and procedures that adopt the best practice criteria outlined in the NSW Ombudsman's *Protected Disclosures Guidelines*.

3.18 The aim of the Committee's proposal was to ensure that public sector agencies and local councils have comprehensive and consistent policies in relation to assessing and dealing with protected disclosures and that such policies provide robust protection to whistleblowers.

### Responses to the proposal

- 3.19 Submissions received from Mr Ben Blackburn, the Department of Education and Training, ICAC and the Ministry of Transport expressed support for the proposal.<sup>125</sup> The Audit Office of New South Wales commented that the operation of the protected disclosures unit proposed by the Committee should lead to the development of agency internal policies and a 'consistent and robust approach to whistleblowers'.<sup>126</sup>
- 3.20 STOPline noted that internal agency policies should not be limited to detailing the legislative means of achieving protection in order for the agency to satisfy legislative requirements, but should also acknowledge the needs of whistleblowers and their concerns in terms of confidentiality, fear of reprisal and independence.<sup>127</sup> STOPline also submitted that there should be provision in the PDA for disclosures to be made anonymously.<sup>128</sup>
- 3.21 NSW Health supported the proposal and stated that the Department's policy directives are consistent with the NSW Ombudsman's *Protected Disclosures Guidelines*. The Department also indicated that the new model procedures to be contained in the *Whistling While They Work* (WWTW) project's second report will be included in departmental policy, following the publication of the report.<sup>129</sup>
- 3.22 Ms Kardell submitted that the regulations proposed should prescribe how and when agency heads should intervene to give protection to whistleblowers.<sup>130</sup>
- 3.23 The NSW Police Force advised that, while it supported a requirement for internal disclosure models consistent with the NSW Ombudsman's model reporting policy, the following factors should be noted by the Committee:
- Disclosures regarding police officers are not assessed under the PDA by the NSW Police Force.
  - Written complaints against police officers are assessed and managed under Part 8A of the Police Act.
  - Verbal allegations concerning misconduct or criminal activity which involve police officers are documented and assessed under Part 8A of the Police Act.
  - Complaints regarding police officers are overlooked by the NSW Ombudsman and the Police Integrity Commission.<sup>131</sup>

<sup>125</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Department of Education and Training, *Submission 44*, p. 1, ICAC, *Submission 47*, p. 1, Ministry of Transport, *Submission 62*, p. 1.

<sup>126</sup> The Audit Office of NSW, *Submission 42*, p. 1.

<sup>127</sup> STOPline, *Submission 43*, p. 4.

<sup>128</sup> STOPline, *Submission 43*, p. 5.

<sup>129</sup> NSW Health, *Submission 57*, p. 2.

<sup>130</sup> Ms Cynthia Kardell, *Submission 52*, p. 1.

<sup>131</sup> NSW Police Force, *Submission 61*, p. 2.

3.24 The Committee's comments and recommendations regarding agency responsibilities in relation to the operation of the protected disclosures scheme are contained in chapter 6.

### Eligibility of certain staff for protection (proposals 3 and 4)

3.25 The Committee examined the issue of broadening the provisions of the PDA to clarify the status of employees who currently do not fit into the definition of 'public official' under the Act. The Committee sought responses on its proposal to make it clear that disclosures made by the following categories of people may be eligible for protection:

- people in contractual relationships with public authorities; and
- volunteers or interns working for a member of Parliament.

### Responses to the proposals

3.26 Submissions received from Mr Blackburn, the Department of Education and Training and the ICAC expressed support for the proposals.<sup>132</sup> Mr Blackburn commented that the proposal to extend eligibility for protection to volunteers and interns working for a member of Parliament is a particularly important proposal which highlights failures in the current protection provisions of the PDA. The Department of Education and Training supported the proposal on the basis that the term 'contractor' was clearly defined in the PDA, in order to prevent a broad definition that may extend eligibility for protection to groups and individuals for whom it was not intended.<sup>133</sup>

3.27 The NSW Police Force indicated that it did not object to the proposal to extend eligibility for protection to contractors, noting that the Police Act only provides protection for the identity of members of the public who make complaints regarding the conduct of police officers, and does not provide protection for actions taken in reprisal for complaints.<sup>134</sup>

3.28 The Ministry of Transport supported the proposal to extend eligibility for protection to contractors, while suggesting that certain limitations to protection be imposed, such as disclosures not being protected if they are made to avoid legitimate action that is pursuant to the relevant contract.<sup>135</sup>

3.29 Ms Kardell submitted that the proposals to extend protection were inadequate, and that protections should be available to 'persons, not just persons working for public sector organisations.'<sup>136</sup>

3.30 In terms of volunteers and interns working for members of Parliament, the Department of the Legislative Assembly submitted that:

- The proposal is unnecessary, as volunteers and interns working for a member of Parliament are eligible for protection under other New South Wales legislation.
- Different protections may be needed for volunteers and interns, as protection against dismissal or disciplinary action would not be applicable to their circumstances.

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<sup>132</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Department of Education and Training, *Submission 44*, p. 1, ICAC, *Submission 47*, p. 1

<sup>133</sup> Department of Education and Training, *Submission 44*, p. 1

<sup>134</sup> NSW Police Force, *Submission 61*, p. 3.

<sup>135</sup> Ministry of Transport, *Submission 62*, p. 1.

<sup>136</sup> Ms Cynthia Kardell, *Submission 52*, p. 1.

- The increased administration and management involved in the placement of interns and volunteers may result in members not participating in such programs.
- Members would be advised to consider risk management in managing their volunteers and intern programs, particularly if they may be potentially liable for civil damages claims for detrimental action.
- An alternate approach to applying the members' staff code of conduct to volunteers and interns may be to clarify a separate code of conduct for volunteers and interns, similar to the Legislative Assembly code of conduct for work experience students, and to include information on reporting corruption or maladministration in the OH&S and security induction that the Legislative Assembly plans to develop for electorate office staff.<sup>137</sup>

3.31 In response to the proposal to extend eligibility for protection to volunteers and interns, the Department of the Legislative Council submitted that:

- Volunteers and interns should receive the same protections as paid employees under the PDA.
- The proposal should be extended to include eligibility for protection to secondary students on work experience.
- The position of such individuals may be more vulnerable than that of paid staff, particularly in the case of volunteers working directly for members.
- Policies should state the protections available for volunteers, interns and work experience students and induction programs should ensure that such individuals are adequately supported.
- Although volunteers are not employees of the Legislative Council, they are inducted as an employee would be and advised that the members' staff code of conduct, which includes information on protected disclosures, applies to them.<sup>138</sup>

3.32 The Department of the Legislative Council indicated that volunteers working in members' offices present difficulties in relation to security and access to parliamentary resources such as the computer network.<sup>139</sup> Furthermore, the actions of a volunteer working in a member's office could result in situations where the volunteer is the subject of a protected disclosure, as the use of parliamentary resources by volunteers for purposes other than the member's parliamentary duties may come under the definition of corrupt conduct under the ICAC Act. In this regard, the Department notes an ICAC recommendation that consideration be given to excluding persons other than the member's staff from using electorate or parliamentary office services, facilities and equipment.<sup>140</sup>

3.33 The Department of the Legislative Council also drew the Committee's attention to recent changes in the structure of the administration of the NSW Parliament. The Department noted that responsibility for administrative duties previously performed separately by the respective Houses, such as the administration of members' entitlements and human resources, has now been combined into the Department of Parliamentary Services.

<sup>137</sup> Legislative Assembly, *Submission 58*, pp. 1-3.

<sup>138</sup> Legislative Council, *Submission 59*, pp. 1-2.

<sup>139</sup> Legislative Council, *Submission 59*, pp. 1-2.

<sup>140</sup> ICAC, *Investigation into Parliamentary and Electorate Travel: Second Report, Analysis of administrative systems and recommendations for reform*, December 1998, p. 9, quoted in Legislative Council, *Submission 59*, Attachment 5, p. 1.

- 3.34 The Department of the Legislative Council stated that ‘the development of policies on issues such as employment conditions, protected disclosures, grievances and inductions is now therefore the responsibility of the Executive Manager, DPS.’<sup>141</sup> Notwithstanding this structural change, the Department noted that the Presiding Officers of both Houses continue to be the employers of their members’ staff. Protected disclosures made by members’ staff would, therefore, continue to be made to the Clerk of the relevant House. If the Committee’s proposals were to be implemented, the Parliament’s protected disclosure policy would need to be updated to reflect the change.
- 3.35 The Department of the Legislative Council also noted that the Department of Parliamentary Services makes frequent use of contractors, and that it would be useful for the Committee to seek the view of the Department’s Executive Manager.<sup>142</sup>
- 3.36 In correspondence to the Committee Ms Clover Moore MP expressed her support for proposal 3. She commented that Governments are ‘increasingly contracting services and programs to other agencies, and contractors should receive the same protections as public employees when they report corruption that is related to Government programs.’<sup>143</sup>
- 3.37 The issue of broadening the provisions that specify who may be eligible for protection under the PDA is discussed in chapter 8.

### Objective and subjective tests (proposal 5)

- 3.38 The PDA provides that in order to attract protection, a disclosure made to an investigating authority or the principal officer of a public authority must satisfy an objective test: the information disclosed must show or tend to show the relevant type of conduct (for example, corrupt conduct).
- 3.39 Some participants in the inquiry, such as the ICAC, submitted that in order to encourage disclosures, the current objective test should be amended so that disclosures made by officials with an ‘honest belief on reasonable grounds’ are eligible for protection.
- 3.40 The Committee sought responses to the proposal that the PDA be amended to provide that, in order to attract protection, disclosures must:
- 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; or
  - Be 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.

### Responses to the proposal

- 3.41 Submissions received from Mr Blackburn and the Ministry of Transport expressed support for the proposal.<sup>144</sup> While the Audit Office of New South Wales expressed support for the proposal, the Auditor-General noted that the assessment by

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<sup>141</sup> Legislative Council, *Submission 59*, p. 1.

<sup>142</sup> Legislative Council, *Submission 59*, p. 1.

<sup>143</sup> Letter from Ms Clover Moore MP to Committee Chair dated 5 August 2009

<sup>144</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Ministry of Transport, *Submission 62*, p. 1.

investigating and public authorities on whether or not to investigate complaints should continue to be on the basis of 'show or tends to show'.<sup>145</sup>

3.42 The Department of Education and Training commented that:

- The proposal would lower the threshold that complaints must satisfy to attract protection.
- An 'honest belief on reasonable grounds' may mean that complaints in which insufficient evidence has been provided to warrant investigation may be eligible for protection, and that such complainants may therefore expect that their complaint will be investigated.
- If agencies are required to investigate complaints, based on the belief that the allegation may have happened, resources would have to be allocated to enable the agency to respond to complaints.
- The proposal would have to be closely linked to agency guidelines on frivolous and vexatious complaints, so that public officials understand they must not make false or frivolous allegations.<sup>146</sup>

3.43 Ms Kardell stated that the PDA should provide for a presumption of protection, 'there should be a presumption that a person, who says in writing or verbally that they are making a disclosure in the public's interest in accordance with the Act, *will be afforded protection unless and until a court determines otherwise*'.<sup>147</sup>

3.44 Ms Kay Pettit expressed the view that the veracity of complaints should be rigorously tested and checked by the investigating authority, to avoid resources being spent on personal grievances. Ms Pettit states that 'some preliminary investigation into the credibility of the complainant and an examination of the documentary evidence is vital to establish the basis to investigate fully'.<sup>148</sup>

3.45 While the ICAC supported the proposal in principle, the Commission noted that the wording of the proposal 'would require a public official to form a belief about whether or not the allegations are 'true', which in the Commission's view may not be immediately apparent'.<sup>149</sup> The Commission submitted that the wording should instead be consistent with the Queensland *Whistleblowers Protection Act 1994*, and state that to attract protection disclosures are to 'be made by a public official who has an honest belief on reasonable grounds that the disclosure tends to show corrupt conduct, maladministration, or serious and substantial waste'.<sup>150</sup>

3.46 The NSW Ombudsman reflected that it is difficult for recipients of disclosures to assess a whistleblower's state of mind at the time they made the disclosure. The NSW Ombudsman submitted that a possible way to retain both the subjective and objective tests, while addressing the difficulties posed by the subjective test, would be to distinguish between the way the tests are applied:

<sup>145</sup> The Audit Office of NSW, *Submission 42*, p. 1.

<sup>146</sup> Department of Education and Training, *Submission 44*, pp. 1-2.

<sup>147</sup> Ms Cynthia Kardell, *Submission 52*, p. 2 (original emphasis).

<sup>148</sup> Ms Kay Pettit, *Submission 49*, pp. 5 and 7.

<sup>149</sup> ICAC, *Submission 47*, p. 1

<sup>150</sup> ICAC, *Submission 47*, p. 1

*Whistleblower Protection Act 1994* (Qld), **14 What type of information can be disclosed?**

... (2) A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.

One way around this difficulty, while still providing for both objective and subjective tests, may be to distinguish between when the tests apply. It would be appropriate to make a distinction between:

- (1) determining whether the obligations under the Act apply to the recipient of a disclosure, and
- (2) determining whether the protections of the Act apply to the maker of a disclosure.

In the first instance, the objective test of "show or tends to show" would be practical and appropriate.

In the second case, either or both of the objective and/or subjective tests could apply.<sup>151</sup>

3.47 The NSW Police Force advised that the proposal would not impact significantly on the police complaints system, as the provisions of the Police Act give wider protection to a range of allegations than the PDA. The test for protection for complaints under s.122 of the Police Act applies to complaints that 'allege' or 'indicate' certain types of conduct, without there being a requirement for the person making the complaint to have reasonable grounds for believing the complaint to be true, or for the complaint to 'show or tend to show' certain types of conduct. The proposed objective and subjective tests would therefore be narrower than the current, wider protection provisions of the Police Act. The NSW Police Force indicated that it supported the proposal's application to disclosures regarding civilian employees of the Police Force.<sup>152</sup>

3.48 The Committee discusses the issue of broadening the threshold tests provided for in the PDA in chapter 8.

### Applications for injunctions and civil damages (proposals 6 and 7)

3.49 The Committee examined various ways to extend protections available under the PDA. Many inquiry participants submitted that the statutory protections should be widened to include injunctions against reprisals and the ability to seek damages for reprisals through civil proceedings. The Committee proposed that the PDA be amended to provide for:

- Public or investigating authorities to make applications for injunctions against detrimental action on behalf of public officials.
- Public officials to claim for civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.

### Responses to the proposals

3.50 Submissions received from Mr Blackburn, the Department of Education and Training, ICAC and Ms Kardell expressed support for the proposals.<sup>153</sup> Ms Kardell submitted that it should be open to public officials to make applications for injunctions against detrimental action, and that a whistleblower oversight body should also be able to make such applications.<sup>154</sup>

3.51 The University of New South Wales expressed reservations about the proposals in view of the reverse onus of proof in s.20 of the PDA, submitting that:

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<sup>151</sup> NSW Ombudsman, *Submission 40*, p. 4.

<sup>152</sup> NSW Police Force, *Submission 61*, pp. 4-5.

<sup>153</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Department of Education and Training, *Submission 44*, p. 2, ICAC, *Submission 47*, p. 1, Ms Cynthia Kardell, *Submission 52*, p. 2.

<sup>154</sup> Ms Cynthia Kardell, *Submission 52*, p. 2.



- The reverse onus of proof would make it hard for agencies to resist claims for damages, or applications for injunctions, and ‘would result in significant pressure to settle such claims however unfounded they might be.’
- There is no time limit on when the detrimental action may occur, with the result that a person could take action many years after their disclosure has been made and dealt with.
- A protected disclosure may be misconceived and unsubstantiated but still be a valid disclosure.
- Although vexatious and frivolous complaints and complaints made to avoid disciplinary action are not protected under the PDA, these motives are often difficult to establish.<sup>155</sup>

3.52 The Ministry of Transport supported the proposal to enable public or investigating authorities to apply for injunctions against detrimental action, while suggesting that it be necessary to obtain the approval of the Attorney General prior to the commencement of such action. The Ministry did not support the proposal to enable public officials to claim for civil damages for detrimental action taken against them, stating that complainants should not have any expectation of financial gain, as this may motivate them to make unwarranted disclosures.<sup>156</sup>

3.53 The NSW Police Force submitted that it did not object to the proposal to enable public officials to claim for civil damages for detrimental action, as it is intended to apply to action for damages taken against the official who is found to have taken detrimental action, as opposed to the NSW Police Force, or the Crown.<sup>157</sup>

3.54 The protections available under the PDA are discussed by the Committee in chapter 9.

### Confidentiality guidelines (proposals 8 and 9)

3.55 Difficulties with the confidentiality guidelines in the PDA were raised by some inquiry participants. For example, Professor Richard Henry, the Deputy Vice Chancellor (Academic) of UNSW, submitted that problems can arise in relation to maintaining confidentiality, in situations where the allegations raised relate to a workplace with a very small number of employees; and where the identity of a whistleblower becomes known, for example, through the whistleblower publicly identifying themselves.<sup>158</sup>

3.56 In light of such evidence, the Committee proposed that the confidentiality guidelines be amended to:

- Remove the requirement for confidentiality if a public official has voluntarily and publicly identified themselves as having made a protected disclosure.
- Clarify that the guidelines apply to a public official who has made a protected disclosure, in addition to the investigating and/or public authorities investigating the disclosure.

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<sup>155</sup> The University of New South Wales, *Submission 55*, pp. 1-2.

<sup>156</sup> Ministry of Transport, *Submission 62*, pp. 1-2.

<sup>157</sup> NSW Police Force, *Submission 61*, p. 5.

<sup>158</sup> Professor Richard Henry, Deputy Vice-Chancellor (Academic), University of New South Wales, *Transcript of evidence*, 24 November 2008, p. 3.

## Responses to the proposals

- 3.57 Mr Blackburn, the Department of Education and Training, ICAC and the Ministry of Transport expressed support for these proposals.<sup>159</sup> The Department of Education and Training commented that public officials making a complaint should be required to maintain confidentiality in order to retain the protection afforded under the PDA, as this would help agencies to manage investigations and limit breaches of confidentiality by complainants.<sup>160</sup>
- 3.58 Ms Kardell supported the proposals, on the basis that:
- Investigating authorities should not be able to decline to investigate a complaint on the grounds that a whistleblower requests anonymity.
  - Authorities should not disclose the identity of a whistleblower, even if the whistleblower consents to it (and in order to observe procedural fairness).
  - Whistleblowers should not be required to keep the fact that they have made a disclosure confidential.<sup>161</sup>
- 3.59 The NSW Police Force indicated that it supported the proposal to remove the confidentiality requirement in cases where an official has identified themselves as having made a disclosure, in terms of its application to its civilian employees. In relation to sworn employees, the NSW Police Force stated that the proposal would not adversely affect the Police Force, and that it could be adopted through an amendment to the Commissioner's guidelines, pursuant to s.169A of the Police Act.
- 3.60 Clause 75 of the Police Regulations would prevent officers from disclosing details of an allegation they have made under the Police Act against another officer, while clause 53(3) would probably prevent an officer from identifying themselves as the complainant. The NSW Police Force noted, therefore, that proposal 9 is consistent with the current provisions in relation to sworn officers. In terms of civilian employees, the Police Force supported the proposal.<sup>162</sup>
- 3.61 Issues relevant to the confidentiality guidelines in the PDA are examined by the Committee in chapter 9.

## Detrimental action as disciplinary offence (proposal 10)

- 3.62 During the inquiry, the Deputy Ombudsman told the Committee that the responsibility of agencies to take action in cases of detrimental action should be made clear by providing that detrimental action taken substantially in reprisal for a protected disclosure is a disciplinary offence for all public officials.<sup>163</sup> The Committee sought responses to the proposal to amend the PDA accordingly.

## Responses to the proposal

- 3.63 Mr Blackburn expressed support for this proposal, while noting that the use of the term 'substantially' may weaken the impact of the proposal, as it could lead to questioning of the level of reprisal action taken against a whistleblower.<sup>164</sup> ICAC and

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<sup>159</sup> Mr Ben Blackburn, *Submission 41*, p. 3, Department of Education and Training, *Submission 44*, p. 2, ICAC, *Submission 47*, p. 1, Ministry of Transport, *Submission 62*, p. 2.

<sup>160</sup> Department of Education and Training, *Submission 44*, p. 2.

<sup>161</sup> Ms Cynthia Kardell, *Submission 52*, p. 2.

<sup>162</sup> NSW Police Force, *Submission 61*, pp. 6-7.

<sup>163</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 7.

<sup>164</sup> Mr Ben Blackburn, *Submission 41*, p. 4.

the Ministry of Transport supported the proposal.<sup>165</sup> The Department of Education and Training also supported the proposal, advising that it reflected current Departmental policy.<sup>166</sup> Ms Kardell supported the proposal, commenting that it may result in more frequent use of disciplinary action to prevent reprisals against whistleblowers.<sup>167</sup>

- 3.64 The University of New South Wales submitted that if a complaint, based on the reverse onus of proof, would constitute grounds for disciplinary action, the rights of persons accused of detrimental action may be 'severely adversely affected leading to significant unfairness.'<sup>168</sup>
- 3.65 The NSW Police Force advised that under s.173 of the Police Act the Commissioner may take action for 'misconduct', which would include the taking of reprisal action for a complaint made under s.206 of the Police Act. The proposal would therefore mean consistency between the PDA, the Police Act and the Public Sector Employment and Management Act in terms of detrimental action constituting a disciplinary offence.<sup>169</sup>
- 3.66 The detrimental action provisions of the PDA are canvassed in greater detail by the Committee in chapter 9. The Committee examines the proposal that taking detrimental action pursuant to the PDA be classed as a disciplinary matter in chapter 6 of this report.

### Simplifying to whom disclosures may be made (proposals 11 and 12)

- 3.67 The Committee heard evidence in support of simplifying the provisions that set out how disclosures must be made to attract the protection of the PDA. ICAC submitted that it can be difficult for public officials to determine whether a matter constitutes maladministration, corrupt conduct or serious and substantial waste, in order to make their disclosure to the relevant investigating authority provided for in sections 10 to 12C of the PDA. The Commission advised that there is uncertainty as to whether a public official is protected should they, in good faith, make a disclosure to the incorrect agency.<sup>170</sup>
- 3.68 The Committee proposed that the PDA be amended to:
- provide a detailed, stand-alone definition of a public authority, similar to that found in the *Whistleblowers Protection Act 1994* (Qld)
  - clarify that, to be protected by the PDA, disclosures by public officials that show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money may be made to an appropriate public or investigating authority, where the public official honestly believes it is the appropriate authority to receive the disclosure.
- 3.69 The proposals sought to ensure that disclosures made in good faith by public officials would attract protection under the PDA, where an effort was made to direct the disclosures towards an appropriate public or investigating authority.

<sup>165</sup> ICAC, *Submission 47*, p. 1, Ministry of Transport, *Submission 62*, p. 2.

<sup>166</sup> Department of Education and Training, *Submission 44*, p. 2.

<sup>167</sup> Ms Cynthia Kardell, *Submission 52*, p. 3.

<sup>168</sup> The University of New South Wales, *Submission 55*, p. 2.

<sup>169</sup> NSW Police Force, *Submission 61*, p. 8.

<sup>170</sup> ICAC, *Submission 22*, pp. 3-4.

### Responses to the proposals

- 3.70 Mr Blackburn, ICAC, Ms Kardell and the Ministry of Transport supported the proposal to provide a stand-alone definition of a public authority.<sup>171</sup>
- 3.71 Mr Blackburn, ICAC and the Ministry of Transport also expressed support for the proposal to clarify that disclosures made to any appropriate public or investigating authority are eligible for protection.<sup>172</sup>
- 3.72 The Department of Education and Training did not support the proposal, stating that instead of clarifying and simplifying the disclosure process, it may result in administrative difficulties and confusion about the administration of disclosures. The Department noted that it was not clear how agencies could accept complaints on another agency's behalf, and that the investigating agency may not have sufficient awareness of the agency the complaint related to, in order to determine if the complaint constituted corrupt conduct, or maladministration.<sup>173</sup>
- 3.73 The NSW Police Force submitted that the proposal did not affect the police complaints system in relation to sworn employees, and that it supported the proposal for unsworn employees.<sup>174</sup>
- 3.74 Ways to simplify the provisions relating to how disclosures must be made are explored by the Committee in chapter 8.

### Disclosures made frivolously, vexatiously or to avoid disciplinary action (proposals 13 and 14)

- 3.75 Agencies indicated that they receive some complaints from staff seeking the protections available under the PDA, for complaints involving disciplinary and performance issues or personal grievances. Some agencies submitted that there was a lack of clarity in relation to how such complaints should be dealt with and that clearer legislation and guidelines for determining which types of disclosures attract protection would be of assistance.
- 3.76 The Committee proposed that s.16 of the PDA be amended to include definitions for 'vexatious' and 'frivolous', to enable agencies to more easily identify complaints that are not eligible for protection. The Committee also proposed that agencies educate and inform their staff, through their protected disclosures policies, regarding:
- The types of complaints that are not eligible for protection under the PDA.
  - More appropriate means, such as internal grievance or performance management processes, for resolving those complaints that do not meet the criteria of a protected disclosure.

### Responses to the proposals

- 3.77 The NSW Ombudsman commented that the proposal to amend the PDA to provide definitions for 'frivolous' and 'vexatious' could be problematic. In particular, a definition of 'made frivolously' would require an assessment of the state of mind of the person making the disclosure at the time it was made. The NSW Ombudsman

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<sup>171</sup> Mr Ben Blackburn, *Submission 41*, p. 4, ICAC, *Submission 47*, p. 1, Ms Cynthia Kardell, *Submission 52*, p. 3, Ministry of Transport, *Submission 62*, p. 2.

<sup>172</sup> Mr Ben Blackburn, *Submission 41*, p. 4, ICAC, *Submission 47*, p. 1, Ministry of Transport, *Submission 62*, p. 2.

<sup>173</sup> Department of Education and Training, *Submission 44*, p. 2.

<sup>174</sup> NSW Police Force, *Submission 61*, pp. 8-11.

was of the view that disclosures regarding serious matters made in the public interest would rarely be made frivolously.<sup>175</sup>

- 3.78 The NSW Ombudsman raised the question of whether, if the content of a disclosure shows or tends to show a serious matter in the public interest, the motivation of the whistleblower matters. While the motivation of a whistleblower may diminish the reliability of the evidence provided and the weight given to it, the NSW Ombudsman argued that complaints motivated by malice are an important source of information about misconduct and mismanagement. In his view, s.16 of the PDA should be repealed.<sup>176</sup>
- 3.79 The Department of Education and Training supported the Committee's proposals, stating that a definition of 'frivolous' and 'vexatious' would be 'most helpful' in terms of clarifying when complaints can be deemed as frivolous and vexatious, without requiring significant investigation by the agency.<sup>177</sup> NSW Health also indicated that clarification of s.16 would assist the Department in assessing whether certain disclosures attract protection.<sup>178</sup>
- 3.80 Mr Blackburn rejected the proposals, stating that they would act as a disincentive to whistleblowers.<sup>179</sup> Dr Tom Benjamin submitted that the provisions relating to frivolous and vexatious complaints are unnecessary and that the frequency of such complaints has been exaggerated. Dr Benjamin further commented that poor definitions of the terms would 'open a loophole for ... departments that will make the Act entirely worthless'.<sup>180</sup>
- 3.81 Ms Kardell submitted that the incidence of such complaints is relatively rare and that the provisions in relation to false or misleading disclosures, at s.28 of the PDA, adequately cover frivolous and vexatious complaints.<sup>181</sup> Ms Kardell also noted that the issue of complaints that are made frivolously and vexatiously should not be confused with the question of how to determine whether a complaint is in the public interest.<sup>182</sup>
- 3.82 Ms Pettit expressed concern about the rights and welfare of public officials who are accused of wrongdoing by complainants with personal grievances, stating that 'for ... every false or vexatious allegation there is an employee who may be seriously impacted'.<sup>183</sup> Ms Pettit submitted that appropriate investigation of such complaints should involve action being taken on any workplace issues, and that statistics on the number of frivolous and vexatious complaints received by agencies should be maintained and publicly available.<sup>184</sup>
- 3.83 ICAC supported the proposal that agencies provide information in their protected disclosures policies on the provisions of the PDA in relation to complaints made to avoid disciplinary action and frivolously and vexatiously.<sup>185</sup>

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<sup>175</sup> NSW Ombudsman, *Submission 40*, p. 4.

<sup>176</sup> NSW Ombudsman, *Submission 40*, pp. 4-5.

<sup>177</sup> Department of Education and Training, *Submission 44*, p. 2.

<sup>178</sup> NSW Health, *Submission 57*, pp. 2-3.

<sup>179</sup> Mr Ben Blackburn, *Submission 41*, p. 4.

<sup>180</sup> Dr Tom Benjamin, *Submission 45*, p. 1.

<sup>181</sup> Ms Cynthia Kardell, *Submission 52*, p. 3.

<sup>182</sup> Ms Cynthia Kardell, *Submission 52*, p. 3.

<sup>183</sup> Ms Kay Pettit, *Submission 49*, p. 2.

<sup>184</sup> Ms Kay Pettit, *Submission 49*, p. 7.

<sup>185</sup> ICAC, *Submission 47*, p. 2.

- 3.84 However, in terms of defining ‘frivolous’ and ‘vexatious’, the Commission submitted that:
- Similar provisions in other jurisdictions’ legislation do not include definitions.
  - Definitions may not be helpful, and may inspire legal disputes due to the difficulty of encompassing all issues that may lead to complaints being classed as frivolous or vexatious.
  - Some conduct may be unintentionally excluded from the definition.
  - Education and guidance provided by the NSW Ombudsman, consistent with the second proposal, would be a more helpful option.<sup>186</sup>
- 3.85 The Ministry of Transport supported the proposals.<sup>187</sup> The Department of the Legislative Council also supported the proposals, and noted that if the PDA were amended to include the proposed definitions, the Parliament’s current protected disclosures and grievance policies would need to be amended to reflect the changes in the PDA.<sup>188</sup>
- 3.86 The NSW Police Force noted that s.141 of the Police Act provides that the Commissioner may decline to investigate a complaint if it is ‘frivolous, vexatious or not made in good faith’. The Police Act also provides a defence under s.206 to a prosecution for reprisal action, if the allegation was made ‘frivolously, vexatiously or in bad faith’. The NSW Police Force supported the proposal to define these terms in the PDA, suggesting that consistent definitions could also be inserted into the Police Act.<sup>189</sup>
- 3.87 In response to the proposal for agencies to include advice in their protected disclosures policies that frivolous and vexatious complaints and those made substantially to avoid disciplinary action are not eligible for protection, the NSW Police Force noted that the Police Act does provide protection for allegations that are made substantially to avoid disciplinary action and that the proposal would therefore not affect the protections available under the police complaints system.<sup>190</sup>
- 3.88 The Committee looks at the issue of disclosures made on ‘frivolous’ and ‘vexatious’ grounds in chapter 8.

### Public officials to be kept informed (proposal 15)

- 3.89 Section 27 of the PDA requires agencies to notify whistleblowers, within six months of a protected disclosure being made, of the action taken or proposed to be taken in respect of the disclosure. The Committee is aware that investigation of complex matters may take some time to complete. The Committee therefore proposed that s.27 of the PDA be amended to provide that public authorities that have received a disclosure keep the public official who made the disclosure informed about developments in relation to their disclosure.

### Responses to the proposal

- 3.90 Submissions received from Mr Blackburn, the Audit Office of New South Wales, the Department of Education and Training, Ms Kardell and NSW Health expressed

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<sup>186</sup> ICAC, *Submission 47*, p. 2.

<sup>187</sup> Ministry of Transport, *Submission 62*, p. 2.

<sup>188</sup> Legislative Council, *Submission 59*, p. 3.

<sup>189</sup> NSW Police Force, *Submission 61*, p. 11.

<sup>190</sup> NSW Police Force, *Submission 61*, pp. 11-2.

support for this proposal.<sup>191</sup> The Department of Education and Training stated that information provided to whistleblowers should be restricted to the progress and outcome of the investigation and not contain specific details.<sup>192</sup> The Ministry of Transport suggested that such reporting should be limited to general information about action taken, and should not be required in serious cases, where it may be preferable for agencies to report to the NSW Ombudsman.<sup>193</sup>

- 3.91 ICAC did not support the proposal, commenting that it may not be possible for agencies to inform public officials about developments in relation to the investigation of the disclosure without prejudicing the investigation. The Commission submitted that the current provision, which requires notification of outcomes and action proposed to be taken within six months of a complaint being made, provides whistleblowers with sufficient information, and that investigating authorities should be excluded from any amendment that would expand the requirement to keep public officials informed about their disclosure.<sup>194</sup>
- 3.92 The NSW Police Force noted that it does not manage disclosures about police officers under the PDA, and that the Police Act provides that complaints must be dealt with in a timely manner. Furthermore, s.150 of the Act provides for complainants to be consulted by the Commissioner in relation to their satisfaction with the action taken or proposed to be taken, after the investigation of their complaint has concluded. The Police Force advised that it supported the proposal's application to disclosures about its civilian employees.<sup>195</sup>
- 3.93 Notifying whistleblowers of progress in relation to their disclosure is discussed in chapter 8 of this report.

### Agency reporting on protected disclosures (proposal 16)

- 3.94 The Committee heard evidence indicating that there is insufficient information available in relation to the operation of the PDA, as agencies are not required to report on protected disclosures in their annual report, or to a central agency. The Committee proposed that the PDA be amended to require public authorities to report on protected disclosures, in the same way as they are required to report on freedom of information applications under s.69 of the *Freedom of Information Act 1994*. The Committee proposed that the reporting requirement could take the form of a regulation requiring a public authority to publish in their annual report information on protected disclosures, including: the number of disclosures made during the reporting period; outcomes; policies and procedures; year-on-year comparisons; and the organisational impact of investigations.
- 3.95 The proposal aimed to provide an efficient and cost effective way of improving transparency by making more information in relation to protected disclosures publicly available.

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<sup>191</sup> Mr Ben Blackburn, *Submission 41*, p. 5, The Audit Office of NSW, *Submission 42*, p. 1, Department of Education and Training, *Submission 44*, p. 2, Ms Cynthia Kardell, *Submission 52*, p. 4, NSW Health, *Submission 57*, p. 3.

<sup>192</sup> Department of Education and Training, *Submission 44*, p. 3.

<sup>193</sup> Ministry of Transport, *Submission 62*, p. 2.

<sup>194</sup> ICAC, *Submission 47*, p. 2.

<sup>195</sup> NSW Police Force, *Submission 61*, p. 13.

## Responses to the proposal

- 3.96 Mr Blackburn, the Department of Education and Training, ICAC and Ms Kardell supported the proposal.<sup>196</sup> Ms Kardell noted that agency reporting on disclosures would enhance the role of the proposed protected disclosures unit, and that the PDA and statistics on disclosures 'should be promoted as an important part of the organisations risk management policy and practice.'<sup>197</sup> Ms Kardell submitted that the information published by agencies should cover the type of wrongdoing and also include enough detail for public officials to be able to identify their disclosure. Ms Kardell stated that whistleblowers should be encouraged to give their consent to being identified.<sup>198</sup>
- 3.97 NSW Health supported the proposal on the basis that identifying details are not published.<sup>199</sup> The Ministry of Transport agreed to the proposal, while expressing reservations about reporting on investigation outcomes. In the Ministry's view, it would be preferable for agencies to report to the NSW Ombudsman with details of investigation outcomes.<sup>200</sup>
- 3.98 The NSW Police Force submitted that the proposal should not apply to sworn employees of the Police Force, for the following reasons:
- Police complaints are not assessed under the PDA and implementation of the proposal would require training and education on the PDA, in addition to changes to existing systems, for little benefit.
  - Oversight of, and reporting on, the police system by the NSW Ombudsman and PIC is comprehensive.
  - The current complaint system, which was developed in response to the recommendations of the Wood Royal Commission, is adequate.
- 3.99 The Police Force supported the proposal in terms of its civilian employees.<sup>201</sup>
- 3.100 The Committee's discussion and recommendations in relation to agency reporting on protected disclosures are contained in chapter 6.

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<sup>196</sup> Mr Ben Blackburn, *Submission 41*, p. 5, Department of Education and Training, *Submission 44*, p. 3, ICAC, *Submission 47*, p. 2, Ms Cynthia Kardell, *Submission 52*, p. 4.

<sup>197</sup> Ms Cynthia Kardell, *Submission 52*, pp. 4-5.

<sup>198</sup> Ms Cynthia Kardell, *Submission 52*, pp. 4-5.

<sup>199</sup> NSW Health, *Submission 57*, p. 4.

<sup>200</sup> Ministry of Transport, *Submission 62*, p. 2.

<sup>201</sup> NSW Police Force, *Submission 61*, pp. 13-4.



## Chapter Four - Oversight, monitoring and review

4.1 In this chapter, the Committee discusses the need for coordinated oversight of the whistleblower protection scheme in NSW. The Committee outlines inquiry participants' views on whether there is a need for oversight of the scheme and which body should undertake such oversight. In addition, the Committee examines the relevant recommendations of previous reviews of the PDA and the recent federal inquiry into a Commonwealth whistleblower protection scheme. Relevant principles developed through the *Whistling While They Work* (WWTW) project are also outlined.

### Background

4.2 The NSW Ombudsman, in conjunction with the other investigating authorities, performs a de facto advisory and education role in relation to protected disclosures. However, no agency has the statutory power or additional funding required to undertake a coordinating and monitoring role. Agencies in New South Wales are not required to report on protected disclosures, or to submit statistics or information on protected disclosures to a coordinating agency. While the investigating authorities report on protected disclosures in their annual reports, there is no provision for the systematic collection, publication or analysis of information relating to disclosures that have been made and investigated internally within public authorities. The members of the Protected Disclosures Act Implementation Steering Committee meet relatively infrequently and it is not a role of the Steering Committee to oversight the scheme.

### Previous reviews of the Protected Disclosures Act

4.3 The lack of central oversight and coordination of the whistleblower protection scheme in New South Wales has continually been identified as an area for reform since the enactment of the PDA in 1994. Three previous parliamentary committees conducting reviews of the PDA have considered the issue. All of the reviews recommended the establishment of a Protected Disclosures Unit in the NSW Ombudsman's Office, to perform a role including:

- overseeing the operation of the Act
- providing an advisory role to agencies and public officials in relation to protected disclosures
- monitoring the conduct of investigations arising out of protected disclosures by public authorities
- coordinating the collection, collation and publication of statistics on protected disclosures in New South Wales
- providing relevant education and training to public authorities.<sup>202</sup>

4.4 The previous Committees' recommendations in relation to coordinated oversight of the whistleblower protection scheme have not been implemented.

<sup>202</sup> See Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, recommendation 1; Committee on the Office of the Ombudsman and PIC, *Second Review of the Protected Disclosures Act 1994*, August 2000, recommendations 3 and 4; Committee on the ICAC, *Review of the Protected Disclosures Act 1994*, November 2006, report 12/53, recommendation 9.

## Protected Disclosures Act Implementation Steering Committee

- 4.5 The Protected Disclosures Act Implementation Steering Committee indicated its support for the establishment of an oversight unit during the previous ICAC Committee's 2006 review of the PDA. In recommending the establishment of the unit, the Steering Committee identified the need for more effective, proactive monitoring and review of agencies' compliance with the PDA. The Steering Committee also submitted that many agencies' lack of experience in dealing with protected disclosures highlights the need for a properly resourced advisory body, to assist agencies with handling disclosures.<sup>203</sup>
- 4.6 The Steering Committee submitted that the unit should have the following roles, in addition to a monitoring role:
- improving awareness of the Act in the public sector
  - providing advice and guidance to agencies and their staff
  - providing or coordinating training for agency staff who are responsible for dealing with disclosures
  - coordinating the collection of statistics on protected disclosures
  - monitoring trends in the operation of the scheme
  - providing advice to the Government or relevant agencies on Bills relating to whistleblowing issues
  - periodically reporting on its work to the Government and Legislature.<sup>204</sup>
- 4.7 The Steering Committee further noted that the NSW Ombudsman's Office has broad investigative powers that may be invoked in monitoring agency investigations of disclosures and that the previous reviews of the PDA, conducted in 1996 and 2000, had recommended that the unit be established in the NSW Ombudsman's Office.<sup>205</sup>
- 4.8 During the current inquiry, the Chair of the Steering Committee, Mr Chris Wheeler, provided the Committee with a letter outlining the Steering Committee's support for the recommendations arising out of the 2006 review and identifying those recommendations that the Steering Committee considered to be a priority.
- 4.9 In terms of the establishment of an oversight unit, the Steering Committee noted the ICAC's concerns in relation to oversight of investigations it has referred to another body under sections 53 and 54 of the ICAC Act and the ICAC's wish to be formally involved in the education function of the oversight unit:
- The Committee supports this recommendation subject to a concern expressed by the ICAC that agencies conducting investigations pursuant to section 53 and 54 of the ICAC Act are only subject to oversight by the ICAC and that ICAC is formally involved in the education function of the unit.<sup>206</sup>

## *Whistling While They Work* project

- 4.10 The WWTW national research project identified improved coordination and monitoring of protected disclosures as a necessary operational development for Australian whistleblowing regimes, particularly in light of the preference of most

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<sup>203</sup> Committee on the ICAC, November 2006, report 12/53, Annexure 5, submission 38, pp. 5-6.

<sup>204</sup> Committee on the ICAC, November 2006, report 12/53, Annexure 5, submission 38, pp. 5-7.

<sup>205</sup> Committee on the ICAC, November 2006, report 12/53, Annexure 5, submission 38, p. 7.

<sup>206</sup> Letter from Mr Chris Wheeler to the Hon Morris Iemma MP, tabled at public hearing, 18 August 2008, p. 2.

public sector employees to make disclosures internally. The project's first report stated that the 'variability in outcomes and in the quality of agency procedures further mitigate in favour of a more consistent and coordinated approach, in which public employees and the general public can have greater confidence that disclosures are being managed in a fair and professional manner.'<sup>207</sup>

4.11 The report of the project included a set of key principles for best practice whistleblowing legislation, which were developed based on an analysis of the data gathered from several surveys conducted during the project. The key principles dealt with oversight in the following terms:

One of the external agencies with responsibility for public interest disclosures should be designated as the oversight agency for the administration of the legislation. The responsibilities of the oversight agency should include:

- being notified by agencies of all disclosures and recording those disclosures and how they were dealt with and resolved
- having the option to decide, on being notified of a disclosure, to provide advice or direction to an agency on how the disclosure should be handled, to manage the investigation of the disclosure by the agency or to take over the investigation of the disclosure
- providing advice or direction to agencies on the steps that should be taken to protect people who have made disclosures, or to provide remedial action for a person who has suffered detriment as a result of making a disclosure
- promoting the objectives of the legislation, within government and publicly, and conducting training and public education
- publishing model procedures for the administration of the legislation, with which agencies' internal procedures must be consistent
- conducting a public review of the operation of the legislation at least once every five years.<sup>208</sup>

## **Inquiry into a whistleblower protection scheme for the Commonwealth public sector**

4.12 As part of its inquiry into a Commonwealth whistleblower protection scheme, the House of Representatives Legal and Constitutional Affairs Committee considered the issue of oversight of the proposed Commonwealth scheme. The report of the House of Representatives Committee was tabled in February 2009.<sup>209</sup> The Committee concluded that the Commonwealth Ombudsman was the most appropriate agency to oversee the scheme. The Committee reasoned that, being the only generalist investigative agency, the Commonwealth Ombudsman possessed the skills, experience and public profile required to fulfil the oversight role.<sup>210</sup> The Committee therefore recommended that the Commonwealth Ombudsman be established as the oversight agency that would administer the Public Interest Disclosure Bill, undertaking the following roles:

<sup>207</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 269.

<sup>208</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 284-5.

<sup>209</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 133-4.

<sup>210</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 133-4.

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The Committee recommends that the Public Interest Disclosure Bill establish the Commonwealth Ombudsman as the oversight and integrity agency with the following responsibilities:

- general administration of the Act under the Minister;
- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies;
- refer public interest disclosures to other appropriate agencies;
- receive referrals of public interest disclosures and conduct investigations or reviews where appropriate;
- provide assistance to agencies in implementing the public interest disclosure system including:
  - provide assistance to employees within the public sector in promoting awareness of the system through educational activities; and
  - providing an anonymous and confidential advice line; and
- receive data on the use and performance of the public interest disclosure system and report to Parliament on the operation of the system.<sup>211</sup>

4.13 At the time of writing, the federal government had not responded to the Committee's recommendations.

### **Inquiry participants' views**

4.14 Participants in the current inquiry raised the lack of oversight and accountability of the management of protected disclosures by NSW public authorities as an issue. Mr Chris Wheeler, the Deputy Ombudsman, told the Committee that agencies' implementation of the PDA was not monitored or reported on:

We do not have and nobody has a view on how agencies are dealing with this Act. The Act has no owner; it is an orphan. It sits out there on its own and there are various agencies that are named in there as investigating authorities. No agency has the role or power to actually monitor how it is being implemented. There is no reporting by line agencies about their experiences under this Act. They do not have to put anything in their annual report. They do not have to notify any centralised body.<sup>212</sup>

4.15 The NSW Ombudsman's Office submitted that the establishment of an appropriately resourced oversight body may address many of the problems with the PDA. The problems with the PDA were identified by the NSW Ombudsman as including: no agency with ownership of the PDA to ensure it is operating effectively; a lack of information on how the Act is working (including data about disclosures made to agencies, information on the nature of the disclosures and how they were dealt with); and the lack of experience and training agencies have in terms of managing disclosures.<sup>213</sup>

4.16 The NSW Ombudsman outlined the possible roles that could be performed by an oversight body, as follows:

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<sup>211</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. xxiv.

<sup>212</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 5.

<sup>213</sup> NSW Ombudsman, *Submission 21*, p. 8.

## (1) Notifications:

- **being notified of all protected disclosures made to NSW agencies**
- **being informed by agencies as to how disclosures were dealt with and resolved**

## (2) Investigations:

- providing advice to agencies in relation to investigations they are undertaking
- **oversighting investigations undertaken by agencies**
- **taking over investigations from agencies**

## (3) Protection of whistleblowers - internal witness support and management:

- providing advice in relation to the protection of whistleblowers/internal witnesses
- **providing remedial action for a person who has suffered detriment**
- **determining legitimate compensation needs of people who have suffered detriment**
- **prosecuting for breaches of the PD Act**

## (4) Training:

- promoting the objects of the legislation, including public education
- providing training for public officials charged with responsibilities under the Act

## (5) Procedures and guidelines:

- **publishing model procedures for the administration of the legislation, with which agencies' internal processes must be consistent**
- publishing guidelines to assist agencies in the implementation of the legislation

## (6) Reviews/monitoring/evaluation:

- **preparing an annual report to Parliament each year on the operation of the legislation**
- **undertaking annual reviews of the legislation**
- keeping disclosure handling systems within agencies under review.<sup>214</sup> (original emphasis)

4.17 The NSW Ombudsman noted that the items listed above in bold may require statutory power, depending on which agency undertook them. He further noted that examples of existing models that could be used as a basis for such an oversight function include the NSW Ombudsman's oversight function in relation to police complaints and its role in relation to allegations concerning child protection in the workplace.<sup>215</sup>

4.18 In evidence to the Committee, the Deputy Ombudsman also noted that his Office is a complaint handling agency, with expertise in dealing with difficult complainants and with advising agencies on effective complaint handling:

Dealing with complainants, particularly with certain complainants, can be time-consuming and stressful. If the agency does not adopt the right approach to that, it can lead to all sorts of difficulties as time goes on. One of the development projects being

<sup>214</sup> NSW Ombudsman, *Submission 21*, pp. 8-9.

<sup>215</sup> NSW Ombudsman, *Submission 21*, p. 9.

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done by all the Australian Ombudsmen is developing new policies and procedures for managing unreasonable complainant conduct. We find that about 4 per cent of our complainants might take between 25 and 30 per cent of our resources, and that this has equity considerations in relation to the resources we have available to deal with other complaints.

So there are detailed things that can be done to help manage that process, to ensure that resources are properly allocated and that people are all treated fairly and reasonably. It is a profession, basically. It is not something that most people are able to do straight off, unless they can be given some guidance about what is necessary and what is important.<sup>216</sup>

- 4.19 A number of other inquiry participants suggested that some form of external oversight be implemented as a way of overcoming the problems with the protected disclosures regime. The University of New South Wales (UNSW) told the Committee that it would support an external body, such as the ICAC, providing an advisory and review role in terms of protected disclosures, submitting that:

It would be of assistance to the University and to those making protected disclosures in complex and difficult circumstances if the ICAC were to provide authoritative advice and direction to the University in specific matters where required by the University. At present, there is little assistance for organisations such as the University when faced with conflicting obligations and unrealistic expectations.<sup>217</sup>

- 4.20 The Auditor-General told the Committee that it would assist agencies if the NSW Ombudsman took on the role of collating, analysing and reviewing data on protected disclosures and providing feedback to agencies.<sup>218</sup>

- 4.21 Whistleblowers Australia supported the establishment of an oversight body, either as a new stand-alone agency, or, preferably, as a unit within the NSW Ombudsman's Office, which would be more cost-effective than creating a new agency. Whistleblowers Australia supported a scheme that maintained agencies' primary role in conducting investigations of internal disclosures, while also establishing an oversight role for the proposed unit. They proposed that the unit's role should be to receive reports from agencies when a disclosure was made, as well as receiving progress reports and information on outcomes of investigations, providing support to whistleblowers, and acting as a 'second line of appeal' for internal disclosures, in addition to fulfilling a research, educative and data collection function.<sup>219</sup>

- 4.22 The Liberal and National Parties submitted that the recommendation of the 2006 ICAC Committee report to establish a Protected Disclosures Unit within the NSW Ombudsman's Office should be implemented.<sup>220</sup>

- 4.23 Other inquiry participants were less supportive of external oversight of protected disclosures. While expressing support for a more coordinated and consistent approach to protected disclosures, the ICAC did not support the proposal to set up an oversight unit based in the NSW Ombudsman's Office, for the following reasons:

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<sup>216</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 11.

<sup>217</sup> University of New South Wales, *Submission 32*, p. 6.

<sup>218</sup> Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 24 November 2008, pp. 67-8.

<sup>219</sup> Whistleblowers Australia, *Submission 4*, pp. 2-3, 7-8 and Mr Peter Bowden, President NSW Branch, Whistleblowers Australia, *Transcript of evidence*, 1 December 2008, p. 30.

<sup>220</sup> NSW Liberal and National Parties, *Submission 3*, p. 2.

- The NSW Ombudsman would be too directly involved in the operations of other agencies and the way they investigate disclosures.
- The NSW Ombudsman may become involved in complaints that relate to decisions it was involved in.
- Many of the proposed educative and data collection functions of such a unit could be undertaken by existing agencies, or a policy unit within an appropriate department, without the need for legislative amendment.
- The role of the proposed unit would not be in keeping with current government policy, which requires agencies to take greater responsibility for their corruption prevention activities.<sup>221</sup>

4.24 In the Commission's view, instead of shifting responsibility for the management of protected disclosures to a central unit, agencies should be educated and encouraged to take responsibility for dealing with disclosures.

4.25 The Department of Education and Training did not support additional oversight of disclosures, submitting that it was unnecessary and would result in greater administrative and reporting burdens being placed on agencies. The Department commented that increased administration associated with reporting may result in resources being diverted from investigations and support programs:

The Department does not consider it necessary to establish a further oversight agency or function. This would increase the red tape and administrative burdens already placed upon public sector agencies in NSW when undertaking investigations of misconduct.

...

Current oversight capacity of the Independent Commission Against Corruption and NSW Ombudsman ensures appropriate application of the legislation. Additional oversight of protected disclosures may establish onerous administrative and reporting tasks for agencies, leading to resources being distracted from investigations and support to disclosants.<sup>222</sup>

4.26 The Department stated that it currently sends regular reports to the ICAC outlining instances of corrupt conduct, maladministration and serious and substantial waste and that such reports include information on protected disclosures and their outcomes:

The Department provides a quarterly report to the Independent Commission Against Corruption (ICAC) notifying all identified cases of alleged corrupt conduct, maladministration or serious waste. The report also provides progress reports for all matters previously notified and advises ICAC of the outcomes of investigations.

As all matters which meet the criteria of a protected disclosure are required to be notified, the Commission is aware of all protected disclosures and the Department's response. The opportunity is therefore available for the Commission to review these matters and seek information about individual cases if required.<sup>223</sup>

4.27 However, the Department did express some support for an auditing function to be undertaken by an oversight agency, similar to that currently performed by the NSW Ombudsman in relation to child protection investigations:

<sup>221</sup> ICAC, *Submission 22*, pp. 5-6 and Ms Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 18 August 2008, pp. 21, 26.

<sup>222</sup> Department of Education and Training, *Submission 37*, p. 5.

<sup>223</sup> Department of Education and Training, *Submission 37*, p. 5.

Oversight, monitoring and review

If the Parliamentary Committee was of a view to enhance the monitoring of whether complaints should have been assessed to constitute protected disclosures, it should give consideration to providing one of the current oversight agencies with the power to audit agencies' investigations in a similar way to which the NSW Ombudsman currently audits child protection investigations.<sup>224</sup>

4.28 The NSW Ombudsman made the following points in response to the arguments put forward by the ICAC and the Department of Education and Training:

- Some involvement in the way agencies investigate disclosures is necessary, in order to ensure that public sector agencies achieve and maintain an appropriate standard. The Ombudsman's involvement in agencies' management of complaints, such as police complaints and child protection related complaints, is determined by the investigative expertise of staff within the relevant agency and is the subject of 'class or kind' agreements between the agency and the Ombudsman.
- The educative and data collection functions of the unit could be undertaken by existing bodies, however, those functions that are currently undertaken by the Ombudsman are not funded and are not likely to be funded in the absence of a statutory role. Certain aspects of the data collection role, such as achieving adequate compliance and dealing with privacy related issues, would be difficult to manage in the absence of statutory authority.
- The unit would be consistent with government policy that seeks to encourage agencies to take responsibility for corruption prevention, as the unit's role would include facilitating agencies to take greater responsibility for their corruption prevention activities.
- The creation of the unit would not involve a shift in responsibility for the management of protected disclosures, instead the unit would seek to ensure that agencies are educated and encouraged to take responsibility for the disclosures they receive.
- The role of the unit is not to increase administrative burdens on agencies, instead its purpose would be taking steps to ensure that agencies investigate disclosures. The relative costs and benefits involved in the administrative and reporting tasks would be minimal in comparison to the detriment that can occur when agencies do not deal appropriately with a disclosure.<sup>225</sup>

4.29 The NSW Ombudsman reflected on his Office's involvement in the oversight of agency investigations, since the commencement of the NSW Ombudsman's role in child protection related complaints. He noted that while agency investigations have improved significantly as a result of his Office's recommendations, there are still some issues in relation to the management of complaints:

Issues still arise from time to time, including in relation to the Department's practices and procedures for dealing with protected disclosures and the people and staff members who make them.

We have noted that DET and other agencies have found the management of whistleblowers in the workplace, particularly after investigations have ceased, to be somewhat problematic. It also appears that access to advice from persons suitably qualified and experienced in dealing with protected disclosures is extremely limited. We have also noted that it is not uncommon for officers designated by agencies as

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<sup>224</sup> Department of Education and Training, *Submission 37*, p. 5.

<sup>225</sup> NSW Ombudsman, *Submission 40*, p. 1.



'Notifiable Disclosure Officers' or 'Disclosure Officers' to have little training in the requirements of the Act, nor an understanding of their responsibilities when dealing with whistleblowers.<sup>226</sup>

- 4.30 In terms of the ICAC's comments on the NSW Ombudsman becoming involved in complaints relating to decisions that it was a party to, the NSW Ombudsman responded in the following terms:

I am not sure what the ICAC is referring to about the Office becoming involved in complaints that relate to decisions we were involved in. The only circumstances I can think of where this might arise would be where we have oversights the investigation of a complaint by an agency within another area of our jurisdiction. In such circumstances issues relating to the appropriate response to such disclosures would be addressed as part of that oversight role. Further, our role is to advise not to make decisions or determinations.<sup>227</sup>

### Committee comment

- 4.31 In the Committee's view, oversight of the whistleblower protection regime is critical in terms of providing a clearer picture of how the current administrative and statutory protections are used and whether they are adequate. The effectiveness of the regime, including the adequacy of protections, has been difficult for the Committee to gauge given the lack of information on agencies' use of the available statutory protections, their provision of administrative protections and the outcomes of protected disclosures.
- 4.32 The Committee notes that there was broad support for its proposal to establish an oversight body, and that many responses to the Committee's discussion paper nominated the NSW Ombudsman's Office as an appropriate agency to undertake such a role.
- 4.33 The Committee acknowledges the concerns expressed by the Department of Education and Training, that greater oversight of disclosures may increase the administrative and reporting burden on agencies. The Committee notes that principal officers of all agencies are currently required to report to the ICAC on suspected corrupt conduct, which includes matters raised through protected disclosures. The Committee also notes that the Department of Education and Training's submission states that its internal reporting policy and procedures 'provide for centralised oversight so that matters can be externally reported and internally monitored.'<sup>228</sup>
- 4.34 Nevertheless, on balance, the Committee is of the view that agencies should be collecting data and information on the receipt, investigation and management of protected disclosures as part of an effective and comprehensive procedure for the management of disclosures. It should, therefore, not pose a substantial additional burden for agencies to collect such data and provide it to another agency for oversight purposes. Agencies participating in the Committee's inquiry indicated that they receive relatively few disclosures each year, suggesting that in many cases the additional administrative burden associated with reporting on disclosures would be relatively light.
- 4.35 The Committee notes the ICAC's reservations in relation to locating a Protected Disclosures Unit within the NSW Ombudsman's Office, particularly the Commission's

<sup>226</sup> NSW Ombudsman, *Submission 40*, p. 2.

<sup>227</sup> NSW Ombudsman, *Submission 40*, pp. 1-2.

<sup>228</sup> Department of Education and Training, *Submission 37*, p. 1.

view that, if the NSW Ombudsman were to undertake the oversight role, it would be too involved in the operations of other agencies. Instead of increasing external oversight, the Commission has argued agencies should be encouraged to take greater responsibility for dealing with protected disclosures and protecting internal whistleblowers.

- 4.36 It is not clear to the Committee that the concerns held by the ICAC would be factors in respect of the proposed oversight role as envisaged by the Committee. In the Committee's view, oversight of the disclosure scheme by the NSW Ombudsman would be a strategic, general oversight role advising on matters such as standards, policies and education initiatives. Although agencies may be guided by NSW Ombudsman publications and standards, decisions taken in an investigation would be a matter for the agency and the NSW Ombudsman's role would not extend to the handling of particular investigations. The Committee agrees with the ICAC that any agency undertaking oversight of the protected disclosure regime should not be directly involved in particular investigations that it may later seek to review. The oversight role should involve monitoring and auditing agency responses in general, in order to detect systemic problems and reach some conclusions about the operation of the PDA. While the sort of advisory function to be performed by the proposed oversight body would include interpreting guidelines and giving assistance in terms of outlining the options available to agencies in dealing with protected disclosures, the Committee does not contemplate the oversight body being actively involved in agency decision-making during the investigation of a protected disclosure. The Committee anticipates that, in this regard, the oversight role would not be dissimilar to that already performed by the NSW Ombudsman's Office in relation to other areas of its jurisdiction.
- 4.37 The Commission has commented that it would seek to be formally involved in the education function of an oversight unit.<sup>229</sup> In response, the Committee would suggest that the oversight unit's education and training initiatives could continue to be undertaken, where appropriate, in conjunction with other investigating authorities, particularly the ICAC, given its extensive experience in developing and delivering corruption prevention education and training programs and protected disclosure programs.
- 4.38 The Committee concurs with ICAC's argument that agencies should be encouraged to take greater responsibility for managing disclosures. In fact, the Committee considers that oversight of agencies' management of disclosures would strongly encourage agencies to focus on the adequacy of their disclosure procedures and their management of disclosures. Agencies would continue to be responsible for ensuring the protection of whistleblowers, and there would be greater transparency and accountability of their management of disclosures. Agencies would also be able to approach the oversight body if they required advice or training in relation to the handling of protected disclosures. The Committee notes that the NSW Ombudsman's Office has extensive experience in dealing with complaints and providing advice and training on complaint handling.
- 4.39 The Committee has also examined other ways to encourage agencies to take greater responsibility for protected disclosures as part of this inquiry. The Committee examines this issue in detail in chapter 6.

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<sup>229</sup> Letter from Mr Chris Wheeler to the Hon Morris Iemma MP, tabled at public hearing, 18 August 2008, p. 2.

- 4.40 As the ICAC has pointed out, agencies are required to take responsibility for their corruption prevention activities and principal officers are required to report suspected corrupt conduct to the Commission under s.11 of the ICAC Act. However, these agency responsibilities and obligations form only one part of the equation. From the Committee's perspective, it would be an oversimplification to focus solely on agency responsibilities without also emphasising the role of independent statutory bodies such as the ICAC to oversight the scheme.
- 4.41 The Committee considers that, although agencies should be responsible for the management of internal whistleblowers, it is in the public interest to ensure that the management and investigation of complaints that relate to corrupt conduct, maladministration and serious and substantial waste, is adequately oversights. Having conducted the inquiry the Committee is firmly of the view that there is a real need for additional information about how the protected disclosures scheme is working in New South Wales.

## Conclusion

- 4.42 In the Committee's view, the NSW Ombudsman's Office is the most appropriate agency to undertake the oversight of protected disclosures. Consequently, the Committee recommends that the NSW Ombudsman's Office be empowered, funded and resourced to perform the following functions as part of this oversight role:

### Monitoring function

- 4.43 The NSW Ombudsman performs an ongoing monitoring role in relation to the inspection and monitoring of law enforcement agency records on undercover operations, pursuant to the *Law Enforcement (Controlled Operations) Act 1997*, and the monitoring of the handling and investigation of complaints by the NSW Police Force.<sup>230</sup> As part of its role in relation to controlled operations, the NSW Ombudsman inspects the records of all relevant agencies at least once every 12 months, in order to assess their compliance with the Act. The NSW Ombudsman publishes an annual report outlining the results of the Office's monitoring role in respect of the Act, which includes statistics and information on each agency's use of controlled operations, in addition to an analysis of issues that arose in relation to compliance with specific provisions of the Act.<sup>231</sup>
- 4.44 In the Committee's view, similar monitoring of agency compliance with the requirements of the PDA would provide a valuable insight into the operation of the Act and agency observance of its requirements. Given the NSW Ombudsman's experience in monitoring areas such as controlled operations, the Committee is recommending that the NSW Ombudsman's Office perform a monitoring role in relation to protected disclosures, including:
- Collecting and collating statistics and information on protected disclosures, current agency policies and agency compliance with statutory requirements, based on agency reporting.

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<sup>230</sup> Part 4 of the *Law Enforcement (Controlled Operations) Act 1997* outlines the Ombudsman's role in the monitoring of controlled operations, while Part 8A of the *Police Act 1990* contains provisions relating to the handling of complaints about police conduct and the Ombudsman's role in relation to such complaints.

<sup>231</sup> See NSW Ombudsman, *Law Enforcement (Controlled Operations) Act Annual Report 2007-2008*, November 2008, <<http://www.ombo.nsw.gov.au/publication/PDF/annualreport/law%20enforcement%20controlled%20operations%20annual%20report%2007-08.pdf>>

Oversight, monitoring and review

- Publishing on an annual basis information gathered as part of its monitoring function.
- Monitoring the extent of operational responses by public authorities, other than investigating authorities, to the PDA.
- Monitoring and reporting, as considered necessary, on trends in the operation of the PDA, based on information received from public authorities in relation to the management and outcomes of all disclosures received.

**Audit function**

- 4.45 The NSW Ombudsman performs an audit role in respect of certain legislation, for example, in relation to Freedom of Information annual reporting by agencies. The NSW Ombudsman also scrutinises and reviews NSW Police Force systems for dealing with complaints about police officers by:
- Auditing NSW Police's records, including those about police handling of less serious complaints.
  - Keeping police policies, procedures and practices in dealing with complaints under scrutiny.<sup>232</sup>
- 4.46 Consistent with this type of role, the NSW Ombudsman could systematically undertake a staged audit across the public sector of agency compliance with standards and other reporting requirements relating to protected disclosures. The NSW Ombudsman could, as occurs with police complaint investigations, review the handling of agency investigations using random sampling techniques to form a view about the standard of investigations and those procedures and practices that need to be revised.
- 4.47 In the Committee's view, such an audit role for the NSW Ombudsman should not be confined to simply checking that agencies have done all their paperwork. It is hoped that the audit role would support strategic oversight of the PDA and also enliven agencies to their responsibilities for protected disclosures.
- 4.48 The Committee is recommending that, as part of its audit function, the NSW Ombudsman conduct a regular protected disclosures audit and report to Parliament on the findings of the audit, including any recommendations for reform. The audit could be conducted across the public sector on a staged basis if necessary.
- 4.49 The NSW Ombudsman's audit would include checks of agency compliance with the proposed statutory reporting requirements and internal policy requirements of the PDA, in addition to compliance with the PDA. In conducting its audits, the NSW Ombudsman's Office would be able to assess the quality of protected disclosures investigations by public sector agencies. The Committee's recommendations in relation to increasing agency responsibilities for protected disclosures, including reporting requirements and internal policies, are contained in chapter 6 of this report.
- 4.50 The Committee is further recommending an amendment to the PDA to require the Premier, as the Minister with responsibility for administering the PDA, to provide a response to any recommendations contained in the NSW Ombudsman's annual

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<sup>232</sup> See NSW Ombudsman's website, <<http://www.ombo.nsw.gov.au/aboutus/scrutinisesys.html>>, accessed 20 July 2009

protected disclosures audit reports and for the response to be tabled in Parliament.<sup>233</sup>

### Education and advisory function

- 4.51 The NSW Ombudsman currently provides advice to agencies, in addition to conducting an education and training program on protected disclosures, in cooperation with the other investigating authorities. The NSW Ombudsman has previously reviewed agency policies and codes in relation to protected disclosures, and has published model guidelines for internal agency and local council policies. The NSW Ombudsman also has extensive experience in providing education and advice in relation to other areas within its jurisdiction, such as complaints relating to community services and child protection.
- 4.52 The Committee is recommending that, as part of its oversight role, the NSW Ombudsman:
- Provide advice in relation to protected disclosures to public officials and public authorities.
  - Provide advice on internal education programs to public authorities.
  - Evaluate the internal reporting policies and procedures of public authorities.
  - Coordinate education and training programs and publish guidelines, in consultation with the other investigating authorities.

### Review of the proposed oversight system

- 4.53 The efficacy of the proposed oversight system outlined in the Committee's report, and the role performed by the NSW Ombudsman's Office within that system, are matters that the Committee considers should be assessed after an appropriate period of time. A period of five years should provide sufficient data on the operation of the system to allow a considered judgement about the merits of continuing to oversight and monitor the protected disclosures scheme in this way. It occurs to the Committee that, in view of the previous history of the PDA, it may be necessary to consider alternative models for the operation of this aspect of the scheme. One such alternative may be a separate oversight body, similar to that which has been legislated for public access to government information and the establishment of an Information Commissioner.<sup>234</sup>

**RECOMMENDATION 1:** That the NSW Ombudsman's Office be funded, resourced and empowered to perform the following oversight functions in relation to the protected disclosures scheme:

#### Monitoring function

- (a) Collect and collate statistics regarding protected disclosures, current policies and agency compliance with statutory requirements, based on agency reporting.
- (b) Publish on an annual basis the information gathered as part of its monitoring

<sup>233</sup> This requirement is modelled on s.27(2) of the Ombudsman Act, Ministers are required to make a statement in response to reports made by the NSW Ombudsman under s.27(1), where the NSW Ombudsman is not satisfied that sufficient and timely steps have been taken as a consequence of a report prepared by its Office.

<sup>234</sup> The *Government Information (Information Commissioner) Act 2009* provides for the creation of the office of Information Commissioner.

function.

- (c) Monitor the operational response of public authorities (other than investigating authorities) to the *Protected Disclosures Act 1994*.
- (d) Monitor and report, as considered necessary, on trends in the operation of the *Protected Disclosures Act 1994*, based on information received from public authorities in relation to the management and outcomes of all disclosures received.

**Audit function**

- (e) The NSW Ombudsman conduct a regular protected disclosures audit and report to Parliament on the findings of the audit and any recommendations for reform. (The audit could be conducted on a staged basis if necessary.)
- (f) The NSW Ombudsman's audit would encompass:
  - Checking agency compliance with the proposed statutory reporting requirements of the *Protected Disclosures Act 1994*.
  - Checking agency compliance with the proposed internal policy requirements of the *Protected Disclosures Act 1994*.
  - Arriving at an assessment of the quality of protected disclosures investigations by public sector agencies.

**Education and advisory function**

- (g) That the NSW Ombudsman's Office be responsible for:
  - Providing advice in relation to protected disclosures to public officials and public authorities.
  - Evaluating the internal reporting policies and procedures of public authorities.
  - Coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities.
  - Providing advice on internal education programs to public authorities.

**RECOMMENDATION 2:** That the effectiveness of the oversight system proposed by the Committee, and the functions of the NSW Ombudsman's Office within that scheme, be reviewed after a five year period with a view to assessing whether there is a need for an alternative oversight model. (see Recommendation 7).

**RECOMMENDATION 3:** That the *Protected Disclosures Act 1994* be amended to require the Premier, as the relevant Minister, to provide a response to the NSW Ombudsman's protected disclosures audit report, addressing any specific recommendations by the NSW Ombudsman, and for the response to be tabled in Parliament.

## Chapter Five - Policy development and legislative reform

5.1 This chapter examines the mechanisms for further policy development and legislative reform in relation to the operation of the protected disclosures scheme in NSW. The Committee identifies problems that have occurred in this area and possible ways to overcome the apparent lack of momentum in implementing and driving reform of the scheme.

### Background

5.2 In chapter 4, the Committee proposes various roles for the NSW Ombudsman as part of a system of dedicated oversight for the protected disclosures scheme. As the Committee has observed, the dearth of information about the way in which the protected disclosures legislation is being utilised and the investigation and handling of disclosures by agencies serves as a major impediment to any systematic evaluation of the scheme and its efficacy in protecting whistleblower employees.

5.3 In evidence to the Committee, the Deputy Ombudsman, Mr Chris Wheeler, stated:

There is a third issue as to whether there should be another body that is concerned about the policy issues under the Act, about the legislation itself, keeping that under scrutiny. In most jurisdictions there is an agency of government that owns that Act and is responsible for making sure it is kept up to date, et cetera, reviewed.<sup>235</sup>

5.4 This perspective is supported by reviewing the legislative development of the protected disclosures scheme. An examination of the amendments made to the PDA since its commencement in 1995 shows that:

- Despite three statutory reviews of the legislation pursuant to s.32 of the Act, there has been no comprehensive package of legislative reforms to the scheme.
- The majority of the amendments to the Act have been piecemeal and to a large extent given effect over several years through various statute law (miscellaneous provisions) legislation.

5.5 The amendments made to the PDA to date are given in the following table.

**Table 4: Amendments to the *Protected Disclosures Act 1994***

Amending legislation	Nature of the amendment provided for
<i>Police Legislation Amendment Act 1996</i>	Following on from the establishment of the Police Integrity Commission (PIC), these amendments provided for: the inclusion of the PIC and the PIC Inspector as investigating authorities under the PDA; the inclusion of the <i>Police Integrity Commission Act 1996</i> as part of the legislative framework underlying the scheme; provision for public officials to make disclosures to the PIC, in accordance with the PIC Act, regarding corrupt conduct, maladministration or serious and substantial waste of public money on the part of police officers; protection for disclosures about such conduct on the part of the PIC, a PIC officer or an officer of the PIC Inspector, to be made to the PIC Inspector; protection for disclosures to the ICAC concerning corrupt conduct, maladministration or serious and substantial waste of public money by the PIC Inspector or an officer of the PIC Inspector, in the exercise of their administrative functions, and for ICAC to investigate and report on these disclosures.

<sup>235</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 9.

Amending legislation	Nature of the amendment provided for
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1997</i>	The amendment corrected an incorrect cross-reference to a section of the <i>Police Integrity Commission Act 1996</i> .
<i>Protected Disclosures Amendment (Police) Act 1998</i>	The following amendments were made to the Act: a member of the Police Service was inserted into the definition of public official; provision for a disclosure made by a member of the Police Service to be taken to have been made voluntarily (and therefore protected under the Act) even if the disclosure relates to the same conduct as an allegation that the member of the Police Service has made in performance of a duty imposed on the member by or under the <i>Police Service Act 1990</i> or any other Act; in any proceedings for an offence against section 20 of the Act, the burden of proving that detrimental action was not taken against a person substantially in reprisal for the person making a protected disclosure lies on the defendant.
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 1999</i>	The amendment repealed section 31 'Amendments of Acts' and Schedule 1 'Amendments of Acts'.
<i>Statute Law (Miscellaneous Provisions) Act 2000</i>	This amendment provided for a change in the definition of public official. The amendment made it clear that an employee of a State owned corporation or a subsidiary of a State owned corporation is a public official for the purposes of the Act.
<i>Statute Law (Miscellaneous Provisions) Act 2001</i>	This amendment provided for a disclosure made by a correctional officer to be taken to have been made voluntarily (and therefore protected under the Act) even if the disclosure is made in relation to the same conduct or activities regarding a disclosure that is required to be made by or under the <i>Crimes (Administration of Sentences) Act 1999</i> or any other Act.
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 2001</i>	These amendments extended the protection of the <i>Protected Disclosures Act 1994</i> to disclosures by certain persons about serious and substantial waste of local government money. Specifically the definition of investigating authority was amended to include the Director-General of the Department of Local Government and the kinds of disclosures made to the Director-General of the Department of Local Government that will attract the protection of the Act were specified. Amendments were also made to the time for instituting certain proceedings. To bring the Protected Disclosures Act into line with section 206 of the <i>Police Service Act 1990</i> , the Act was amended to extend from 6 months to 2 years the time in which proceedings may be brought for an offence against section 20.
<i>Statute Law (Miscellaneous Provisions) Act (No. 2) 2002</i>	The following amendments were made to the Act: provision for a public official to make a disclosure to an officer of the authority to which the disclosure relates in accordance with any procedure established by the authority concerned for that purpose; protection of a disclosure made by a public official to the principal officer of, or officer who constitutes, the public or investigating authority to which the disclosing officer belongs even if it is a disclosure relating to another public or investigating authority; provision of the same protection in respect of such a disclosure when it is made to another officer of the authority to which the disclosure relates in accordance with any procedure established by the authority concerned for that purpose; and insertion of a new subsection in section 26 of the Act so as to require a public official to whom a disclosure under Part 2 (Protected disclosures) of the Act is made in respect of another public authority to refer the disclosure to the principal officer of (or officer who constitutes) the public authority to which the disclosure relates.
<i>Statute Law (Miscellaneous Provisions) Act 2003</i>	This amendment elucidates the meaning of 'officer of a local government authority' by making it clear that complaints may be made about such waste by councillors, members of county councils, delegates of councils and county councils and members of staff of councils and county councils.
<i>Independent Commission Against Corruption Amendment Act 2005</i>	The following amendments were made to the Act: the ICAC Inspector and Office of the ICAC Inspector were defined; the ICAC Inspector was included in the definition of investigating authority; provision for the protection of a disclosure made to the ICAC Inspector about the ICAC in accordance with the Act; for a



Amending legislation	Nature of the amendment provided for
	disclosure that is made to an investigating authority (being the Auditor-General or the NSW Ombudsman) about the ICAC or an officer of the ICAC to have protection under the Act it must relate to a matter referred by the ICAC Inspector to the investigating authority under section 57C(f) of the ICAC Act; provision for the protection of a disclosure made to the NSW Ombudsman about the ICAC Inspector which has been made in accordance with the Act.
<i>Miscellaneous Acts (Local Court) Amendment Act 2007</i>	As a consequence of the enactment of the <i>Local Court Act 2007</i> , section 29 of the Act was amended to replace the words 'a Local Court constituted by a Magistrate sitting alone' with 'the Local Court'.
<i>Independent Commission Against Corruption Amendment Act 2008</i>	An amendment was made in relation to the public officials covered by the Protected Disclosures Act. The words 'and (without limitation), includes' were omitted from the definition of public official and replaced with 'and (without limitation and to avoid doubt), includes an individual in the service of the Crown or of a public authority,'.

## Current legislative review

5.6 Statutory review pursuant to s.32 of the PDA, which provides for regular reviews of the Act by a joint parliamentary committee, has been the main vehicle for reviewing the legislation governing protected disclosures. Three such reviews have been conducted to date by the Committee on the Office of the Ombudsman and the Police Integrity Commission (in 1996 and 2000) and the Committee on the ICAC (in 2006).<sup>236</sup>

5.7 A Premier's Memorandum on review clauses in legislation, issued in 1992 by the then Premier, the Hon Nick Greiner MP, stated that the purpose of review clauses in legislation is to require the relevant Minister to review whether:

- the policy objectives which the legislation sought to achieve remain valid;
- the form of the legislation remains appropriate for securing those objectives;

and to report to Parliament on the outcome of the review.<sup>237</sup> The intent of review clauses is quite specific and is aimed at reducing unnecessary legislation:

The inclusion of such review clauses will ensure that legislation is properly reviewed after it has been in operation for several years, and that the need for its continued existence is fully considered. This action will assist in the Government's efforts to remove obsolete and ineffectual statutory provisions, and reduce the quantity of legislation in existence.<sup>238</sup>

5.8 However, the need for legislation in relation to the making of disclosures and the protection of whistleblowers is not in question. What is needed in terms of the protected disclosures scheme is ongoing review and consideration of whether the legislative provisions are operating effectively to achieve the policy objectives set out in the legislation.

5.9 Modern policy making is regarded as being:

<sup>236</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996; Committee on the Office of the Ombudsman and PIC, *Second Review of the Protected Disclosures Act 1994*, August 2000; Committee on the ICAC, *Review of the Protected Disclosures Act 1994*, November 2006, Report 12/53.

<sup>237</sup> Premier's Memorandum No. 92-10 (Memorandum to all Ministers), *Review Clauses in Legislation*, 13 May 1992.

<sup>238</sup> Premier's Memorandum No. 92-10 (Memorandum to all Ministers), *Review Clauses in Legislation*, 13 May 1992.

Policy development and legislative reform

- forward looking
- outward looking
- innovative, flexible and creative
- evidence-based
- inclusive
- joined up
- reviewed
- evaluated
- subject to lessons learnt.<sup>239</sup>

5.10 A number of these policy making features are of particular note when considering the development of the protected disclosures scheme in New South Wales. In the Committee's view it is essential that there should be:

- A long-term view towards the future of the scheme.
- Systematic review and evaluation of the scheme based on accurate and current data about whistleblowing and the scheme's operation.
- Full and open consultation with key stakeholders concerning proposed policy, legislative and administrative changes to the scheme.
- Policy changes informed by evidence-based decision making on the part of policy makers.
- As far as possible, consistent legislation and standards across jurisdictions (this may be affected by the context in which relevant statutes operate in each jurisdiction).

5.11 In terms of evidence-based policy making, the Committee concurs with the view that:

... policy decisions should be based on sound evidence. The raw ingredient of evidence is information. Good quality policy making depends on high quality information, derived from a variety of sources – expert knowledge; existing domestic and international research; existing statistics; stakeholder consultation; evaluation of previous policies; new research, if appropriate; or secondary sources including the internet. Evidence can also include analysis of the outcome of consultation, costings of policy options and the results of economic or statistic modelling. To be as effective as possible, evidence needs to be provided by, and/or be interpreted by, experts in the field working closely with policy makers.<sup>240</sup>

5.12 The data and information available from the national *Whistling While They Work* (WWTW) project is a timely, authoritative and valuable source for policy makers dealing with whistleblowing schemes in New South Wales and other jurisdictions in Australia. With the release of a draft second report for consultation in July 2009, the project is nearing completion. The Committee strongly supports the use of information from the project as the basis for considering comprehensive amendment of the PDA. As to the question of who should drive such reform, the Committee considers that the Protected Disclosures Steering Committee is an undervalued and underutilised vehicle for change. The PDA has moved well beyond the

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<sup>239</sup> Helen Bullock, Juliet Mountford, Rebecca Stanley, Centre for Management and Policy Studies, "Better Policy-Making", November 2001, p. 15.

<sup>240</sup> British Cabinet Office, *Professional Policy Making for the Twenty First Century*, Report by Strategic Policy Making Team, September 1999, para 7.1.

implementation stage and the role of the Steering Committee should change to reflect this.

## The role of the Protected Disclosures Steering Committee

- 5.13 The Protected Disclosures Act Implementation Steering Committee was set up following the PDA's enactment, to develop strategies that would promote its implementation. The Steering Committee is made up of representatives from the ICAC, the NSW Ombudsman's Office, the Audit Office of New South Wales, the Department of Local Government, the Police Integrity Commission, the Department of Premier and Cabinet and the NSW Police Force.
- 5.14 In November 2007, the Steering Committee met to consider the recommendations made by the previous ICAC Committee as part of the most recent 2006 review of the PDA. The Steering Committee agreed on the following recommendations which it considered to be matters of priority:
- Amending the name of the PDA to the 'Public Interest Disclosures Act'.
  - Amending the long title of the PDA to reflect its broader objectives.
  - Consideration by the Steering Committee of whether the PDA should be amended to cover disclosures about dangers to public health, safety and the environment, including the resource implications of creating additional investigating authorities to receive such disclosures.
  - Consideration of whether the PDA should be amended to include the Health Care Complaints Commission as an investigating authority.
  - Amending the PDA to provide that public and investigating authorities must adequately assess and properly deal with protected disclosures, consistent with other jurisdictions.
  - Ensuring that the Clerk of the Legislative Assembly and the Clerk of the Parliaments provide appropriate training and documentation to members of Parliament regarding the receipt of disclosures from public officials, pursuant to s.19 of the PDA.
  - Amending s.32 of the PDA to provide for one further review of the Act, five years after the implementation of the Committee's recommendations.
  - Consideration of the establishment of the functions of the Steering Committee under the Act, as a statutory advisory committee.
  - Convening a national conference of key integrity bodies and government representatives from Australian jurisdictions, under the auspices of the NSW Ombudsman, to discuss and seek consensus on the fundamental principles of whistleblowing legislation.<sup>241</sup>
- 5.15 In March 2008, Mr Chris Wheeler, the Chair of the Steering Committee, wrote to the then Premier, the Hon Morris Iemma MP, to advise the government of the Steering Committee's meeting, and request that the priority recommendations identified by the Steering Committee be implemented. In August 2008, Mr Wheeler advised the Committee that he had not received any advice in response to the letter.<sup>242</sup>

<sup>241</sup> Committee on the ICAC, November 2006, report 12/53, pp. 9-13.

<sup>242</sup> See letter from Mr Chris Wheeler to the Hon Morris Iemma MP, tabled at public hearing, 18 August 2008, and Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 3.

5.16 The effectiveness and role of the Steering Committee was an issue the Committee canvassed during the inquiry. Ms Theresa Hamilton, the Deputy Commissioner of the ICAC, gave the following evidence on the Steering Committee's role and its effectiveness:

**Reverend the Hon. FRED NILE:** Commissioner, do you have any views on the protected disclosure steering committee during this reform process? Does it perform a good and important role? How can you improve its role?

...

**Ms HAMILTON:** ... Yes, I do think so. I must say that it has not met frequently. In fact, I think I have only been to one meeting since I have been at the ICAC, but it was a detailed meeting about some of the same legislative amendments that we have been discussing here today when they were first mooted. That was how I was able to identify, for example, that there were differences of opinion among the agencies about which agency you could go to with protected disclosures, and whether you were protected if you went to the wrong agency. I think it has been useful from the point of view of highlighting, even among the agencies that administer the legislation and are involved in it, that there are differences of opinion that have led to some of the submissions that we have made here today.

**Reverend the Hon. FRED NILE:** The fact that it does not meet, or meets very infrequently, seems to put a question mark over its effectiveness or its value. When bodies do not meet, that seems to send a message.

**Ms HAMILTON:** I can only agree with that. I think I saw it mainly as an avenue to discuss how the legislation is working. It does not need to meet frequently to do that, but there probably would be more room to discuss other administrative arrangements and how the whole Act is being administered by the various agencies as well as consistency. Yes, I can only agree; it probably would have been more useful if it met more frequently.

**Reverend the Hon. FRED NILE:** Should there be some more direct role for convening it? Who convenes it now?

**Ms HAMILTON:** The Ombudsman's office convenes it, I think.

**Reverend the Hon. FRED NILE:** Should that continue, or should it be convened by the ICAC's office?

**Ms HAMILTON:** The Ombudsman's office has always taken a great interest in this legislation and has played a lead role. I certainly would have no objection to its continuing to be their responsibility.<sup>243</sup>

## Committee comment

5.17 In light of such evidence and in the absence of comprehensive reform of the scheme, the Committee is proposing that the Steering Committee be the focal point for independent advice on future legislative and policy changes and that the NSW Ombudsman's Office should continue to take a lead role on the Steering Committee. The oversight and monitoring role that has been proposed for the NSW Ombudsman's Office in relation to protected disclosures would enhance its role on the Steering Committee and, hopefully, serve to improve the Committee's effectiveness.

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<sup>243</sup> Ms Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 11 August 2009, p. 34.

- 5.18 While the relevant Minister, in this case the Premier, would remain responsible for bringing forward legislative proposals for Cabinet's consideration and introducing bills into Parliament, the Steering Committee, as an independent advisory body, would have a clearer, more strategic role in the process by which legislation affecting protected disclosures is formulated and developed. The following recommendations are aimed at ensuring the Steering Committee becomes a vehicle for focussing attention on reform of the PDA. The Committee hopes the proposals relating to the Steering Committee will result in greater ownership of the legislation and increased momentum for improvements to the scheme.
- 5.19 The recommendations that follow provide for:
- Statutory recognition of the role of the Steering Committee.
  - A requirement to consult the Steering Committee on any proposed amendments to the PDA or changes to the protected disclosures scheme.
  - Regular publication of the Steering Committee's activities and any recommendations it may have made regarding the protected disclosures scheme, including, for instance, the Steering Committee's views on the results of the NSW Ombudsman's audits, problems with the current operation of the PDA, and proposed legislative, policy and administrative reforms.
  - Special reporting, as considered necessary by the NSW Ombudsman, on the PDA and possible areas of legislative reform (this would be in addition to the NSW Ombudsman's regular protected disclosures audit reports as proposed in recommendation 1).
  - Statutory requirement for a Government response to any special protected disclosures reports by the NSW Ombudsman.
  - Statutory requirement for a Government response to any recommendations made by the Steering Committee for reform of the protected disclosures scheme.
  - Amendment of s.32 of the PDA to require a review of the Act in five years' time by a parliamentary committee (this period of time should provide a better timeframe within which to realise reform of the scheme).
- 5.20 It is relevant to note that the NSW Ombudsman may already make a special report to Parliament, in accordance with s.31 of the Ombudsman Act on 'any matter arising in connection with the discharge of the Ombudsman's functions' and the parliamentary committee charged with oversight of the NSW Ombudsman's Office may examine these reports. Special reports could include matters pertaining to the NSW Ombudsman's functions in respect of protected disclosures. The Committee's recommendation is aimed at putting this beyond doubt by making a specific amendment to the PDA.
- 5.21 Finally, the Committee notes that the previous Committee's 2006 review of the PDA made recommendations in relation to:
- i. Amending the name and long title of the PDA to the *Public Interest Disclosures Act 1994*, to emphasise the public interest objectives of the Act.
  - ii. Considering the inclusion of the Health Care Complaints Commission as an investigating authority under the PDA.
  - iii. The Steering Committee examining and advising the Minister on whether the PDA should be amended to include dangers to public health, safety and the environment within the scope of the Act, as such matters are of public concern

and do not appear to be covered by the definition of maladministration at s.11 of the Act. The Committee noted that other jurisdictions, such as Western Australia and Queensland, provide for disclosures in relation to such matters in their legislation.<sup>244</sup>

5.22 The terms of reference for the Committee's current inquiry were not centred on conducting a review of the Act. With regard to the proposal that the name of the Act be changed, the Committee concurs with the view expressed by the previous Committee that such a proposal may better emphasise the public interest in the objectives of the Act. This proposal is not a matter on which the Committee received many submissions or evidence. However, the Committee is proposing a change to the name of the Act as a positive measure, symbolic of the changes the Committee has recommended in this report.

**RECOMMENDATION 4:** That the *Protected Disclosures Act 1994* be amended to change the name of the Act to the Public Interest Disclosures Act.

5.23 The Committee did not receive submissions or take evidence sufficient to enable an adequate assessment of the implications of the second and third proposals, including whether they would result in improvements to the whistleblower protection scheme in NSW. However, the Committee would suggest that these issues are matters that the Steering Committee could consider as areas that may require legislative reform.

5.24 In addition, the Committee has identified several important issues for the Steering Committee's consideration throughout the report, including the eligibility status of public sector volunteers, disclosures made anonymously, external third party receipt and investigation of disclosures, and the adequacy of current provisions in relation to disclosures to the media.

5.25 A further recommendation of the Committee relates to the ongoing policy direction to be taken in relation to the protected disclosures scheme. The Committee considers that after a period of five years, there should be adequate data and information available on the operation of the changes to the scheme to permit a full review of the oversight system and the roles of the NSW Ombudsman's Office and Steering Committee. It is the view of the Committee that this period of time should provide sufficient evidence to enable an informed decision as to whether the changes recommended by the Committee have worked or whether there is a need to institute further changes, including the necessity for a separate, dedicated oversight body.

**RECOMMENDATION 5:**

(a) That the *Protected Disclosures Act 1994* be amended to:

- Make the Protected Disclosures Steering Committee a statutory advisory body with the role of providing advice to the Premier, as the relevant Minister, on issues arising for investigating authorities and other agencies surrounding the operation of the Act, and possible areas for reform.
- Provide that the NSW Ombudsman publish in his protected disclosures audit reports (see Recommendation 1), an account by the Steering Committee of its

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<sup>244</sup> Committee on the ICAC, November 2006, report 12/53, pp. 22-3, 30.

activities and any recommendations it has made for reform during the audit reporting period.

- (b) That, in *responding* to the NSW Ombudsman's audit reports, the Premier be required under the *Protected Disclosures Act 1994* to address any recommendations of the Steering Committee.
- (c) Provide that the Steering Committee be consulted by the Premier on any legislative proposals going before Cabinet, subordinate legislation, or any administrative instrument that affects the operation of the *Protected Disclosures Act 1994*.

**RECOMMENDATION 6:** That, as a matter of some priority, the Protected Disclosures Steering Committee, consider the findings and recommendations of the *Whistling While They Work* project and report on the policy implications of the reports for the protected disclosures scheme in New South Wales and also identify possible areas for reform.

**RECOMMENDATION 7:** That the *Protected Disclosures Act 1994* be amended to provide that the NSW Ombudsman may provide a special report to Parliament, as he or she considers necessary, on systemic issues or other problems identified with the operation of the *Protected Disclosures Act 1994*, and suggested legislative reform.

**RECOMMENDATION 8:** That the *Protected Disclosures Act 1994* be amended to require the Premier, as Minister with administrative responsibility for the relevant legislation, to table in Parliament a response to any special report of the NSW Ombudsman, and for the response to address each recommendation for reform.

(The Committee notes in making the recommendations for special and audit reports by the NSW Ombudsman on protected disclosures that the parliamentary oversight committee dedicated to the NSW Ombudsman's Office has the capacity to examine such reports and report to Parliament on any matter considered necessary.)

**RECOMMENDATION 9:**

- (a) That section 32 of the *Protected Disclosures Act 1994* be amended to remove the need for a biennial review of the Act and to provide for a parliamentary committee to undertake a review of the Act five years from the implementation of the recommendations contained in this report.
- (b) That the need for ongoing review of the legislation by a parliamentary committee be one of the issues subject to examination in the next parliamentary committee review, and that the report on the review include a recommendation to Parliament on this question, in light of progress made in reforming the scheme and the implementation of the new roles proposed for the NSW Ombudsman and the Protected Disclosures Steering Committee.
- (c) That the next parliamentary committee review of the Act in five years time examine:
  - i. the extent to which the amendments proposed by the Committee have successfully addressed the problems with the protected disclosures scheme identified during this inquiry;
  - ii. whether the structures in place to support the operation and future direction of the

protected disclosures scheme remain appropriate, including –

- the need to establish a separate body dedicated to overseeing the investigation of disclosures and the operation of the protected disclosures scheme; and,
- if such a need exists, the extent of the role and functions to be performed by such a body and the powers it should be able to exercise.



## Chapter Six - Agency responsibilities

... whistleblower legislation by itself is not going to work. If you have an agency with the right attitude, they really do not need whistleblower legislation, apart from the protections against actions. If you have an agency that does not have the right approach, the whistleblower Act itself is unlikely to really help the whistleblower. You need both: you need a cultural change in the workplace to accept that whistleblowers are vital sources of information as to what is going wrong in your organisation, and you need the Act. The two work together well, but the Act by itself, if you have a culture in an organisation, an attitude, that is against whistleblowers, the Act is not going to be of much use.<sup>245</sup>

- 6.1 In this chapter, the Committee looks at broadening the responsibilities of agencies to develop adequate and comprehensive policies to deal with protected disclosures and to report on their management of disclosures. The Committee also examines the importance of a positive workplace culture in encouraging public officials to come forward with reports of wrongdoing.

### Internal disclosures policies and procedures

#### Background

- 6.2 The PDA does not prescribe that agencies are to have protected disclosures policies and procedures in place for managing disclosures that are made internally. However, the Committee has noted that after the PDA was enacted, the Department of Premier and Cabinet (DPC) directed agencies to implement documented reporting procedures. The NSW Ombudsman's Office then requested and obtained copies of agencies' internal reporting policies and assessed their adequacy against certain criteria. The NSW Ombudsman's assessment showed that most agencies either had not adopted a policy, or had inadequate policies in place. After its initial assessment, the NSW Ombudsman provided feedback to agencies and assessed revised versions of policies.<sup>246</sup> Model policies for agencies and local councils were also developed and published in the NSW Ombudsman's *Protected Disclosures Guidelines*.<sup>247</sup>
- 6.3 The Department of Local Government is currently assessing councils' disclosures policies and procedures as part of its Promoting Better Practice Review Program. As at November 2008, eight of 74 reviewed councils did not have protected disclosures policies in place, while seven had adopted a policy in response to the Review.<sup>248</sup>

#### **Whistling While They Work project results**

- 6.4 The *Whistling While They Work* (WWTW) project indicated that most whistleblowers make their disclosures internally. The project highlighted the importance of adequate agency protected disclosures policies, while noting that many agencies had failed to adopt such policies. Increasing obligations on agencies to develop comprehensive policies to encourage and support whistleblowers was a key theme of the project,

<sup>245</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 12.

<sup>246</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, pp. 2-3.

<sup>247</sup> The NSW Ombudsman has produced six editions of its *Protected Disclosures Guidelines*. The latest edition was published on 9 April 2009 and is available at <http://www.ombo.nsw.gov.au/publication/guidelines.asp>.

<sup>248</sup> Mr Ross Woodward, Deputy Director-General, Department of Local Government, *Transcript of evidence*, 24 November 2008, p. 13 and Department of Local Government, *Submission 27*, p. 6 and Answers to questions taken on notice at 24 November hearing, pp. 1-2.

Agency responsibilities

which developed a framework for agency policies and systems, to assist agencies with their disclosures regimes.

6.5 As stated above, the research conducted during the project showed whistleblowers' preference to make disclosures internally. The employee survey undertaken as part of the project found that the bulk of whistleblowing recorded by the survey started (97%) and ended (90%) as an internal process, while 4% of employees blew the whistle to an external watchdog agency. The first report of the project stated that 'although this data was based on current employees only, the proportion was unlikely to increase significantly'.<sup>249</sup> The research also indicated that surveyed employees who reported wrongdoing were more likely to suffer reprisals from management if their disclosure was investigated externally, following an initial internal investigation, a result that 'further increase[s] the obligations on agencies to manage their investigation and employee welfare processes actively and positively in the first instance.'<sup>250</sup> It is therefore apparent that adequate internal protected disclosures policies and procedures are vital both in terms of encouraging whistleblowers to disclose wrongful conduct and ensuring they are protected.

6.6 The second report of the WWTW project noted that the research had highlighted issues with statutory requirements in relation to the adoption of whistleblowing policies by agencies at operational level. According to the report, the research 'provided considerable evidence confirming widespread failure in ... take-up [of policies]'.<sup>251</sup> The project team noted the current reviews of whistleblower legislation being undertaken by many Australian governments, in particular the Federal Committee review, which had recommended in favour of implementing legislative requirements for agency procedures, consistent with the framework recommended by the WWTW report:

The project team encourages other governments to continue with the revision of public interest disclosure legislation in a manner that increases the obligations and capacities of agencies to develop procedures on the model now provided from this research.<sup>252</sup>

6.7 The findings of the project indicated which aspects of agency whistleblowing programs required improvement. Many of the key findings, reproduced below, relate to agency responsibilities for adequately addressing whistleblowing:

1. More comprehensive agency systems for recording and tracking employee reports of wrongdoing;
2. Agency procedures for assessing and monitoring the risk of reprisals or other conflict for those who report;
3. Clearer and better advice for employees on the range of avenues available for reporting wrongdoing;
4. Basic training for public sector managers in how to recognise and respond to possible public interest disclosures;
5. A program of training for internal investigators in basic techniques, with special attention to issues of internal witness management;

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<sup>249</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 83, 86-93.

<sup>250</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 149-51.

<sup>251</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 21, <<http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 22 September 2009.

<sup>252</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 21.

6. Adoption and expansion of structured support programs for employees who report wrongdoing;
7. Improved mechanisms for monitoring the welfare of employees who report wrongdoing, from the point of first report;
8. More detailed and flexible agency procedures for the investigation and remediation of reprisals and breaches of duty of care;
9. A dedicated oversight agency or unit for the coordination of responses to employee-reported wrongdoing; and
10. Legislative action to provide more effective organisational systems, realistic compensation mechanisms, and recognise public whistleblowing.<sup>253</sup>

6.8 The second report of the project provided greater detail on the way in which agencies could target the priority areas identified in the key findings, particularly findings 1 to 8. Sample policies, procedures and checklists for the key elements relevant to each aspect of an effective program were developed to assist agencies. The five key elements identified by the project are listed below:

- Organisational commitment
- Encouragement of reporting
- Assessment and investigation of reports
- Internal witness support and protection
- An integrated organisational approach.<sup>254</sup>

6.9 The framework was developed in co-operation with a Standards Australia working group, which is reviewing the current *Australian Standard on Whistleblower Protection Programs for Entities*.

### **Inquiry into a whistleblower protection scheme for the Commonwealth public sector**

6.10 The House of Representatives Standing Committee on Legal and Constitutional Affairs considered the issue of protected disclosures procedures as part of its inquiry into a whistleblower protection scheme for the Commonwealth public sector. The House of Representatives Committee stated that inquiry participants had identified placing obligations on agencies in their handling of disclosures to be an important aspect of the scheme. In particular, inquiry participants raised the importance of adequately managing whistleblowers' expectations, and cultural change supported by an obligation on management to assess and investigate disclosures.<sup>255</sup> According to the Committee, evidence indicated that a legislative framework and agency participation are required to build confidence in the scheme:

The Committee heard that a legislated scheme is not a complete solution to managing disclosures, but considers that placing positive obligations on agency heads should provide for a measure of confidence in a disclosure system.<sup>256</sup>

6.11 The Committee recommended that the Public Interest Disclosure Bill provide an obligation for agency heads to:

<sup>253</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, pp. 16-7.

<sup>254</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, pp. 2-6.

<sup>255</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 116-7.

<sup>256</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 117.

Agency responsibilities

- establish public interest disclosure procedures appropriate to their agencies;
- report on the use of those procedures to the Commonwealth Ombudsman; and
- where appropriate, delegate staff within the agency to receive and act on disclosures.<sup>257</sup>

Committee comment

- 6.12 The Committee noted in chapter 2 that agencies participating in the inquiry have developed protected disclosures policies that inform staff of their rights under the PDA, and provide detail on the investigation process and relevant agency contacts. However, the Committee has also noted that it is difficult to determine the implementation and efficacy of administrative protections, such as agency policies, in the absence of more detailed data on disclosures that are investigated by agencies and local councils.
- 6.13 The Committee is of the view that oversight of the entire regime would result in a clearer picture of agencies' management of internally reported and investigated protected disclosures. The Committee hopes that its recommendation to establish a protected disclosures oversight body in the NSW Ombudsman's Office, as discussed in chapter 4 of this report, will lead to the development, as far as practicable, of common, standard internal policies and procedures in relation to protected disclosures, thereby enabling agency policies and procedures to be assessed for their adequacy and for areas requiring reform to be identified.
- 6.14 The Committee notes that the results of the WWTW project identified a relationship between comprehensive agency procedures and better treatment of whistleblowers by management and, to a lesser extent by co-workers.<sup>258</sup> The study also concluded that agency procedures were generally weak across all surveyed jurisdictions, and that legislation requiring agencies to develop procedures and systems is needed.<sup>259</sup> In the Committee's view, the WWTW project provides an indication of the importance of agency policies and procedures in the investigation and management of disclosures. The second report of the project also provided a framework for agencies to use as a guide in developing effective policies and procedures to encourage reports of wrongdoing, investigate protected disclosures, and support whistleblowers and protect them from reprisals.
- 6.15 During the second reading debate on the Protected Disclosures Bill, Mr Don Page MP stated that 'all public authorities will develop appropriate internal procedures.'<sup>260</sup> Section 14(2) of the PDA provides that disclosures by a public official are to be made '... in accordance with any procedure established by the authority concerned for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by that authority'. It is clear to the Committee that the intention was that agencies would develop policies for dealing with disclosures.
- 6.16 The Committee notes that, although most agencies have policies in place, evidence received from the Department of Local Government indicated that a small minority of councils had not developed disclosures policies, 14 years after the enactment of the PDA. An amendment to the PDA requiring agencies to implement and observe such

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<sup>257</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 135.

<sup>258</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 255-7.

<sup>259</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 286.

<sup>260</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, p. 5016.

policies would make it clear that agencies are responsible for having policies in place, as part of their role in managing disclosures and providing protection to whistleblowers.

- 6.17 In order to ensure that agencies take responsibility for disclosures, and to enable further assessment of agency policies, the Committee is recommending that the PDA be amended to require agencies and local councils to have internal reporting systems to facilitate the making of disclosures and protect whistleblowers when they make disclosures. The recommended amendment would require an agency to assess and deal with disclosures in accordance with internal policies and procedures that adopt the best practice criteria outlined in the NSW Ombudsman's *Protected Disclosures Guidelines*. Internal policies, as far as practicable, should be consistent with the NSW Ombudsman's 'Model internal reporting policy for state government agencies' and 'Model internal reporting policy for councils'.<sup>261</sup>
- 6.18 In addition, the Committee notes that suggested elements of protected disclosures policies were developed through the WWTW project, and that agencies could also consult the *Australian Standard on Whistleblower Protection Programs for Entities* in developing or reviewing their policies. In making its recommendation, the Committee notes the importance of communicating policies to ensure their effectiveness. The Committee envisages that agencies will raise staff awareness on protected disclosures policies by focusing on the policies in staff inductions and conducting targeted training programs to inform staff of their obligations and rights. Management commitment to the principles reflected in agency protected disclosures policies should also be stressed through the promotion of effective awareness programs.
- 6.19 The Committee's recommendations in this regard seek to ensure that public sector agencies and local councils have appropriate, adequate and consistent policies and procedures in relation to assessing and dealing with protected disclosures. It also seeks to ensure that such policies provide robust protection to whistleblowers.

**RECOMMENDATION 10:** That the *Protected Disclosures Act 1994* be amended to require public authorities (including local government authorities) to have internal policies that adequately assess and properly deal with protected disclosures, and to provide adequate protection to the person making the disclosure. As far as is practicable, the internal policies should be consistent with the NSW Ombudsman's 'Model internal reporting policy for state government agencies' and its 'Model internal reporting policy for councils' as outlined in the NSW Ombudsman's *Protected Disclosures Guidelines*.

## Agency reporting on protected disclosures

### Background

- 6.20 Sections 10 and 11 of the *Annual Reports (Departments) Act 1985* and ss.8 and 9 of the *Annual Reports (Statutory Bodies) Act 1984* prescribe the information to be included by agencies in their annual reports. The Acts do not require departments or statutory bodies to report on protected disclosures, and agency reporting on disclosures is not a requirement under the PDA.

<sup>261</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, Annexures 1 and 2.

Agency responsibilities

- 6.21 None of the 11 departments and public bodies that the Committee heard evidence from on 24 November and 1 December 2008 provided information in their 2007-2008 annual report on the number of protected disclosures received during the year, and their outcomes. Two departments provided some information on their protected disclosures policies, while the remaining public bodies did not provide any information on protected disclosures. The Department of Education and Training reported on corrupt conduct complaints notified to the ICAC on a year by year basis, including the percentage of these complaints that were classed as protected disclosures.<sup>262</sup>
- 6.22 The NSW Police Force, which manages complaints pursuant to the Police Act, provided details on the number of internal complaints received and the issues they raised.<sup>263</sup>
- 6.23 The Department of Local Government's Annual Report stated that it had a statutory complaints handling role in relation to protected disclosures pursuant to the PDA, but did not provide any information on protected disclosures received by the Director-General during the reporting year, only reporting on categories of complaints by subject matter.<sup>264</sup>

*Whistling While They Work* project

- 6.24 The survey of public interest disclosure legislation produced as part of the WWTW project noted that Australian jurisdictions deal with public reporting requirements for whistleblowing in the following ways:
- No requirement for agencies to publicly report on disclosures in either their annual reports or to a central agency (as in South Australia and New South Wales): 'plainly problematic as it provides no ongoing mechanism for ensuring that the legislation is being implemented.'
  - Agencies are required to report on disclosures and their outcomes to a central coordinating authority, which publishes an annual report on the operations of the relevant Act, with some jurisdictions also requiring information to be included in agency annual reports (Western Australia and the Commonwealth).
  - All agencies are required to publish details in their annual reports on the number of disclosures received and their outcomes (the ACT).
  - A central coordinating agency provides an annual report on the overall operations of the relevant Act, in addition to agencies being required to report details of disclosures in their annual reports (Queensland, Victoria and Tasmania).<sup>265</sup>
- 6.25 According to Dr Brown, whistleblowing legislation should require agencies to report on their handling of disclosures and their outcomes, if coordinating agencies and the public are to be informed about the effectiveness of the relevant scheme. Dr Brown stated that the reporting requirements adopted by Queensland, Victoria and Tasmania are 'the clearest way of ensuring a consistent and coordinated approach to implementation of the legislation.'<sup>266</sup>

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<sup>262</sup> Department of Education and Training, *2007-2008 Annual Report*, p. 125.

<sup>263</sup> NSW Police Force, *2007-2008 Annual Report*, p. 49.

<sup>264</sup> Department of Local Government, *2007-2008 Annual Report*, pp. 40-1.

<sup>265</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, pp. 32-3.

<sup>266</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, pp. 32-3.

- 6.26 The first report of the WWTW project stated that best practice whistleblower legislation should provide for agencies to be obliged to include in their annual reports a summary of disclosures received and the action taken in response.<sup>267</sup>

### Inquiry participants' views

- 6.27 The Deputy Ombudsman told the Committee that there is insufficient information in relation to the operation of the PDA, as agencies are not required to report on protected disclosures in their annual reports, or to a central agency. According to Mr Wheeler, this lack of information makes it difficult to get a clear grasp of what agencies are doing in relation to protected disclosures. Consequently, the information that the Deputy Ombudsman has on protected disclosures is mainly based on experience gained during NSW Ombudsman protected disclosures training and investigations, or from what Mr Wheeler gleans when talking to agency staff.<sup>268</sup> The Department of Local Government also noted that councils currently do not provide the Department with any data or information on protected disclosures they receive.<sup>269</sup>
- 6.28 In evidence to the Committee, Ms Theresa Hamilton, Deputy Commissioner of the ICAC, supported a coordinated approach to gathering data and information on protected disclosures, undertaken by a separate, overarching unit.<sup>270</sup>

### Freedom of Information Act as a model

- 6.29 More information and data relating to the operation of the PDA could be collated and published, if agencies were required to report on protected disclosures in their annual reports.
- 6.30 The *Freedom of Information Act 1989* (FOI Act) provides a model for such a reporting regime. Under clause 10 of the Freedom of Information Regulation 2005, agencies must include in their annual reports required information on FOI applications and an assessment of the information, including:
- A comparison with the previous year's information.
  - An assessment of the impact of the FOI requirements on the agency's activities.
  - The details of any major issues that have arisen in terms of the agency's compliance with FOI requirements.
  - The details of any investigations under the FOI Act by the NSW Ombudsman or applications for review to the Administrative Decisions Tribunal or Supreme Court, including outcomes.
- 6.31 The Regulation stipulates that the information on FOI applications in agency annual reports must be set out in the form required by Appendix B of the *NSW FOI Manual*, jointly produced by the DPC and the NSW Ombudsman.<sup>271</sup>
- 6.32 Furthermore, the information provided by agencies pursuant to their statutory requirements provides a source of information to assess the operation of the FOI legislation. For example, the NSW Ombudsman's *Audit of FOI Annual Reporting*

<sup>267</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 284.

<sup>268</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 5.

<sup>269</sup> Mr Woodward, *Transcript of evidence*, 24 November 2008, p. 14.

<sup>270</sup> Ms Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 18 August 2008, p. 21.

<sup>271</sup> NSW Department of Premier and Cabinet and NSW Ombudsman, *The NSW FOI Manual*, August 2007, <[http://www.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0019/685/FOIManual15Aug07.pdf](http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0019/685/FOIManual15Aug07.pdf)>

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2005-2006 was based on information contained in annual reports from state government bodies (including universities), local councils and ministerial offices.<sup>272</sup>

**Inquiry participants' views**

6.33 Several agencies participating in the inquiry told the Committee that there would be no difficulties posed by annual reporting on protected disclosures.<sup>273</sup> Mr Ross Woodward, the Deputy Director General of the Department of Local Government, commented that while the Department currently does not have access to statistics on disclosures, it would be helpful if councils were required to report on disclosures:

**Mr WOODWARD:** We could not currently because we do not have individual numbers from councils, but if something was put in place to require councils to report those on an annual basis to us or in their own annual reports then certainly we could collate that.

...

**CHAIR:** Would you be in favour of that?

**Mr WOODWARD:** It certainly would be a useful exercise to know how many complaints there are, absolutely.

**CHAIR:** And what policies are in place, how they are being handled, outcomes and things like that?

**Mr WOODWARD:** Yes.<sup>274</sup>

6.34 Inquiry participants told the Committee that agency reporting on disclosures would be useful both in terms of revealing systemic problems, in addition to aiding transparency and clarity around protected disclosures received and investigated by public sector agencies. The Auditor-General, Mr Peter Achterstraat, commented on the usefulness of such data from an audit and management perspective, indicating that it can reveal trends that may point to systemic issues:

... If someone gives a protected disclosure it could be a symptom for something else. It is handy for us to know that. Someone might write in and say, "This is happening in my organisation" whether it is an accommodation issue or whatever. Even if it does not necessarily involve serious and substantial waste there could be underlying issues. From a management point of view it would be handy to collate that information. That would then enable us to say, "If we look at them individually there is nothing there, but if there are 10 of them there could be something to do."

It would be a first-class idea if somehow that information were collated. I am not sure whether or not they need to be reported before they are investigated. If the data were there it would be helpful for agencies such as mine. If a central repository kept the data it could write to me and say, "Auditor-General, we have noticed that there seems to be a trend on these sorts of things in this agency, or even across the sector generally" and we would probably look into it.<sup>275</sup>

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<sup>272</sup> See NSW Ombudsman, *Audit of FOI Annual Reporting 2005-2006*, October 2007, p. 1.

<sup>273</sup> See evidence from Professor Henry, Deputy Vice-Chancellor (Academic), UNSW; Mr Ross Woodward, Deputy Director General, Department of Local Government; Mr Peter Cribb, Acting Principal Solicitor, Contract Information and Audit, NSW Maritime; Ms Frances Simons, Group General Manager, Human Resources and Communications, RailCorp; Mr Timothy Rogers, Executive Director, Performance Management and Communication, Department of Environment and Climate Change; Mr Barry O'Farrell, Leader of the Opposition, NSW Liberal Party: *Transcript of evidence*, 24 November 2008, pp. 12, 22-3, 25, 37, 50-1, 75.

<sup>274</sup> Mr Woodward, *Transcript of evidence*, 24 November 2008, pp. 22-3.

<sup>275</sup> Mr Peter Achterstraat, Auditor-General, NSW Audit Office, *Transcript of evidence*, 24 November 2008, p. 68.



6.35 The Leader of the Opposition, Mr Barry O'Farrell, echoed the Auditor-General's comments, stating that reporting on disclosures would improve public sector accountability:

I think transparency and accountability on matters related to protected disclosures ... are essential. One of the ways in which you can predict whether there is a problem in a particular area is by the collection of statistics that show whether or not the number of disclosures has gone up. Presumably it will also include the number of successfully prosecuted disclosures. ... It is a great tool to ensure that the public sector is responsive. It is a great tool to ensure that those agencies that are meant to keep our public sector clean and corruption-free have some direction upon which to act.<sup>276</sup>

6.36 The Deputy Ombudsman told the Committee that, in his view, the lack of information on the number of disclosures made in New South Wales, the way they are managed and their outcomes is 'a serious problem'.<sup>277</sup> Mr Wheeler made the following observations on the Committee's discussion paper proposal to require agencies to report on disclosures in their annual reports:

- Confidentiality requirements can limit the amount of information agencies can publish about disclosures in their annual reports.
- It would be useful to have information and data on disclosures, including:
  - the number of allegations that are claimed to be disclosures and how many are actually accepted as disclosures
  - conduct categories detailing what type of conduct each disclosure relates to
  - outcomes of disclosures, including whether they were investigated, declined or referred to another body
  - whether investigations resulted in the disclosures being substantiated, or not sustained
  - whether any disciplinary or criminal action was taken as a result of the disclosures.<sup>278</sup>

6.37 Mr Wheeler commented that, based on his experience of the quality of agency FOI reports, such reports would not be a sufficient and reliable source of information on protected disclosures. Mr Wheeler stated that centralised collation of data is preferable to relying on inconsistent agency reports, noting that in terms of FOI, other jurisdictions have a central agency that collects data and reports on it on an annual basis:

... When we had the FOI role I used to go through and audit the annual reports of about 135 agencies each year looking at the FOI reporting because that is the only way we can find out what is happening with FOI applications. The standard of reporting ranged from abysmal to generally not very good, with certain agencies quite good. So if the only way we can collect data is from agencies putting it in their annual report at their discretion, if it is anything like FOI—and they have been doing that since 1989—I would not rely on that data. Not only is it often wrong and the figures do not add up, but they just ignore the bits that they are supposed to put in there. Every other Australian jurisdiction, in the FOI context, has a centralised collection of statistics by an agency, often an ombudsman or the Attorney General, and they produce an annual report every year going through all those statistics. That does not happen in New South Wales. I

<sup>276</sup> Mr O'Farrell, *Transcript of evidence*, 24 November 2008, p. 75.

<sup>277</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 20.

<sup>278</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 20.

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would recommend against going down that path as a way of getting statistics together for protected disclosures. They really need to be collected centrally.<sup>279</sup>

- 6.38 Mr Wheeler reflected that the data reporting would be ideally performed by an agency as part of an oversight role, drawing a comparison with the NSW Ombudsman's role in oversighting and advising on child protection matters that have been reported to the NSW Ombudsman's Office:

If you have a body that had a type of oversight role where they would actually see what is coming in, watch how agencies are dealing with it, they can put those statistics together because they would see all the ones that come in. If you look at Victoria, Tasmania, Northern Territory and Western Australia, from memory, there is a central notification of disclosures and there is somebody who is looking at them and saying, "Right, you have dealt with that appropriately". It is a bit like the Ombudsman's child protection in the workplace function where any allegation of child protection-related matters has to be reported to the Ombudsman and we oversight how they are dealt with to make sure that they are dealt with properly and we give advice and guidance. That would work; but in annual reports, if it is anything like FOI, it would be next to useless.<sup>280</sup>

### Committee comment

- 6.39 In the Committee's view, the information provided by agencies in annual reports could aid an audit of the effectiveness of the PDA, in addition to providing greater transparency by ensuring that information in relation to protected disclosures is publicly available. The statutory reporting requirements would provide a low cost option for obtaining information in relation to protected disclosures being made in the public sector. They would also be consistent with the WWTW project's findings, which identified the requirement for agency annual reporting as an aspect of best practice whistleblowing legislation. The Committee notes that the study stated that a coordinated approach to protected disclosures would be achieved through annual reporting by agencies, in addition to an oversight agency reporting on the operation of the relevant legislation. The Committee's recommendations are aimed at increasing transparency and coordination within the scheme by providing for reporting by agencies, in addition to reporting by the NSW Ombudsman's Office as part of its oversight role. The NSW Ombudsman's oversight role is discussed in detail in chapter 4.
- 6.40 The Committee notes the reservations expressed by the Deputy Ombudsman in regard to relying on data published by agencies in their annual reports, and his preference for centralised data collection undertaken by an oversight body. As noted above, the Committee has recommended that the NSW Ombudsman be funded and resourced to undertake an oversight role, which would include the collection, collation and publication of statistics on protected disclosures received by agencies, based on agency reporting. The Committee envisages that the NSW Ombudsman's collation of agency data would serve to ensure that adequate and consistent information was collected and provided by each agency. Such data could provide the basis for information to be included in agency annual reports. In the Committee's view, agency annual reporting would increase transparency around protected disclosures, in addition to underscoring the role and responsibility that agencies have in managing disclosures and their investigation.

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<sup>279</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 20.

<sup>280</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 20.

- 6.41 To ensure consistent reporting on protected disclosures a model could be developed, similar to that contained in Appendix B of the *NSW FOI Manual*, which would include a description of the data required to be kept by agencies for reporting purposes. The NSW Ombudsman's *Protected Disclosures Guidelines* could be revised to set out in an appendix the appropriate format for reporting on protected disclosures in an agency's annual report. In turn, the PDA could prescribe that agencies set out information on disclosures in their annual report, in accordance with the NSW Ombudsman's model format.
- 6.42 The Committee has noted that agencies participating in the inquiry indicated their willingness to publish information on protected disclosures in their annual reports. The proposal also received support in the responses received to the Committee's discussion paper. NSW Health supported the proposal, while noting that identifying details should not be published.<sup>281</sup> The Ministry of Transport agreed to the proposal, however, it expressed reservations about reporting on investigation outcomes.<sup>282</sup>
- 6.43 The Committee does not envisage that the reporting requirement will compromise confidentiality. The information published would largely consist of statistical detail and any additional information would be de-identified and would not contain sufficient detail for whistleblowers' identities to be revealed. The purpose of agencies publishing such data is to improve awareness of agency management of disclosures and the amount of information available on disclosures received by each agency. It is hoped that this requirement will also emphasise agencies' responsibility for documenting their policies and investigations of disclosures and the protection provided to whistleblowers.
- 6.44 In terms of reporting on investigation outcomes, the Committee notes that some oversight and transparency around outcomes is desirable, on the basis that whistleblowers' identities are not revealed. The establishment of an oversight body, as recommended by the Committee, will entail greater scrutiny of agencies' management of investigations, including outcomes.
- 6.45 The NSW Police Force stated that such an amendment should not apply to sworn police employees, as police complaints are not assessed under the PDA and implementation of such a requirement would require training and education, in addition to changes to existing systems, for little benefit. The NSW Police Force further commented that existing oversight and reporting on the police system by the NSW Ombudsman and PIC is comprehensive. However, the NSW Police Force supported the proposed amendment in terms of its application to civilian employees.<sup>283</sup>
- 6.46 Internal reporting of police misconduct and internal police complaints are dealt with in accordance with the Police Act and other relevant legislation, such as the *Police Integrity Commission Act 1996*, and internal policies. This legislation and related procedures provide for a well-developed reporting scheme distinct from the scheme in place for public servants generally, in recognition of the special discretion and powers exercised by police officers. As the NSW Police Force's submissions and evidence have noted, there may be some scope to apply the public sector general policies to non-sworn employees within the NSW Police Force. The Committee supports this approach where appropriate and notes, as cited in the previous

<sup>281</sup> NSW Health, *Submission 57*, p. 4.

<sup>282</sup> Ministry of Transport, *Submission 62*, p. 2.

<sup>283</sup> NSW Police Force, *Submission 61*, pp. 13-4.

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paragraph, that it may not always be appropriate to apply policies and practices applicable to the rest of the public sector to employees operating in the policing environment. The Committee is also of the view that it is undesirable to duplicate reporting on internal complaints and disclosures that occur in relation to the NSW Police Force, if this information is already captured under existing reporting requirements.

**Conclusion**

- 6.47 The Committee is recommending that the PDA be amended to require agencies to publish information on protected disclosures in their annual reports, in the same way they are currently required to report on Freedom of Information applications. The information reported on would include the number of disclosures, comparisons with previous years, relevant policies and procedures, and the impact on the agency of conducting investigations into disclosures.
- 6.48 The Committee is also recommending that the NSW Ombudsman develop and publish a model for agencies to follow in compiling their annual report data on disclosures, including a description of the specific data agencies are required to collect for reporting purposes. The NSW Ombudsman may use the information provided by agencies in conducting audits of agencies' compliance with the PDA. In doing so, the NSW Ombudsman may assess the usefulness of the information prescribed in the PDA to determine whether it is adequate and make recommendations for amendments to the PDA in his audit reports. The NSW Ombudsman could assess the adequacy of the categories of information and data in consultation with the Protected Disclosures Steering Committee.

**RECOMMENDATION 11:**

- (a) That the *Protected Disclosures Act 1994* be amended to require public authorities to publish in their annual reports the following information on protected disclosures:
- i. the number of disclosures made in the past 12 months
  - ii. outcomes
  - iii. policies and procedures
  - iv. year-on-year comparisons
  - v. organisational impact of investigations of disclosures.
- (b) That the NSW Ombudsman review the appropriateness of the above categories of information and data in consultation with the Protected Disclosures Steering Committee, and recommend amendments to the Act if the categories are considered to be inadequate.

**RECOMMENDATION 12:** That, to ensure consistent reporting and to give agencies assistance, the NSW Ombudsman include in its *Protected Disclosures Guidelines* an Appendix setting out a model for agency annual reporting of information on protected disclosures, with the *Protected Disclosures Act 1994* requiring public authorities to adopt this model.

## Detrimental action as misconduct

6.49 Section 20 of the PDA provides that anyone taking detrimental action against another person, substantially in reprisal for a protected disclosure, is guilty of an offence. Although the PDA does not specify that taking detrimental action is also a disciplinary matter, s.43(c) of the *Public Sector Employment and Management Act 2002* provides that misconduct includes:

... taking any detrimental action (within the meaning of the Protected Disclosures Act 1994) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act,

6.50 Detrimental action taken against a whistleblower, therefore, amounts to misconduct under the PSEM Act, and a public official who takes such detrimental action may be subject to disciplinary action. Section 42 of the PSEM provides that disciplinary action means one or more of the following:

- dismissal from the Public Service,
- directing the officer to resign, or to be allowed to resign, from the Public Service within a specified time,
- if the officer is on probation—annulment of the officer's appointment,
- except in the case of a senior executive officer—reduction of the officer's salary or demotion to a lower position in the Public Service,
- the imposition of a fine,
- a caution or reprimand.

## Inquiry participants' views

6.51 Mr Chris Wheeler, the Deputy Ombudsman, told the Committee that detrimental action should be classed as a disciplinary matter for all public officials, not just those employed under the PSEM Act.<sup>284</sup> Commenting on the effectiveness of s.20 of the PDA, Mr Wheeler suggested that the Act should establish the responsibility of agencies to take disciplinary action in cases of detrimental action:

I personally believe it would be more effective to retain it but to add a separate provision in this Act that talks about a detrimental action also being a disciplinary matter that should be dealt with by the employer as a disciplinary matter using the civil standard of proof within the organisation. I think you would have a lot more actions being taken if that was the way it was to go, with the agency having an obligation to do something. At the moment there is no obligation on an agency to prosecute if they believe there has been a breach of the Act. But if there was a specific provision that indicated that detrimental action could either be dealt with criminally or through disciplinary procedures, I think that would be a much more effective way of proceeding.<sup>285</sup>

6.52 Mr Wheeler pointed out that, although the PSEM Act provides that detrimental action is a type of misconduct, the PSEM Act does not apply to all public officials. He stated that an amendment to the PDA would make it clear that detrimental action is misconduct for all public officials:

For each agency, detrimental action under this Act would be a disciplinary offence for that agency; implying in that agency's legislation—if they have anything about codes of conduct and standards of behaviour—that this is a disciplinary offence. There is

<sup>284</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 7.

<sup>285</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 7.

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something in the Public Sector Employment and Management Act but that only covers certain public officials; it does not cover officials who are employed in a whole range of other agencies. So having one centralised provision, maybe even modelled on that one, would say that basically detrimental action is a disciplinary offence.<sup>286</sup>

6.53 In terms of the effectiveness of the detrimental action provisions, Mr Wheeler noted that the survey results of the WWTW project have suggested that detrimental action is more likely to be taken by managers than colleagues. He acknowledged that this may mean that the detrimental action provisions would not be effective in all instances. However, Mr Wheeler stated that it was important to emphasise the responsibility of agencies to protect whistleblowers, and to bring about cultural change:

That is one of the reasons why the offence provision, while it serves a purpose, is not going to be that effective in many cases. But as to proving that somebody is being impacted on in the workplace in terms of their conditions of employment or greater supervision than they may have had otherwise, or whatever it might be, and that that was substantially in reprisal for making a protected disclosure, a disciplinary offence would not necessarily achieve the right objective there either.

But one of the things that we are lacking in the Act that is in certain other Acts around Australia is an obligation on management to bring in procedures and practices to protect whistleblowers. Maybe that might assist in terms of trying to ensure the right culture is in place in that workplace.<sup>287</sup>

6.54 The ICAC also submitted that the PDA should provide that detrimental action is a disciplinary matter, noting that the Queensland *Whistleblower Protection Act 1994* makes it clear that a breach of the Act constitutes misconduct:

... while taking a reprisal would arguably already come within public sector agencies' disciplinary regimes, section 57 of the Queensland WPA specifically provides that a public officer is guilty of misconduct under any Act under which the officer may be dismissed from office or disciplined for misconduct if the officer contravenes the provisions of the WPA relating to reprisals, preservation of confidentiality and providing false or misleading information.<sup>288</sup>

6.55 The Committee notes that in response to the Committee's proposal to amend the PDA to provide that detrimental action is a disciplinary matter, the University of New South Wales submitted that if a complaint, based on the reverse onus of proof, would constitute grounds for disciplinary action, the rights of persons accused of detrimental action may be 'severely adversely affected leading to significant unfairness.'<sup>289</sup>

6.56 In their response to the proposal, the NSW Police Force stated that s.173 of the Police Act provides that the Commissioner may take action for 'misconduct', which includes the taking of reprisal action for a complaint made under s.206 of the Police Act. The NSW Police Force noted that an amendment to the PDA would result in consistency between the PDA, the Police Act and the Public Sector Employment and Management Act in terms of making reprisals for disclosures being subject to disciplinary action.<sup>290</sup>

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<sup>286</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 7.

<sup>287</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 8.

<sup>288</sup> ICAC, *Submission 22*, p. 5.

<sup>289</sup> University of New South Wales, *Submission 55*, p. 2.

<sup>290</sup> NSW Police Force, *Submission 61*, p. 8.

## Committee comment

6.57 There was widespread support from inquiry participants for the Committee's proposal to amend the PDA to provide that detrimental action taken in accordance with s.20 is a disciplinary matter, *in addition to a criminal offence*.

6.58 However, the Committee notes that UNSW raised concerns about the potential application of the reverse onus of proof, at s.20(1A) of the PDA, to disciplinary matters.

6.59 Section 20(1A) of the PDA provides that in proceedings for the offence of taking detrimental action against a whistleblower 'it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected disclosure.'

6.60 The reverse onus of proof was inserted by the *Protected Disclosures Amendment (Police) Act 1998*, implementing a 1996 recommendation of the Committee on the Office of the Ombudsman and PIC. The Committee recommended the amendment in order to make it easier for whistleblowers to establish the offence of detrimental action to a criminal standard of proof:

The Committee noted the view that the offence provision at section 20 ... was of limited effectiveness, and so of doubtful value in providing protection to persons who have made protected disclosures. Proving that the offence has been committed would involve proving to a criminal standard of proof (i.e. beyond a reasonable doubt) that detrimental action took place substantially in reprisal for the making of a protected disclosure. It may well be difficult in many cases to establish to this standard that an offence had occurred.

The suggestion was put ... that the offence should be revised to make it more capable of being invoked. The most obvious way this can be done is to place the onus on a defendant authority, where detrimental action has been taken against a person who has made a protected disclosure, to prove that the action was not taken in reprisal.<sup>291</sup>

6.61 The reverse onus of proof was intended to apply to proceedings for criminal offences under s.20(1) of the PDA. The Committee, in recommending an amendment, is not advocating that the reverse onus of proof should apply to public officials who are subject to disciplinary action for having taken detrimental action against a whistleblower. In the Committee's view, an amendment to provide that detrimental action is a disciplinary breach should be drafted in a way that makes it clear that the reverse onus of proof applies to criminal offences, as distinct from disciplinary matters. The latter are determined to a lower standard of proof.

6.62 The Committee notes that the WWTW project stated that best practice legislation should provide for various kinds of remedial action to be taken if a person suffers detriment as a result of having made a disclosure, which would include 'disciplinary or criminal action against any person responsible for the detriment.'<sup>292</sup>

6.63 The WWTW research indicated that whistleblowers' managers are more likely to take reprisal action than co-workers. The Deputy Ombudsman pointed out that this may mean that disciplinary action will not be an effective response to all cases of reprisal. However, Mr Wheeler stated that making detrimental action a disciplinary matter may serve to emphasise the obligation on management to implement processes that will

<sup>291</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, p. 78.

<sup>292</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 286-7.

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protect whistleblowers, in addition to helping to bring about cultural change in workplaces. In the Committee's view, it is therefore desirable to broaden the kinds of remedial action that are available to management if detrimental action has been taken against a whistleblower.

- 6.64 The Committee is seeking to emphasise agencies' responsibilities to ensure that whistleblowers are adequately protected and that disciplinary action is pursued in cases of detrimental action. The Committee is recommending that the PDA be amended to expressly provide that detrimental action taken substantially in reprisal for a protected disclosure be classed as misconduct, subject to disciplinary action, for public officials. Such an amendment would boost the deterrent provisions in the Act, and make clear that public officials may be subject to criminal prosecution or disciplinary proceedings as a result of taking a reprisal.
- 6.65 The lack of successful prosecutions indicates that it can be difficult to meet the criminal standard of proof in prosecutions for detrimental action offences. The Committee is seeking to broaden the protections available to whistleblowers by enhancing the ability of agencies to take action if detrimental action has occurred. It is hoped that the amendment providing scope for detrimental action to be treated as a disciplinary matter will improve the efficacy of protection and the ability of agencies to provide pro-active support to whistleblowers.
- 6.66 The Committee envisages that agencies would update their protected disclosure policies and procedures to make it clear to staff that they may be subject to disciplinary action if they take a reprisal against a whistleblower. Whistleblowers would also be informed about the additional deterrent provision through agency policies. The Committee hopes that the amendment would have an additional preventative effect, while also enabling agencies to take disciplinary action if reprisals are taken against whistleblowers. This is particularly relevant given the lack of successful criminal prosecutions for detrimental action under s.20 to date.

**RECOMMENDATION 13:** That the *Protected Disclosures Act 1994* be amended to expressly provide that detrimental action taken substantially in reprisal for a protected disclosure is misconduct, subject to disciplinary action, for all public officials.

## Cultural change

### *Whistling While They Work* project

- 6.67 The WWTW project sought to gauge current levels of whistleblowing in addition to examining the adequacy of agency policies and management of whistleblowing. Data gathered suggested that the culture within many of the agencies surveyed did not appear to have affected most employees' willingness to report wrongdoing and that most of those who reported wrongdoing had not suffered negative consequences as a result. However, the results were variable and some individual agencies recorded less encouraging results.
- 6.68 As part of the project, survey data from four participating jurisdictions was examined to determine the current incidence and significance of whistleblowing in agencies.<sup>293</sup>

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<sup>293</sup> The four surveyed jurisdictions were the Commonwealth, New South Wales, Queensland and Western Australia. The research instruments developed for the project included: an agency survey of practices and



In measuring the rate of whistleblowing, the project also sought to assess the value placed on whistleblowing by the groups surveyed as part of the project. The employee survey results indicated that whistleblowing appeared to be highly valued by most public officials, including those who had not observed wrongdoing, or who observed it but did not report it. Whistleblowers also appeared to view their reports as valued, as most indicated that they would report the conduct again, and that they knew their report was investigated. While these results gave a positive picture of the value placed on whistleblowing, the project noted that many whistleblowers did not know whether any action resulted from their disclosure.<sup>294</sup>

- 6.69 In terms of the organisational value of whistleblowing, the agency survey indicated that 67% of wrongdoing cases investigated by selected agencies over a two year period had been reported by staff. Case handlers and managers appeared to confirm the value placed on whistleblowing, with most agreeing that information gained through employee reports was significant and valuable. Case handlers and managers also rated employee reports as relatively more important than routine controls, internal audits or external investigations in bringing wrongdoing to light.<sup>295</sup> The project report stated that the results show that whistleblowing is accepted and valued within agencies as a way of detecting wrongdoing:

The results confirm that the unique position of employees within organisations gives them a strategic role as quality information sources. Together, these results confirm that, on the whole, whistleblowing is not only regular, but is recognised within organisations as highly important for uncovering organisational wrongdoing. Of course, they also increase the responsibility of agencies to manage the process of whistleblowing in a responsible fashion.<sup>296</sup>

- 6.70 A majority of surveyed officials who reported public interest wrongdoing stated that they were treated either the same, or as well, as a result of the incident by management and colleagues, suggesting that many did not suffer detriment.<sup>297</sup> The project's results suggest that many agencies therefore recognise the value of whistleblowing and have succeeded in encouraging and protecting staff who report wrongdoing:

While debate is alive and well about how to manage the complexities of these situations, many agencies have actively grappled with the practical issue of how to encourage staff to disclose perceived wrongdoing, and even with the difficult issue of how to protect staff from reprisals should they do so.<sup>298</sup>

- 6.71 The project also sought to identify the factors that influence whistleblowers to report wrongdoing, as well as the reasons for employees not reporting wrongdoing. The employee survey data was used to arrive at a measurement of the 'reporting rate' and 'inaction rate' for surveyed agencies. In terms of jurisdictional differences, the data suggested that New South Wales and Queensland agencies had slightly higher average reporting rates than those from the other surveyed jurisdictions, with New

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procedures with 304 participating agencies; an employee survey of workplace experiences and relationships completed by employees from 118 agencies; and internal witness, case handler and manager surveys which assessed the experiences of internal witnesses and the management of internal reports of wrongdoing among 15 and 16 participating agencies: see pp. 16-7 of Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008.

<sup>294</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 42-4.

<sup>295</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 43-4.

<sup>296</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 44.

<sup>297</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 2.

<sup>298</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 2.

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South Wales agencies also having lower 'inaction' rates. The project report noted that this result indicates that 'major differences in the reporting climate are not arising at the jurisdictional level, notwithstanding the substantial differences in the legislative regimes governing whistleblowing in between the various sectors ... what is clear is that the major differences are to be found at the agency level.'<sup>299</sup>

6.72 Some of the factors that were identified as influencing employees' decisions to report wrongdoing included the perceived seriousness and frequency of the wrongdoing (with more serious wrongdoing being more likely to be reported) and confidence in whether any management action would be taken in response to the wrongdoing. Employees' reasons for not reporting included their expectation of an inadequate management response, a lack of faith in agencies' handling of the process and the risk of reprisals.<sup>300</sup> The report stated that employees' confidence in their agency is critical to promoting whistleblowing:

The encouragement of reporting appears to turn directly on employee confidence that the organisation will take effective action to stop or remedy the perceived wrongdoing. In many cases, the decision to report will also hinge on an employee's natural assessment of the associated risk and especially whether the organisation is capable of protecting them from adverse outcomes if more senior employees or management itself are involved.<sup>301</sup>

6.73 The project indicated, therefore, that agencies have a critical role in encouraging reports of wrongdoing. Many of the survey results suggested that the culture within an agency is vital to building employees' confidence in the reporting process, and, therefore, increasing the likelihood that employees will report wrongdoing.

6.74 The second report of the project stressed the importance of organisational commitment to promoting the disclosure of wrongdoing and protecting whistleblowers who seek to disclose wrongdoing. The report noted that the research reinforced the link between an organisation's ethical culture and effective policies and procedures for dealing with disclosures.<sup>302</sup> The following elements of organisational commitment were identified as being important to an effective whistleblowing program:

- Management commitment at all levels, including statements articulating the agency's support for disclosures; and commitment to investigating and remedying reported wrongdoing that is substantiated; understanding the benefits of whistleblowing mechanisms and a knowledge of policies at all levels of management.
- Whistleblowing policy that is easy to understand, outlining procedures and legal rights and obligations, with wide staff awareness and confidence in the policy and management's responsiveness to disclosures.
- Resources, including staffing and funding the establishment and maintenance of whistleblowing programs, and training and induction for all staff as well as specialised training for key staff and managers.

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<sup>299</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 48.

<sup>300</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 65-6, 70-4.

<sup>301</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 82.

<sup>302</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 23, <<http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 13 October 2009.

- Evaluation and engagement, consisting of regular evaluation and improvement of whistleblower programs and engagement with external integrity agencies, staff associations and clients.<sup>303</sup>

6.75 The report also emphasised the importance of an integrated approach to whistleblowing, stating that '[o]rganisational commitment to the program must move beyond procedures setting out the responsibilities and obligations that must be fulfilled by staff, to an approach which also emphasises the responsibilities of the organisation as a whole, including the most senior management.'<sup>304</sup>

## Inquiry into a whistleblower protection scheme for the Commonwealth public sector

6.76 The House of Representatives Committee stated that evidence received during its inquiry had emphasised the importance of changing workplace culture. The Committee noted that 'a pro-disclosure culture would support the making of public interest disclosures, encourage management to be responsive to the disclosures made and reduce the risk of adverse action against people who have made disclosures.'<sup>305</sup>

6.77 Several points were raised by inquiry participants in relation to cultural change:

- The importance of leadership from management in encouraging a pro-disclosure culture. The current public service culture does not provide adequate support to whistleblowers and whistleblowing is not well understood by managers and employees.
- Overcoming cultural attitudes that create a stigma or taboo around speaking out about wrongdoing.
- The lack of ethical standards, stemming from a management failure to model ethical behaviour and deal with reports of misconduct.
- Cultural change as a process that involves changing social attitudes to certain behaviour, along with enforcing laws in relation to the behaviour, in the same way, for example, as community attitudes to drink driving have been successfully changed.
- Providing seminars and training for public servants on the proposed new Commonwealth public interest disclosure scheme and their role in the scheme.
- Improving awareness of legislation and creating a statutory obligation on agencies to report on their use of public interest disclosure laws would change perceptions in relation to the importance of the disclosure system.<sup>306</sup>

6.78 The House of Representatives Committee noted the comments of the Secretary of the Department of Immigration and Citizenship on the way that placing obligations on agencies can bring about cultural change:

If departments were obliged to report about those arrangements to some external body, there would be some ability for confidence that each of the numerous agencies has

<sup>303</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, pp. 25-40.

<sup>304</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 109.

<sup>305</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 171-2.

<sup>306</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 171-5.

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proper arrangements in place. That, to me, would seem to be a substantial embedding of this as a key cultural issue, the so-called 'soft law' ...<sup>307</sup>

6.79 The House of Representatives Committee acknowledged that workplace culture can be a significant deterrent for public officials wishing to disclose wrongdoing. The recommendations made by the Committee for the establishment of a Commonwealth whistleblower protection scheme intended to promote cultural change. The Committee concluded by noting the importance of leadership and accountability:

However, driving cultural change from the top down is only part of the challenge. Public sector leaders need to model the values of transparency and accountability and initiate a dialogue with staff about the importance of open communication within organisations.<sup>308</sup>

Inquiry participants' views

6.80 Several inquiry participants commented on the importance of workplace culture in terms of encouraging disclosures. The Deputy Ombudsman stated that legislation alone will not produce a change in attitudes to whistleblowers; there also needs to be an accompanying change in workplace approaches and attitudes. Mr Wheeler pointed out that, in addition to legislation, a shift to bring about a cultural acceptance of whistleblowers as important sources of information about wrongdoing is also needed.<sup>309</sup>

6.81 In terms of achieving cultural change, Mr Wheeler identified factors such as education and training, government commitment, and statutory obligations and responsibilities on agencies to protect whistleblowers:

... I would think it is things like education, things like government making it plain that they want to see these matters dealt with appropriately; it is having obligations in the Act so that management must have policies and procedures in place to ensure that whistleblowers are protected; it is holding management responsible for the protection of whistleblowers. But it means some organisation that is out there trying to bring change into that workplace—not three or four organisations doing ad hoc things—within the resources they can make available.<sup>310</sup>

6.82 Mr Wheeler pointed to the NSW Police Force as an agency that successfully achieved a change in culture, following the Wood Royal Commission into police corruption. He cited the high number of yearly internal police complaints as indicative of the high level of trust that police officers have in the ability of the NSW Police Force to investigate and deal with their complaints:

The New South Wales Police Force has one of the best systems around for dealing with internal witnesses. They set up their internal witness support unit, which at the time was unique, I think, almost in the world. They take it very seriously. They take appropriate steps to protect whistleblowers, which is why there are 1,200. Before the royal commission if there were any it would be surprising. The number demonstrates that the police trust the organisation to deal with it appropriately. They are not going to make a disclosure if they think they are going to get into a significant amount of trouble or if they think it will not be dealt with. The research showed that one of the key factors that leads to a person making a disclosure is if they think it is going to be dealt with.

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<sup>307</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 171-5.

<sup>308</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 178-9.

<sup>309</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 12.

<sup>310</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 12.

They are not going to bother if they think it will not be. So it is the culture of the police and how it has changed that has led to those disclosures being made.<sup>311</sup>

- 6.83 Management commitment was identified by the Deputy Commissioner of the ICAC as critical to cultural change. Ms Hamilton echoed the Deputy Ombudsman's comments about managers' tendency to view whistleblowers as problems or troublemakers, rather than recognising that the conduct they are seeking to report is the true problem:

I think it always comes down to the tone at the top, as they call it. ... If management shows a real commitment to supporting whistleblowers and protecting them, and not just paying lip service but everybody knows that they secretly love to get rid of them if they could, that is going to filter right down and even somebody who might be minded to be nice to the person and support the person will not because they think management will see them as a troublemaker too. So, I think you have to really change the way managers tend—and it is only human nature—to see these people as problems to be dealt with because it is causing problems for them, their agency is going to be investigated. They have to try to change that attitude: that it is a process and that they have an obligation to try to protect that person as much as possible—and not to see them as the problem but to see the conduct they are reporting as the problem, if it is true. They would not create the situation normally; they are just reporting it. But they are often seen as the problem and the trouble to be gotten rid of, instead of managers saying, "We've got a bit of a problem here. We are going to address it head on."<sup>312</sup>

- 6.84 Several agencies told the Committee of the importance of workplace culture in encouraging disclosures. Ms Fran Simons, Group General Manager, Human Resources and Communications at RailCorp, spoke of her agency's recent efforts to target workplace culture by informing staff of agency standards and codes, in addition to detailing mechanisms for staff to report breaches of those standards. Ms Simons referred specifically to RailCorp's Just Culture program, designed to reframe workplace culture by focusing on the duty of agency staff to report behaviour that falls below accepted standards:

We have put over 2,000 people—managers mostly—through that program, and that is about trying to establish the fact that our workplace culture is very important for the organisation and the workplace culture is defined by what we do react to and what we do not react to. This is about saying that if there are norms in the workplace that are below the standards that our code of conduct sets out, whether they be interpersonal behaviour norms, safety behaviour norms or procedural norms in terms of procurement and administration, then we have a duty to do something about it, we have a duty to report that and we have a duty to re-establish those norms. So that program in itself, I believe, is very significant for the long term of the organisation and has been, as I said, a flagship program.<sup>313</sup>

- 6.85 According to RailCorp's *Annual Report 2007-2008*, Just Culture 'is an internationally recognised concept in organisations with high safety requirements ... [t]he Just Culture program explains the duties and expected behaviours of every employee and provides RailCorp employees with a consistent and concise framework for making decisions about matters ranging from professional performance to safety and purchasing decisions.'<sup>314</sup>

<sup>311</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 21.

<sup>312</sup> Ms Hamilton, *Transcript of evidence*, 18 August 2008, p. 27.

<sup>313</sup> Ms Fran Simons, Group General Manager, Human Resources and Communications, RailCorp, *Transcript of evidence*, 24 November 2008, p. 36.

<sup>314</sup> RailCorp, *Annual Report 2007-2008*, p. 25.

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- 6.86 Mr Ross Woodward, the Deputy Director General of the Department of Local Government, spoke of the importance of communication in building an open culture in which staff feel they are able to make complaints. He told the Committee that Departmental staff undertaking Promoting Better Practice Reviews of councils' performance are able to gauge the culture within each council based on their discussions with local council staff:

We have a good working relationship with councils and they see us as a place to check things. There is very good networking, as you know, in local government—people do talk to each other—and so we encourage council staff and the community, if they have any concerns about local government, to make that complaint to us. We do not have any suspicion that staff in councils feel that they cannot make complaints. I think it is all about culture and that is part of what we do when we do our reviews. We look at the culture: Is this a culture of everything being so controlled and staff feeling frightened to speak up? Our reviewers go and speak to staff and we are very quick to pick up whether or not there is control, and staff are pretty forthright if there is an issue around that.<sup>315</sup>

- 6.87 The inter-relationship between protected disclosures policies and other agency policies and codes in building a positive workplace culture was highlighted by the Deputy Director General of NSW Health, Ms Karen Crawshaw:

... I do not think you can look at a protected disclosure policy in isolation from other policies and other settings that you have in place around your workforce, whether it relates to anti-bullying policy, good grievance management, a robust code of conduct that people respect and understand, and even going into the area of effective workers compensation and rehabilitation processes. I agree with you: all that comes together in a culture. There is always more that we can do in that area.<sup>316</sup>

- 6.88 The CEO of the South Eastern Sydney and Illawarra Area Health Service, Mr Terry Clout, spoke about the importance of senior management's approach in promoting a healthy workplace culture to overcome people's natural reluctance to report wrongdoing. Ms Crawshaw added that targeting senior staff may also help to allay fears that reporting wrongdoing could affect junior staff members' future career prospects:

**Mr CLOUT:** ... Those penalties are already there; I do not think you can do any more than that. We are educating people and making it clear through our code of conduct. From a senior manager's point of view it is walking the walk and talking the talk. If they see me doing it and talking about it and if they see my senior managers doing it and supporting them when they do it, more than likely they will be prepared to come forward. Even so, people see that things are wrong and they say, "Sorry, it's somebody else's problem." No legislation, guidelines, codes or policies will change that natural human behaviour. In my view, if we have leadership from people walking out there and talking about it, over time that is the only thing that will make it better than it is now.

**Ms CRAWSHAW:** And targeting the senior clinical staff to whom you alluded—those that junior staff are fearful of confronting. Perhaps they are fearful of confronting them because in the past there was a concern that those senior staff could impact on their future career prospects, et cetera. Because of that we must also ensure in a number of areas that their career prospects, access to training, access to promotional

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<sup>315</sup> Mr Woodward, *Transcript of evidence*, 24 November 2008, p. 21.

<sup>316</sup> Ms Karen Crawshaw, Deputy Director General, Health System Support, NSW Health, *Transcript of evidence*, 24 November 2008, p. 44.

opportunities, and access to specialty training is all done transparently. We have been trying to promote that to ensure people do not fear their access to future prospects.<sup>317</sup>

### Committee comment

- 6.89 Workplace culture within agencies plays an important part in ensuring that integrity and ethics are valued in the public sector. An open workplace environment that seeks to promote ethical behaviour and encourages staff to speak up about wrongdoing is therefore vital in terms of public sector integrity. A healthy workplace is one in which staff feel comfortable with disclosing suspected corruption and misconduct, and are confident that their disclosure will be investigated and acted upon.
- 6.90 The Committee notes that many agency representatives participating in the inquiry were clearly aware of the importance of workplace culture and ways to bring about cultural change. The Committee was encouraged to hear of existing agency programs that seek to emphasise employees' responsibilities in relation to workplace misconduct. Agency representatives also spoke of the importance of management attitudes in bringing about a change in workplace culture.
- 6.91 In the Committee's view, an effective whistleblower protection scheme also impacts positively on agency culture by establishing requirements and responsibilities that agencies are to observe. The scheme therefore seeks to create a broader environment that stresses the importance of public sector integrity by providing for public interest disclosure systems at the agency level.
- 6.92 In making its recommendations for the protection of public sector whistleblowers, the Committee has considered the importance of bringing about cultural change within workplaces. The Committee has considered the results of the WWTW project, in addition to the comments of inquiry participants in developing recommendations for policy changes that would have the effect of bringing about cultural change.
- 6.93 The WWTW project suggested that cultural issues appear to be present on an individual agency level, rather than being a systemic problem across the public sector. The Committee hopes that the establishment of an oversight unit within the NSW Ombudsman's Office will assist with identifying problem agencies, in addition to making it clear to all agencies that disclosures policies, processes and support systems are ineffectual in the absence of a culture that encourages and values whistleblowing. In terms of aiding the development of a positive culture, the oversight unit's role would include conducting education and training initiatives and publishing guidelines to assist agencies.
- 6.94 The Deputy Ombudsman noted that placing statutory obligations on agencies is an element that can contribute to bringing about cultural change. The Committee has recommended that the PDA be amended to require agencies to develop protected disclosures policies and processes, in addition to including information on disclosures in their annual reports. While many agencies are clearly aware of their responsibilities to adequately deal with disclosures, the Committee feels that it is important to make it a legislative requirement for agencies to observe certain standards and requirements. The Committee's reforms seek to develop a culture that values and deals with disclosures transparently and effectively. It is hoped that such a change in culture will also serve to improve the protection of whistleblowers by changing attitudes.

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<sup>317</sup> Mr Terry Clout, CEO, South Eastern Sydney and Illawarra Area Health Service, NSW Health, *Transcript of evidence*, 24 November 2008, p. 45.

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- 6.95 Legislative changes would signal a government commitment to improving protections for whistleblowers. It would also emphasise the responsibility of senior management in the public sector to take steps to implement changes that would improve workplace cultural attitudes to ethics and integrity. The Committee notes that the WWTW project also developed guidelines and checklists to assist agencies in developing effective and comprehensive protected disclosures policies. Such material, in addition to the guidelines developed by the NSW Ombudsman's Office, ensures that managers are supported in seeking to develop strategies to create a better workplace environment. In addition to stressing managers' responsibility to develop policies and improve reporting on disclosures, the Committee is seeking to make it clear to public officials that taking detrimental action against a whistleblower is a disciplinary matter in addition to a criminal offence, by recommending an amendment to the PDA. The Committee hopes that its recommendations will make it clear to both management and colleagues that reprisals against whistleblower employees are unacceptable. It is hoped that legislative changes will result in cultural acceptance of the importance of protecting whistleblowers.
- 6.96 The WWTW project results show the importance of agency awareness training in boosting reporting, and improving the reporting climate. It is the Committee's intention that its reforms are communicated to public officials through agency training and induction programs in order to improve awareness of public officials' rights and obligations in relation to protected disclosures. The Committee has sought to develop policy reforms that address gaps in the existing whistleblower protection scheme. It is hoped that the reforms will also create an environment in which whistleblowers' protected disclosures made in the public interest are valued and encouraged.



## Chapter Seven - The Parliament of New South Wales

- 7.1 The background to the Committee's inquiry has been referred to previously in chapter 1. The terms of reference for the inquiry include 'the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and *members of Parliament*' (emphasis added). In view of the terms of reference for the inquiry and its jurisdiction, the Committee considered an examination of the protected disclosures scheme as it currently applies to disclosures about members of Parliament to be an essential part of the inquiry. In this regard, several points about the underlying legislative framework for the protected disclosures scheme are significant.
- 7.2 It also is important to appreciate that the Committee's authority as a parliamentary body does not exceed that of its parent body and, consequently, the Committee has neither the power nor the authority to direct that either House or both Houses take certain actions. The Committee's inquiry takes the form of an exploration of relevant issues, from which certain conclusions have been drawn and these are submitted to both Houses, along with recommendations for consideration.
- 7.3 References throughout this chapter to 'parliamentary employees' relate to two distinct groups of employees employed under different awards, namely:
- departmental staff (sometimes termed parliamentary staff) who are the employees working for the Departments of the Legislative Council, Legislative Assembly and Parliamentary Services; and
  - members' staff who are the employees working in the offices of members of the Legislative Council (entitled Secretary/Research Assistants) and the Legislative Assembly (Electorate Officers).

### Relevant statutory provisions

- 7.4 Briefly, the objectives of the PDA as provided for in s.3 of the Act are to:
- Enhance and augment established procedures for making disclosures in the public interest, of corrupt conduct, maladministration and serious and substantial waste, in the public sector, and
  - Protect persons from reprisals that might otherwise be inflicted on them because of such disclosures, and
  - Provide for such disclosures to be properly investigated and dealt with.
- 7.5 Members of Parliament may be the subject of protected disclosures, may make disclosures and may receive them.<sup>318</sup>
- 7.6 In order to be protected under the PDA, a disclosure concerning maladministration must be made in accordance with the *Ombudsman Act 1974*. However, under schedule 1 of that Act the following conduct is excluded from the NSW Ombudsman's jurisdiction:
- 1 Conduct of:

<sup>318</sup> Russell D Grove (ed), *New South Wales Legislative Assembly Practice, Procedure and Privilege*, 1st ed, 2007, p. 279.

- a. the Governor, whether acting with or without the advice of the Executive Council,
  - b. a Minister of the Crown, including a Minister of the Crown acting as a corporation sole, but not so as to preclude conduct of a public authority relating to a recommendation made to a Minister of the Crown,
  - c. Parliament,
  - d. the Houses of Parliament,
  - e. a committee of either House, or both Houses, of Parliament,
  - f. either House of Parliament,
  - g. a member of either House of Parliament, where acting as such,
  - h. an officer of Parliament or of either House of Parliament, where acting as such.<sup>319</sup>
- 7.7 As the NSW Ombudsman does not have jurisdiction over members of Parliament, disclosures against members concerning maladministration must be made to the principal officer, being the Speaker or the President (the Presiding Officers).<sup>320</sup>
- 7.8 The non-application of the Ombudsman Act with respect to members of Parliament is not a matter for review by this Committee and there are grounds for this being the position, e.g. ministerial responsibility and the privilege of Parliament to administer its internal affairs. The exclusions contained in schedule 1 of that Act reflect Parliament's intention when passing the legislation that the Governor in Council and a Minister of the Crown 'should be answerable to the Parliament rather than the Ombudsman' and that the Legislature, like the judiciary, 'supervise the conduct of persons within their respective jurisdictions'.<sup>321</sup>
- 7.9 The exclusions do not preclude the NSW Ombudsman from investigating conduct of a public authority relating to a recommendation made to a Minister. Consequently, it would be possible for the NSW Ombudsman to examine conduct relating to a recommendation made to a Minister, for example, in order to investigate whether a Minister had been misled through the withholding of information by a public authority.<sup>322</sup>
- 7.10 A protected disclosure concerning corrupt conduct must be made in accordance with the *Independent Commission Against Corruption Act 1988* (ICAC Act). The ICAC may investigate corrupt conduct, as defined in the ICAC Act, which involves or affects public authorities or public officials.<sup>323</sup> Public officials are defined under the Act to include members of the NSW Parliament and staff employed by the Presiding Officers of the Parliament. Section 8 of the Act defines the general nature of corrupt conduct and lists specific types of conduct covered by the definition.
- 7.11 The two-part definition at ss.8 and 9 provides that in order for conduct by a Minister or a member of Parliament to amount to corrupt conduct it must reach the threshold contained in s.9 of the Act. It must constitute or involve a 'substantial breach' of an applicable code of conduct, i.e. the Ministerial code of conduct and, in the case of

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<sup>319</sup> *Ombudsman Act 1974*, Sch 1, cl 1

<sup>320</sup> Russell D Grove (ed), *New South Wales Legislative Assembly Practice, Procedure and Privilege*, 1st ed, 2007, pp. 279-80.

<sup>321</sup> Legislative Assembly Hansard, Ombudsman Bill, 29 August 1974, p. 776-7.

<sup>322</sup> Legislative Assembly Hansard, Ombudsman Bill, 19 September 1974, p. 1256.

<sup>323</sup> The term "public official" is defined at s.3 of that Act as "an individual having public official functions or acting in a public official capacity", including: a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary; a member of the Legislative Council or of the Legislative Assembly; and a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both.

members, the code of conduct adopted by both Houses of Parliament. Conduct of a Minister or member of Parliament which falls within the description of corrupt conduct in s.8, also falls within ICAC's jurisdiction if it is conduct that 'would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute' (s.9(4)).<sup>324</sup>

- 7.12 The Code of Conduct for Members of Parliament specifies that public resources to which members have access must be applied according to any guidelines or rules about the use of those resources. The Legislative Assembly *Members' Handbook* contains guidelines for the use of facilities, services and entitlements provided to members of the Legislative Assembly, for example, travel entitlements. The Handbook indicates that:

Members are held strictly accountable for their use of allowances and entitlements (audits are conducted in this regard), and the issue is sufficiently important that it is addressed in the Members' Code of Conduct. (para 1.1)

Failure to use public resources in accordance with the guidelines detailed in the Members' Handbook amounts to a breach of the Members' Code of Conduct which may, in turn, amount to corrupt conduct under the Independent Commission Against Corruption Act 1988, even if the conduct is not otherwise illegal.<sup>325</sup>

- 7.13 The NSW Audit Office investigates any allegations of waste in public authorities other than local government. In order to be protected, disclosures to the Auditor-General must be made in accordance with the *Public Finance and Audit Act 1983* and must show or tend to show that an agency or public official, as defined in that Act, has seriously and substantially wasted public money. The New South Wales Parliament is not listed in the schedules of statutory bodies and departments covered by the *Public Finance and Audit Act* (schedules 2 and 3). The Auditor-General audits the Parliament's accounts and systems on the invitation of the Presiding Officers and protected disclosures about serious and substantial waste against a member of Parliament can be made to the Audit Office.<sup>326</sup> Parliamentary officials are included in the public officials eligible for protection when making disclosures of serious and substantial waste of public money.<sup>327</sup>
- 7.14 The Audit Office of New South Wales has advised that allegations of waste tend to be caused by maladministration or possible corrupt conduct and, in such cases, the conduct can be referred to other investigating authorities.<sup>328</sup>

## Members' staff

- 7.15 Legislative Assembly members' electorate office staff and Legislative Council members' secretary/research assistants, are employed by the Speaker of the Legislative Assembly and the President of the Legislative Council respectively. The terms and conditions of employment for these individuals are quite distinct from those applicable to other public sector employees; a direct result of the political environment in which they work. The Committee's inquiry is not concerned primarily

<sup>324</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 65.

<sup>325</sup> Department of Legislative Assembly, *Members' Handbook*, Chapter 1, para 1.1, [http://www.parliament.nsw.gov.au/prod/la/la handbook2008.nsf/PDFs/Full+Handbook/\\$File/Handbook.pdf](http://www.parliament.nsw.gov.au/prod/la/la handbook2008.nsf/PDFs/Full+Handbook/$File/Handbook.pdf)

<sup>326</sup> Russell D Grove (ed), *New South Wales Legislative Assembly Practice, Procedure and Privilege*, 1st ed, 2007, p. 279.

<sup>327</sup> Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice*, The Federation Press, Sydney, 2008 p. 217.

<sup>328</sup> Audit Office of NSW, *Submission 28*, p. 1.

with the conditions of employment for such staff, which are subject to an award made by the Industrial Relations Commission of New South Wales, pursuant to s.19 of the *Industrial Relations Act 1996* (NSW). However, the terms and conditions of employment for members' staff highlight the need to ensure that the protections available to staff wishing to make, or having made, disclosures are adequate in light of their particular employment circumstances.

7.16 As noted above, electorate officers working for members of Parliament are employed under the *Crown Employees (Parliamentary Electorate Officers) Award*.<sup>329</sup> In terms of their selection, it is relevant to note that the merit selection principles applicable to other public sector appointments are not required to be observed. Members of Parliament may recruit staff either by directly appointing them, or by conducting a competitive selection process. Once a member has chosen a staff member, a recommendation to employ new staff is made to the relevant Presiding Officer, who then approves the appointment.<sup>330</sup>

7.17 Mr Russell Grove, the Clerk of the Legislative Assembly, told the Committee of the unusual employment circumstances that apply to members' staff, noting that while the member is responsible for selecting and supervising their staff, the Speaker is their employer:

The relationship between electorate office staff and their member is unique in that the member is not the employer but is the supervisor and the person who chooses the person whereas the Speaker for administrative purposes is the employer and the Speaker is the person who is named in any industrial action.<sup>331</sup>

7.18 Clause 16 of the Award provides for the termination of employment of electorate office staff 'by the giving of 2 weeks notice by either the Speaker, being the employer, or the individual officer or upon the end of the term of office of the Member for whom the officer works'.<sup>332</sup>

7.19 In terms of separation from service provisions, clause 17 of the Award provides as follows:

At general election time, or upon a seat in the Legislative Assembly becoming vacant for any reason, every endeavour will be made to retain the services of currently employed Electorate Officers having regard to the wishes of each incoming Member.

Where an officer's services are terminated (other than at the officer's own request or where the officer is found guilty of a breach of discipline), the following termination arrangements are to apply:

(a) Basis of entitlement

Electorate Officers whose services are terminated in circumstances where the relevant Member of the Legislative Assembly has ceased to hold office for any reason and provided that:

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<sup>329</sup> Industrial Relations Commission, *NSW Industrial Gazette*, Vol. 363 IG, Publication No.C5895, September 2007, p. 752, <<http://www.lawlink.nsw.gov.au/irc/ircgazette.nsf/webviewdate/C5895?OpenDocument>>, accessed 6 October 2009

<sup>330</sup> Legislative Council, *Submission 29*, Attachment 1: Chapter 9 of the *Legislative Council Members' Guide*, pp. 100-2.

<sup>331</sup> Mr Russell D Grove, Clerk of the Legislative Assembly, *Transcript of evidence*, 1 December 2008, p. 49.

<sup>332</sup> See New South Wales Industrial Relations Commission, *Industrial Gazette*, <<http://www.lawlink.nsw.gov.au/irc/ircgazette.nsf/webviewdate/C5895?OpenDocument>> accessed 20 July 2009.

- (i) the Electorate Officer continues to work at the existing location and the incoming Member notifies the Speaker of the Legislative Assembly, within three months of the declaration of the poll, of his/her intention not to continue with the existing staffing arrangements, or
  - (ii) the officer continues to work for the incoming Member and,
    - (1) after the expiration of two months and before the expiration of the third month from the date of the declaration of the poll, and
    - (2) to that date the member has not given to the officer/s a clear indication regarding an offer to continue employment, and
    - (3) the officer identifies that they can no longer continue with the existing arrangements, and that they notify the Speaker of the Legislative Assembly of this, they shall be entitled to separation payments as provided hereunder in subclause (b), however,
  - (iii) Should an offer of employment be made and the Electorate Officer declines to accept the offer on grounds other than those identified above and this voluntary withdrawal of service is either before the third month or after the third month, it shall be treated as voluntary resignation and so not attract an entitlement to payment of the separation provisions.
- (b) Separation payments
- (i) Officers whose employment is terminated under subclause (a) of this clause will be entitled to termination payments and non-monetary support programs as agreed between the parties in the Electorate Officers Entitlements on Termination of Employment Agreement and the guidelines and policies of the Parliament of New South Wales.<sup>333</sup>

7.20 The Legislative Council *Members' Guide* states that certain entitlements and assistance may be provided to secretary/research assistants in cases where the member who they work for ceases to be a member:

Where a member ceases to be a member, Secretary/Research Assistants may be entitled to separation from service payments, job search leave and retraining assistance under the Department's *Separation from Service Policy*, dated February 2003.<sup>334</sup>

7.21 The Department of the Legislative Assembly provided the Committee with a copy of the current Electorate Officers' Entitlements on Termination of Employment Agreement, made between the Speaker and the Public Service Association of NSW. The Agreement provides for six weeks pay in lieu of notice to all electorate officers on termination of employment, in addition to severance pay, reimbursement of expenses for training and career transition job assistance and job search leave, which are calculated based on years of continuous service. The job assistance enables former employees to gain financial assistance with finding other employment or gaining additional skills and knowledge. Example of the types of assistance that may be reimbursed include assessment of existing skills and aptitudes; programs to upgrade skills through training and education; stress counselling; and resume preparation and interview skills. Job search leave provides former employees who are actively

<sup>333</sup> See New South Wales Industrial Relations Commission, *Industrial Gazette*, <<http://www.lawlink.nsw.gov.au/irc/ircgazette.nsf/webviewdate/C5895?OpenDocument>> accessed 20 July 2009.

<sup>334</sup> Legislative Council, *Submission 29*, Attachment 1: Chapter 9 of the *Legislative Council Members' Guide*, p. 3.

seeking employment with their normal pay for a set period of time, depending on their years of continuous service.<sup>335</sup>

7.22 The Department of the Legislative Council's *Separation from Service Policy* states that termination of employment for staff employed by Legislative Council members, including the President, or temporary employees, may occur by:

- the giving of 2 weeks written notice by either the President, as the employer, or by the employee in the form of a resignation
- the term of office of the Member the person works for expires
- the Member the person works for is appointed to the Ministry.<sup>336</sup>

7.23 The policy provides that eligible staff may be entitled to job search leave and separation payment on termination of service, as outlined above in relation to the Department of the Legislative Assembly's Agreement.

## Inquiry into a whistleblower protection scheme for the Commonwealth public sector

7.24 The employment conditions of staff of members of the NSW Parliament are similar to those of members' staff in other jurisdictions. The Committee notes the comments of the House of Representatives Legal and Constitutional Affairs Committee in relation to the similar conditions of employment for staff of the Federal Parliament:

Employees under the Members of Parliament (Staff) Act 1984 can be dismissed more easily than staff employed under the Parliamentary Service Act 1999 or the Public Service Act 1999. Section 23(1) of the Members of Parliament (Staff) Act 1984 provides for termination of employment where a member of parliament dies or ceases to be a member. Section 23(2) provides a further general power of a member of parliament to terminate the employment of a staff member.<sup>337</sup>

7.25 The House of Representatives Committee recommended that the Commonwealth whistleblower protection scheme include members' staff. In recognition of the political environment within which parliamentary staff work and their employment arrangements, which may not give the option of internal disclosure, the Committee recommended that the Commonwealth Ombudsman be the authority authorised to receive public interest disclosures from the employees of members of Parliament, employed under the *Members of Parliament (Staff) Act 1984 (Cth)*.<sup>338</sup>

## Inquiry participants' views

### Employment conditions of members' staff

7.26 During the inquiry, the Clerk of the Legislative Assembly outlined how electorate officers' terms of employment, as provided for in the Award, may affect the protection available to staff working for a member who ceases to be a member of Parliament. The Clerk noted that the terms of employment in effect limit the employment

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<sup>335</sup> Legislative Assembly, *Electorate Officers' Entitlements on Termination of Employment Agreement*, paragraph 5 and pp. 4-5.

<sup>336</sup> Department of the Legislative Council, *Separation from Service Policy*, p. 4.

<sup>337</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 46-7.

<sup>338</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 53-4.

protection available to electorate officers, including those who have made a protected disclosure:

The policies relating to protected disclosures apply to electorate officers. However there is a limitation of the employment protection in the case where their member ceases to be a member of the Legislative Assembly.

Where a member ceases to be a member of the Legislative Assembly and a byelection or general election is held, the employment schedule of electorate officers and their award allows for the termination of their employment on the recommendation of the new member.

This means that an electorate officer making a protected disclosure against their member may have their employment contract terminated at any subsequent byelection or general election of a new member.

This is also the case if any member of the public or Parliamentary staff make a disclosure against a member that resulted in that member no longer remaining a member of the Legislative Assembly. It is a matter for the incoming member to exercise their right to choose their own staff.

The Legislative Assembly has no intention at this stage to change this employment arrangement for electorate staff.<sup>339</sup>

- 7.27 The NSW Parliament's ability to protect members' staff is also affected by the unique work environment in which members and their staff work. The Clerk of the Parliaments, Ms Lynn Lovelock, told the Committee that she counsels members to be cautious in their employment of staff due to the stressful environment in which they work. Ms Lovelock noted that members may be the subject of malicious complaints from their staff, and that politically active staff may also be working against a member. The Clerk stated that, in terms of protecting staff in cases where the relationship between a member and their staff has broken down, the Department of the Legislative Council uses mediation and staff trained in managing such situations.<sup>340</sup> However, she noted that it is difficult to protect staff from political reprisals:

... Can I see a way of protecting staff members from political reprisals within a party?

... I think there is very little that can be done for the subtle things that can happen to a staffer who acts against a member if the party chooses to not give them preselection or not give them work. It is very difficult to prove a link between an action in the Parliament and what happens within a party.<sup>341</sup>

- 7.28 The Clerk of the Legislative Assembly told the Committee that it is important for members to have confidence in their staff, noting that loyalty is an issue that is covered in the staff code of conduct. Mr Grove also advised the Committee that placements in other agencies are sometimes possible in cases where the relationship between a member and their staff has broken down. However, in such instances merit selection principles must apply:

... On other occasions we have attempted to place staff in outside agencies so that they are outside the environment of the very close electorate office which creates a difficulty in itself.

... We have been successful where people have actually transferred to outside agencies. The problem with outside agencies from our perspective is that the staff are

<sup>339</sup> Legislative Assembly, *Submission 39*, p. 3.

<sup>340</sup> Ms Lynn Lovelock, Clerk of the Parliaments, *Transcript of evidence*, 1 December 2008, p. 28.

<sup>341</sup> Ms Lovelock, *Transcript of evidence*, 1 December 2008, p. 28.

not appointed on merit and have no right to ... direct appointment into a public sector agency. They need to win it on the job. But because the agencies cooperate, we continue to pay the salary. The agencies cooperate, people skill themselves up in another area and they have been successful in winning jobs. All of this, of course, takes quite a deal of time.<sup>342</sup>

7.29 The Department of the Legislative Assembly submitted that secondments within the public sector could be used to protect electorate officers who make disclosures, with arrangements for secondments ideally being made by a coordinating agency rather than the Department itself:

... the Department of the Legislative Assembly would be interested in exploring ways to arrange secondments to other public sector agencies for whistleblower electorate officers, however, it is submitted to the Committee that this would be best achieved through a central coordinating agency rather than ad hoc approaches between agencies.<sup>343</sup>

### Departmental policies and procedures

7.30 The Departments of the Legislative Assembly and Legislative Council submitted the Parliament's joint Protected Disclosures Policy to the Committee in November 2008. The Policy states that the PDA 'provides protection to public officials who make a protected disclosure. All employees of the Parliament are 'public officials' under the Act'.<sup>344</sup> The Parliamentary Staff Code of Conduct also contains a section on whistleblowing, which states that disclosures will be handled in confidence, in accordance with the requirements of the Act.<sup>345</sup>

7.31 The Department of the Legislative Council noted that, although the Public Sector Employment and Management Act does not apply to staff under the control of the Presiding Officers of the Parliament, 'the Act notes that parliamentary officers comprise a public sector service, to which certain public service wide employment policies apply.'<sup>346</sup>

7.32 In terms of previous staff training, the two Departments conducted a joint workshop on ethical conduct in July 2005, which included a module on the Code of Conduct for Parliamentary Staff and the requirements and purpose of the code.<sup>347</sup> The Legislative Assembly advised that a training program covering the making of a protected disclosure in accordance with the Parliament's policy was delivered throughout 2006. Since 2006 the Members' Staff Code of Conduct and protected disclosures policy have been provided to new electorate officers at the time of their induction, prior to that staff were given the protected disclosures policy as part of their induction information package. In terms of personal support, the Legislative Assembly noted that staff have access to free counseling services.<sup>348</sup>

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<sup>342</sup> Mr Grove, *Transcript of evidence*, 1 December 2008, p. 45.

<sup>343</sup> Legislative Assembly, *Submission 34*, p. 3.

<sup>344</sup> 'Protected Disclosures NSW Parliament' August 1997, p. 1: see Legislative Assembly, *Submission 34*, Attachment 2 and Legislative Council, *Submission 29*, Attachment.

<sup>345</sup> Legislative Assembly, *Submission 34*, Attachment 2: Parliamentary Staff Code of Conduct, May 2005, p. 8. The Parliamentary Staff Code of Conduct was issued in May 2005; the Members' Staff Code of Conduct was issued in June 2006.

<sup>346</sup> Legislative Council, *Submission 29*, p. 2.

<sup>347</sup> Legislative Council, *Submission 29*, p. 7.

<sup>348</sup> Legislative Assembly, *Submission 34*, p. 2.



## Recent developments

- 7.33 In May 2009, the Department of the Legislative Council drew the Committee's attention to recent changes in the structure of the administration of the NSW Parliament. The Department noted that responsibility for administrative duties previously performed separately by the respective Houses, such as the administration of members' entitlements and human resources, had been combined into a new Department of Parliamentary Services (DPS). The Department of the Legislative Council advised that 'the development of policies on issues such as employment conditions, protected disclosures, grievances and inductions is now therefore the responsibility of the Executive Manager, DPS.'<sup>349</sup> Notwithstanding this structural change, the Department noted that the Presiding Officers of both Houses continue to be the employers of their members' staff. Protected disclosures made by parliamentary employees, including members' staff, therefore, continue to be made to the Clerk of the relevant House.<sup>350</sup>
- 7.34 The Committee wrote to the Executive Manager of DPS regarding the status of the NSW Parliament's protected disclosures policies and procedures and any recent changes that may have occurred, in light of the organisational changes outlined above. The Committee also sought advice on the processes that would be involved in any future review and amendment of the Parliament's protected disclosures policy.
- 7.35 The Executive Manager, Mr Brian Ward, advised the Committee that the Parliament's Protected Disclosures Policy was reviewed and updated on 23 April 2009. A copy of the policy was provided for the Committee's information. The only change to the policy was the addition of the Executive Manager, Department of Parliamentary Services, to the list of department heads to whom protected disclosures could be made. Mr Ward stated that DPS held information sessions in June 2009 on principles relevant to the Code of Conduct, Ethics and Protected Disclosures. Sixty-five members of staff, the majority of whom were electorate officers, attended the sessions.<sup>351</sup>
- 7.36 In relation to future reviews of the policy, Mr Ward informed the Committee that DPS would shortly commence a review of its policies and procedures in an effort to 'develop a policy governance framework and to establish refresh and review procedures for policies and procedures applicable to the Parliament.'<sup>352</sup> The review would include an assessment of the relevance and consistency of policies and procedures, including those relevant to the Protected Disclosures Policy. Mr Ward noted that it was intended to allocate resources to develop a training program covering a range of subjects relevant to the Parliament, including Ethics and Protected Disclosures, for staff including members' staff:
- ... resources will be allocated to the development of specific training across a broad range of subjects for the Parliament. It is envisaged that this training catalogue will expand and continue training pertaining to the Code of Conduct, Ethics and Protected Disclosures, particularly for Electorate Officers of Members of the Legislative Assembly, Secretaries/Research Assistants to Members of the Legislative Council and will also include training for the Organisational Development team to enable them to more effectively act as a point of reference for Protected Disclosure enquiries.<sup>353</sup>

<sup>349</sup> Legislative Council, *Submission 59*, p. 1.

<sup>350</sup> Legislative Council, *Submission 59*, p. 1.

<sup>351</sup> Correspondence from Mr Brian Ward, Executive Manager, DPS, dated 8 September 2009, p. 1.

<sup>352</sup> Correspondence from Mr Brian Ward, Executive Manager, DPS, dated 8 September 2009, p. 1.

<sup>353</sup> Correspondence from Mr Brian Ward, Executive Manager, DPS, dated 8 September 2009, p. 1.

## Volunteers and interns

7.37 It was apparent during the inquiry, that a volunteer or intern placed in a member's office or a parliamentary department may witness or be privy to information about conduct that may fall within the PDA and that such individuals are not 'employed' as such by the Parliament. The following section of the report examines the issue of disclosures by volunteers in the public sector generally and then looks at the situation in respect of volunteers and interns taking up opportunities in the parliamentary environment.

### Volunteers in the public sector

7.38 Some Australian jurisdictions, for example South Australia and the ACT, provide that any person is eligible for protection if they make a disclosure, which means that volunteers are covered by the relevant statute. None of the jurisdictions that limit the focus of their whistleblower legislation to public sector employees, as is the case in NSW, provide protection for public sector volunteers.

7.39 The *Whistling While They Work* (WWTW) research project noted that volunteers, such as those with roles in the State Emergency Service and Rural Fire Service, form a category of persons who may be subject to reprisals for making a disclosure. In the WWTW issues paper, Dr Brown observed that volunteers are currently only able to make disclosures if legislation allows for any person to make a disclosure, or if they fall within the jurisdiction of an investigating body.<sup>354</sup> In terms of whether volunteers may need protection, the issues paper noted that a relevant consideration is whether volunteers' concerns are already being addressed through other processes:

One issue is the fact that some of the concerns of volunteers may already be properly dealt with by elective processes (representative committees etc) rather than by formal investigation.<sup>355</sup>

7.40 The House of Representatives Committee inquiry into a whistleblower protection scheme for the Commonwealth public sector received evidence calling for eligibility for protection to include 'current and former volunteers with public sector bodies and current and former volunteers with organisations that work for public sector bodies on a contractual basis'.<sup>356</sup>

7.41 The House of Representatives Committee noted that the volunteer sector is growing, with ABS figures indicating that 34% of adult Australians are volunteers and that approximately 14% of volunteering takes place in the government sector.<sup>357</sup> While the Committee considered that volunteers were 'insiders' in the Australian public sector who should therefore be targeted by whistleblower legislation, it did not recommend that they be defined as 'public officials' for the purposes of the Public Interest Disclosures Bill, instead it recommended that:

... the Public Interest Disclosure Bill include a provision to enable a decision maker within the scheme to deem other persons to be a 'public official' for the purposes of the Act. Those who may be deemed a public official would have an 'insider's knowledge' of

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<sup>354</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 11.

<sup>355</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 11.

<sup>356</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 48.

<sup>357</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 48.

disclosable conduct under the legislation and could include current and former volunteers to an Australian Government public sector agency ...<sup>358</sup>

## Volunteers and interns working for the NSW Parliament

7.42 The Clerk of the Parliaments advised the Committee that members of the Legislative Council use volunteer staff, in addition to the staff whose employment in their offices is approved by the President. If a member of the Legislative Council made separate arrangements for individuals to work in their office, the Department of the Legislative Council has certain procedures in place to ensure that parliament-wide policies, e.g. occupational health and safety, are followed. Members are informed of their obligations when they make separate arrangements to place individuals in their offices – there is material in the Members' Handbook; a guideline for members that outlines their responsibilities as the person working with the staff member; and members are made aware of the staff code of conduct. Ms Lovelock told the Committee that:

If a person who was not employed by the Parliament but was employed by a member or was a volunteer here brought a matter to my attention I would treat it in the same way, even if it may not fall strictly within the limits of our policy ...<sup>359</sup>

7.43 The Legislative Council *Members' Guide* states that the Department has established a policy for non-staff persons, who are defined as 'a volunteer or other persons not employed by the Parliament, such as those employed directly by a member or the member's political party, who provide assistance in a member's office.'<sup>360</sup> In addition to volunteers organised by a political party, the *Members' Guide* notes that the Department supports members' participation in formal university internships, which form part of public policy or social science programs. The Parliamentary Education Section also coordinates internship programs for students who are studying specific courses at several universities.<sup>361</sup>

7.44 Volunteers and interns are not 'employed' by the Parliament, and therefore may not be covered by the definition of 'public official' under the PDA. However, the Parliament's Code of Conduct for members' staff states that the code applies to 'volunteers and people engaged in work experience programs with Members.'<sup>362</sup> The Code includes a section on whistleblowing, which informs staff that disclosures may be made to senior Parliamentary staff, in addition to the investigating authorities, in accordance with the PDA.

7.45 Although disclosures by volunteers and interns may not attract the protections available to public officials under the PDA, as members of the public, they may make a complaint to the ICAC or the NSW Ombudsman and would be eligible for the protections that are available under the ICAC and Ombudsman Acts. For example ss.93(1) and 94(1) of the ICAC Act provide:

<sup>358</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 55.

<sup>359</sup> Ms Lovelock, *Transcript of evidence*, 1 December 2008, p. 17.

<sup>360</sup> Legislative Council, *Submission 29*, Appendix: extract from Legislative Council Members' Guide, p. 107.

<sup>361</sup> Legislative Council, *Submission 29*, Appendix: extract from Legislative Council Members' Guide and <<http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/TertiaryEducationPrograms>> accessed 21 January 2009.

<sup>362</sup> Mr Grove, *Transcript of evidence*, 1 December 2008, p. 48.

93 (1) A person who uses, causes, inflicts or procures, or threatens to use, cause, inflict or procure, any violence, punishment, damage, loss or disadvantage to any person for or on account of:

- (a) his or her assisting the Commission, or
- (b) any evidence given by him or her before the Commission,

is guilty of an indictable offence. Maximum penalty: 200 penalty units or imprisonment for 5 years, or both. ...

94 (1) An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence. Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

### Inquiry participants' views

- 7.46 In its discussion paper, the Committee proposed that the PDA could be amended to clarify that, in addition to public officials, disclosures made by volunteers and interns working in the office of a member of Parliament, are eligible for protection.
- 7.47 Submissions received from Mr Ben Blackburn, the Department of Education and Training and the ICAC expressed support for the proposal.<sup>363</sup> Mr Blackburn commented that the proposal was a particularly important proposal, that highlighted failures in the current protection provisions of the PDA.
- 7.48 The Department of the Legislative Council submitted that volunteers and interns should receive the same protections under the PDA as paid employees, given that the position of such individuals may be more vulnerable than that of paid staff. Although volunteers are not employees of the Department, they are inducted as an employee would be and are advised that the members' staff code of conduct, which includes information on protected disclosures, applies to them.<sup>364</sup>
- 7.49 The Department of the Legislative Council also pointed out that the actions of a volunteer working in a member's office could result in situations where the volunteer is the subject of a protected disclosure, as the use of parliamentary resources by volunteers for purposes other than the member's parliamentary duties may come under the definition of corrupt conduct pursuant to the ICAC Act. The Department noted an ICAC recommendation that consideration be given to excluding persons other than members' staff from using electorate or parliamentary office services, facilities and equipment.<sup>365</sup> The Department further commented that policies should state the protections available for volunteers, interns and work experience students and induction programs should ensure that such individuals are adequately supported.<sup>366</sup>
- 7.50 However, other inquiry participants did not support the Discussion Paper proposal. The Department of the Legislative Assembly submitted that the proposal was unnecessary, noting that volunteers and interns working for a member of Parliament are eligible for protection under other NSW legislation.

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<sup>363</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Department of Education and Training, *Submission 44*, p. 1, ICAC, *Submission 47*, p. 1

<sup>364</sup> Legislative Council, *Submission 59*, pp. 1-2.

<sup>365</sup> ICAC, *Investigation into Parliamentary and Electorate Travel: Second Report, Analysis of administrative systems and recommendations for reform*, December 1998, p. 9, quoted in Department of the Legislative Council, *Submission 59*, Attachment 5, p. 1.

<sup>366</sup> Legislative Council, *Submission 59*, p. 2.

- 7.51 The Department of the Legislative Assembly indicated that there are administrative difficulties associated with keeping track of the presence of volunteers in members' electorate offices:
- With 95 offices through the state, the coming and going of volunteers through those offices is remote from Parliament House and the oversight of the Department. There is no requirement for members to advise the Department of the attendance in the office of volunteers. No access to the Parliament's computer network or other official facilities supported by the Department.<sup>367</sup>
- 7.52 As many other public sector agencies use volunteers and interns, the Department of the Legislative Assembly asserted that different protections may be required for this group generally, as the protections available under the PDA would not apply to their circumstances:
- The reasons for the special treatment of members of parliament in this proposal compared to other public sector organisations that have volunteer and intern programs would benefit from further clarification and explanation. There are many agencies that formally use volunteers in the delivery of their programs and are integrated into their operations and service delivery, for example volunteers in the Rural Fire service or in the health and community care sectors. As a group or class of people engaged with the public sector volunteers and interns perhaps need different protections to employees, for example protection against dismissal or disciplinary action as defined in the Act are irrelevant.<sup>368</sup>
- 7.53 The Department also observed that an increase in administration and management associated with the placement of interns and volunteers may result in members not participating in such programs. If the PDA were amended as proposed, the Department would advise members to consider a risk management approach when using volunteers and participating in intern programs, particularly if the member may potentially be liable for civil damages claims for detrimental action.<sup>369</sup>
- 7.54 An alternative approach identified by the Department would be to clarify a separate code of conduct for volunteers and interns, similar to the Department's code of conduct for work experience students, and to include information on reporting corruption or maladministration in an OH&S and security induction that the Department is planning to develop for electorate office staff.<sup>370</sup>

## Committee comment

### Statutory recognition of protection for parliamentary employees

- 7.55 The preceding discussion indicates that there is no *statutory basis* within the principal legislation on which the PDA is framed, for the NSW Ombudsman to exercise any jurisdiction in respect of maladministration on the part of members of Parliament. The same situation appears to apply in respect of allegations of serious and substantial waste against members.
- 7.56 Although disclosures of maladministration, and serious and substantial waste of public money, can be made to the Presiding Officers and the Auditor-General respectively, neither the Ombudsman Act nor the Public Finance and Audit Act appear to provide any underlying statutory basis for the protection of such

<sup>367</sup> Legislative Assembly, *Submission 58*, p. 1.

<sup>368</sup> Legislative Assembly, *Submission 58*, pp. 1-3.

<sup>369</sup> Legislative Assembly, *Submission 58*, pp. 2.

<sup>370</sup> Legislative Assembly, *Submission 58*, pp. 2-3.

disclosures about members of Parliament under the PDA. At present, there may be some doubt on two fronts:

- Whether parliamentary employees are ‘public officials’ for the purposes of the PDA; and
- Whether disclosures made to investigating authorities that may not fall within their jurisdiction, or that may not have been made in accordance with a strict interpretation of the requirements of the PDA, would be eligible for protection under the PDA.

7.57 The NSW Parliament’s protected disclosures policy states that:

Because of the special nature of the Parliament and its Members there are limitations on the powers of investigating authorities (particularly the NSW Ombudsman and Audit Office) to investigate the Parliament and its Members. ... *Please note that these limitations in no way reduce the protection provided to staff of the Parliament who make a protected disclosure* (emphasis added).<sup>371</sup>

7.58 The Ombudsman would not be able to investigate disclosures of maladministration about members of Parliament and would instead need to refer such disclosures to the ICAC or the NSW Parliament, depending on the nature of the disclosure. However, as discussed in chapter 8 clarification is needed as to the provisions of the PDA concerning disclosures made to investigating authorities, particularly those disclosures that do not strictly conform to the provisions of the PDA. It is relevant to note, as recounted in chapter 8 of the report, that there is no clear consensus among the members of the Steering Committee on some of these matters of interpretation and the relevant provisions have not been considered by the courts.

7.59 The application of the PDA to parliamentary employees appears to rely upon the definition of ‘public official’ contained in s.4 of the Act.<sup>372</sup> (The Committee notes that there is a need for a consequential amendment to the definition, arising from the repeal of the *Public Sector Management Act 1988*.) The submission received by the Committee from the NSW Legislative Council notes that ‘there is some ambiguity’ in relation to the interpretation of the definition of public official in the PDA, as s.4 of the *Public Sector Employment and Management Act 2002* (PSEM Act) does not apply ‘to any position of officer of either House of Parliament or any position under the separate control of the President or Speaker, or under their joint control’.<sup>373</sup>

7.60 Consequently, the application of the PDA to parliamentary employees appears to turn on the section of the definition of ‘public official’ in the PDA that refers to ‘any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority.’

7.61 This part of the PDA definition may be interpreted to include parliamentary employees on the basis that the ICAC may investigate corrupt conduct by a public official, which is defined under s.3 of the ICAC Act to mean ‘an individual having

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<sup>371</sup> Correspondence from Mr Brian Ward, Executive Manager, DPS, dated 3 September 2009; policy attachment.

<sup>372</sup> ‘**public official** means a person employed under the *Public Sector Management Act 1988*, an employee of a State owned corporation, a subsidiary of a State owned corporation or a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority, and (without limitation and to avoid doubt), includes an individual in the service of the Crown or of a public authority, a member of the Police Service, a PIC officer or a PICI officer.’

<sup>373</sup> Legislative Council, *Submission 29*, p. 2.

public official functions or acting in a public official capacity' including 'a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both'. On this reading, the crucial point regarding the definition of 'public official' in the PDA is that the conduct and activities of parliamentary employees may be investigated by *at least one* of the investigating authorities (that is, the ICAC).

- 7.62 Nevertheless, the issues raised in the inquiry suggest that it would be desirable to clarify the application of the PDA to parliamentary employees and to put this issue beyond doubt.
- 7.63 The Parliament's policy recognises the public interest in facilitating protected disclosures about corrupt conduct, maladministration and serious and substantial waste of public money. It would seem consistent with this policy approach to ensure that disclosures about members of Parliament in relation to maladministration and serious and substantial waste of public money, where made in accordance with the policies and procedures set down by the Parliament, are clearly eligible for protection under the PDA. This would accord with the much clearer situation in respect of protection for disclosures about corrupt conduct on the part of members of Parliament, made in accordance with the ICAC Act.

**RECOMMENDATION 14:** That the *Protected Disclosures Act 1994* be amended to put beyond doubt that a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both, be included in the definition of 'public official' under the Act.

**RECOMMENDATION 15:** That the *Protected Disclosures Act 1994* be amended to put beyond doubt that disclosures about a member of Parliament:

- (a) concerning maladministration, made to the NSW Ombudsman, or to the Clerk of the Legislative Assembly, the Clerk of the Parliaments or the Executive Manager of the Department of Parliamentary Services, in accordance with the NSW Parliament's current policies and procedures; and
- (b) concerning serious and substantial waste of public money, made to the Auditor-General;

are eligible for protection under the Act.

### Support and protection for members' staff

- 7.64 The Committee notes that, notwithstanding the protected disclosures policy and practices adopted by the parliamentary departments for parliamentary employees, the situation of members' staff who make protected disclosures against members is in many ways unique in the public sector, due to the terms of the Award under which these staff are employed.<sup>374</sup>
- 7.65 The Committee encourages the NSW Parliament to further refine its policies and practices in relation to staff who are employed to work for members of Parliament, so

<sup>374</sup> The Crown Employees (Parliamentary Electorate Officers) Award: see Legislative Assembly, *Submission 34a*, for the relevant terms of the Award.

as to ensure that such staff are not discouraged from making protected disclosures as a consequence of their unusual employment situation.

7.66 The Committee notes that, according to the Department of the Legislative Assembly's *2007-2008 Annual Report*, the Department is reviewing its induction program for electorate officers:

... the Legislative Assembly has reviewed the induction training given to electorate officers on their code of conduct, the protected disclosures legislation and internal reporting.

The Legislative Assembly remains committed to further reviewing our practices and support to electorate officers in relation to protected disclosures and internal reporting, their rights and who to contact for assistance and support.<sup>375</sup>

7.67 The Clerk of the Legislative Assembly acknowledged that there were avenues in the public sector for providing individuals who are displaced from their employment with other employment opportunities. However, the fact that individuals who work with members of the Legislative Council and the Legislative Assembly are not required to be employed on the basis of merit, limits the capacity for such individuals to be included in any public sector wide scheme for displaced persons. Consequently, the administration of both Houses has recourse only to internal transfer or redeployments within other electorate offices or members' offices, where merit selection is not a requirement.

7.68 The Committee, therefore, focussed on initiatives that the Departments of the Legislative Council and Legislative Assembly take to support individuals where their employment is terminated on the cessation of the term of the member in whose office they work. Support initiatives include pay in lieu of notice to electorate officers on termination of employment, as well as severance pay, reimbursement of certain expenses for training and career transition job assistance, and paid job search leave.

7.69 In the view of the Committee, such support is essential to ensure that individuals who cease their employment in a member's office, including in circumstances following their having made a protected disclosure, have sufficient avenues to obtain other employment. This is particularly relevant where such individuals have not previously experienced merit selection and recruitment procedures and they seek employment in the public sector.

7.70 It is apparent from the advice of the Clerks that the Parliament has developed support systems for members' staff whose services are terminated at the end of their member's term of office, including initiatives to assist the members' staff in finding new employment. The Committee would recommend that the Parliament consider amending its Protected Disclosures policy to make explicit that the post-employment assistance and entitlements available to members' staff should not be varied or reduced because the making of a protected disclosure formed part of the circumstances leading to the termination of their employment.

## Avenues for making disclosures

7.71 The Committee also notes that the House of Representatives Committee, in conducting an inquiry into a federal whistleblower scheme, recommended that the

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<sup>375</sup> Legislative Assembly, *Annual Report 2007-2008*, p. 43, <[http://www.parliament.nsw.gov.au/prod/la/lacorporate.nsf/0/236095A1580032A1CA25752100071143/\\$File/LA+Annual+Report+20072008.pdf](http://www.parliament.nsw.gov.au/prod/la/lacorporate.nsf/0/236095A1580032A1CA25752100071143/$File/LA+Annual+Report+20072008.pdf)>, accessed 25 September 2009



Commonwealth Ombudsman be the authorised authority to receive disclosures made by members' staff, as a way of overcoming any reluctance such staff may feel in making disclosures internally, due to their particular employment circumstances. It is not clear to the Committee on the ICAC whether the recommendation would operate to exclude the possibility of staff making disclosures internally. Nevertheless, in respect of the NSW protected disclosures scheme, a similar amendment does not appear necessary as the PDA already provides that members' staff may make disclosures externally to an investigating authority such as the ICAC, in addition to making disclosures via internal reporting channels.

- 7.72 Also, the Committee does not wish to restrict members' staff to only using external avenues for protected disclosures. It is clear from the WWTW research and the evidence of the Parliamentary Departments that staff often prefer to make disclosures internally in the first instance. The WWTW research emphasised multiple reporting pathways, with clear internal and external reporting paths, as required elements of a whistleblowing program.<sup>376</sup>
- 7.73 Relevant initiatives have been undertaken by parliamentary departments in other jurisdictions. For instance, the Parliament of Victoria has recently produced a detailed document entitled, 'Procedures for making a disclosure about a member of Parliament' (April 2007), which contains information for parliamentary staff on the Victorian legislation, its application to the parliament and its members, key concepts under the legislation, the system of reporting within Parliament and key officers to contact, the roles and responsibilities of members of Parliament and staff, support and welfare systems, conduct the subject of a disclosure and disclosure requirements, the disclosure and investigation processes.<sup>377</sup>
- 7.74 In the Committee's view, clear and comprehensive disclosures policies and procedures that offer adequate support to staff are important in allaying the fears of members' staff about their future employment prospects. The Committee has sought to make recommendations that would target the comprehensiveness of the NSW Parliament's policies and procedures, with the aim of overcoming issues that may arise due to the unique parliamentary work environment and the employment conditions of members' staff. In addition, comprehensive training and awareness initiatives by the Parliamentary Departments for all parliamentary employees should contribute to greater certainty about identifying the types of matters staff should report and the avenues available for doing so.

### Codes of conduct for parliamentary and members' staff

- 7.75 The Department of the Legislative Council noted that parliamentary staff are not covered by the Public Sector Employment and Management Act. Despite this, it is clear to the Committee that the Parliamentary Departments as far as possible seek to observe general public sector standards, including those in relation to protected disclosures. The Parliament's protected disclosures policy states that staff are eligible for protection under the PDA and provides information on how staff may make a disclosure. In the previous chapter, the Committee recommended that the PDA be amended to provide that detrimental action is a disciplinary matter for public officials.

<sup>376</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 7, <<http://www.griffith.edu.au/centre/srsc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 19 October 2009.

<sup>377</sup> Parliament of Victoria, *Whistleblowers Protection Act 2001 - Procedures for making a disclosure about a Member of Parliament*, April 2007, pp. 10-1 at <<http://www.parliament.vic.gov.au/whistleblower.htm>>

In the Committee's view, it is important that this measure should extend to all public sector employees, including those working for the NSW Parliament and its members. Therefore, the Committee recommends that the Parliamentary Departments consider revising their Protected Disclosures policy and Codes of Conduct for parliamentary employees, including members' staff, to state that detrimental action is a disciplinary matter, as well as a criminal offence (already provided for in the PDA).

## Code of conduct for members of Parliament

- 7.76 For members of Parliament, disciplinary matters are governed by the *Members' Code of Conduct*. The Code is agreed to and passed by a resolution of both Houses and covers issues such as conflicts of interest, secondary employment and bribery. It is adopted at the commencement of each parliamentary term. The resolution adopting the Code for the current parliament was passed by the Legislative Assembly on 8 May 2007 and was amended in the Assembly the following month on 20 June.
- 7.77 The amendments made to the Code in May 2007, included new obligations on members regarding the disclosure of secondary employment at the start of parliamentary debate.<sup>378</sup> The amendments made to the Code in June 2007 related to clause 2, which concerns bribery, and involved extending the prohibition to include the receipt of benefits in kind, such as goods or services, in return for a member taking action in Parliament. They also clarified the circumstances in which action taken by a member is prohibited, where the action is in return for private benefits being conferred on a person who has a close association with the member, e.g. family members. The prohibition against bribery involving receipt of private benefits by members is not to affect legitimate political activities.<sup>379</sup> The Legislative Council adopted the amended Code on 21 June 2007.<sup>380</sup>
- 7.78 The ICAC Act provides for regular reviews of the Code by the designated committees, at least once every four years. The Committee notes that while detrimental action is not dealt with by the Code, members of Parliament would be subject to the current detrimental action offence provision found at s.20 of the PDA, as well as other reprisal related offences under legislation relating to the investigating authorities, such as ss.93 and 94 of the ICAC Act. The question of whether there should be any amendments to the Code of Conduct for members of Parliament in light of any amendments to the PDA arising from this report is a matter for both Houses and their respective privileges committees to consider.

## Reporting on disclosures

- 7.79 In the previous chapter, the Committee recommended that agencies be required to report on protected disclosures in their annual reports. The Committee heard that although it is not bound by the same requirements as the rest of the public sector, the NSW Parliament seeks to observe public sector standards in relation to protected disclosures. The Committee considers that reporting on disclosures would ensure transparency and clarity around the Parliament's protected disclosures policies, in

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<sup>378</sup> This included details of clients who have benefited from the member's services. The amendment followed reforms to disclosure obligations set out in the Constitution (Disclosure by Members) Amendment Regulation 2007, which imposed new obligations on members to disclose details of their secondary employment in the Pecuniary Interests Register.

<sup>379</sup> Legislative Assembly Hansard, Ombudsman Bill, 20 June 2007.

<sup>380</sup> Legislative Assembly, Votes and Proceedings, 22 June 2007, pp. 175-8; Legislative Council Hansard, 21 June 2007, p. 1497.

addition to providing information to the public on disclosures received and investigated by the Departments of the Legislative Assembly, Legislative Council and Department of Parliamentary Services. In the Committee's view, this measure of transparency and accountability is particularly relevant given the unique employment conditions of members' staff.

- 7.80 One model for such reporting is provided by the Parliament of Victoria, which has implemented reporting requirements for the Presiding Officers when submitting the annual reports of their respective parliamentary departments. The requirements specify that:

#### 8. Collating and publishing statistics

The Presiding Officers will ensure a secure register is established to keep account of the status of whistleblower disclosures. This information will be published in the relevant annual report of the Department of the Legislative Assembly and the Department of the Legislative Council. The register will be confidential and will not record any information that may identify the whistleblower.

The register will contain the following information:

- The number and types of disclosures made to a Presiding Officer during the year;
- The number and types of disclosures referred by the Presiding Officer to the Ombudsman for determination;
- Any recommendations made by the Ombudsman that relate to the Parliament of Victoria or its Members;

The number and types of disclosed matters that were substantiated upon investigation and the action taken on completion of the investigation.<sup>381</sup>

- 7.81 The Committee is recommending that the administrative departments of the NSW Parliament consider providing information on protected disclosures in their respective annual reports, including the number of disclosures received and their outcomes, and relevant policies and procedures.<sup>382</sup> In undertaking such reporting, the Committee would suggest that the departments of the NSW Parliament examine reporting by parliaments in other jurisdictions, particularly that undertaken by the Parliament of Victoria.<sup>383</sup>

**RECOMMENDATION 16:** That the Parliament of New South Wales consider updating its Protected Disclosures policy, Parliamentary Staff Code of Conduct and Code of Conduct for Members' Staff to include a statement that detrimental action is a disciplinary matter for staff, as well as a criminal offence under section 20 of the *Protected Disclosures Act 1994*.

**RECOMMENDATION 17:** That the Parliament of New South Wales consider amending its Protected Disclosures policy to make explicit that post-employment assistance and

<sup>381</sup> Parliament of Victoria, *Whistleblowers Protection Act 2001 - Procedures for making a disclosure about a Member of Parliament*, April 2007, pp. 10-1 at <<http://www.parliament.vic.gov.au/whistleblower.htm>>

<sup>382</sup> The provision of annual reports by the departments of the NSW Parliament is itself a voluntary exercise.

<sup>383</sup> See Department of the Legislative Assembly, *Annual Report 2008-2009*, Appendix 9, p. 66 at <<http://www.parliament.vic.gov.au/assembly/downloads/Annual%20Report%202008-2009.pdf>>; and Department of the Legislative Council, *Annual Report 2008-2009*, p. 37 at <<http://www.parliament.vic.gov.au/council/download/Annual%20Reports/Annual%20Report%202008-09.pdf>>

entitlements available to members' staff should not be varied or reduced because the making of a protected disclosure formed part of the circumstances which led to the termination of their employment.

**RECOMMENDATION 18:** That the Departments of the Legislative Assembly, Legislative Council and Parliamentary Services, consider providing, as far as practicable, the following information on protected disclosures in their annual reports:

- (a) the number of disclosures made in the past 12 months
- (b) outcomes
- (c) policies and procedures
- (d) year-on-year comparisons
- (e) organisational impact of investigations of disclosures.

**FINDING 1:**

- (a) That while the Parliament of New South Wales has protected disclosures policies and procedures in place, there may be scope for further improvements to these through:
  - Educational initiatives for parliamentary employees and, as far as is practicable, other individuals located within the offices of members of Parliament.
  - A comprehensive review of existing policies, procedures and codes of conduct relevant to the making and handling of protected disclosures.
  - A review of induction programs to ensure such programs provide adequate information about protected disclosures policies, internal reporting systems and support mechanisms for individuals wishing to make disclosures.
- (b) Further, that the administrative structures of the Parliament of New South Wales have changed significantly since the commencement of the inquiry and that the Department of Parliamentary Services has commenced a number of initiatives relating to the above measures.

The Committee encourages DPS's initiatives in this regard and draws the attention of the Parliament of New South Wales to the best practice models currently available through the NSW Ombudsman's Office and the national *Whistling While They Work* research project, and initiatives in other Parliaments.

## Volunteers and interns working at the NSW Parliament

- 7.82 The administrative structure of the Parliament changed significantly during the course of the Committee's inquiry, with the creation of a Department of Parliamentary Services (DPS). Consequently, policies concerning protected disclosures as generated by Human Resources would need to be approved by both Clerks and the Executive Manager of DPS. The Executive Manager of DPS advised the Committee that DPS will soon undertake a review of the Parliament's policies and procedures, including its Protected Disclosures Policy. In the Committee's view, all of the parliamentary administration's policies in relation to protected disclosures should be consistent and comprehensive.
- 7.83 The Committee notes that, although its staff are not technically covered by the PSEM Act, the Parliament observes public sector standards. The Committee further notes that volunteers and interns working in the rest of the public sector are not eligible for

protection under the PDA. The Committee did not receive evidence relating to the eligibility of other public sector volunteers for protection sufficient to recommend an amendment that would apply only to those volunteers and interns working in the Parliament, while possibly overlooking the needs of other public sector volunteers. Furthermore, volunteers and interns have other legislative protections available to them, through the ICAC and Ombudsman Acts.

- 7.84 The Committee acknowledges that the practicalities of extending eligibility to volunteers and interns would seem to be difficult, with the Department of the Legislative Assembly indicating that volunteers and interns working in the 93 members' electorate offices are remote from the Department's oversight. However, there is nothing that should prevent both Houses from ensuring all individuals in a working relationship with a member are advised of the PDA and any protections available to them under other legislation.
- 7.85 The Department indicated that it could include information on reporting maladministration and corrupt conduct in its induction programs and that a separate code of conduct for volunteers and interns could be developed, similar to that already in place for work experience students. The Committee strongly supports any such initiatives. The Committee notes that the information supplied by other public sector agencies in relation to their policies and relevant codes was comprehensive. The parliamentary administration may wish to seek the assistance of the NSW Ombudsman's Office in this regard.
- 7.86 The parliamentary administration has indicated that there are ways that it could improve the support provided to individuals working as volunteers and interns in members' offices.

**RECOMMENDATION 19:** That the Parliament of New South Wales review its current policies, procedures and codes of conduct for volunteers and interns relating to protected disclosures, including reviewing induction programs to ensure they provide adequate information and support on protected disclosures.

## Public sector volunteers

- 7.87 The Committee has noted that it did not receive sufficient evidence to enable it to fully consider extending eligibility for protection under the PDA to public sector volunteers generally. For example, the Committee did not hear from agencies on relevant factors, such as the number of volunteers working in various areas of the public sector and whether volunteers frequently seek to make disclosures that may otherwise be covered by the PDA. In the Committee's view, the PDA should serve to provide all public sector employees with eligibility for protection if they wish to disclose misconduct. The definition of 'public official' in the PDA should be reviewed to ensure that it reflects changes and trends in public sector employment, for example the increasing tendency to use contractors. The Committee has recommended amendments to the definition to reflect such changes in chapter 8 of this report. Although the Committee did not receive enough evidence about the situation of public sector volunteers, it acknowledges that they may be in a position to observe misconduct or corrupt conduct. The Committee therefore encourages the NSW Ombudsman and the Protected Disclosures Steering Committee to consider whether public sector volunteers should be eligible for protection under the PDA, as

an area that may require future legislative reform. The Ombudsman may form a view on the issue of volunteers, based on agency reporting on disclosures and on other aspects of his monitoring and oversight role.

## Chapter Eight - Simplifying the who, where and how of whistleblowing

8.1 In this chapter, the Committee examines ways of simplifying the provisions of the PDA in relation to where, how and to whom disclosures may be made in order to attract the protection of the PDA. In particular, the Committee looks at the current objective test, applicable to disclosures made to public authorities and investigating authorities, the types of staff that are eligible for protection, and the relevance of whistleblowers' motivations, in addition to disclosures made to the media.

### Objective and subjective tests for disclosures

#### Background

8.2 The PDA provides that in order to attract protection, a disclosure must satisfy two objective tests:

- For disclosures made to the investigating authorities and principal officers of public authorities: the information disclosed must show or tend to show the relevant type of conduct (for example, corrupt conduct).
- For disclosures made to a member of Parliament or a journalist: the disclosure must be substantially true.<sup>384</sup>

8.3 In terms of disclosures made to members of Parliament or journalists, s.19 of the PDA provides that the public official must have already made substantially the same disclosure to an investigating authority or public authority, and the authority to whom the disclosure was made must have: decided not to investigate; or not completed the investigation within six months of the original disclosure being made; or investigated the matter but not recommended any action to be taken in respect of the matter; or failed to notify the person making the disclosure whether the disclosure would be investigated within six months of the disclosure being made.

8.4 For disclosures to a member of Parliament or a journalist, s.19(4) of the PDA provides that public officials must also satisfy a subjective test: in making the disclosure they must have reasonable grounds for believing the disclosure is substantially true.

8.5 The NSW Ombudsman outlined to the Committee the way the objective test is used by an investigating authority to assess disclosures, and the circumstances that may precipitate the consideration of whether a disclosure meets the subjective test, by a court or tribunal:

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

On the other hand, where a disclosure is made to an MP or journalist, the Act imposes no obligations on the recipient. The only reason why an assessment would need to be

<sup>384</sup> PDA, ss.10(b), 11(1)(b), 12(1)(b), 12A(1)(b), 12B(1)(b), 12C(1)(c), 13(1) (3) (4A), 14(1), 19(5).

made as to whether such a disclosure is a disclosure to which the Act applies would be where a whistleblower wishes to rely on the protections of the Act in legal or disciplinary proceedings. In such circumstances, a subjective test may be appropriate for a court, tribunal, etc, through questioning of the complainant.<sup>385</sup>

### Inquiry participants' views

8.6 Some inquiry participants argued that the PDA should be amended to provide for a subjective test, rather than the current 'show or tend to show' objective test. The ICAC submitted that the PDA should encourage people to report information, and that restricting the protections 'to circumstances where there is more than a mere possibility that such conduct is occurring do not provide much encouragement to those with such information to come forward.'<sup>386</sup> The Commission noted that the Queensland *Whistleblowers Protection Act 1994* contains subjective test provisions, and expressed support for such a test:

Section 14(2) of the WPA provides that a person has information about the various types of misconduct that can constitute a public interest disclosure under that Act if "the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger" in question.

This makes it clear that, as long as a person has acted honestly and reasonably, they will be protected even if the information provided is not substantiated by investigation, or does not amount to the particular category of misconduct which they thought it did.<sup>387</sup>

8.7 The Liberal and National Parties also submitted in favour of amending the PDA to protect persons who have an 'honest belief on reasonable grounds' that their disclosure meets the specified grounds for protection,<sup>388</sup> while Whistleblowers Australia expressed support for requiring an 'honest and reasonable belief' in the truth of relevant allegations.<sup>389</sup>

8.8 On the other hand, the Deputy Ombudsman argued that the objective test is easier for watchdog agencies to apply, as it is difficult for agencies to determine if complainants have an honest and reasonable belief. Mr Wheeler told the Committee that his office would find it more practical to use the objective test:

... But I think basically the objective test of it 'shows or tends to show' is a far easier test to administer from our perspective as a watchdog body that has to assess it and say do we think it is or not, because how would we know if they have an honest and reasonable belief? That might be okay in a court setting down the track if they need to defend themselves under the Act, but from a watchdog body's perspective you get a disclosure in, you have to assess on its face is this likely to be a protected disclosure? You can do that on the basis of does it show or tend to show; you cannot do it on the basis that they have got an honest and reasonable belief. You would not have a clue who they are; you do not know what is in their mind. So, from a practical perspective if you had both, our decision should be made on the basis of it shows or tends to show.<sup>390</sup>

8.9 In response, the Deputy Commissioner of the ICAC told the Committee that a subjective test assessment of a disclosure would still involve an objective

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<sup>385</sup> NSW Ombudsman, *Submission 21*, pp. 3-4.

<sup>386</sup> ICAC, *Submission 22*, p. 3.

<sup>387</sup> ICAC, *Submission 22*, p. 3.

<sup>388</sup> NSW Liberal and National Parties, *Submission 3*, p. 2.

<sup>389</sup> Whistleblowers Australia, *Submission 4*, p. 5.

<sup>390</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 16.



assessment of the information. Ms Hamilton commented that it is not difficult to determine whether a complaint is reasonable:

I know Mr Wheeler thought that might make it harder to categorise, but it is not really because you mainly look at the objective part. The honest part might come in later down the track where it has to be determined whether this person was acting honestly. But if you just look at whether they have an objective belief, you can normally pick that up from the terms of their complaint. Does this person seem to have an objective belief that they have information about corrupt conduct? That has to be reasonable. So that is an objective test. If somebody thinks it is corrupt conduct for the mayor to wear a yellow tie into the Chamber, of course you can look at that and say, "He may honestly hold that belief but that is not reasonable; that is not an honest and reasonable belief". So you are mainly looking at the reasonable part. You are saying, "Could somebody reasonably believe this is corrupt conduct?" Yes, they could. This person seems to reasonably believe that so we will categorise it as a protected disclosure.<sup>391</sup>

8.10 Some inquiry participants expressed support for the Committee's discussion paper proposal to introduce a subjective test, in addition to the objective test currently provided for in the PDA.<sup>392</sup> However, some agencies expressed concerns in regard to the difficulty of applying the tests. The Auditor-General submitted that the assessment by investigating and public authorities of whether or not to investigate complaints should continue to be on the basis of 'show or tends to show'.<sup>393</sup>

8.11 The NSW Ombudsman responded to the proposal by noting that it can be difficult to assess a whistleblower's state of mind at the time they made the disclosure. The NSW Ombudsman submitted that it may be possible to retain both tests by distinguishing between the way the subjective and objective tests are applied:

One way around this difficulty, while still providing for both objective and subjective tests, may be to distinguish between when the tests apply. It would be appropriate to make a distinction between:

- (1) determining whether the obligations under the Act apply to the recipient of a disclosure, and
- (2) determining whether the protections of the Act apply to the maker of a disclosure.

In the first instance, the objective test of "show or tends to show" would be practical and appropriate.

In the second case, either or both of the objective and/or subjective tests could apply.<sup>394</sup>

8.12 The Department of Education and Training commented that:

- The proposal would lower the threshold that complaints must satisfy to attract protection.
- An 'honest belief on reasonable grounds' may mean that complaints in which insufficient evidence has been provided to warrant investigation may be eligible for protection, and that such complainants may therefore expect that their complaint will be investigated.
- If agencies are required to investigate complaints, based on the belief that the allegation may have happened, additional resources would have to be allocated to enable the agency to respond to complaints.

<sup>391</sup> Ms Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 18 August 2008, p. 24.

<sup>392</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Ministry of Transport, *Submission 62*, p. 1.

<sup>393</sup> The Audit Office of NSW, *Submission 42*, p. 1.

<sup>394</sup> NSW Ombudsman, *Submission 40*, p. 4.

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- The proposal would have to be closely linked to agency guidelines on frivolous and vexatious complaints, so that public officials understand they must not make false or frivolous allegations.<sup>395</sup>

8.13 While the ICAC supported the proposal in principle, the Commission noted that the wording of the proposal 'would require a public official to form a belief about whether or not the allegations are 'true', which in the Commission's view may not be immediately apparent.'<sup>396</sup> The Commission repeated its support for an amendment consistent with the subjective test in the *Whistleblowers Protection Act 1994* (QLD).<sup>397</sup>

8.14 The NSW Police Force advised that the proposal would not impact significantly on the police complaints system, as the provisions of the Police Act give wider protection to a range of allegations than the PDA. The test for protection for complaints under s.122 of the Police Act refers to complaints that 'allege' or 'indicate' certain types of conduct, without there being a requirement for the person making the complaint to have reasonable grounds for believing the complaint to be true, or for the complaint to 'show or tend to show' certain types of conduct.<sup>398</sup>

### Previous Committee on the ICAC review of the PDA

8.15 The 2006 review of the PDA conducted by the previous Committee recommended that the PDA be amended to extend protection to disclosures where a public official has an honest belief on reasonable grounds that the disclosure is true, noting that the amendment 'is not intended to replace the existing criteria but to provide an additional alternative protection to the purely objective test that is currently in place'.<sup>399</sup>

8.16 The previous Committee noted Mr Chris Hartcher's second reading speech on the Whistleblowers Protection Bill No 2, in which he stated that the test for protection is 'a purely objective one, namely, a disclosure by an individual must "show or tend to show" that there has been misconduct'.<sup>400</sup>

8.17 In making its recommendation, the previous Committee noted that the Legislation Committee's review of the Bill had recommended a subjective test of 'honest belief on reasonable grounds'. In addition, the previous Committee observed that several other jurisdictions, including Queensland, Victoria, South Australia, Tasmania, Western Australia and the ACT had provision for a subjective test.<sup>401</sup> The previous Committee expressed concern that under the objective test, 'even if the whistleblower has reasonable grounds for forming a view that corrupt conduct, maladministration, or serious [sic] and substantial waste has occurred or may have occurred, there is no protection if the disclosure turns out to be wrong'.<sup>402</sup>

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<sup>395</sup> Department of Education and Training, *Submission 44*, pp. 1-2.

<sup>396</sup> ICAC, *Submission 47*, p. 1

<sup>397</sup> ICAC, *Submission 47*, p. 1

*Whistleblower Protection Act 1994* (Qld), **14 What type of information can be disclosed?**

... (2) A person has information about conduct or danger specified in sections 15 to 20 if the person honestly believes on reasonable grounds that the person has information that tends to show the conduct or danger.

<sup>398</sup> NSW Police Force, *Submission 61*, pp. 4-5.

<sup>399</sup> Committee on the ICAC, *Review of the Protected Disclosures Act 1994*, November 2006, report 12/53, p. 27.

<sup>400</sup> Committee on the ICAC, November 2006, report 12/53, p. 26.

<sup>401</sup> Committee on the ICAC, November 2006, report 12/53, pp. 26-7.

<sup>402</sup> Committee on the ICAC, November 2006, report 12/53, p. 27.

- 8.18 The previous Committee concluded that an amendment was therefore warranted, as it would bring New South Wales into line with many other jurisdictions and would enable protection to be extended to officials who make disclosures with reasonable grounds for believing that a certain kind of conduct has or may have occurred, even if it turns out to be incorrect.<sup>403</sup>

### *Whistling While They Work* project

- 8.19 The first report of the *Whistling While They Work* (WWTW) project concluded that best practice whistleblower legislation would provide for disclosures to qualify for protection if they met either a subjective test (honest and reasonable belief) or an objective test (showing or tending to show certain conduct, irrespective of the person's belief).<sup>404</sup> The project recommended that the motivation or intention of the whistleblower should not be relevant. The Committee addresses the issue of motivation later in this chapter.

### Inquiry into a whistleblower protection scheme for the Commonwealth public sector

- 8.20 The Standing Committee on Legal and Constitutional Affairs report on a whistleblower protection scheme for the Commonwealth public sector concluded that an objective test, such as the New South Wales test which provides that a disclosure must 'show or tend to show' wrongdoing, is excessive and 'would discourage disclosures and should not form part of the scheme'.<sup>405</sup>
- 8.21 The Committee recommended that the primary requirement for protection be that 'a person making a disclosure has an honest and reasonable belief on the basis of the information available to them that the matter concerns disclosable conduct under the legislation'.<sup>406</sup>

### Committee comment

- 8.22 The object of the PDA is to encourage disclosures of information relating to certain types of conduct and provide for their investigation, in the public interest. The Committee notes that meeting the objective test may be difficult for some whistleblowers. The current test may therefore serve to discourage some disclosures of information that would be in the public interest.
- 8.23 There was general support for the Committee's proposal for a subjective test to be inserted into the PDA. However, agencies pointed out the potential difficulties with using both tests, noting that the subjective test would in effect prevail. The NSW Ombudsman submitted that both tests could be retained, if a distinction was drawn between how the tests were applied.
- 8.24 The Committee received evidence in favour of an amendment that would be consistent with the subjective test provisions of the Queensland *Whistleblowers Protection Act 1994*. The Committee notes that such an amendment would bring New South Wales into line with other jurisdictions. It would also be consistent with the

<sup>403</sup> Committee on the ICAC, November 2006, report 12/53, pp. 26-7.

<sup>404</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 283-4.

<sup>405</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 85.

<sup>406</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 85.

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recommendations of the House of Representatives Committee inquiry into a whistleblower protection scheme for the Commonwealth public sector. In the Committee's view, consistency across Australian jurisdictions is an important consideration.

- 8.25 The Committee is recommending that the PDA be amended to provide that, in order to be eligible for protection, disclosures must be made by a public official who has an honest belief on reasonable grounds that their disclosure tends to show corrupt conduct, maladministration, or serious and substantial waste.
- 8.26 The Committee is seeking to simplify the PDA and make it easier for whistleblowers disclosing wrongdoing to meet its criteria. The Committee's view is that the adoption of a subjective test for protected disclosures in the PDA would encourage disclosures and make it easier for New South Wales whistleblowers to meet the requirements of the PDA.

**RECOMMENDATION 20:** That the *Protected Disclosures Act 1994* be amended to provide that, in order to be eligible for protection, disclosures must be made by a public official who has an honest belief on reasonable grounds that the disclosure tends to show corrupt conduct, maladministration, or serious and substantial waste.

### Simplifying where disclosures may be made

- 8.27 The PDA provides that, in order to be protected, disclosures made under the PDA are to be made to the ICAC, the NSW Ombudsman's Office, the Auditor-General, the PIC, or the Director General of the Department of Local Government (DLG), in accordance with the provisions of the relevant investigation Act, or the Local Government Act.<sup>407</sup> Section 14 further provides that to attract protection, disclosures by public officials to the principal officer of, or officer constituting a public authority, must show or tend to show corrupt conduct, maladministration or serious and substantial waste of public money by the authority or its officers, or by another public authority or its officers.

### Inquiry participants' views

- 8.28 The Committee heard evidence indicating that the current provisions of the PDA in relation to where public officials must make disclosures are overly prescriptive and technical, and that there is some uncertainty about their interpretation.
- 8.29 The Audit Office noted that 'allegations of waste tend to be caused by maladministration or possible corrupt conduct'.<sup>408</sup> This observation illustrates the possible difficulties with determining which type of conduct a disclosure is concerning, and, therefore, which investigating authority it should be made to in order to attract protection. A disclosure may also involve allegations of more than one type of misconduct.
- 8.30 The ICAC indicated that it can be difficult for public officials to determine whether a matter constitutes maladministration, corrupt conduct or serious and substantial waste, and that there is uncertainty as to whether a public official is protected should

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<sup>407</sup> PDA, ss 10, 11, 12, 12A, 12B.

<sup>408</sup> Audit Office of NSW, *Submission 28*, p. 1.

they, in good faith, make a disclosure to the incorrect agency. The ICAC noted that members of the Protected Disclosures Act Implementation Steering Committee were not able to agree on how to interpret s.14 of the PDA, demonstrating that clarification of the provision is required:

In many cases, the line between serious maladministration and corrupt conduct may be quite fine, and it may be difficult ... for a complainant to know which agency to go to.

Arguably, section 14 of the PDA addresses this issue to some extent by providing generally that a public official may make a protected disclosure about corrupt conduct, maladministration or serious and substantial waste of money to the principal officer of a public authority if it relates to that public authority or another public authority.

However, there has been some difference of opinion even among the members of the Protected Disclosures Steering Committee ... about whether this section extends to protect, for example, people who complain to the ICAC about maladministration. Some take the view that, because section 10 of the PDA provides specifically that complaints to the ICAC must be about corrupt conduct to constitute a protected disclosure, the general provisions of section 14 of the Act do not apply to such a disclosure to the ICAC.

In the Commission's view, this needs to be clarified. ...<sup>409</sup>

- 8.31 The DLG also noted that it has received referred complaints from another investigating authority that it could not have treated as protected disclosures had they initially been made to the DLG:

In the 2007/08 year, the Department received five (5) complaints that were identified as protected disclosures. In the current financial year, to date, the Department has also received five (5) complaints that were identified as protected disclosures. All but one of these were referred by another investigating authority and related to matters that could form the subject of a protected disclosure to that investigating authority. Had the complaints been made directly to the Department of Local Government, given their subject matter, they could not have been treated as protected disclosures. ... only one of the protected disclosures referred to was made directly to the Department and related to the serious and substantial waste of local government money.<sup>410</sup>

- 8.32 To remedy the situation the DLG proposed that disclosures made to the Director General of DLG, which relate to maladministration, should be eligible for protection:

Given the Department's jurisdiction and powers ... and in the interests of supporting the Department's capacity to effectively exercise its functions in this regard, I believe it may be appropriate to extend the protections offered to persons making disclosures to me as Director General of the Department of Local Government under the Protected Disclosures Act to include matters that show or tend to show maladministration as defined under that Act.<sup>411</sup>

- 8.33 The DLG submitted that it would then work with the NSW Ombudsman to determine who would be the most appropriate body to deal with the disclosure.<sup>412</sup>

- 8.34 The ICAC proposed to the Committee an amendment consistent with the provisions at ss.25 and 26 of the *Whistleblowers Protection Act 1994* (QLD). The Commission commented that such an amendment would clarify that anyone with an honest and

<sup>409</sup> ICAC, *Submission 22*, pp. 3-4.

<sup>410</sup> Department of Local Government, *Submission 27*, p. 7.

<sup>411</sup> Department of Local Government, *Submission 27*, p. 8.

<sup>412</sup> Mr Ross Woodward, Director General, Department of Local Government, *Transcript of evidence*, 24 November 2008, p. 14.

reasonable belief that an agency was the appropriate agency to receive and investigate a particular disclosure would be eligible for protection:

The Queensland WPA deals with this issue by allowing public interest disclosures to be made to an appropriate agency or to any public sector entity, if it is made by somebody entitled to make a disclosure who "honestly believes it is an appropriate entity to receive the disclosure" because it is about the conduct of that agency or its officers or because it is about something that the agency has the power to investigate or remedy.

If similar provisions were inserted into the PDA, it would make it clear that people who complained to the ICAC under the honest belief that it was something that the ICAC had the power to investigate would be protected. In fact, anyone who made a complaint to any public sector entity about a matter under the honest belief that it was the appropriate agency to receive the information would be protected.<sup>413</sup>

- 8.35 Several inquiry participants expressed support for the Committee's discussion paper proposal to clarify that disclosures made to any appropriate public or investigating authority are eligible for protection.<sup>414</sup> However, the Department of Education and Training did not support the proposal, stating that it may result in administrative difficulties and confusion about the administration of disclosures. The Department noted that it was not clear how agencies could accept complaints on another agency's behalf, and that the investigating agency may not have sufficient awareness of the agency the complaint relates to, in order to determine if the complaint constituted corrupt conduct, or maladministration.<sup>415</sup>

### Committee comment

- 8.36 One of the objects of the PDA is to encourage and facilitate disclosures, by enhancing established procedures for making disclosures. The Committee has heard from participants who indicated that, in order to encourage disclosures, some clarification is required in terms of the provisions relevant to investigating authorities. Evidence received indicates that it may be difficult for public officials who wish to make a complaint to determine the type of conduct their complaint relates to - for example, whether it concerns corrupt conduct or maladministration. Moreover, there is uncertainty as to whether a public official would receive protection if they made a disclosure to what would be, under the provisions of the PDA, the incorrect agency. It would appear that public officials making a disclosure directly to the DLG with regard to maladministration would not receive protection. The Committee is concerned that the provisions of the Act may be unclear in this regard, and may not be effective in encouraging disclosures.
- 8.37 Section 4 of the PDA provides that a public authority is 'any public authority (including local government authority) whose conduct or activities may be investigated by an investigating agency'. A public official must therefore refer to the relevant provisions in each of the Acts of the investigating authorities, in order to determine which relevant investigating authority may investigate their disclosure. The Committee also heard evidence indicating that there are doubts about the interpretation of s.14 of the PDA, and its application to disclosures that are referred by an investigating authority to another investigating authority. In the Committee's view, if members of the Steering Committee are not able to agree on an interpretation of the provision, a public official may also find it difficult to understand the process for making a

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<sup>413</sup> ICAC, *Submission 22*, pp. 3-4.

<sup>414</sup> Mr Blackburn, *Submission 41*, p. 4, ICAC, *Submission 47*, p. 1, Ministry of Transport, *Submission 62*, p. 2.

<sup>415</sup> Department of Education and Training, *Submission 44*, p. 2.

disclosure. This lack of clarity could also have the effect of hindering a public official's attempt to make a disclosure.

- 8.38 Although the Department of Education and Training has expressed concerns in relation to the administrative burden associated with the proposed amendment, and a potential lack of knowledge of agencies' operations, the Committee is of the view that the administration of disclosures would not be significantly impacted by the amendment. Investigating authorities such as the ICAC and the NSW Ombudsman currently receive and investigate disclosures relating to a range of agencies, therefore the Committee is confident that their expertise and knowledge of agencies would not impede an investigation.
- 8.39 The Committee is recommending that a disclosure by a public official be eligible for protection under the PDA, if the public official makes the disclosure in the honest belief that it is being made to an appropriate public authority or investigating authority concerned with such conduct. The aim of the amendment is to address the possibility that disclosures may not meet the current narrow reporting requirements of the PDA, due to the ambiguities and technicalities that were raised by inquiry participants. Technicalities, such as whether or not the disclosure has been made to a specific agency, should not prevent a disclosure from attracting protection.
- 8.40 The Committee is seeking to simplify the provisions that set out how disclosures must be made to attract the protection of the PDA. The aim of the recommendation is to remove any doubts about the protected status of referred investigations and encourage disclosures by clarifying certain aspects of the process for whistleblowers.

**RECOMMENDATION 21:** That the *Protected Disclosures Act 1994* be amended to provide that a public official is eligible for protection, if the official makes a disclosure to a public authority or investigating authority, in the honest belief that it is an appropriate authority to receive a disclosure concerned with such conduct.

## Disclosures to third parties

### Inquiry participants' views

- 8.41 Disclosures in New South Wales must be made to a public or investigating authority in order to be eligible for protection under the PDA. The Committee heard evidence calling for the extension of the provisions that specify who disclosures must be made to, so as to include independent third party organisations.
- 8.42 STOPline, a Victorian company that specialises in the provision of whistleblower services to private and public sector clients, submitted that the 'scope of recipients of protected disclosures be expanded to include appropriate persons appointed for that purpose.'<sup>416</sup> STOPline argued that agencies should be free to employ a third party to receive and investigate whistleblower complaints, in order that the process be impartially and independently conducted. STOPline commented that third party receipt of disclosures would provide agencies with flexibility and also enable them to take greater responsibility for preventing wrongdoing:

As a provider of whistleblowing programs in the public sector addressing disclosures inside and outside legislative boundaries, STOPline believes that ultimate flexibility

<sup>416</sup> STOPline, *Submission 43*, p. 2.

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should be provided for agencies to best determine their needs. As such the ... stated concern that the current government policy requires agencies to take greater responsibilities for their corruption prevention activities would be satisfied.<sup>417</sup>

- 8.43 In evidence to the Committee, the Chairman of STOPline, Mr Bob Falconer, referred to Commonwealth legislation, such as s.1317AA the *Corporations Act 2001* (CTH), which provides protection for whistleblowers who make disclosures to authorised third parties. Mr Falconer commented on the expertise and experience that agencies could gain from employing a third party to receive disclosures, noting that smaller agencies with little experience in managing disclosures would particularly benefit from the involvement of a third party. Mr Falconer also pointed out that third parties would be open to review by agencies such as the NSW Ombudsman:

... These Acts ... are allowing for appointed third parties to provide the service. Whether it is us or somebody else, the benefits are the expertise, the knowledge and the understanding from doing this all the time and the background. That is beneficial, particularly for small organisations—although some of the big ones blow it as well because it is an extraneous appointment. It is not part of their real position description.

We think the capacity should be there. Some will say, "No, we can do that and we have all these great people", but others need to be able to engage somebody. Those same bodies can be held accountable by the Ombudsman. If the Ombudsman oversees your Act and your piece of legislation, then part of that oversight would be any public entity that engaged, if it was available, a third party provider because you would then be coming under the scope of the Ombudsman's purview.<sup>418</sup>

- 8.44 The Deputy Ombudsman, Mr Chris Wheeler, told the Committee that while third parties do not have a role in relation to protected disclosures in New South Wales, agencies are able to use the government Internal Audit Bureau to conduct investigations on their behalf. Mr Wheeler stated that his office advises smaller agencies with less experience in conducting investigations to use the services of the Bureau. Mr Wheeler drew a distinction between third party investigation of disclosures and third party receipt of disclosures, stating that while he did not object to third party organisations conducting investigations, employees should be encouraged to make disclosures internally. In Mr Wheeler's view, agencies should be responsible for receiving disclosures in the first instance, with subsequent investigations being conducted by external providers or the Audit Bureau, if the agency lacked capacity to conduct them:

... I think we should be doing everything to try to get people to make the disclosure internally to their own management, and to feel comfortable about doing so. If not, management can say, "We will pass that off to an external provider." In some ways you could argue that that is an abrogation of responsibilities. I think it depends on the jurisdiction and the culture of that public sector. In the New South Wales context my preference would be to sheet home responsibility to the agency to deal properly with disclosures, unless they are so small that they do not have any capacity to handle these things.<sup>419</sup>

- 8.45 The Internal Audit Bureau of NSW, which trades as IAB Services, is a government trading enterprise, established under the *Internal Audit Bureau Act 1992* (NSW). IAB provides audit, investigation and consultancy services to state, local and Commonwealth government bodies within New South Wales and the ACT. According

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<sup>417</sup> STOPline, *Submission 43*, pp. 2-3.

<sup>418</sup> Mr Bob Falconer, Chairman, STOPline, *Transcript of evidence*, 11 August 2009, p. 14.

<sup>419</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 23.



to the IAB website, the bureau offers outsourced misconduct and corruption investigations, with expert consultants acting as investigators, in investigations including grievances or complaints; alleged misconduct and disciplinary matters; protected disclosures; and referrals from watchdog and regulatory bodies.<sup>420</sup>

- 8.46 In addition to using the services of the IAB, Mr Wheeler noted that under certain legislation, such as the *Privacy and Personal Information Act 2001* (NSW), smaller agencies could be deemed to be part of another agency for compliance purposes. Mr Wheeler stated that this may address the difficulties that small agencies may have with managing and investigating protected disclosures:

... You might look at agencies that are so small they cannot build up any expertise either in the Act or in carrying out investigations. They might have some other avenue through which they can do this. There are slightly similar provisions, for example, under the Privacy Act where you can decide that a very small organisation is part of some other agency for the purposes of the Privacy Act, or part of some other agency for the purposes of the Freedom of Information Act. Maybe you could say that a certain agency is part of another agency for the purposes of the Protected Disclosures Act. That might address the problem. They certainly need help. It is totally unrealistic to expect them to be able to receive, assess and deal with a disclosure, and then deal with what will happen in their workplace.<sup>421</sup>

- 8.47 Mr Mick Symons, Executive Director of the Investigation Division at the ICAC supported the availability of third party services, on the basis that it allows for a level of anonymity and may reduce fear of internal reprisals. However, Mr Symons noted that the services provided by companies such as STOPline should be seen within the legislative context operating in other jurisdictions, which differ in certain respects to the New South Wales scheme:

... There are other companies. Deloitte's do it as well and other companies do it. In my view it is an excellent avenue. It takes away the fear factor within the agency, especially the smaller the agency, "I am going up to tell about a person who works with me." It provides some degree of anonymity and it is an excellent vehicle. I am not advocating that we go to that company, but as a concept, it is an excellent concept in the sense that it takes it outside the system but it is still within the system.

Having said that, Victoria and South Australia have a system—in particular South Australia and I believe Queensland—whereby anyone can be, to use that dreaded term, "a whistleblower". It is covered by the legislation. ... As I said, it is also done by Deloitte's and done by some of the other major companies, and it is a growth industry  
...<sup>422</sup>

### **Whistling While They Work project**

- 8.48 An issues paper produced for the WWTW project, assessing current whistleblower legislation in Australian jurisdictions, considered the role that third parties could play in receiving disclosures. The paper stated that enabling third party involvement could serve to encourage disclosures by ensuring confidentiality:

<sup>420</sup> IAB Services, *Investigation Services Flyer*,

<[http://www.iab.nsw.gov.au/images/stories/newsletters/investigation\\_services\\_flyer.pdf](http://www.iab.nsw.gov.au/images/stories/newsletters/investigation_services_flyer.pdf)>, p. 2, and *IAB Services Brochure*, <[http://www.iab.nsw.gov.au/images/stories/newsletters/iab\\_services\\_brochure\\_1208.pdf](http://www.iab.nsw.gov.au/images/stories/newsletters/iab_services_brochure_1208.pdf)>, p. 2, accessed 19 October 2009.

<sup>421</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 23.

<sup>422</sup> Mr Mick Symons, Executive Director, Investigation Division, ICAC, *Transcript of evidence*, 11 August 2009, p. 33.

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A gap across all jurisdictions is the inability of agencies to ‘contract out’ the receipt of disclosures to non-public sector third parties. If it is in the public interest for employees to be able to make disclosures confidentially, one of the most effective means of encouraging this is the use of an independent ‘hotline’ to whom employees can disclose detailed information with extra reassurance that their identity will be protected. While many agencies seek to provide this facility internally, others may prefer the option of an independent contractor.<sup>423</sup>

- 8.49 The first report of the project identified best practice legislation as providing for disclosures to be made to various internal and external recipients, including managers and agency CEOs, external watchdogs with relevant jurisdiction and contracted external hotlines that are dedicated to receiving disclosures.<sup>424</sup>
- 8.50 While stating that third party involvement may encourage disclosures, the WWTW research indicated that whistleblowers’ preference is to make disclosures internally to people they know within their organisation. The first report noted that the effectiveness of encouraging other avenues may therefore be limited:
- The research strongly suggests that employees will most often make disclosures to people they already know. Unless integrity-related staff are widely known and perceived as trustworthy and approachable in an organisation, attempts to encourage disclosures to be made directly to points other than the normal management chain—where this is desirable—could have limited effect.<sup>425</sup>
- 8.51 The research conducted as part of the project pointed to the importance of the initial response to a disclosure, and therefore the important role played by the recipient of the initial report. The project noted that employees should be informed of all internal and external reporting options, with the second report of the WWTW project concluding that multiple external reporting pathways, including the availability of external contracted hotlines, were an essential part of a whistleblowing program.<sup>426</sup>
- 8.52 The fear of internal reprisals was identified as a reason for staff making external reports, in addition to perceived objectivity and ‘the belief that nothing would get done’.<sup>427</sup> During the workshops and interviews conducted as part of the project it was noted that ‘reporting to external agencies does not mean necessarily that the recipient of the report is going to handle the investigation’, as integrity agencies may refer matters back to the relevant agency, unbeknownst to the whistleblower:
- If the person making the report did so because of lack of trust in the organisation, it comes as an unpleasant surprise to find that the report (and possibly the reporter’s identity) has been referred back to the organisation. (A representative of one integrity agency pointed out that its practice was to seek the agreement of the reporter before going back to the agency with the disclosure).<sup>428</sup>

### **Inquiry into a whistleblower protection scheme for the Commonwealth public sector**

- 8.53 Inquiry participants supported the availability of a broad range of reporting options, with an emphasis on internal disclosure as a first step. However, the Australian

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<sup>423</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 28.

<sup>424</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 284.

<sup>425</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 294.

<sup>426</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 304-5 and Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 7, <<http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 22 September 2009.

<sup>427</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 51.

<sup>428</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, pp. 53-4.

Institute of Private Investigators supported the use of private agencies, commenting that a focus on internal avenues may lead to the perception of a lack of independence and transparency.<sup>429</sup>

- 8.54 In assessing reporting pathways, the House of Representatives Committee focussed on the role played by external oversight bodies, rather than private companies. The Committee recommended that the proposed Commonwealth scheme provide for the Commonwealth Ombudsman, the Australian Public Service Commissioner and the Merit Protection Commissioner to receive, investigate and refer disclosures. In addition, authorities such as the Commissioner for Law Enforcement Integrity, the Inspector-General of the Department of Defence and the Privacy Commissioner would receive, investigate and refer disclosures relevant to their jurisdiction.<sup>430</sup>

### Committee comment

- 8.55 The Committee heard that external avenues for whistleblowers should be broadened to include private companies contracted by agencies to receive disclosures, via the provision of services such as hotlines. Some inquiry participants expressed support for third party receipt of disclosures, citing the fear of reprisals and the perception of confidentiality and independence from the agency concerned.
- 8.56 The Committee notes that the WWTW research indicated that most whistleblowers prefer to use internal avenues for reporting wrongdoing. While the project concluded that whistleblowers should be able to use both external and internal reporting paths, it was noted that some matters reported externally may be referred back to an agency for investigation by external watchdog agencies. Therefore, some of the fears and concerns that may motivate whistleblowers to use external services may, in some cases, be negated if the investigation itself was conducted internally. On the other hand, providing for external receipt of complaints may win the confidence of those public officials who wish to report wrongdoing, but are reluctant to make their disclosures internally.
- 8.57 The Committee considers further assessment is needed before it is possible to conclude that providing for third party receipt of disclosures would encourage reports of wrongdoing and improve the protection of whistleblowers.
- 8.58 Evidence received by the Committee suggested that third parties, such as STOPline, may act as conduits of confidential information, with the relevant agency still being responsible for conduct of the investigation of the disclosure. However, in the Committee's view, further clarity is needed in terms of the role that third parties may have in conducting investigations on behalf of agencies. The Committee did not receive sufficient evidence on this point. Factors that may be relevant to this issue are the costs involved for agencies, and the availability of the Internal Audit Bureau as a source of expert consultants. The Deputy Ombudsman told the Committee that he recommends small agencies with limited capacity to conduct investigations use the services of the IAB. The Committee also notes that the PDA provides for expert external investigation and receipt of disclosures through the avenue of complaints to investigating authorities including the ICAC and NSW Ombudsman.

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<sup>429</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 106-7.

<sup>430</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 136-7.

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- 8.59 While expressing support for third party involvement, the ICAC noted that the jurisdictions in which third parties have a role in receiving and investigating disclosures have a different statutory context in that disclosures from any person are eligible for protection. In the Committee's view, this contextual difference may necessitate the provision of broader avenues for the receipt and investigation of complaints.
- 8.60 The Committee is seeking to broaden the protections available under the PDA. External third party receipt and investigation of disclosures, and whether it improves protection, is an area that could be considered by the NSW Ombudsman, as part of its oversight role. The NSW Ombudsman could investigate the feasibility and need for broadening the external receipt of protected disclosures, based on its analysis of the statistics and information it gathers from agencies. The NSW Ombudsman's Office could work with the Steering Committee in assessing this matter as a proposal for legislative change.

## Broadening eligibility for protection

### Background

- 8.61 Section 8 of the PDA provides that disclosures must be made by public officials. The definition of a public official includes:
- persons employed under the PSEM Act;
  - employees of a State owned corporation or the subsidiary of a State owned corporation;
  - local government authorities;
  - other individuals having public official functions or acting in a public official capacity.<sup>431</sup>
- 8.62 The issue of whether area health service staff are included in the definition of 'public official' - raised during several inquiries into the PDA - has recently been resolved through an amendment to the PDA. The definition of public official in the PDA was amended by the *Independent Commission Against Corruption Amendment Act 2008*, in order to remove doubt about the application of the PDA to area health service staff. In the second reading speech to the Bill, the Hon John Aquilina MP stated that:
- Although the New South Wales Department of Health has been operating on the basis that the Act does apply [to area health service employees], the amendment will remove any doubt. Therefore, the bill will amend the definition of "public official" to clarify, for the avoidance of doubt, that any individual in the service of the Crown or of a public authority is a public official.<sup>432</sup>

### Inquiry participants' views

#### Members of the public

- 8.63 The Committee received evidence from participants to the inquiry who argued that eligibility for protection should be extended to certain groups not covered by the PDA. The ICAC submitted that the object of the PDA would be better served if protections available under the PDA were extended to include private citizens, thereby

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<sup>431</sup> See PDA, s.4. The definition includes individuals in the service of the Crown or of a public authority, a member of the Police Service, a PIC officer or a PICI officer.

<sup>432</sup> The Hon John Aquilina MP, Legislative Assembly Hansard, 28 November 2008, p. 12076.

encouraging and facilitating disclosures.<sup>433</sup> The Commission noted that an increasing number of complaints are likely to come from members of the public, given moves to privatise government services and contract out government work. ICAC relevantly advised that 31.6% of the complaints received by the Commission in 2006-2007 came from members of the public, while 9% of complaints were classed as protected disclosures.<sup>434</sup>

8.64 The NSW Ombudsman did not support the extension of eligibility for protection to members of the public, submitting that:

- Members of the public do not appear to be reluctant to complain about the conduct of public officials or authorities out of concern of reprisals.
- Offence provisions under s.20 would not assist members of the public who make disclosures about public officials or authorities, as there is no employment relationship that could be jeopardised.
- Confidentiality guidelines under s.22 would not be relevant, as the person's identity would be known or would need to be disclosed in order for the matter to progress.
- An extension of the Act would impact negatively on the work of the NSW Ombudsman and other complaint handling bodies covered by the legislation, as it would mean that the confidentiality guidelines would apply to many more complainants than is currently the case. In many of these cases the complainant would already be directly involved in the matter and confidentiality would not be a realistic option.
- While the protection against actions and defamation may be relevant to members of the public, such a protection is already available to anyone who makes a complaint to an investigating authority.<sup>435</sup>

8.65 Whistleblowers Australia submitted that in addition to current and former public sector employees, the following categories of people should also be eligible for protection:

... persons connected with the department or agency in any way. This extension would primarily include clients or users of the agency's services, or staff in other agencies which interact with the one where the offence is occurring. Such people can come across a wrongdoing, but if they expose it, they could suffer in their access to a particular service that the agency may be providing, or could lose the cooperation of that agency.<sup>436</sup>

8.66 Whistleblowers Australian further recommended that the Committee investigate the extension of protections to the private sector.<sup>437</sup>

## Contractors

8.67 Both the ICAC and the NSW Ombudsman submitted that, given the increasing trend for government services to be privatised or contracted out, the PDA should be extended to provide protection for disclosures made by people in contractual relationships with government.<sup>438</sup> The NSW Ombudsman noted that:

<sup>433</sup> ICAC, *Submission 22*, p. 2.

<sup>434</sup> ICAC, *Submission 22*, p. 2.

<sup>435</sup> NSW Ombudsman, *Submission 21*, pp. 4-5.

<sup>436</sup> Whistleblowers Australia, *Submission 4*, p. 3.

<sup>437</sup> Whistleblowers Australia, *Submission 4*, p. 9.

<sup>438</sup> NSW Ombudsman, *Submission 21*, p. 4 and ICAC, *Submission 22*, p. 2.

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The only persons who would benefit from the protection provisions in s.20, particularly if it were to be expanded to include contractual relationships with government, would be public officials and government contractors. To ensure that the objective of the Act can be properly achieved, there is therefore a strong argument to extend its coverage to include any person in an employment or contractual relationship with government.<sup>439</sup>

- 8.68 The Deputy Ombudsman told the Committee that the PDA may cover some contractors, depending on the nature of their employment and whether they are under the jurisdiction of an investigating authority:

**The Hon. TREVOR KHAN:** Section 8 of our Act deals with disclosures made by public officials. ... For example, if there is a StateRail circumstance where there is interaction between public and private sector entities and a disclosure is made by an employee of a subcontractor to StateRail, that plainly is not covered by the Act at present, is it?

**Mr WHEELER:** I would not think so. The key part of the definition is somebody performing a public official function and acting in a public official capacity who is within the jurisdiction of one of the watchdog bodies. I do not think that would cover an employee of a subcontractor. It probably would not cover a contractor, but it depends. If that contractor is acting as an agent of that organisation, they could well come within the jurisdiction. If it was somebody, for example, who was a temporary employee who was hired through a service to fill a job position while somebody was on maternity leave, for example, I think they would be under the Act, even though they are not an employee of the public sector. But if it was somebody who was doing track work on a contract with StateRail, I doubt if they would be.

**The Hon. TREVOR KHAN:** Yet plainly if the object of the Act is, in a sense, to facilitate the disclosure in the public interest of corrupt conduct, et cetera, it would seem appropriate that the definition extend to cover those private sector employees who interact with the public sector?

**Mr WHEELER:** I agree entirely.<sup>440</sup>

- 8.69 The Committee has noted the Commission's support for a broad extension to the protections available under the PDA to provide for the eligibility of private individuals. ICAC submitted that, if the PDA were not amended to include private individuals, the Committee should consider extending the application of the PDA to include contractors, possibly by adopting the definition of 'public sector contractor' provided for in Schedule 6 of the Queensland *Whistleblowers Protection Act 1994*: 'a person who contracts with a public sector entity to supply goods to the entity or services to the entity other than as an employee.'<sup>441</sup>

- 8.70 The NSW Council for Civil Liberties submitted that, as misconduct may be detected by any person who is in a relationship with or involved in public administration, eligibility for protection should be provided to 'independent contractors doing business with government (and to their employees), to consultants used by government agencies or by members of parliament ...'.<sup>442</sup> The Council stated that in situations where serious misconduct is occurring, factors such as the type of employee seeking to disclose it are irrelevant:

The distinctions between a government employee, independent contractor, or personal consultant are not relevant when a person is aware of serious misconduct.

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<sup>439</sup> NSW Ombudsman, *Submission 21*, p. 4.

<sup>440</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 22.

<sup>441</sup> ICAC, *Submission 22*, p. 2.

<sup>442</sup> NSW Council for Civil Liberties, *Submission 17*, pp. 3-4.

Whistleblowers of all kinds must be free to expose wrongdoing, and the Parliament should extend protection to all those in a position to do it.<sup>443</sup>

- 8.71 Although the Ministry of Transport supported an amendment to extend eligibility for protection to contractors, it suggested that certain limitations to protection be imposed, such as disclosures not being protected if they are made to avoid legitimate action, which is pursuant to the relevant contract.<sup>444</sup>
- 8.72 NSW Health supported an amendment, on the basis that 'the protection is limited to the time the contractor remains in a contractual relationship with the public authority.'<sup>445</sup>
- 8.73 The Committee also received correspondence from the Member for Sydney, Ms Clover Moore MP, indicating her support for the Committee's proposal to extend eligibility for protection to people in contractual relationships with public authorities, stating that 'Governments are increasingly contracting services and programs to other agencies, and employees and contractors should receive the same protections as public employees when they report corruption that is related to Government programs.'<sup>446</sup>

### Anonymous disclosures

- 8.74 The Committee heard evidence in support of extending eligibility for protection to disclosures made anonymously. The NSW Council for Civil Liberties recommended that the PDA be amended to provide for disclosures to be made anonymously.<sup>447</sup> The Council stated that whistleblowers should be able to disclose information without revealing their names, noting that:

This can be implemented through several schemes, which include facilitating the provision of information anonymously, exclusion of the whistleblower's identity as a subject of investigation, and imposing a duty on the recipient of the information not to reveal the whistleblower's identity.<sup>448</sup>

- 8.75 STOPline submitted that 64% of the whistleblowers it receives complaints from, through its provision of private whistleblower hotline services, seek anonymity as a protective measure:

... Their major concern is that if their identity is submitted to their employer then the likelihood of their confidentiality being maintained is very low. And of course most of them are aware of the negative ramifications of being identified as a workplace whistleblower; with or without protective legislation.<sup>449</sup>

- 8.76 STOPline expressed the view that anonymity does not give rise to frivolous and vexatious complaints, and recommended to the Committee that the PDA be amended to provide for anonymous disclosures.<sup>450</sup> In evidence to the Committee, the Chairman of STOPline, Mr Bob Falconer, said that anonymity is critical to maintaining confidentiality in relation to whistleblowers' identities:

... We have had people telling us things that were absolutely right. They said, "If my name goes forward on that to our head office it will be out on SMS and email all over

<sup>443</sup> NSW Council for Civil Liberties, *Submission 17*, p. 4.

<sup>444</sup> Ministry of Transport, *Submission 62*, p. 1.

<sup>445</sup> NSW Health, *Submission 57*, p. 2.

<sup>446</sup> Letter from Clover Moore MP, Member for Sydney, dated 5 August 2009, p. 1.

<sup>447</sup> NSW Council for Civil Liberties, *Submission 17*, p. 3.

<sup>448</sup> NSW Council for Civil Liberties, *Submission 17*, p. 4.

<sup>449</sup> Document tabled by Mr Bob Falconer, Chairman, STOPline, at public hearing held on 11 August 2009, p. 6

<sup>450</sup> STOPline, *Submission 43*, p. 6 and Mr Falconer, *Transcript of evidence*, 11 August 2009, pp. 8-9.

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the State by lunchtime." Anonymity is important. We sell our service to the entity and the entity buys our honest brokerage, our capabilities and our capacity to deal with it confidentially. Forty per cent of the 70 per cent of people who wished to remain anonymous to the entity that employed them told us their identity, with the proviso that it should not be passed on. Any entity to which we provide our service must agree that it will receive anonymous disclosures if that is the choice of the whistleblower.<sup>451</sup>

- 8.77 Mr Falconer told the Committee that, in his experience, anonymous whistleblowers are keenly interested in the outcome of their disclosure, and frequently seek information and feedback on how it has been managed:

Of course, at the end of the day ... out of all the anonymous whistleblowers we have that we give a code number to and their question, we have only had about half a dozen out of 1,300 that do not ring back for feedback. They want something done. It is not always what they wanted; it is not always as perhaps seriously dealt with as they might like, but the general feedback at the end of the day is that the whistleblower has made a report and seen or heard—and remembering they are inside, they work in the organisation so they generally see or hear about what has been done. Conversely, of course, if nothing is done sometimes we get that feedback as well.<sup>452</sup>

- 8.78 Some inquiry participants told the Committee that anonymity can be difficult in practical terms. The Deputy Ombudsman, Mr Chris Wheeler, noted that it is inevitable for people to speculate about the identity of a whistleblower. Mr Wheeler also pointed out that in many cases a whistleblower may have aired their concerns in the workplace, making it difficult to conceal their identity. He noted that, while certain investigative techniques can be used in an attempt to conceal the fact of a disclosure or keep a whistleblower's identity confidential, it can be difficult to achieve in practice:

... From our experience, if you admit you have a disclosure human nature being what it is, people will speculate about who made it. I would speculate - if somebody made a disclosure about me, or that concerned me, then I would wonder who made it. I may have no intention of taking detrimental action but I would speculate or wonder who had made it ...

The other thing we have found through long and painful experience is that people have generally raised the issue already in the workplace. As Mr Falconer said, it is so common that people have already raised it with a supervisor, or they have told their colleagues, or mentioned it down at the pub in one case, or they were seen going into the disclosure coordinator to make the disclosure in another case ...

One of the things we advocate is when a person comes forward with a disclosure that management should sit down with them and say: Who have you told? If we investigate this will it be obvious it was you? Are you so inextricably entwined in this thing that it has got to be you? ...

While confidentiality is a great thing if it is possible, generally it is not. Mr Falconer gave an example about sending in an internal audit and saying: Why not start over there? That can work really well in circumstances where you are trying not to admit you have any disclosure. Internal audit knows where to look ... In summary, from a practical perspective anonymity is a great concept but it really does not work in most cases.<sup>453</sup>

- 8.79 The Department of Education and Training also commented on the difficulties associated with anonymous disclosures. The Department submitted that:

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<sup>451</sup> Mr Falconer, *Transcript of evidence*, 11 August 2009, p. 3.

<sup>452</sup> Mr Falconer, *Transcript of evidence*, 11 August 2009, p. 5.

<sup>453</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 18.



- Anonymity 'often leads to difficulty in clarifying allegations and establishing detail of the alleged wrongdoing.'
- It is difficult to provide protection to an anonymous complainant. For example, in cases where the Department receives disclosures that are referred by agencies such as the ICAC, the identity of the complainant is generally withheld. In such cases, it would be of benefit to the Department if the identity of the complainant were disclosed, as it would 'ensure the protections of the legislation are able to be offered and applied, as well as enhancing investigation options by clarifying allegations and information.'
- Staff members who have made disclosures can mistakenly believe that their identity will not be released. Although the Department seeks to maintain confidentiality, the necessity of affording natural justice may mean that details of the allegation are provided to the subject of the complaint, which may enable them to identify the complainant. Complainants are consulted in such cases.
- Staff sometimes seek to withdraw complaints once they are informed that confidentiality is not guaranteed. In such circumstances, the Department consults with the complainant during the process, and will ultimately accept the disclosure anonymously. To avoid identifying the complainant, the Department interviews them as a witness.<sup>454</sup>

### *Whistling While They Work* project

8.80 An issues paper released in 2006 as part of the first stage of the WWTW project addressed the issue of widening the category of individuals who may make a protected disclosure. Dr AJ Brown noted that some jurisdictions have moved to provide protection to any person, regardless of whether they are public officials. Dr Brown identified the potential lack of connection between the complainant and the organisation being complained about as being problematic in terms of implementation, and noted that members of the public usually do not require statutory protection to report wrongdoing, as they are not subject to internal reprisals. Dr Brown states that whistleblower protection laws seek to focus on preventing this kind of internal detriment:

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.<sup>455</sup>

8.81 Dr Brown outlined the way in which opening statutory protection to members of the public can result in a lack of purpose and concerns about large numbers of complainants:

... the consequences of open standing appear to be more negative than positive, diluting the purpose and focus of the legislation, confusing its operation, and creating 'floodgate' fears about the potential number of complaints, which have in turn led to attempts to narrow the scope or implementation of the Act in other areas (e.g. by limiting the types of wrongdoing that may be reported). The reputation of the legislation may suffer because it can be used by complainants who are not actually whistleblowers, as an alternative avenue for pursuing non-whistleblowing grievances.<sup>456</sup>

<sup>454</sup> Department of Education and Training, *Submission 37*, pp. 3-4.

<sup>455</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 8.

<sup>456</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, pp. 8-9.

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8.82 The solution suggested by Dr Brown is to:

- Return to the original purpose of protection by limiting it to public officials, and others who may be classified as 'internal' to the public sector.
- Provide other complainants with general protection against reprisals - such as anti-reprisal provisions in the criminal code or legislation of investigative agencies – in jurisdictions where they are not currently provided.<sup>457</sup>

8.83 In terms of protection for contractors, Dr Brown noted that it is generally accepted that contractors and their employees should be eligible for protection, as they may be in a position to observe public sector wrongdoing and are vulnerable to reprisals in the same way that public officials are:

It is now widely accepted that private contractors, and their employees, should be able to blow the whistle on wrongdoing they discover as either (a) private providers of services to government or (b) providers of public services that have been 'contracted out' to private providers. In both cases, contractors and their employees can be considered 'internal' to the public sector whenever they are positioned to observe wrongdoing of public significance, and whenever they are at risk of reprisals if they report it (e.g. through suspension from a contract or being barred from future contracts). In effect they can easily be subject to the same legal and cultural obstacles to reporting that afflict officials.<sup>458</sup>

8.84 The WWTW project examined the issue of anonymous disclosures and made the following observations in relation to anonymity:

- Ideally public officials should be willing to make disclosures openly, however, there is a policy argument that anonymity should be provided, as the priority should be on exposing and remedying wrongdoing.
- Many hotline services that form an important part of public programs, such as Crimestoppers, allow for anonymity.
- It may not be possible to determine whether an anonymous complainant is in fact a whistleblower, or to protect them from reprisal. However, the information they provide may be sufficient to indicate whether they are a whistleblower and procedures such as codenames can be instituted to help manage reprisals.
- Many whistleblowers make initial contact on an anonymous basis, and reveal their identities when they are confident of discretion and confidentiality.<sup>459</sup>

8.85 The WWTW issues paper identified best practice as providing for anonymous disclosures, and noted that the relevant Victorian and Tasmanian provisions allowed for anonymity.<sup>460</sup> The Committee notes that s.11(3) of the *Public Interest Disclosure Act 2008* (NT) also provides that public interest disclosures may be made anonymously.

8.86 The first report of the WWTW project contained survey data results on whistleblowing outcomes, including reprisals. The data revealed that the extent to which confidentiality is maintained was not a significant risk factor in terms of whether whistleblowers experience reprisals, and that confidentiality may not serve to protect whistleblowers from reprisals:

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<sup>457</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 9.

<sup>458</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 10.

<sup>459</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, p. 11.

<sup>460</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, p. 11.

Contrary to expectations, the level of confidentiality maintained in respect of the whistleblowing incident also failed to emerge as a significant predictor of mistreatment. ... The fact that confidentiality did not emerge as a clear protective factor confirms that while it could be important, in most circumstances, it is either simply unachievable or plays no protective role.<sup>461</sup>

8.87 The second report of the project stated that, while raising complex issues for the management of disclosures, the offer of anonymity and undertaking of confidentiality are 'a worthy objective that every organisation should aim for'.<sup>462</sup> The checklist produced as part of the report envisaged agency whistleblower programs as dealing with anonymity in the following way:

- Clear advice that anonymous reports will be acted upon wherever possible, and as to how anonymous reports/approaches can be made
- Commitment to the confidentiality of whistleblowing reports to the maximum extent possible, with clear advice about possible limits of confidentiality.<sup>463</sup>

8.88 In analysing survey results on anonymity, the report noted that 68.1% of surveyed agencies stated they would accept anonymous reports of wrongdoing and 28% would not. The agencies that accepted anonymous reports estimated that 5.64% of reports received were anonymous.<sup>464</sup> It should be noted that some jurisdictions only provide protection to formal, written complaints while in others anonymous, oral reports are required to be accepted.

### NSW Ombudsman's *Protected Disclosures Guidelines*

8.89 The NSW Ombudsman's *Protected Disclosures Guidelines* recommend that agency internal reporting policies cover whether the agency will accept reports made anonymously. The guidelines note that, while the PDA is silent on anonymous disclosures, 'in a privacy related matter, the Administrative Decisions Tribunal accepted that it is possible for an anonymous disclosure to be a protected disclosure'.<sup>465</sup>

8.90 The NSW Ombudsman's Guidelines also note that this question is particularly relevant in cases where the author of a disclosure is later identified, for example, on the basis of the disclosure's contents. If such a disclosure is made by a public official, pursuant to the PDA, in the NSW Ombudsman's view, 'it can be strongly argued that it would be protected, particularly given the Act's emphasis on protecting disclosures'.<sup>466</sup>

8.91 The NSW Ombudsman states that his office accepts complaints made anonymously, as long as sufficient information is provided in the complaint, particularly in cases where the allegations relate to a significant public interest matter, or a serious abuse of power.<sup>467</sup>

<sup>461</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 149.

<sup>462</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 304-5 and Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 4, <<http://www.griffith.edu.au/centre/slr/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 21 October 2009.

<sup>463</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 7.

<sup>464</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 54.

<sup>465</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 62. The Ombudsman also notes that the PDA does not provide for a person to identify themselves in a disclosure: p. 85.

<sup>466</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 62.

<sup>467</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 62.

8.92 The Guidelines note that disclosures made anonymously raise the following issues for the parties involved:

- In terms of the recipient - primary focus should be on the disclosure's merits, that is, whether it meets the requirements of the PDA to show or tend to show the relevant type of conduct. The identity of the complainant should not be essential in order for an investigation of the disclosure to be conducted.
- In terms of the agency/person that is the subject of the disclosure - 'extension of protection to anonymous complaints should not cause unreasonable prejudice', as the confidentiality requirements of the PDA prevent the identity of the person from being disclosed even if they disclose their identity in the disclosure.
- In terms of the person making the disclosure - if confidentiality has been maintained, the requirement for protection remains, regardless of whether their disclosure was made anonymously or if they identified themselves.<sup>468</sup>

8.93 Finally, the NSW Ombudsman notes that people making anonymous disclosures 'should be able to claim the protection of the Act by either proving to the satisfaction of the recipient of their disclosure or the relevant court or tribunal that they are the author of the disclosure.'<sup>469</sup>

## Inquiry into a whistleblower protection scheme for the Commonwealth public sector

8.94 The House of Representatives Standing Committee on Legal and Constitutional Affairs report on a whistleblower protection scheme for the Commonwealth public sector noted that whistleblower legislation should continue to focus on the public sector, as public sector employees are not only more susceptible to reprisals, but are also more likely to supply critical information.<sup>470</sup>

8.95 The House of Representatives Committee reflected that contractors, being increasingly involved in the provision of services to or on behalf of government, are in a similar position to public servants in terms of being aware of wrongdoing and facing risks for exposing it.<sup>471</sup> Evidence to the Federal inquiry was supportive of the inclusion of contractors in the proposed Commonwealth scheme. A submission maker to the inquiry commented that matters which essentially relate to contract disputes should not be covered.<sup>472</sup>

8.96 The House of Representatives Committee concluded that only public sector employees should be covered by the legislation, recommending that the proposed Public Interest Disclosure Bill:

... define people who are entitled to make a protected disclosure as a 'public official' and include in the definition of public official the following categories: ...

- contractors and consultants engaged by the public sector;
- employees of contractors and consultants engaged by the public sector;

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<sup>468</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 62.

<sup>469</sup> NSW Ombudsman, *Protected Disclosures Guidelines*, 6th ed, April 2009, Sydney, p. 62.

<sup>470</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 52.

<sup>471</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 44-5.

<sup>472</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 45.

...

- former employees in one of the above categories; ...<sup>473</sup>.

8.97 In regard to anonymity, the House of Representatives Committee noted that participants to its inquiry had expressed support for protecting anonymous disclosures, as it may encourage some whistleblowers to come forward with reports of wrongdoing. The Committee also referred to the Australian Standard for 'Whistleblower protection programs for entities', which states that:

A whistleblower who reports or seeks to report reportable conduct should be given a guarantee of anonymity (if anonymity is desired by the whistleblower) bearing in mind, that in certain circumstances, the law may require disclosure of the identity of the whistleblower in legal proceedings.<sup>474</sup>

8.98 The House of Representatives Committee stated that whistleblower legislation should target public sector 'insiders' with access to insider information, such as current and former employees, including those employed by contractors and consultants, the Parliament, as well as volunteers and overseas staff. The Committee concluded that 'people making anonymous disclosures who, on the basis of the information provided, are reasonably viewed as being in one of the above categories of 'insiders' should receive protection.'<sup>475</sup> It recommended that the Public Interest Disclosure Bill define people entitled to make a disclosure as a 'public official', including anonymous persons who are likely to be in one of the 'insider' categories listed above.<sup>476</sup>

### Committee comment

8.99 In making its comments on extending the eligibility for protections under the PDA, the Committee notes that the terms of reference for the inquiry directed it to examine 'the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament'. The terms of reference for the inquiry would appear to be limited to public sector employees, and clearly do not extend to considering private sector employees.

### Members of the public

8.100 The Committee is not convinced that protection is required for individuals who are not vulnerable to reprisals in the workplace in the same way that public officials are. The Committee acknowledges the point made by the ICAC that a large number of its complainants are private individuals. However, private individuals are able to make complaints to the ICAC and the NSW Ombudsman and are, therefore, eligible for protections under the relevant Acts, which would appear to be more relevant to their circumstances than the protections available under the PDA. As the NSW Ombudsman has explained, there also may be practical issues in applying the confidentiality provisions of the PDA to complaints from members of the public.

<sup>473</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 54.

<sup>474</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 52.

<sup>475</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 52-3.

<sup>476</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 54.

- 8.101 The Committee notes that the large proportion of complaints to ICAC from members of the public would seem to suggest that the ICAC Act is adequate in encouraging such complainants to come forward with information about corrupt conduct. Dr Brown's comments as part of the WWTW project seem to suggest that protections available under other legislation, such as the ICAC and Ombudsman Acts, are preferable in terms of protecting members of the public. The Committee is also mindful of maintaining the original intention and focus of the PDA on the disclosure of information by public officials.
- 8.102 The Committee did not receive sufficient evidence to conclude that protection should be extended to private individuals and it is arguable as to whether this issue was covered by the inquiry terms of reference. In the Committee's view, the issue of extending protection to private individuals should be reassessed, with the benefit of information and data from the NSW Ombudsman's Office. This may be an issue that the Protected Disclosures Steering Committee may wish to consider as part of its policy development role, with input from the NSW Ombudsman and other investigating authorities.

### **Contractors**

- 8.103 The Committee notes that there was widespread support among inquiry participants for extending protection to contractors. The Committee further notes that the 1996 review of the PDA recommended an amendment to extend eligibility to any person or body who is in a contractual relationship with a public authority.<sup>477</sup>
- 8.104 NSW Health expressed the view that only contractors in current contractual relationships with public authorities should be eligible for protection under the PDA. The Committee notes that former contractors may also become aware of information about public sector corruption, maladministration, and serious and substantial waste. Furthermore, former contractors may be disadvantaged in securing further work for public authorities as a result of having made a protected disclosure.
- 8.105 Ms Theresa Hamilton, the Deputy ICAC Commissioner, told the Committee that '[s]ometimes people take a long time to make up their mind to come forward for various reasons. I would see no reason to limit it to current contractors as long as a previous contractor had information about corrupt conduct or maladministration.'<sup>478</sup>
- 8.106 The Ministry of Transport commented that complaints that are made to avoid legitimate action pursuant to the relevant contract should be excluded from protection under the PDA. The Deputy Commissioner of the ICAC stated that, while in her view such complaints may be classed as frivolous or vexatious, she would support a provision to exclude complaints made on these grounds.<sup>479</sup> The Committee considers that the focus of protection should be on encouraging disclosures, in the public interest, of information about wrongdoing. A disclosure made in the context of a contractual dispute may still contain information that is useful in terms of detecting corrupt conduct, maladministration or serious and substantial waste. The Committee canvasses issues relating to the relevance of motivation for disclosures in the next section of this report.

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<sup>477</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, p. 78.

<sup>478</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, pp. 34-5.

<sup>479</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, pp. 34-5.

- 8.107 In the Committee's view, it is important to recognise that people other than public officials may become aware of wrongdoing within a public sector agency, through their work with the agency. The Committee notes that encouraging disclosures by contractors of information that is in the public interest is in keeping with the object of the PDA, to 'encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector'.<sup>480</sup> In order to encourage such disclosures, protection should also be extended to contractors. The Committee is not recommending that protection be extended to include former contractors, as this would be inconsistent with the provisions of the PDA, which do not provide protection for disclosures made by former public officials. The Committee notes that former contractors and public officials may be eligible for protection under the ICAC and Ombudsman Acts.
- 8.108 The Committee is recommending an amendment to the PDA to extend eligibility for protection to disclosures made by individuals who are in contractual relationships with public authorities.

**RECOMMENDATION 22:** That the *Protected Disclosures Act 1994* be amended to provide that, in addition to public officials, disclosures that are made by individuals who are in contractual relationships with public authorities are eligible for protection.

- 8.109 The Committee addresses the issue of protections for disclosures made by volunteers and interns, including those working for members of Parliament, in chapter 7.

### **Anonymous disclosures**

- 8.110 In considering the issue of anonymity the Committee notes that the main points advanced by inquiry participants in favour of anonymity were the benefits of encouraging more disclosures by accepting anonymous complaints, and the importance to whistleblowers of ensuring their confidentiality.
- 8.111 The Committee notes that much of the evidence around anonymity seemed to focus on keeping the whistleblower's identity confidential – a matter that is already provided for in s.22 of the PDA. The confidentiality guideline of the PDA provides that information that may reveal the identity of a whistleblower is not to be disclosed, unless the whistleblower agrees in writing, or it is essential to provide information that may reveal their identity in order to investigate the complaint effectively or to ensure the principles of natural justice are observed in relation to persons who the disclosure may concern. The Committee received evidence indicating that it can be difficult for investigating and public authorities to maintain confidentiality, as whistleblowers may already have telegraphed their concerns in the workplace, and it may be necessary to provide some details to the subject of the complaint in order to observe procedural fairness and conduct an investigation in a practical way. It can therefore be difficult to guarantee confidentiality to a whistleblower.
- 8.112 In evidence to the Committee the distinction between anonymity and the requirement to maintain confidentiality in relation to the whistleblower's identity became somewhat unclear. Inquiry participants emphasised whistleblowers' fear that their identity will be disclosed.

<sup>480</sup> PDA, s.3

- 8.113 In terms of protections for whistleblowers, the 1996 review of the Act by the previous Committee on the Office of the Ombudsman and PIC concluded that an amendment of the PDA to include anonymous disclosures was unnecessary. The Committee recommended instead that ‘guidelines on the Act and other advisory material prepared by the proposed Protected Disclosures Unit should contain a statement that anonymous disclosures can be protected under the Act in the event that the identity of the person making the disclosure becomes known.<sup>481</sup> (emphasis added)
- 8.114 In terms of how anonymous complaints may be received, and whether verbal complaints should be accepted, the provision of a hotline to receive anonymous complaints may be best achieved through the use of an external third party service, which would necessitate other amendments to the PDA. The Committee examined the issue of third party receipt of complaints at paragraph 8.41.
- 8.115 The Committee notes that the ICAC and Ombudsman Acts do not contain provisions for the receipt of anonymous complaints. However, the NSW Ombudsman’s Guidelines state that anonymous disclosures are accepted by the Office, provided that they contain sufficient detail. The Committee has noted the comments of the NSW Ombudsman in relation to confidentiality. However, the Committee did not receive evidence from the other investigating authorities indicating their views on providing for anonymity. The Committee notes that it would be ideal to achieve consistency in terms of the way complaints may be received both internally and externally by the investigating authorities.
- 8.116 The Committee notes that the WWTW project formulated best practice legislation that would provide for agencies to accept anonymous complaints. However, the WWTW research suggested that confidentiality is not helpful in preventing reprisals, and may be difficult to achieve in many cases. Some of the survey results gathered during the research also suggested that relatively few whistleblowers make complaints anonymously. Nevertheless, accepting anonymous reports was identified as a way of providing broader, flexible reporting options to encourage reports of wrongdoing.
- 8.117 The Department of Education and Training told the Committee that anonymity can be difficult to achieve and that it can inhibit agencies’ investigation of allegations. The Committee did not receive sufficient evidence on the implications of anonymity in terms of agency investigations and processes for receiving disclosures, and possible resource implications. The practicalities of how agencies would go about affording protection to anonymous complainants were also not clear to the Committee. The Department of Education and Training submitted that providing effective protection, in accordance with the PDA, to anonymous complainants may be difficult. These concerns in regard to agency management of anonymity are particularly relevant, given whistleblowers’ preference for making complaints internally.
- 8.118 It is clear to the Committee that there may be some merit in making statutory provision for anonymous disclosures. Although the Committee is not recommending an amendment to the PDA, it encourages the NSW Ombudsman to consider this issue as part of its oversight role. The NSW Ombudsman could form a view on whether making specific provision for the receipt of anonymous protected disclosures would serve to encourage whistleblowers to disclose corruption and

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<sup>481</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, p. 141.



maladministration. The NSW Ombudsman's Office could work with the Steering Committee in assessing this matter as a proposal for legislative change.

## Disclosures made on frivolous or other grounds

8.119 Section 16 of the PDA provides that:

(1) An investigating authority, or principal officer of or officer constituting a public authority, may decline to investigate or may discontinue the investigation of any matter raised by a disclosure made to the authority or officer of a kind referred to in this Part if the investigating authority or officer is of the opinion that the disclosure was made frivolously or vexatiously.

8.120 Under s.28 of the PDA it is an offence to wilfully make any false statement to, or mislead or attempt to mislead, an investigating authority, public authority or public official in making a disclosure to the authority.

## Inquiry participants' views

8.121 Agencies indicated that they receive some complaints from staff who seek to make their complaints under the PDA, in cases involving disciplinary and performance issues or personal grievances, and that at times they have difficulty in determining whether certain complaints involving grievances are eligible for the protections available under the Act.

8.122 Agencies told the Committee of their concerns in relation to a lack of clarity around complaints that relate primarily to grievances or performance management issues. The Department of Education and Training noted that on occasion staff seek protection after reporting matters relating to personal grievances. The Department submitted that clearer legislation and guidelines would be of assistance in determining which types of disclosures attract protection, particularly 'in relation to protected disclosures not being an avenue to resolve personal grievances'.<sup>482</sup>

8.123 NSW Health submitted that some disclosures were more appropriately dealt with through grievance policies and that definitions of relevant terms, which would prescribe that disclosures should be in the public interest, would assist with managing such cases:

... the broadness of the current definitions of what constitutes protected disclosures (particularly maladministration) has resulted in attempts to use the Act for matters that were better managed by the organisations' grievance policies.

Amendment is recommended to the definition of maladministration to indicate that it has to involve "public interest" not "personal interest".<sup>483</sup>

8.124 In terms of the management of such complaints, the Chief Executive of the South Eastern Sydney and Illawarra Area Health Service told the Committee that the Area Health Service deals with complaints involving grievances or disciplinary matters by having appropriately trained staff consider complaints and, if they are uncertain about the status of a complaint, seeking guidance from senior staff such as the CEO.<sup>484</sup>

8.125 Ms Cynthia Kardell submitted that the incidence of frivolous and vexatious complaints is relatively rare and that the provisions in relation to false or misleading disclosures,

<sup>482</sup> Department of Education and Training, *Submission 37*, pp. 3, 6.

<sup>483</sup> NSW Health, *Submission 33*, p. 3.

<sup>484</sup> Mr Terry Clout, Chief Executive, South Eastern Sydney and Illawarra Area Health Service, Department of Health, *Transcript of evidence*, 24 November 2008, p. 40.

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at s.28 of the PDA, adequately cover these types of complaints.<sup>485</sup> Ms Kardell also noted that the issue of complaints made frivolously and vexatiously should not be confused with the question of how to determine whether a complaint is in the public interest.<sup>486</sup>

8.126 Whistleblowers Australia also submitted that the public interest should be the determining factor in terms of whether disclosures attract protection, noting that personal grievances are not public interest matters and that other mechanisms are available to deal with such matters.<sup>487</sup>

8.127 The Deputy Ombudsman, Mr Chris Wheeler, made several points in relation to disclosures that are motivated by personal grievances:

- It can be difficult to determine whether detrimental action has occurred when disclosures are made in the context of an existing performance issue that has not been adequately documented by the agency.
- Complaints may still contain valuable information regardless of the motivation behind them, and agencies dealing with complaints should focus on the content of the complaint rather than the motivation behind it.
- Awareness of the motivation behind a complaint is relevant in terms of the weight that is put on the information contained in the complaint during an investigation, as it may be partial or selective and further verifying information may be required than would be in other cases.<sup>488</sup>

8.128 Mr Wheeler also pointed out some of the problems with s.16 of the PDA. Under the section, it is necessary to identify complaints that are made vexatiously or frivolously, in order to determine eligibility for protection. He further noted that he was uncertain about the meaning of 'made vexatiously':

Just to start from the provisions of the Act, the Act provides that a disclosure is not protected if it was made vexatiously or frivolously. I do not know what "made vexatiously" actually means, but you do need to distinguish between a complaint which is 'vexatious' in the sense that it is made for the wrong purpose and it has got nothing in it and a complaint that is 'malicious' in the sense that it is made for the wrong purpose but it has got something in it.<sup>489</sup>

8.129 The Deputy Ombudsman reflected that it is often not possible to decline to investigate a complaint as a disclosure, on the basis that it is frivolous or vexatious, as it has to be investigated in order for the motivation to become apparent:

A further problem there is that it generally is impossible to know if a complaint was made frivolously or vexatiously until after it has been investigated. It is not something that you can use to decline a complaint because you just will not know. Unless you have looked into it, you do not know if there is substance, and you do not really know what the motivation of that person may have been.<sup>490</sup>

8.130 In his response to the Committee's discussion paper proposal, the NSW Ombudsman commented that the proposal to amend the PDA to provide definitions for 'frivolous' and 'vexatious' could be problematic. In particular, a definition of 'made

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<sup>485</sup> Ms Cynthia Kardell, *Submission 52*, p. 3.

<sup>486</sup> Ms Cynthia Kardell, *Submission 52*, p. 3.

<sup>487</sup> Whistleblowers Australia, *Submission 4*, pp. 4-5.

<sup>488</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, pp. 10, 17-8.

<sup>489</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 17.

<sup>490</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 16.

frivolously' would require an assessment of the state of mind of the person making the disclosure at the time it was made. The NSW Ombudsman submitted that 'examples do not immediately come to mind of circumstances where a disclosure of serious matters in the public interest ... could be made "frivolously"'.<sup>491</sup>

8.131 The NSW Ombudsman also raised the question of whether, if the content of a disclosure shows or tends to show a serious matter in the public interest, the motivation of the whistleblower matters. The NSW Ombudsman argued that, although the motivation of a whistleblower may diminish the reliability of the evidence provided and the weight given to it, complaints motivated by malice are an important source of information about misconduct and mismanagement. The NSW Ombudsman submitted that s.16 of the PDA should be repealed.<sup>492</sup>

8.132 Mr Ben Blackburn rejected the discussion paper proposal, on the basis that it would act as an 'unnecessary disincentive' to whistleblowers.<sup>493</sup> Dr Tom Benjamin submitted that the provisions relating to frivolous and vexatious complaints are unnecessary as the frequency of such complaints has been exaggerated. Dr Benjamin stated that poor definitions of the terms would 'open a loophole for ... departments that will make the Act entirely worthless'.<sup>494</sup>

8.133 Mr Bob Falconer, the Chairman of STOPline, told the Committee that his company received very few vexatious complaints. He observed that the motivation behind a complaint does not affect the soundness of the information it contains:

In all those 1,300 ... we would not have had five that I would declare as vexatious in the proper and true meaning of the word. That does not mean that some people do not say that two and two are five, but if they believe that on their observations and what they have heard and seen something is corrupt or definitely is improper conduct, you have to accept that in good faith, and we do.

So there are very little numbers of disclosures or reports that we get that could truly be described as "vexatious". Having said that, there are some, because we always press them for their motivation when we take them to course. We ask, "Why are you ringing?" or "Why is this driving you?" Sometimes there are admissions of clashes, but because the motivation is not pure that does not negate the validity of that report.<sup>495</sup>

8.134 The NSW Council for Civil Liberties supported the repeal of s.16(2) of the PDA, which provides that a disclosure is not protected if an investigating authority declines to investigate or discontinues investigation of the matter pursuant to s.16. The Council argued that disclosures are frequently categorised as vexatious, even in cases where they raise serious issues:

Subsection 16 (2) should be removed. A whistleblower who in good faith makes a disclosure should not be subjected to reprisals, even if someone else thinks that the matter was raised vexatiously. It is, indeed, a common response to whistleblowers that their efforts are treated as vexatious, even when very serious matters are raised. For misconduct often occurs within a culture where it is taken for granted, and any action against it is likely to be seen as vexatious.<sup>496</sup>

<sup>491</sup> NSW Ombudsman, *Submission 40*, p. 4

<sup>492</sup> NSW Ombudsman, *Submission 40*, pp. 4-5.

<sup>493</sup> Mr Ben Blackburn, *Submission 41*, p. 4.

<sup>494</sup> Dr Tom Benjamin, *Submission 45*, p. 1.

<sup>495</sup> Mr Falconer, *Transcript of evidence*, 11 August 2009, pp. 8-9.

<sup>496</sup> NSW Council for Civil Liberties, *Submission 17*, pp. 4-5.

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- 8.135 The ICAC supported the Committee's proposal that agencies provide information in their protected disclosure policies on the provisions of the PDA in relation to complaints made to avoid disciplinary action and frivolously and vexatiously.<sup>497</sup>
- 8.136 In terms of defining 'frivolous' and 'vexatious', the Commission submitted that:
- Similar provisions in other jurisdictions' legislation do not include definitions.
  - Definitions may not be helpful, and may lead to legal disputes due to the difficulty of encompassing all issues that may lead to complaints being classed as frivolous or vexatious.
  - Some conduct may be unintentionally excluded from the definition.
  - Education and guidance provided by the NSW Ombudsman, consistent with the second proposal, would be a more helpful option.<sup>498</sup>
- 8.137 In evidence to the Committee, the Deputy Commissioner of the ICAC reiterated the view that defining 'frivolous' and 'vexatious' was unnecessary and problematic. Ms Hamilton commented that s.16 of the PDA should be retained as it was helpful in terms of categorising complaints. She also noted that she did not know of any instances in which a decision to class a complaint as frivolous or vexatious had been subsequently successfully challenged.<sup>499</sup>
- 8.138 In response to the suggestion that some investigation of a complaint may be required in order to categorise it as frivolous or vexatious, Ms Hamilton commented that such complaints are often easy to identify, as they contain information that is clearly untrue or absurd:
- ... It normally is a complaint that on the face of it is nonsensical or perhaps could not possibly be true on any level. It sometimes involves aliens or conspiracy theories about these types of things. I am just saying that it is sometimes quite apparent that complaints are frivolous or vexatious, just on the face of it. I think it is helpful to be able to categorise them as such up front and not have to spend a lot of time disclosing why they are being investigated.<sup>500</sup>
- 8.139 Ms Hamilton observed that, in the context of the ICAC, the decision not to investigate a complaint is not taken by an individual officer, it is made by a panel of senior officers: 'decisions are made at a high-enough level that I am quite confident that matters are not being unfairly categorised as frivolous or vexatious when they are not.'<sup>501</sup> In terms of differentiating between malicious and frivolous complaints, she noted that malicious complaints may contain information that is useful and truthful, and therefore warrant investigation, regardless of the motive behind them.<sup>502</sup>

## Committee comment

- 8.140 The Committee is mindful of the importance of assisting agencies to encourage and investigate disclosures from staff which relate to public interest issues, regardless of the motivation behind them. The Committee notes that the object of the PDA is to facilitate disclosures in the public interest, and that complaints that primarily involve personal grievances are not captured by the PDA and may be dealt with through

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<sup>497</sup> ICAC, *Submission 47*, p. 2.

<sup>498</sup> ICAC, *Submission 47*, p. 2.

<sup>499</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, p. 33.

<sup>500</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, p. 35.

<sup>501</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, p. 35.

<sup>502</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, p. 35.

appropriate internal policies. However, the Committee feels that s.28 of the PDA, which makes it an offence to wilfully make false statements to, or mislead an authority or official in making a disclosure, is adequate to deter disclosures that are not in the public interest. The Committee further notes that disclosures made with the aim of avoiding disciplinary action are not eligible for protection. In the Committee's view, these provisions are sufficient to strike the balance between encouraging disclosures that expose certain types of conduct, and discouraging false information that is provided maliciously.

- 8.141 The Committee received evidence from the ICAC in support of s.16. The Commission argued that the provision was useful in excluding frivolous disclosures that are clearly untrue. In the Committee's view, such complaints may be excluded through adequate advice being provided to public officials on the offence provisions at s.28 of the PDA. The Committee also notes that several participants observed that, in their experience, very few disclosures could be classed as frivolous or vexatious.
- 8.142 Evidence received from inquiry participants emphasised the importance of the substance of a disclosure, rather than the motivation behind it. Many agencies indicated their difficulty with interpreting the current provisions of the PDA, and the NSW Ombudsman's Office advised that the meaning of s.16 was far from clear. The Committee notes that agencies submitted that they frequently receive disclosures that appear to be motivated by personal or workplace grievances. The Committee feels that it would be more productive to stress the importance of the veracity and quality of the information being disclosed, rather than the motivation behind the disclosure. Workplace issues should be dealt with by agencies through the use of appropriate internal grievance policies. If public officials are adequately informed about agencies' grievance processes, and in turn about protected disclosures policies, it should be possible for them to determine the appropriate forum for allegations.
- 8.143 The Committee is recommending that s.16 of the PDA be repealed, and that agencies provide clear advice in their protected disclosures policies that it is an offence to make false or misleading disclosures, and that disclosures made substantially to avoid disciplinary action are not eligible for protection. Agencies should also seek to indicate the appropriate avenues for resolving workplace grievances and personal employment matters that are not relevant to the protected disclosures scheme, as they do not concern corrupt conduct, maladministration or serious and substantial waste of public money.
- 8.144 In making this recommendation, the Committee further notes that the principal legislation under which the investigating authorities operate, makes provision for the authorities to decline to investigate a matter on several grounds, including if the matter is frivolous, vexatious or not in good faith.<sup>503</sup> Consequently, the investigating authorities would not appear to be precluded from relying on existing provisions in their enabling legislation as legitimate grounds for investigative decisions on this basis. As it may be a matter of interpretation as to whether these existing provisions would apply in respect of disclosures made in accordance with the PDA, the Committee considers that the Steering Committee should be fully consulted on the implications of the proposed amendment in terms of the interplay with the provisions in their principal acts.

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<sup>503</sup> See ICAC Act s.20(3)(c) and Ombudsman Act s.13(4)(b)(i).

**RECOMMENDATION 23:** That section 16 the *Protected Disclosures Act 1994*, which provides for disclosures made on frivolous or other grounds, be repealed.

**RECOMMENDATION 24:**

- (a) That agency protected disclosure policies include advice that complaints made substantially to avoid disciplinary action are not eligible for protection and that it is an offence to wilfully make false statements to or mislead, a public authority, investigating authority or public official, in making a disclosure, pursuant to section 28 of the *Protected Disclosures Act 1994*.
- (b) Further, that the policies should also indicate appropriate avenues for resolving grievances and performance issues.

## Providing information on the status of investigations

### Background

- 8.145 Section 27 of the PDA requires an investigating authority, public authority or officer receiving a disclosure to notify the person who made the disclosure, within six months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.
- 8.146 The Committee is aware that investigation of complex matters may take some time to complete. The Committee, therefore, proposed in its discussion paper that s.27 of the PDA be amended to provide that public authorities keep public officials who make a disclosure informed about developments in relation to the investigation of their disclosure.
- 8.147 The NSW Ombudsman's Office has produced 'Managing information arising out of an investigation' guidelines. The guidelines seek to give guidance to agencies on the information that can be provided to interested parties about the progress and results of an investigation, with a view to balancing openness and confidentiality. The guidelines cover:
- the various circumstances when information should be disclosed, including why, what, when and to whom
  - the circumstances when information should not be disclosed
  - the mechanisms available to refuse access to documents in the circumstances when information should not be disclosed
  - recording and storing information obtained during an investigation
  - security of information.<sup>504</sup>
- 8.148 The guidelines also include a list of the matters that could be reported to whistleblowers, at the outset of a complaint, after a decision is made, during an investigation, and at the completion of an investigation.<sup>505</sup>

<sup>504</sup> NSW Ombudsman, *Managing information arising out of an investigation - Balancing openness and confidentiality*, May 2009, p. 2, <<http://www.ombo.nsw.gov.au/publication/PDF/guidelines/Managing%20Information%20Arising%20Out%20of%20an%20Investigation%20-%20May%202009.pdf>> accessed 22 July 2009

## Inquiry participants' views

8.149 Professor Henry, the Deputy Vice Chancellor of UNSW told the Committee that, although investigation outcomes should not be delayed, it can be difficult to determine the length of time that is needed for an investigation to be properly carried out. Professor Henry suggested that interim reports provided to whistleblowers may alert them to the complexities involved in an investigation:

But I do think there may be a role for an interim report back to people to say, "Look, we think this matter is of substance, but it is going to take a while to work through things. We are not ignoring you, but there are complexities here." In practice, I think that is what a good organisation does with complainants anyway. It keeps them regularly briefed about the progress. I would have no problems if the legislation enforced a regular reporting back to complainants so that they have confidence that the matter was being managed on an active basis rather than being passively pushed aside.<sup>506</sup>

8.150 Several submission makers supported the Committee's proposal to require agencies to keep whistleblowers informed about developments in relation their disclosure.<sup>507</sup> NSW Health indicated that the proposal was consistent with current departmental policies, which provide for the officer assessing the disclosure to assess it with a view to ensuring that 'feedback is provided where applicable to the public official who made the disclosure.'<sup>508</sup> The Audit Office stated that the proposal would reflect good complaints handling procedure.<sup>509</sup>

8.151 The Department of Education and Training stated that information provided to whistleblowers should be restricted to the progress and outcome of the investigation and not contain specific details.<sup>510</sup> The Ministry of Transport suggested that such reporting should be limited to general information about action taken, and should not be required in serious cases, where it may be preferable for agencies to report to the NSW Ombudsman.<sup>511</sup>

8.152 ICAC did not support the proposal, commenting that it may not be possible for agencies to inform public officials about developments in relation to the investigation of the disclosure without prejudicing the investigation. The Commission submitted that s.27, which requires notification of outcomes and action proposed to be taken within six months of a complaint being made, provides whistleblowers with sufficient information, and that investigating authorities should be excluded from any amendment that would expand the requirement to keep public officials informed about their disclosure.<sup>512</sup>

8.153 In evidence to the Committee, the Deputy Commissioner of the ICAC stated that in some cases it would not be appropriate to reveal the status of an investigation, even to the whistleblower:

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<sup>505</sup> NSW Ombudsman, *Managing information arising out of an investigation - Balancing openness and confidentiality*, May 2009, pp. 5-7.

<sup>506</sup> Professor Richard Henry, Deputy Vice-Chancellor (Academic), University of New South Wales, *Transcript of evidence*, 24 November 2008, p. 7.

<sup>507</sup> Mr Ben Blackburn, *Submission 41*, p. 5, The Audit Office of NSW, *Submission 42*, p. 1, Department of Education and Training, *Submission 44*, p. 2, Ms Cynthia Kardell, *Submission 52*, p. 4, Name suppressed, *Submission 54*, p. 1, NSW Health, *Submission 57*, p. 3.

<sup>508</sup> NSW Health, *Submission 57*, p. 3.

<sup>509</sup> The Audit Office of NSW, *Submission 42*, p. 1

<sup>510</sup> Department of Education and Training, *Submission 44*, p. 3.

<sup>511</sup> Ministry of Transport, *Submission 62*, p. 2.

<sup>512</sup> ICAC, *Submission 47*, p. 2.

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... The concern was that in some cases it may not be a problem at all to have to go back to the discloser. But there might be some cases where the investigation is at a delicate covert operational level and it is not appropriate to disclose what is happening even to the person who originally made the complaint. The concern raised was that to have an invariable direction that you must always go back at a set period to the complainant might prejudice investigations in some cases.<sup>513</sup>

8.154 The NSW Police Force noted that although it does not manage disclosures about police officers under the PDA, it supported the proposal's application to disclosures about its civilian employees.<sup>514</sup> The Police Force advised that the Police Act provides that complaints must be dealt with in a timely manner. Furthermore, s.150 of the Act provides for complainants to be consulted by the Commissioner in relation to their satisfaction with the action taken or proposed to be taken, after the investigation of their complaint has concluded.<sup>515</sup>

### *Whistling While They Work* project

8.155 In an issues paper on public interest disclosure legislation in Australia, Dr Brown addressed the issue of keeping whistleblowers informed. Dr Brown noted the importance of keeping whistleblowers informed, observing that if they are not kept informed they may question whether any action is being taken, and prove to be more difficult to manage. Whistleblowers may also be inclined to explore external avenues for their disclosure as 'many whistleblowers, already under stress, will fear the worst if they do not know what action is being taken – and act accordingly.'<sup>516</sup>

8.156 An examination of the relevant provisions in Australian jurisdictions led Dr Brown to identify the *Public Interest Disclosures Act 2002* (Tas) as best practice. According to Dr Brown, the Tasmanian Act provides that 'all whistleblowers must be notified of all critical decisions, as well as providing the option of progress reports, and requiring procedures to be made available.'<sup>517</sup>

8.157 The first report of the WWTW project recommended best practice legislation as providing for an agency to be obliged 'to the extent practicable and reasonable, to keep the person who made the disclosure informed of action proposed to be taken, the progress of any action and the outcomes of any action.'<sup>518</sup>

8.158 The second report of the project developed key components of whistleblower support programs for agencies. The report identified the importance, in terms of whistleblower support and protection, of information and advice being provided to whistleblowers as part of an effective agency support program. The checklist developed for agencies as part of the project stated that agencies should provide: information and feedback on action being taken in response to the disclosure and who to approach regarding issues and concerns; access to professional support services such as legal, counselling and stress management; and information on external or integrity agencies to access for support.<sup>519</sup> The report stated that 'regular and accurate

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<sup>513</sup> Ms Hamilton, *Transcript of evidence*, 11 August 2009, p. 32.

<sup>514</sup> NSW Police Force, *Submission 61*, p. 13.

<sup>515</sup> NSW Police Force, *Submission 61*, p. 13.

<sup>516</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 9.

<sup>517</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 9.

<sup>518</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 283-4.

<sup>519</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, pp. 94-6, <<http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 26 October 2009.



information, advice and feedback to internal witnesses on action being taken in response to their disclosure was confirmed by the research as crucial to the minimization of real and apprehended mistreatment risks ...<sup>520</sup>

## Inquiry into a whistleblower protection scheme for the Commonwealth public sector

- 8.159 The House of Representatives Standing Committee on Legal and Constitutional Affairs report on a whistleblower protection scheme for the Commonwealth public sector noted that the proposed Commonwealth scheme would include a requirement to provide a report on completion of an investigation, therefore addressing the matter of keeping a whistleblower informed 'within the limits of what is appropriate in the circumstances.'<sup>521</sup>
- 8.160 The House of Representatives Committee recommended that agencies should 'within a reasonable amount of time or periodically, notify the person who made the disclosure of the outcome or progress of an investigation, including the reasons for any decisions taken; ...'<sup>522</sup>

## Committee comment

- 8.161 The Committee considers that further assessment is needed regarding the adequacy of the current notification provisions in the PDA, and whether whistleblowers are being kept sufficiently informed about the progress of their disclosures under the provisions of the PDA.
- 8.162 The requirements under the PDA for notifying whistleblowers of progress in relation to their disclosure are generally consistent with the recommendation of the inquiry into a whistleblower protection scheme for the Commonwealth public sector and are also in keeping with the WWTW project's suggestions for best practice whistleblower legislation. However, the ICAC's objection to the proposal to require agencies to inform whistleblowers about the progress of their disclosure, on the grounds that it could potentially lead to investigations being prejudiced is a serious consideration.
- 8.163 The Committee notes that the NSW Ombudsman has produced guidelines to assist agencies with keeping complainants informed about the status of investigations. The guidelines include information that is specific to whistleblowers. In the Committee's view, agencies should use these guidelines in determining the information they provide to whistleblowers during the course of an investigation. Agencies could also consult the guidelines if a whistleblower seeks information on the status of their investigation prior to the expiration of the six month statutory notification period provided for in s.27 of the PDA.
- 8.164 The Committee envisages that agencies may seek the NSW Ombudsman's advice on reporting to whistleblowers as part of the NSW Ombudsman's oversight and advisory role, which is discussed in chapter 4 of this report.

**RECOMMENDATION 25:** That the NSW Ombudsman's guidelines on 'Managing

<sup>520</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 94.

<sup>521</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 119.

<sup>522</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 133.

information arising out of an investigation' May 2009, be used as a guide for agencies in circumstances where a public official who has made a protected disclosure seeks information about the status of the matters they have raised, prior to the expiration of the six month statutory notification period provided for in section 27 of the *Protected Disclosures Act 1994*.

## Disclosures to the media

The conservative view, that whistleblowers should be restricted to making public interest disclosures only to government officers, fails to recognise the fact that the whistleblower is often a product of an organisation that has failed to operate as it should, with both efficiency and integrity. In a dysfunctional administrative environment, the whistleblower may be justified in the view that internal reporting mechanisms are not only fruitless, but their utilization would jeopardise his or her personal position. In such circumstances, only the ability to approach the media can ensure that the disclosure will result in action prompted by public debate.<sup>523</sup>

- 8.165 New South Wales is the only Australian jurisdiction in which disclosures made to the media may be eligible for protection in certain circumstances. The PDA provides that, in order to be eligible for protection, public officials making disclosures to members of Parliament or journalists must have already made substantially the same disclosure to an investigating authority or public authority, and the authority to whom the disclosure was made must have: decided not to investigate; or not completed the investigation within six months of the original disclosure being made; or investigated the matter but not recommended any action to be taken in respect of the matter; or failed to notify the person making the disclosure whether the disclosure would be investigated within six months of the disclosure being made.<sup>524</sup>
- 8.166 In addition, ss.19(4) and (5) provide that the public official must have reasonable grounds for believing the disclosure is substantially true, and the disclosure must be substantially true.

## Second reading debate on Protected Disclosures Bill

- 8.167 During the second reading debate on the Protected Disclosures Bill, the issue of disclosures made to the media was the subject of considerable discussion. Protection for disclosures made to the media was the only issue on which the members of the Legislation Committee examining the Bill dissented.<sup>525</sup>
- 8.168 Mr Don Page MP, a government member, stated that the majority of the members of the Legislation Committee examining the Bill had concluded that the media was 'a forum not well suited to the reception and investigation of serious allegations concerning corruption, maladministration or substantial waste.'<sup>526</sup>
- 8.169 Mr Page observed that:
- The media's priorities are not always in keeping with the public interest, as they also consider matters such as profit and expediency, which may affect the reliability of the media to investigate serious allegations impartially.

<sup>523</sup> Australian Press Council, *Submission 13*, p. 4.

<sup>524</sup> PDA, ss.19(1) to 19(3)

<sup>525</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, p. 5016.

<sup>526</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, p. 5015.

- The media's primary function is not to examine complaints about corrupt conduct, maladministration and substantial waste of public money.
- Incorrect disclosures made to the media and published could irreparably harm a person's career or reputation, or the integrity of a public authority.
- If a disclosure has been properly investigated by the ICAC, NSW Ombudsman or Auditor-General, the whistleblower should not be given protection to make the same disclosure to the media.<sup>527</sup>

8.170 Ms Sandra Nori MP, an opposition member at the time, noted a submission made by representatives of the media, which argued that freedom of expression is the basis for whistleblower protection, and that it should not be denied to whistleblowers simply because they are making a disclosure to the media. Ms Nori also referred to the media code of ethics, which seeks to ensure responsible reporting.<sup>528</sup>

8.171 Ms Nori stated that whistleblowers should be able to make a disclosure to the media, if they have exhausted all other avenues. She noted that a disclosure to the media may be indicative of a failure by investigating authorities to adequately investigate a whistleblower's allegations. In addition, the media would be subject to defamation proceedings if they published allegations without checking their veracity:

By the time a whistleblower decides to go to the media, either there has been a complete institutional failure whereby for some inexplicable reason the ICAC, the Ombudsman or the Auditor-General has somehow failed to investigate the matter thoroughly, and has not exposed the corruption or the waste that the whistleblower was trying to expose, or the whistleblower has totally lost it, as it were. As a balance, I feel strongly that whistleblowers should be given the right to go to the media if, after all avenues have been exhausted, they still believe that their allegations are correct. ... the added protection as I see it is that the media has the ultimate responsibility and, if you like, legal liability. If they print something that is not right or defame someone, they will suffer the full consequences of the defamation laws. That gives protection to all people.

I would not like to see a situation where a third party against whom an allegation is made has no recourse. That is why I am opposed to any amendment that absolves the media from the ordinary laws of defamation. Equally, if whistleblowers reach the point where they have tried everything, yet they are correct and the issue still has not been exposed, what avenue is left to them?<sup>529</sup>

### Inquiry participants' views

8.172 Some participants in the inquiry called for a loosening of the provisions relating to disclosures made to the media, to broaden the circumstances in which whistleblowers can approach the media under the protection of the PDA. For example, the Right to Know Coalition (RTK), a coalition of media organisations, submitted that s.19 of the PDA 'should be amended to permit a public servant, in certain circumstances to make a disclosure directly to the media without the need to first pursue official channels.'<sup>530</sup>

8.173 RTK argued that public servants should be able to make disclosures directly to the media without having to initially make the disclosure to an investigating or public

<sup>527</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, pp. 5017-8.

<sup>528</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, pp. 5017-8.

<sup>529</sup> Legislative Assembly Parliamentary Debates, 15 November 1994, pp. 5017-8.

<sup>530</sup> Right to Know Coalition, *Submission* 39, p. 1.

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authority. However, RTK acknowledged that such disclosures should be required to meet a higher threshold test in order to be protected:

... RTK recognises that disclosure to the media which by pass official channels warrants a higher threshold test than that which should apply to disclosures through official channels.<sup>531</sup>

8.174 The Australian Press Council acknowledged the unique provisions in the PDA, which enable disclosures to the media or members of Parliament. However, the Press Council submitted that, in order to strengthen the protection of whistleblowers and encourage reports of maladministration, s.19 of the PDA should be amended to provide that disclosures to the media or a member of Parliament may be eligible for protection in the following circumstances:

- Where the officer making the disclosure honestly believes, on reasonable grounds, that to make the disclosure along internal channels would be futile or could result in victimisation, OR
- Where the officer making the disclosure honestly believes, on reasonable grounds, that the disclosure is of such a serious nature that it should be brought to the immediate attention of the public, OR
- Where the officer making the disclosure honestly believes, on reasonable grounds, that there is a risk to health or safety, OR
- Where internal disclosure has failed to result in prompt investigation and corrective action.<sup>532</sup>

8.175 The Press Council also argued that s.19(3) of the PDA should be amended to omit or significantly reduce the period of time before a public official may approach the media after having made a protected disclosure to a public or investigating authority, commenting that six months is 'an excessive period of time to expect a whistleblower to wait before going to the media.'<sup>533</sup>

8.176 The NSW Council for Civil Liberties submitted that the threshold that disclosures to the media must satisfy in order to be eligible for protection is too high. The Council argued that s.19(5) requiring such disclosures to be substantially true should be repealed, as reasonable grounds for believing that the disclosure is substantially true (s.19(4)) is a sufficient condition for whistleblowers to meet.<sup>534</sup>

8.177 Whistleblowers Australia expressed support for the retention of the provisions at s.19 of the PDA, noting that some significant matters, such as those involving UNSW medical research programs, have been disclosed through the use of these provisions. Whistleblowers Australia also argued that the media would only publish significant allegations that could be substantiated:

The media itself will act as a screening device, in that it will only publicise matters of importance. The fear of legal action will also ensure that the media will only broadcast accusations that are largely provable. It is therefore acting as a whistleblowing review mechanism. Another reason is that experience to date has shown that the media is very effective in bringing public attention to the disclosures of whistleblowers, and in ensuring that discrimination against them is minimised.<sup>535</sup>

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<sup>531</sup> Right to Know Coalition, *Submission 39*, p. 4.

<sup>532</sup> Australian Press Council, *Submission 13*, p. 1.

<sup>533</sup> Australian Press Council, *Submission 13*, p. 2.

<sup>534</sup> NSW Council for Civil Liberties, *Submission 17*, p. 6.

<sup>535</sup> Whistleblowers Australia, *Submission 4*, p. 8.

8.178 Whistleblowers Australia submitted that the provisions at ss.19(3)(b) and (d) should be amended to provide for a shorter period of time for public authorities to complete their investigation of a disclosure, or to notify the whistleblower of whether or not their disclosure is to be investigated. Three months was suggested as an adequate period of time for an agency to assess a complaint and determine the action to be taken. However, Whistleblowers Australia submitted that it 'sees no great problem with immediate disclosure for serious matters along with internal disclosure, for it sees no other way to handle an issue which the department tries to cover up ....'<sup>536</sup>

8.179 Mr Bob Falconer, Chairman of STOPline, told the Committee that while disclosures to the media had some merit, he had reservations about such disclosures, given the priority that media outlets place on ratings:

**The Hon. TREVOR KHAN:** ... Do you see ... that there is merit in extending protection to a public servant who makes a disclosure to the media?

**Mr FALCONER:** Yes, there is. ... I always say to them, "You need to make that your last resort", because the reality is the media certainly love it—the media do not like this third-party stuff. I know some people in the media; they would sooner that they ring in—I just heard Steve Price warbling away there in the taxi—Steve Price or someone like that. They would very much sooner have that out and get the ratings for the shock horror for one day than say, "No, no, this is not the way to go. You really should be going in through the proper authority so that some discreet inquiries can be made to acquire evidence before it is all gone."<sup>537</sup>

8.180 The Deputy Ombudsman expressed the view that disclosures are most appropriately made first using internal agency avenues, followed by an external investigative body, with disclosures to the media as a last resort. Mr Wheeler stated that the current provisions are adequate, while expressing reservations about the practicality of the objective test, which requires disclosures to the media to be true:

... I would think about this in terms of a hierarchy. To my mind the most appropriate place, if possible, for a disclosure to be made is to the employer - within the agency. When that does not work the next fallback position should be an external watchdog body of some sort. If that does not work there might be circumstances where I think it would be appropriate to go to an MP or to a journalist. But I think it would have to be in that sort of hierarchy, and only if all else has failed. I think that a number of the rules in section 19 of our Act are appropriate. Substantially the same disclosure should have been made either internally or to a watchdog body, and if it does nothing with it or it has taken action with which you do not agree, et cetera, I would then accept the subjective test, which is that you would have to demonstrate you have a reasonable belief it was true.

I have some difficulty with the objective test in section 19, which states that it must be true. Absent the "smoking gun" memo—and I have not seen too many of them—it is beyond me how a whistleblower in a prosecution situation could prove that his or her disclosure was true when watchdog bodies, employers, et cetera have not. ... It is appropriate that there should be a clause so that if all else goes wrong you can take the issue to an MP or a journalist. Over the years there have been cases that have shown that that was the appropriate way for people to go.<sup>538</sup>

8.181 The Hon Jerrold Cripps QC, Commissioner of the ICAC, told the Committee that he did not agree that whistleblowers should be able to make protected disclosures

<sup>536</sup> Whistleblowers Australia, *Submission 4*, pp. 8-9.

<sup>537</sup> Mr Falconer, *Transcript of evidence*, 11 August 2009, p. 7.

<sup>538</sup> Mr Wheeler, *Transcript of evidence*, 11 August 2009, p. 22-3.

directly to the media or a member of Parliament. The Commissioner stated that, in his view the current provisions were appropriate, commenting that 'generally speaking I do not think the first response should be to the media. That assumes that everything that comes out of the media is crystal clear and always right, and that is not always the case.'<sup>539</sup>

### *Whistling While They Work* project

8.182 The WWTW project survey results suggested that disclosures to the media are relatively rare, making up less than 1% of initial reports made by current employees. The project recommended that best practice legislation in relation to protecting disclosures to the media would provide for protection for disclosures to bodies such as the media in exceptional circumstances. The protection should apply in situations where the disclosure has already been made to an appropriate body and satisfactory action was not taken by that body:

A disclosure made to a person or body that is not designated by the legislation to receive disclosures (for example, the media) should be protected in exceptional circumstances as defined in the legislation. The protection should apply only if it is reasonable in all the circumstances for the disclosure to be made to some other person or body to ensure that it is effectively investigated. As a general guide, the protection should apply when a person has first made the disclosure to a designated person or body and there has been a failure by that person or body to take reasonable and timely action.<sup>540</sup>

### Inquiry into a whistleblower protection scheme for the Commonwealth public sector

8.183 The House of Representatives Standing Committee on Legal and Constitutional Affairs report on a whistleblower protection scheme for the Commonwealth public sector examined the issue of prosecutions for unauthorised disclosures to the media, under s.70 of the *Crimes Act 1914* (Cth), noting that four such cases were referred to the Commonwealth DPP in the three years prior to 2008.<sup>541</sup>

8.184 The House of Representatives Committee observed that the rate of disclosures to the media may be affected by high profile cases of prosecutions for unauthorised disclosure to the media and may also be indicative of the level of confidence whistleblowers have in the ability of current systems to deal with wrongdoing.<sup>542</sup>

8.185 The following risk factors and points associated with disclosures to the media were identified during the federal inquiry:

- Whistleblowers who disclose to the media may not have full information on the alleged misconduct, may not be aware of the potential ramifications of the disclosure, and could potentially put at risk other important aspects of the public interest such as procedural fairness in investigations.
- The media may be motivated by the self interest of boosting ratings or circulation rather than the interests of the wider public or those involved with an allegation.

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<sup>539</sup> Mr Jerrold Cripps QC, (former) Commissioner, ICAC, *Transcript of evidence*, 11 August 2009, p. 32.

<sup>540</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 286.

<sup>541</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 142.

<sup>542</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 145.

- By maintaining the focus on internal processes and improving internal procedures, the need for taking matters to the media would be minimised.
- The consequences of disclosures to third parties relating to security, intelligence, defence and policing could be much more serious than disclosures on other types of matters such as fraud concerning grants for social services.
- Rather than time elapsed from the initial disclosure, ... the seriousness of the allegation could be an appropriate requirement to protect a disclosure to the media.<sup>543</sup>

8.186 The House of Representatives Committee recommended that the proposed Commonwealth scheme provide for disclosures to the media 'where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety.'<sup>544</sup>

### Committee comment

- 8.187 The Committee notes the views of inquiry participants who argue that the provisions for disclosures to the media should be amended and acknowledges the role the media can play in bringing to light public interest allegations that have not been adequately investigated.
- 8.188 The Committee notes, however, that amending the legislation to reduce the period of time in which agency investigations are to be completed, before a public official can make the same protected disclosure to the media, could have an impact on the comprehensiveness of agency investigations, in addition to having resource implications for investigating and public authorities.
- 8.189 The suggestion that disclosures to the media should be protected, without any time being given for an internal investigation is rejected by the Committee. The objects of the PDA include providing for the proper investigation of disclosures. Such an amendment would not be in keeping with the intentions of the PDA and would not be in the public interest. Premature disclosure of allegations of wrongdoing may inhibit their proper investigation. The Committee is concerned that it would be counter-productive and inconsistent with the objectives of the PDA, in addition to having the potential to impact on the integrity of an investigation.
- 8.190 Submissions received during the inquiry that referred to instances of disclosures being made to the media, would seem to suggest that the provisions are working in the way they were intended to be used, that is, as a last resort for whistleblowers who have exhausted relevant internal or external disclosure avenues.
- 8.191 Empirical evidence is needed to demonstrate that the provisions are inadequate. The Committee received evidence from investigating authorities suggesting otherwise and indicating support for the current provisions.
- 8.192 The Committee notes that submissions from inquiry participants have focussed on the application of s.19 to disclosures to journalists. However, the provisions also apply to members of Parliament. There is insufficient evidence available on the

<sup>543</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, pp. 147-54.

<sup>544</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 164.

Simplifying the who, where and how of whistleblowing

potential effects and implications of amending the provisions, as they apply to members of Parliament.

- 8.193 The Committee suggests that the Protected Disclosures Steering Committee consider the issue, with a view to determining whether an amendment to s.19 is required, and whether it would be consistent with the object of the PDA. The Steering Committee could consult with the NSW Ombudsman, and other investigating authorities in considering the effectiveness of s.19 in terms of the protection it affords whistleblowers and the extent to which it ensures adequate investigations of their disclosures.



## Chapter Nine - Extra protections and avenues for whistleblowers

You do not get invited to the Christmas party; you do not get recommended to do a course in Sydney at the Australian institute; you do not get this, you do not get that; somebody delivers a load of gravel to your house on a Saturday morning; an undertaker rings up to organise your funeral; and a whole range of awful, harmful, psychologically evil things happen but hardly any of them would ever stand up to a prosecution. So it is a bit of a paper tiger, if I can be blunt. The threat of offences for recriminations and reprisals looks good, it is nice to say, but the reality is if you cast around this country and elsewhere not many people have ever been prosecuted for it.<sup>545</sup>

- 9.1 In this chapter, the Committee looks at ways to enhance the legal protections that are available to whistleblowers in New South Wales. In particular, the Committee focuses on broadening protection by providing for civil remedies and injunctions, before examining the adequacy of the current confidentiality provisions in the PDA. In addition, the Committee considers improving the deterrent effect of the current detrimental action provisions in the PDA by increasing the relevant penalty provisions. The Committee is also seeking to address the lack of successful prosecutions, by providing for detrimental action offences to be referred to the Director of Public Prosecutions for prosecution.
- 9.2 Legal protections commonly available to whistleblowers include:
- Protection from potential actions, such as defamation, or disciplinary or criminal prosecution for unauthorised disclosure of information (s.21 of the PDA).
  - Criminalisation of detrimental action taken against a whistleblower (s.20 of the PDA).
  - Confidentiality provisions (s.22 of the PDA).
  - Provision to seek civil, industrial or other remedies, if detriment is suffered.
  - Provision to seek injunctions or interventions to prevent the taking of detrimental action.

### Legislative protections

- 9.3 In this section, the Committee examines provisions that enable whistleblowers, or public or investigating authorities acting on their behalf, to take civil action for damages, or seek an injunction to prevent an act of reprisal made in retaliation for a protected disclosure.
- 9.4 The legal protections available in New South Wales are outlined in detail in chapter 2. The table overleaf details civil, industrial and equitable remedies available to whistleblowers in Australian jurisdictions, as outlined in an issues paper produced for the *Whistling While They Work* (WWTW) project in 2006.

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<sup>545</sup> Mr Bob Falconer, Chairman, STOPline, *Transcript of evidence*, 11 August 2009, p. 6.

**Table 5: Civil, industrial and equitable remedies in other jurisdictions**<sup>546</sup>

Legislation	Civil action	Equal opportunity /anti-discrimination	Industrial	Injunction
SA 1993	<b>9(1) (2)</b> An act of victimisation under this Act may be dealt with – <b>9(2)(a)</b> as a tort	<b>9(2)(b)</b> <i>Equal Opportunity Act 1984</i>	Nil	Nil
Qld 1994	<b>43</b> tort in District Court or Supreme Court	<b>45(1)</b> under an Act, may appeal against, or apply for a review of – (a) disciplinary action taken against the officer; (b) the appointment or transfer or the officer of another public officer ...; (c) unfair treatment of the officer.	<i>Industrial Relations Act 1998</i> , <b>73(2)(f)(i)</b> invalid reason for unfair dismissal includes: the making by anyone, or a belief that anyone has made or may make a public interest disclosure	<b>47</b> Industrial Commission on application from employee, industrial organisation, or CMC. <b>48</b> Supreme Court, on application of complainant or CMC, if no right of application to Industrial Commission.
NSW 1994	Nil			
ACT 1994	<b>29</b> tort in court of competent jurisdiction	Nil	Nil	<b>30, 31</b> Court, on application of complainant or Ombudsman
Cth 1999	Nil	<b>16</b> [victimisation or discrimination provides extra ground for grievance]	Nil	Nil
Vic 2001	<b>19</b> tort in court of competent jurisdiction	Nil	Nil	<b>20, 21</b> Supreme Court, on application of complainant
Tas 2002	<b>20</b> tort in court of competent jurisdiction	Nil	Nil	<b>21, 22</b> As for Vic
WA 2003	<b>53(3)(4)</b> [intentional] tort in court of competent jurisdiction	<b>15(4)</b> <i>Equal Opportunity Act 1984</i>	Nil	Nil

9.5 The Northern Territory *Public Interest Disclosure Act 2008*, which commenced on 31 July 2009, provides that persons who take reprisal action are liable in damages. Section 16(2) provides that ‘damages may be recovered as for a tort in a court of competent jurisdiction’, while s.16(3) provides that the court may award exemplary damages. Injunctive remedies may also be sought for an act of reprisal, or an apprehended act of reprisal, under s.17 of the Act. Applications for injunctions may

<sup>546</sup> Source: Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 40. Commonwealth, Northern Territory and ACT Bills, which subsequently lapsed or were superseded, have been omitted from the table.

be made by the Commissioner for Public Interest Disclosures, or a person against whom the act of reprisal has been or is about to be committed.<sup>547</sup>

- 9.6 The relevant recommendations of the Federal Inquiry into a whistleblower protection scheme for the Commonwealth public sector relating to whistleblower protections are discussed below. At the conclusion of this inquiry, the federal government had not yet responded to the Federal Committee's recommendations, and whistleblower legislation had not been introduced into the Federal Parliament.

### Best practice legislation

- 9.7 In an issues paper on public interest disclosure legislation released as part of the WWTW research project, Dr AJ Brown noted that injunction powers are important, as they can serve to prevent or limit reprisals, while also prompting agencies to take responsibility for acting to prevent reprisals. Dr Brown stated that injunction powers provide 'an important reminder that real, as opposed to legal, protection lies in the ability of whistleblower protection legislation to provoke public agencies into managing whistleblowing incidents so as to avoid or minimise conflicts in the first place.'<sup>548</sup>
- 9.8 Dr Brown concluded that the Queensland provisions, which enable applications for injunctions to be made either to the Industrial Commission or to the Supreme Court, offered best practice at the time, as they had been successful on at least one occasion. In addition, Dr Brown argued that it was particularly important that the relevant Queensland and ACT provisions did not rely on the whistleblower to initiate proceedings, instead providing for public integrity agencies to seek injunctions on their behalf:
- This provides a reminder that a major reason why current remedies have a poor track record may be that there is no specific lead agency for ensuring they are taken up, in circumstances where it is unrealistic to expect 'genuine' whistleblowers to persist with the cost and stress of pursuing remedies on their own.<sup>549</sup>
- 9.9 The best practice legislation principles developed as part of the WWTW project, and presented in the project's first report, stated that remedial action to stop or prevent the recurrence of detrimental action, including through injunctions and compensation for detriment suffered, should be taken by the relevant agency or an oversight agency.<sup>550</sup>

### WWTW survey results on reprisals

- 9.10 In addition to developing best practice principles for legislation, the first report of the WWTW project presented the project's results, including the results of a survey in which employees from 118 participating agencies were asked to give their reasons for not reporting wrongdoing. Fear of reprisals from any source (that is, either the wrongdoer, management or the organisation) was the second highest reason given by employees overall for not reporting wrongdoing.<sup>551</sup>

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<sup>547</sup> *Public Interest Disclosure Act 2008* (NT), ss.17(2) (3)

<sup>548</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 39.

<sup>549</sup> Brown A J, *Public Interest Disclosure Legislation in Australia*, November 2006, p. 39.

<sup>550</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 286-7.

<sup>551</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 72-3. The other most common reasons given for not reporting included: expected management reaction to a report of wrongdoing, lack of faith in the ability of management to properly handle the process and not having enough evidence to report it.

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- 9.11 In terms of the nature of reprisals, data from the employee, internal witness, case-handler and manager surveys indicated that reprisal most often took the form of intimidation, harassment, heavy scrutiny of work, ostracism and unsafe or humiliating work.<sup>552</sup> The study noted that these types of reprisals can generally be taken in a secretive way, and do not involve any formal change to the whistleblower's status, while also being more subjective in nature than more obvious (and less common) forms of reprisal. Such reprisals by their nature would rarely meet the threshold for proving criminal liability and raise 'further questions about whether reliance on criminalisation, prosecution and the like is a well-founded strategy for addressing the bulk of reprisal risks or for trying to deal with most of the reprisals that do occur.'<sup>553</sup>
- 9.12 Overall, the study estimated that, based on the employee and internal witness surveys, around 20% to 25% of whistleblowers perceive that they have experienced a deliberate reprisal.<sup>554</sup> It is worth noting that, as the employee survey was conducted with current employees of various public sector agencies, it did not reflect the experiences of those employees who may have resigned or been dismissed following a whistleblowing experience.
- 9.13 The employee survey results indicated that most employees who reported wrongdoing did not perceive themselves as having suffered reprisals, and that when they did consider themselves to have been treated badly, poor treatment tended to come from management rather than colleagues.<sup>555</sup> According to the study, 'evidence from case-handlers and managers also points to preventing mistreatment by management as typically a more crucial challenge than control of individual co-worker reprisals.'<sup>556</sup>
- 9.14 The study notes that, while 'reducing the incidence of bad treatment of whistleblowers by co-workers remains important ... these results show that policy attempts to control the risk of reprisals through criminalisation, as well as the common management expectation that the major risks of mistreatment lie among employees' peers rather than the management chain, are both misplaced.'<sup>557</sup> The research suggested that whistleblowers' satisfaction with outcomes is affected by their treatment by management. The training of managers and the development of effective systems for dealing with reports of wrongdoing were therefore identified by the WWTW project as areas that agencies should focus on in order to improve whistleblowing outcomes.<sup>558</sup>
- 9.15 The research also suggested that a risk-management approach, whereby the risk factors that may lead to reprisals are assessed and managed when a disclosure is made, is an important way of addressing reprisals. Survey data was used to identify key risk factors, which could be used by managers to recognise situations in which mistreatment following a disclosure was more likely to occur.<sup>559</sup> Factors that played a part in an increased risk of mistreatment included: investigations not being kept

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<sup>552</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 111.

<sup>553</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 128.

<sup>554</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 128.

<sup>555</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 122-3, 125. 78% of workers participating were treated the same or well by managers and co-workers as a result of reporting wrongdoing, and 46% experienced no change in treatment, while 22% indicated they were treated badly by co-workers, managers or both.

<sup>556</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 111.

<sup>557</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 125.

<sup>558</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 135.

<sup>559</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 138, 145-152.

internal and not resulting in a positive outcome overall; the whistleblower being in a vulnerable position in relation to the wrongdoer; and the seriousness of the wrongdoing. It was noted that all of these factors could be addressed through agency programs and intervention strategies.<sup>560</sup>

- 9.16 The second report of the project included the provision of support and protection for whistleblowers as an important objective of agency whistleblower programs, noting that ‘the provision of organisational support ... is currently the single weakest area of most agencies’ responses.<sup>561</sup>
- 9.17 The report noted that ‘the experience of case study organisations confirmed the importance of organisational support for preventing or containing employee perceptions of mistreatment in many of the cases where it was provided’.<sup>562</sup> The following elements were identified as necessary for agency programs, in order for the program to be successful in providing support to whistleblowers:
- Sources of support, including designated officers to establish and coordinate a support strategy; proactive, management-driven operation of the strategy; arrangements tailored to risks of reprisal and workplace conflicts; and the involvement of the whistleblower in risk assessment and support decisions, in addition to an identified support person.
  - Information and advice, consisting of information and feedback to whistleblowers on action being taken in response to the disclosure and who to approach regarding issues and concerns; access to professional support services such as legal, counselling and stress management; and information on external or integrity agencies to access for support.
  - Preventing and remedying detrimental action, including agency commitment not to undertake disciplinary or adverse action or tolerate reprisals as a result of the disclosure; mechanisms to monitor the welfare of staff who report wrongdoing; positive decisions to prevent or contain reprisal risks; engagement of supervisors or alternative managers in support strategy and workplace decisions; specialised internal or external expertise to investigate alleged detriment or failures in support, with notification to external authorities; and flexible mechanisms for compensation and restitution in cases of failure to provide support or prevent adverse outcomes.
  - Exit and follow up strategies consisting of strategies for conclusion of support; and follow up monitoring of whistleblower welfare as part of an evaluation program to identify ongoing support needs.<sup>563</sup>

## Injunctions against detrimental action

### Previous reviews of the PDA

- 9.18 The 2006 review of the PDA, conducted by the previous Committee on the ICAC, recommended that the Act be amended to enable whistleblower public officials, or public or investigating authorities acting on their behalf, to apply for injunctions

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<sup>560</sup> Brown A J, (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 159.

<sup>561</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 82, <<http://www.griffith.edu.au/centre/srsc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 26 October 2009.

<sup>562</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 83.

<sup>563</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, pp. 84-106.

against reprisals. Submissions from inquiry participants including the NSW Ombudsman and Protected Disclosures Act Steering Committee had recommended that the PDA be amended to allow for injunctive relief. The Committee concluded that such an amendment would give whistleblowers and public authorities a way of taking action to limit the occurrence of detrimental action following a disclosure, while the investigation is being managed. The Committee also noted that similar provisions were operating in jurisdictions such as the ACT and Queensland.<sup>564</sup>

### Inquiry participants' views

9.19 Inquiry participants expressed support for an amendment to the PDA to provide for injunctions against detrimental action. Mr Chris Wheeler, the Deputy Ombudsman, told the Committee that he supported the availability of injunction and civil damages provisions, as they act as a deterrent and send a signal that whistleblowers will be protected from reprisals:

But in terms of the experience in other jurisdictions with injunctions and with damages, when you look at what the purpose of this sort of legislation is, it is partly to send a message—strongly to send a message—to say that the Parliament and the Government believe that whistleblowers should be protected and these are the mechanisms that are going to be provided to assist in that protection. It sends a message to people who might be contemplating doing something inappropriate that there could be repercussions.<sup>565</sup>

9.20 The ICAC also supported amendments to the PDA. Ms Theresa Hamilton, the ICAC Deputy Commissioner, cited the Queensland *Corruption and Misconduct Commission Act 2001* as an example of the deterrent effect of injunction provisions:

I was involved in the case where the CMC obtained a mandatory injunction because we believed a council had sacked the CEO for providing information to the CMC. We obtained a mandatory injunction requiring them to rehire the CEO while the case was pending. Even though that was the only occasion on which we actually used an injunction, we used the threat of it for many years thereafter. You found after that that you just had to write a letter and say, "Look, we understand that you are about to sack the CEO. We take it very seriously if people are prejudiced." We found that they drew back because they knew we were serious and that we would take it to court if we had to.<sup>566</sup>

9.21 The Deputy Commissioner told the Committee that she supported the injunction powers being available only to public authorities that had received a disclosure, as most individuals would not be able to afford to take out an injunction, or would not know how to go about doing it.<sup>567</sup>

9.22 The NSW Council for Civil Liberties submitted that the PDA should be amended to 'allow a whistleblower to seek an injunction or an order by a court to restrain breaches of the Act.'<sup>568</sup>

9.23 In its discussion paper, the Committee proposed an amendment to the PDA that would enable public or investigating authorities to make an application for an injunction against detrimental action on a public official's behalf. Submissions

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<sup>564</sup> Committee on the ICAC, *Review of the Protected Disclosures Act 1994*, November 2006, report 12/53, November 2006, p. 45.

<sup>565</sup> Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 7.

<sup>566</sup> Ms Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 18 August 2008, p. 22.

<sup>567</sup> Ms Hamilton, *Transcript of evidence*, 18 August 2008, p. 22.

<sup>568</sup> NSW Council for Civil Liberties, *Submission 17*, p. 5.

received from Mr Blackburn, the Department of Education and Training, ICAC and Ms Kardell expressed support for the proposal.<sup>569</sup> However, Ms Kardell submitted that it should be open to public officials to make applications for injunctions against detrimental action, and that a whistleblower oversight body should also be able to make such applications.<sup>570</sup>

- 9.24 The Ministry of Transport supported the proposal to enable public or investigating authorities to apply for injunctions against detrimental action, while suggesting that it should be necessary to obtain the approval of the Attorney General prior to the commencement of such action.<sup>571</sup>

### Inquiry into a whistleblower protection scheme for the Commonwealth public sector

- 9.25 The House of Representatives Committee focussed on the use of industrial laws to protect public officials from adverse treatment arising out of a disclosure, commenting that witnesses and inquiry participants had 'promoted the use of industrial relations laws and processes, occupational health and safety arrangements and personnel management practices for protection against adverse treatment.'<sup>572</sup>

- 9.26 The Committee concluded that workplace legislation was the most appropriate way to deal with adverse treatment and that Commonwealth public interest disclosure legislation should recognise the right to make a disclosure as a workplace entitlement:

In the Commonwealth setting there are relevant workplace laws and agencies with expertise to manage workplace disputes including those that equate to detrimental or adverse treatment in the workplace. Legislative linkages should be created between public interest disclosure legislation and workplace laws by defining the entitlement to make a public interest disclosure as a workplace right.<sup>573</sup>

- 9.27 The House of Representatives Committee was supportive of forging a link between whistleblower and workplace laws in terms of managing disclosures that resulted in detrimental action. The Committee's recommendation stated that adverse treatment arising out of a protected disclosure may consequently be referred to the Commonwealth Workplace Ombudsman for further action:

The Committee recommends that the Public Interest Disclosure Bill define the right to make a disclosure as a workplace right and enable any matter of adverse treatment in the workplace to be referred to the Commonwealth Workplace Ombudsman for resolution as a workplace relations issue.<sup>574</sup>

<sup>569</sup> Mr Ben Blackburn, *Submission 41*, p. 2, Department of Education and Training, *Submission 44*, p. 2, ICAC, *Submission 47*, p. 1, Ms Cynthia Kardell, *Submission 52*, p. 2. See also Name suppressed, *Submission 54*, p. 2.

<sup>570</sup> Ms Cynthia Kardell, *Submission 52*, p. 2.

<sup>571</sup> Ministry of Transport, *Submission 62*, pp. 1-2.

<sup>572</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 95.

<sup>573</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 103.

<sup>574</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, February 2009, p. 104.

## Committee comment

- 9.28 Preventing reprisals against whistleblowers by providing for applications for injunctions against detrimental action was a recommendation of the previous ICAC Committee. The WWTW project also concluded that best practice whistleblowing legislation would allow for injunctions against reprisals. The project observed that injunction powers can have the effect of limiting or preventing reprisals, in addition to emphasising the responsibility of agencies to take responsibility for actively preventing detrimental action.
- 9.29 The WWTW research indicated that fear of reprisals is one of the main factors that can deter officials from making disclosures.<sup>575</sup> This suggests that whistleblowers may be encouraged to make disclosures by the additional deterrent effect of injunction provisions.
- 9.30 The research also suggested that the role of management is crucial in terms of improving outcomes for whistleblowers. In the Committee's view, providing for agencies to apply for injunctions on a whistleblowers' behalf could help to improve outcomes, in that it would send a signal that management support whistleblowers and will not tolerate reprisals. Evidence received by the Committee indicated that the difficulty of addressing and remedying detrimental action once it has occurred places increasing importance on identifying effective means to prevent reprisals from occurring in the first instance.
- 9.31 Inquiry participants expressed support for the availability of injunctions to prevent reprisals. The Committee notes that Ms Kardell was in favour of an amendment that would enable public officials to apply for injunctions under the PDA, in addition to public and investigating authorities. However, the Deputy Commissioner of the ICAC gave evidence that such a provision may not be effective, due to public officials not being able to afford to apply for injunctions themselves. Ms Hamilton told the Committee of the success the Queensland Crime and Misconduct Commission had with preventing reprisals through an application for an injunction. The WWTW research recommended that legislation should provide for oversight agencies or public authorities to apply for injunctions, in addition to public officials being able to apply for them. Dr Brown stated that it is important that agencies do not rely on public officials to seek remedies themselves, instead taking responsibility for seeking remedies to prevent reprisals.
- 9.32 The Committee has noted that the WWTW research indicated that whistleblowers are more likely to suffer reprisals at the hands of management rather than co-workers. In the Committee's view, public officials may be unlikely to apply for an injunction if they fear management reprisals. It may be more effective in such cases for an investigating authority, such as the ICAC or the NSW Ombudsman's Office, to intervene on a public official's behalf. This is also consistent with the evidence from the ICAC on the CMC's use of the Queensland injunction provisions.
- 9.33 On the other hand, the Committee notes that other jurisdictions have provided for complainants to apply for injunctions. Although the Committee has a preference for emphasising agency responsibilities to obtain injunctions, it does not wish to exclude this option as an avenue for public officials. While the Committee is not recommending that public officials be able to apply for injunctions, it does note that it may be desirable to achieve consistency with other jurisdictions, if it is apparent that

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<sup>575</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 272.



the provision has been used effectively by public officials. In the Committee's view, this issue should be considered by the Steering Committee. The Steering Committee could consider whether it would be effective to broaden the proposed injunction provisions in the PDA to include public officials applying for injunctions, based on the use of such provisions by public officials in other jurisdictions. The Committee recommends that the Steering Committee assess the issue as a proposal for legislative change.

- 9.34 That Committee is recommending that the PDA be amended to provide for applications for injunctions against detrimental action to be made by public or investigating authorities, on behalf of a public official who has made a protected disclosure.

#### **RECOMMENDATION 26:**

- (a) That the *Protected Disclosures Act 1994* be amended to provide for applications by public or investigating authorities for injunctions against detrimental action, on behalf of a public official who has made a protected disclosure.
- (b) That the Steering Committee consider the feasibility of providing for applications for injunctions against detrimental action by public officials who have made a protected disclosure, based on the effectiveness of such provisions in other jurisdictions.

## **Claims for civil damages**

### **Previous reviews of the PDA**

- 9.35 Previous Committees have considered the issue of providing whistleblowers with the right to seek damages if they have suffered detriment as a result of making a protected disclosure. The previous Committee on the Office of the Ombudsman and PIC's 1996 review of the PDA made the following points in relation to the issue:

- Whistleblowers who are plaintiffs in civil action proceedings (as distinct from proceedings under the criminal offence provisions of the PDA) would only have to meet the civil standard of proof, that is, that detrimental action occurred on the balance of probabilities.
- The ICAC, NSW Ombudsman and Auditor-General had supported the introduction of grounds for civil action. However, while the then NSW Ombudsman had supported the availability of capped exemplary damages, or compensation, in addition to civil damages, the then ICAC Commissioner had expressed concern at the possibility, stating that:

The question of exemplary damages where the act committed is malicious applies in trespass to a person, it applies in trespass to land I think still. It applies in defamation where there is malice proved. So if that were an element it would not be inconsistent with the law in other areas, but you will recall that in that consideration it was combined with a reversal of onus. Just imagine exemplary damages with the reversal of onus, sort of 5 million, as it were, unless you proved to the contrary. Not a goer, I think.
- It is difficult to prove detrimental action to a criminal standard of proof, and even if a prosecution for the offence of detrimental action was successfully pursued, the victim of detriment would not be compensated for any loss they suffered. Establishing a civil cause of action may provide a more effective remedy by improving prospects of success through the lower standard of proof required. The

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likelihood of reprisals may also be reduced by the availability of a more effective remedy.

- The awarding of damages to the victim of the detriment means they would be compensated for any loss they had suffered. It would be preferable to confine damages to actual financial loss suffered and not provide for exemplary damages, to reduce the prospect of litigation being commenced for financial gain.<sup>576</sup>

9.36 The previous Committee recommended that the PDA be amended to 'provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.'<sup>577</sup>

9.37 The previous Committee on the ICAC's 2006 review of the PDA also examined the issue. In discussing civil proceedings, the Committee outlined the previous Office of the Ombudsman and PIC Committee's recommendation to amend the PDA. The Committee then observed that the Cabinet Office had responded to the recommendation by noting that existing avenues for redress may be found in the *Victims Support and Rehabilitation Act 1996* (for acts of violence) and the *Industrial Relations Act 1996* (for unfair dismissal or discrimination in employment).<sup>578</sup> The previous Committee then outlined the Protected Disclosures Act Steering Committee's response to the Cabinet Office:

The Protected Disclosures Act Implementation Steering Committee in its current submission replied to these comments by arguing that for the Protected Disclosures Act 1994 to be effective the system it establishes must itself provide adequate remedies for a whistleblower. It said that an employee who has suffered as a result of making a protected disclosure should not be required to resort to trying to find a breach of another Act or a common law duty. This response does not adequately meet the objection raised by the Cabinet Office because under section 90 of the Industrial Relations Act a person would lose their entitlement to reinstatement, remuneration or compensation if they proceeded with an action for damages under the provision contemplated by the Steering Committee. Cabinet's concern was that uninformed persons might therefore jeopardise their own position by commencing a civil action for compensation.<sup>579</sup>

9.38 The previous ICAC Committee also noted that NSW Police had expressed uncertainty about the impact of the proposed amendment on the Police Act, while also questioning the need for the amendment in light of the common law right to claim for compensation.<sup>580</sup> The Committee concluded that it agreed in principle that the PDA should be amended to provide whistleblowers with a right to seek damages for detrimental action. However, it concluded that the proposal should be reviewed and developed further by the Steering Committee to resolve the issues referred to in the Committee's report.<sup>581</sup>

### *Whistling While They Work* project

9.39 The first report of the project concluded that current legislation is 'insufficiently focused on restitution (including financial compensation) as a response to adverse

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<sup>576</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, pp. 70-2.

<sup>577</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, p. 72.

<sup>578</sup> Committee on the ICAC, report 12/53, November 2006, p. 42.

<sup>579</sup> Committee on the ICAC, report 12/53, November 2006, p. 42.

<sup>580</sup> Committee on the ICAC, report 12/53, November 2006, p. 42.

<sup>581</sup> Committee on the ICAC, report 12/53, November 2006, p. 42.

outcomes, as opposed to criminal remedies that are, in any event, inappropriate for the bulk of cases.<sup>582</sup>

9.40 The first report of the project made the following observations in relation to compensation for whistleblowers:

- In many instances, compensating a whistleblower will provide the only effective remedy to reprisals, as attempts to prosecute a manager (to a criminal standard of proof) for having taken a deliberate reprisal are usually likely to be fruitless. It is therefore crucial for there to be effective ways of compensating staff in cases of detriment.
- Public sector agencies have a common law duty of care to support and protect their employees and damages may be payable in cases where an agency has failed to take steps to meet this duty.
- There have been no successful compensation claims by whistleblowers in jurisdictions with statutory compensation provisions:

A general problem is that these statutory mechanisms do not locate the avenue for enforceable legal compensation within the employment relationship, where the duty of care is most obvious, as shown by *Wheadon v. State of New South Wales*. Rather, ... the statutory mechanisms equate the damage suffered by a whistleblower to a personal injury suffered by the individual as the result of negligence by another individual (for example, as if in a car accident). The burden of establishing the nature of the duties involved, combined with the costs of taking legal action in an intermediate or superior court, combined with the risk of a costs order should the action fail, are all enough to explain why whistleblowers would seek to live with adverse outcomes rather than seek compensation.

- Alternative mechanisms, such as those found under equal opportunity legislation, offer a more affordable and flexible forum, however, they are generally no more effective, being focussed on mediating and remedying discrimination instead of identifying breaches of duty of care by employers.<sup>583</sup>

9.41 The WWTW report also referred to two cases heard in Queensland, which involved unsuccessful claims for damages by whistleblowers, stating that the cases 'demonstrate the inadequacy of the current personal injury-based compensation provisions, in their juxtaposition with the criminalisation of reprisals.'<sup>584</sup>

9.42 The report concluded that the principles behind the current statutory provisions should be reconsidered to make it clear that reprisals are both a criminal offence and that whistleblowers should also be compensated for reprisals, as such action represents a breach of an agency's duty of care to its employees:

... it should be made express in the legislation that the criminal offence of reprisal, provable beyond reasonable doubt, does not limit the entitlement of a whistleblower to seek compensation for detriment suffered, whether criminal or non-criminal. In other words, to escape the consequence experienced in Queensland ... but consistent with *Wheadon*, it should be clear that employers can indeed be [sic] held vicariously liable for the acts and omissions of individual staff, direct or indirect, whenever detriment follows and there has been a breach of an individual or organisational duty of care. It should also be made clear that normal evidentiary principles apply—that is, that a claim for compensation may be satisfied based on a balance of probabilities, irrespective of

<sup>582</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 262-3.

<sup>583</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 272-4.

<sup>584</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 275.

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the criminal standard. Consequently, it should be made possible to conclude, on a balance of probabilities, that detriment occurred and that the organisation may therefore owe remedial action, even if individuals cannot be identified as criminally liable. Second, a more appropriate compensation avenue should be found than those presently existing under Australian legislation ...<sup>585</sup>

- 9.43 The best practice legislation, which was developed as part of the project, stated that whistleblowers who have suffered detriment as a result of having made a disclosure should have the ability to apply for pecuniary and non-pecuniary compensation for detriment suffered, if it could have been prevented, avoided or minimised. According to the report, '[j]urisdiction to deal with compensation applications should be conferred on a low-cost tribunal with expertise in determining the rights and responsibilities of employers and employees.'<sup>586</sup>
- 9.44 The report also identified several priority areas for future research, which included more detailed study of the types of compensation available to whistleblowers who have suffered detrimental action, 'including informal compensation and the positive action taken by agencies to extend justice, and how these efforts might be more effectively supported by the broader legal and management frameworks surrounding workplace relations in the public sector.'<sup>587</sup>
- 9.45 The second report of the project noted that the research had established the necessity for 'flexible mechanisms for compensation and restitution' in cases where detriment is suffered as a result of a disclosure being made.<sup>588</sup> In terms of agency responses, workshops conducted with case study agencies as part of the project had discussed the role of formal apologies and disciplinary measures in cases of management failure, in addition to 'organisational assessments of the relevant managers' fitness to retain supervisory responsibilities.'<sup>589</sup>
- 9.46 The report stated that, given the lack of adequate legislative systems for compensation, individual agencies should seek to develop ways of providing for compensation in specific cases:

A final issue concerns compensation by way of adjustments in career path, favourable transfers or access to allowances, or financial compensation for psychological damage and/or damage to career prospects. No jurisdictions have well-developed systems for awarding such forms of compensation to whistleblowers through existing grievance, workers' compensation or equality of opportunity processes. Until such systems are better developed, individual agencies need to consider their own options for bypassing or fast-tracking formal systems in order to facilitate compensation in deserving cases.<sup>590</sup>

### Inquiry participants' views

- 9.47 Several inquiry participants supported an amendment to the PDA to enable whistleblowers to take civil action for damages if detrimental action is taken against them. The NSW Council for Civil Liberties noted that s.1317AC of the *Corporations Act 2001* (Cth) provides that it is an offence to cause detriment to a whistleblower,

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<sup>585</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 276.

<sup>586</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, pp. 286-7.

<sup>587</sup> Brown A J (ed), *Whistleblowing in the Australian Public Sector*, September 2008, p. 312.

<sup>588</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 104.

<sup>589</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 104, <<http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/whistling-july09-full-report.pdf>>, accessed 9 September 2009.

<sup>590</sup> Roberts P, Olsen J, and Brown A J, *Whistling while they work*, Draft report, July 2009, p. 104.

while s.1317AD provides for victims of detriment to be compensated.<sup>591</sup> The Council submitted that whistleblowers should be able to sue for damages if they have experienced a reprisal, in addition to providing for civil action:

Of particular importance here is the right of whistleblowers to sue for damages where they have been subject to reprisals. NSW is the only state in which this legal right has not been provided for.

Recommendation 8. That the Act be amended to require whistleblowers who have been the subject of reprisals to be compensated by the employer or the government.

Recommendation 9. That the Act be amended to permit whistleblowers to take civil action for damages against those who engage in reprisals for their whistleblowing.<sup>592</sup>

9.48 With regard to civil damages, in evidence to the Committee, the ICAC Deputy Commissioner, Ms Theresa Hamilton, made the following points against amending the Act:

- It may create the perception that people are making allegations in order to get damages.
- The emphasis of the legislation should be on effective prevention of reprisals.
- There are other legal remedies available to people who have been wrongfully dismissed or suffered a financial loss due to a protected disclosure.<sup>593</sup>

9.49 However, in response to the Committee's discussion paper proposal to amend the PDA to provide for applications for civil damages the Commission submitted that:

The Commission support proposals which would ... provide for public officials to claim civil damages for detrimental action ...<sup>594</sup>

9.50 The Ministry of Transport did not support the proposal to enable public officials to claim for civil damages for detrimental action taken against them, stating that complainants should not have any expectation of financial gain, as this may motivate them to make unwarranted disclosures.<sup>595</sup>

9.51 Whistleblowers Australia submitted that they were in favour of widening the protections available under the Act to include injunctions against reprisals and the ability to seek damages and compensation for reprisals through civil proceedings.<sup>596</sup>

9.52 The Australian Press Council noted that whistleblowers should be compensated for any loss or injury they suffer as a result of having made a disclosure, while also pointing to the way that fear of career related repercussions may act to prevent whistleblowers from disclosing wrongdoing:

Officers who are subject to victimisation after having made public interest disclosures are likely to suffer psychological injury, including anxiety or depression, and may also suffer financial loss resulting from inability to work. One important reason why employees are reluctant to report maladministration is that they fear damage to their career, whether by termination or loss of opportunities for advancement. While employees may, in some instances, have recourse to workers compensation or expensive tortious actions, it would be preferable if the Act made specific provision for

<sup>591</sup> NSW Council for Civil Liberties, *Submission 17*, p. 5.

<sup>592</sup> NSW Council for Civil Liberties, *Submission 17*, pp. 5-6.

<sup>593</sup> Ms Hamilton, *Transcript of evidence*, 18 August 2008, p. 22.

<sup>594</sup> ICAC, *Submission 47*, p. 1.

<sup>595</sup> Ministry of Transport, *Submission 62*, pp. 1-2.

<sup>596</sup> Whistleblowers Australia, *Submission 4*, pp. 6, 9.

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compensation with respect to loss or injury suffered as a result of making a public interest disclosure.<sup>597</sup>

- 9.53 In evidence to the Committee, Whistleblowers Australia argued in favour of a system that would allow for exemplary damages. Ms Cynthia Kardell told the Committee that she favoured a system similar to that in the United States, where *qui tam* actions are launched by whistleblowers on behalf of the government, to recover the proceeds of fraud:

When you talk about civil claims for compensation for a whistleblower, you are talking about no more or less than what is commonly available to someone for personal injury or related things. When you talk about *qui tam* actions, you are talking about something quite different. You are talking about a particular system, which comes out of ancient common law, ... a system that is built on that and punitive law, which allows a court to treble the amount that is claimed as having been rorted from the Government and then, on a percentage basis, allocate a portion of that to a whistleblower, who may, depending on whether they ran the case themselves or whether it was taken up by the Government and they became like the main witness, the main investigator, the person who helped them through the details. In that sense you are not talking about compensation that is personal, you are talking about compensation for the risk of taking up and managing, perhaps having the whole risk of that litigation.<sup>598</sup>

### Committee comment

- 9.54 The WWTW project outlined the practical difficulties in many Australian jurisdictions with providing adequate compensation for whistleblowers, identifying the issue of adequate compensation mechanisms as an area requiring further research. Nonetheless, the project stated that best practice legislation should enable whistleblowers to seek pecuniary and non pecuniary compensation for detriment suffered.
- 9.55 The Committee notes that a previous Committee on the Office of the Ombudsman and PIC review of the PDA recommended that proposed civil action provisions in the Act be limited to civil damages. Some participants in the current inquiry expressed the view that providing the right to seek damages may lead to the perception that whistleblowers are motivated by financial gain. Other participants favoured providing for exemplary damages in addition to general damages. In the Committee's view, if protective measures have failed to prevent an employee suffering reprisals, the PDA should enable them to seek civil damages for such detriment. However, the civil action provisions should not provide for exemplary damages.
- 9.56 The Committee notes that the 2000 review of the PDA considered Whistleblowers Australia's proposal that a false claims scheme, similar to that in the United States, be introduced in New South Wales. The previous Committee concluded that it did not accept that the false claims system is based on exemplary damages, stating that it 'promotes a system of financial benefits for persons who initiate litigation about false and fraudulent claims. It appears to be based on legal procedures, such as the right for private litigants to initiate proceedings in the name of the Government, which do not form part of the usual legal process which operates in New South Wales.'<sup>599</sup> The previous Committee acknowledged that the system may have some merit, and

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<sup>597</sup> Australian Press Council, *Submission 13*, p. 2.

<sup>598</sup> Ms Cynthia Kardell, Whistleblowers Australia, *Transcript of evidence*, 1 December 2008, p. 40.

<sup>599</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, August 2000, p. 83.

recommended that further research on the system be undertaken by the Steering Committee, 'with a view to recommending implementation of any elements of the statute suited to the NSW jurisdiction.'<sup>600</sup> The Committee on the ICAC did not revisit this issue as part of the current inquiry and would anticipate that it is a matter that the Steering Committee could examine.

- 9.57 The previous ICAC Committee's review of the PDA highlighted possible issues in relation to the application of the proposed amendment to enable claims for civil action for damages, in light of provisions contained in the Industrial Relations Act. The current Committee concurs with the views expressed in the previous Committee's report and remains of the view that this particularly technical legal issue warrants further consideration and clarification.
- 9.58 Nevertheless, the Committee is recommending that the PDA be amended to provide that a public official may claim civil damages for detrimental action taken against them, substantially in reprisal for a protected disclosure. The Committee's recommendation is aimed at ensuring that whistleblowers have further avenues available to them in cases of detrimental action. It is hoped that such an amendment would deter reprisals, in addition to enabling whistleblowers to seek damages for loss if detriment has occurred.

**RECOMMENDATION 27:** That the *Protected Disclosures Act 1994* be amended to provide for a public official to claim civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.

## Confidentiality guidelines

- 9.59 Section 22 of the PDA places an obligation on investigating authorities or public officials that receive or are referred a protected disclosure, not to disclose information that might identify or tend to identify the person who has made the disclosure.
- 9.60 Exceptions are provided in the following circumstances:
- where the person consents in writing, or
  - where it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person the disclosure concerns, or
  - where disclosure of the identifying information is necessary to investigate the matter or it is in the public interest to do so.
- 9.61 The NSW Ombudsman has identified three main aspects of confidentiality in relation to protected disclosures:
- the fact of the disclosure
  - the identity of the whistleblower, and
  - the allegations themselves (including individuals' names).<sup>601</sup>

<sup>600</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, August 2000, p. 83.

<sup>601</sup> NSW Ombudsman, *Information sheet: Protection of whistleblowers Practical alternatives to confidentiality*, May 2008, p. 1 <[http://www.ombo.nsw.gov.au/publication/PDF/factsheets/Whistleblowing\\_infosheet\\_may%202008.PDF](http://www.ombo.nsw.gov.au/publication/PDF/factsheets/Whistleblowing_infosheet_may%202008.PDF)>, accessed January 2009.

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9.62 The NSW Ombudsman also states that 'if practical and appropriate, it is certainly best practice that confidentiality be maintained by the agency, all responsible staff and the whistleblower'.<sup>602</sup>

Inquiry participants' views

9.63 Maintaining confidentiality can be difficult in relation to protected disclosures, particularly when a disclosure is investigated, as the very fact of an investigation can alert other staff to the existence of the allegations, and to the identity of the whistleblower. The Deputy Ombudsman told the Committee of the difficulties that can arise with maintaining confidentiality:

... As soon as we acknowledge or admit that we have a protected disclosure, the chances are that the people in the agency will know who made it, and if they do not, they will think it was somebody else who did not make it. ... But from our experience since the Act commenced, in most cases the person can be identified. What we would normally do is talk to the person and say, "Have you told anybody? Is it obvious that it is going to be you if we admit to the fact that there is a disclosure."

In many cases they will accept that it is important that we are able to identify them to the head of the agency so that we can say, "We have this disclosure. There is a choice: You can look at it, or we can look at it. If you look at it, we need to have guarantees that this person is not going to suffer detrimental action", et cetera. Sometimes we can look at these matters without identifying the whistleblower, but that can be very difficult. Agencies have the same problem. If they get an internal disclosure, often the person will be identified.<sup>603</sup>

9.64 The Committee also discusses the issue of confidentiality, with respect to eligibility for protection for complaints made anonymously, in chapter 8 of this report.

9.65 The University of New South Wales (UNSW) outlined to the Committee the following difficulties in relation to maintaining confidentiality where a protected disclosure has been made:

- Where the allegations relate to a workplace with a very small number of employees, the people making a disclosure are easily identifiable due to the nature of the workplace.
- Where the identity of a whistleblower becomes known, UNSW is still obliged to maintain confidentiality, even if the whistleblower has identified themselves and their identity is a matter of public record. This can lead to the perception of a lack of transparency and honesty on behalf of UNSW.<sup>604</sup>

9.66 UNSW submitted that the confidentiality guidelines in the PDA should be amended to require people who have made a disclosure to maintain confidentiality, until they may make a disclosure to the media or a member of Parliament under s.19 of the Act. UNSW stated that it should be made clear that, if confidentiality is voluntarily breached other than by the relevant public authority, the confidentiality guidelines no longer apply.<sup>605</sup>

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<sup>602</sup> NSW Ombudsman, *Information sheet: Protection of whistleblowers Practical alternatives to confidentiality*, May 2008, p. 1 <[http://www.ombo.nsw.gov.au/publication/PDF/factsheets/Whistleblowing\\_infosheet\\_may%202008.PDF](http://www.ombo.nsw.gov.au/publication/PDF/factsheets/Whistleblowing_infosheet_may%202008.PDF)>, accessed January 2009.

<sup>603</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 4.

<sup>604</sup> University of New South Wales, *Submission 32*, pp. 3-5.

<sup>605</sup> University of New South Wales, *Submission 32*, p. 4.



- 9.67 The Committee proposed in its discussion paper that s.22 of the PDA be amended to remove the requirement for confidentiality if a public official has identified themselves as having made a protected disclosure, and to clarify that the guidelines apply to a public official who has made a protected disclosure, in addition to the investigating and/or public authorities investigating the disclosure.
- 9.68 Several inquiry participants supported the proposal.<sup>606</sup> The Department of Education and Training commented that public officials who have made a complaint should be required to maintain confidentiality, to retain the protection afforded under the PDA, as this would assist agencies in managing investigations and limit breaches of confidentiality by complainants.<sup>607</sup>
- 9.69 The NSW Police Force indicated that it supported the proposal to remove the confidentiality requirement in cases where an official has identified themselves as having made a disclosure, in terms of its application to its civilian employees. In relation to sworn employees, the NSW Police Force stated that the proposal would not adversely affect the Police Force, and that it could be adopted through an amendment to the Commissioner's guidelines, under s.169A of the Police Act.
- 9.70 Clause 75 of the Police Regulations would prevent officers from disclosing details of an allegation they have made under the Police Act against another officer, while clause 53(3) would probably prevent an officer from identifying themselves as the complainant. The NSW Police Force noted that the proposal is therefore consistent with current provisions in relation to its sworn officers, and expressed support for the application of the proposal to its civilian employees.<sup>608</sup>
- 9.71 Ms Kardell expressed support for the proposed amendment, while arguing that:
- Investigating authorities should not be able to decline to investigate a complaint on the grounds that a whistleblower requests anonymity.
  - Authorities should not disclose the identity of a whistleblower, even if the whistleblower consents to it (and in order to observe procedural fairness).
  - Whistleblowers should not be required to keep the fact that they have made a disclosure confidential.<sup>609</sup>

### Committee comment

- 9.72 The Committee heard that the confidentiality guidelines of the PDA have presented practical problems in some respects, with UNSW indicating that its management of disclosures has been compromised by instances of whistleblowers publicly disclosing details of their allegations. The Committee notes that several inquiry participants expressed support for an amendment to the PDA that would clarify the application of the guidelines.
- 9.73 The aim of the confidentiality guidelines is to ensure protection for whistleblowers, while also facilitating the investigation of protected disclosures. The Committee has noted that evidence received during the inquiry indicated that investigation and agency management of disclosures can be hindered by breaches of the confidentiality guidelines, due to their lack of clarity. The Committee is seeking to

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<sup>606</sup> Mr Ben Blackburn, *Submission 41*, p. 3, Department of Education and Training, *Submission 44*, p. 2, ICAC, *Submission 47*, p. 1, Ministry of Transport, *Submission 62*, p. 2.

<sup>607</sup> Department of Education and Training, *Submission 44*, p. 2.

<sup>608</sup> NSW Police Force, *Submission 61*, pp. 6-7.

<sup>609</sup> Ms Cynthia Kardell, *Submission 52*, p. 2.

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clarify the application of the guidelines to ensure they are applied in a practical way. The Committee envisages that agencies will provide clear advice to staff, in their protected disclosures policies, on the obligation on whistleblowers to maintain confidentiality if they have made a disclosure. Staff will therefore be aware that they should not disclose the details of their disclosure, in addition to being advised of the agency's obligation to maintain confidentiality. In cases where a whistleblower voluntarily identifies themselves as having made a disclosure, the confidentiality guidelines will no longer apply.

- 9.74 The Committee is recommending that the confidentiality guidelines at s.22 of the PDA be amended to: remove the requirement for confidentiality if a public official has voluntarily and publicly identified themselves as having made a protected disclosure; and clarified to state that the guidelines apply to a public official who has made a disclosure, in addition to the relevant investigating and/or public authorities investigating the disclosure.

**RECOMMENDATION 28:** That section 22 of the *Protected Disclosures Act 1994* be amended to:

- (a) remove the requirement for confidentiality where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.
- (b) clarify that the confidentiality guidelines apply to a public official who has made a protected disclosure, in addition to the relevant investigating and/or public authorities investigating the disclosure.

## Prosecutions for detrimental action

- 9.75 Detrimental action that is taken substantially in reprisal for a person making a protected disclosure is an offence under s.20 of the PDA. Section 29 provides that proceedings for an offence against the PDA are to be dealt with summarily before the Local Court.

## Previous reviews of the PDA

- 9.76 Previous reviews of the PDA have recommended that the Act be amended to provide for a dedicated agency to prosecute detrimental action offences. The 1996 review of the PDA by the Committee on the Office of the Ombudsman and PIC noted that there may be difficulties with initiating criminal proceedings pursuant to s.20. As a way of enhancing the effectiveness of s.20, the Committee recommended that the PDA be amended to require investigating authorities to refer any evidence of offences under s.20 to the Director of Public Prosecutions.<sup>610</sup>
- 9.77 The Committee on the Office of the Ombudsman and PIC's 2000 review of the PDA also examined the uncertainty around who should prosecute such cases. The previous Committee noted at the time that prosecutions could be conducted by either the DPP or the police, and recommended no change to the status quo. In response to evidence from the NSW Ombudsman, the previous Committee recommended amendments to the Ombudsman Act that would enable the NSW Ombudsman to make disclosures of relevant information to the DPP or police, for the purpose of

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<sup>610</sup> Committee on the Office of the Ombudsman and PIC, *Review of the Protected Disclosures Act 1994*, September 1996, recommendation 10, p. 80.

prosecutions for detrimental action.<sup>611</sup> The Committee concurs with the merits of this proposal and accordingly supports an amendment to the Act.

- 9.78 The previous Committee on the ICAC conducted a review of the PDA in 2006. The previous Committee noted the earlier recommendations and the view of the Steering Committee that more effective prosecutions for offences under both s.20 and s.28 may be possible if the PDA provided for a specific prosecuting authority. The previous ICAC Committee recommended that, in order to remove uncertainty and provide 'clarification and reassurance to whistleblowers', the PDA should be amended to specify the DPP as the prosecuting authority for offences under s.20 (detrimental action) and s.28 (false or misleading disclosures).<sup>612</sup>

### Inquiry participants' views

- 9.79 During the current inquiry, the Committee received a small number of submissions from individuals claiming they had been subject to reprisals for having made a disclosure. Evidence received by the Committee indicates that there have been no successful prosecutions for detrimental action under the relevant provisions since the enactment of the PDA. The Deputy Ombudsman advised the Committee that the five proceedings initiated to date, under the PDA or the relevant provisions of the Police Act, failed on technical grounds.<sup>613</sup>

- 9.80 The NSW Police Force advised the Committee that the only detrimental action prosecution commenced by police pursuant to the PDA was later withdrawn by the DPP:

A search of the NSW Police Force prosecutions database reveals that there has only been one charge laid by police under the provisions of the PDA. That occurred in November 2001 and related to alleged detrimental action taken by a Senior Constable of Police against a Probationary Constable. The prosecution of the matter was taken over by the Director of Public Prosecutions but was withdrawn and therefore never proceeded to a hearing.<sup>614</sup>

- 9.81 Although there have been no prosecutions under the PDA, the NSW Police Force indicated to the Committee that, pursuant to s.60 of the *Crimes Act 1990*, it has successfully prosecuted a police officer for intimidation of another police officer who was a whistleblower, and that the court also granted an Apprehended Personal Violence Order to protect the whistleblower.<sup>615</sup> The Police Force advised that the

<sup>611</sup> Committee on the Office of the Ombudsman and PIC, *Second Review of the Protected Disclosures Act 1994*, August 2000, recommendation 5, pp. 51-2.

<sup>612</sup> Committee on the ICAC, November 2006, report 12/53, recommendation 14, pp. 44-5.

<sup>613</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 6.

<sup>614</sup> Answers to questions on notice, NSW Police Force, June 2009, question 1, p. 1.

<sup>615</sup> NSW Police Force, *Submission 31*, p. 8; *Crimes Act 1990* (NSW), s.60:

#### **Assault and other actions against police officers**

(1) A person who assaults, throws a missile at, stalks, harasses or intimidates a police officer while in the execution of the officer's duty, although no actual bodily harm is occasioned to the officer, is liable to imprisonment for 5 years.

...

(4) For the purposes of this section, an action is taken to be carried out in relation to a police officer while in the execution of the officer's duty, even though the police officer is not on duty at the time, if it is carried out: (a) as a consequence of, or in retaliation for, actions undertaken by that police officer in the execution of the officer's duty, or (b) because the officer is a police officer.

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officer was convicted of two offences under the Crimes Act and was sentenced to a good behaviour bond for 12 months.<sup>616</sup>

9.82 The Deputy Ombudsman also noted that the PDA does not provide for a specific prosecuting body to initiate proceedings, noting that the effect of this is that 'anybody who could prosecute, like police, DPP ... can basically say it is not really our role.'<sup>617</sup>

9.83 A letter provided to the Committee by the Deputy Ombudsman, in his capacity as Chair of the Protected Disclosures Steering Committee, stated that the Steering Committee 'believes that a prosecuting authority should be nominated in the Act, but this could be the DPP or some other organisation.'<sup>618</sup>

9.84 The Committee wrote to the Director of Public Prosecutions, Mr Nicholas Cowdery QC, to seek his view on whether the PDA should be amended to provide for a specific prosecuting body. In response, the DPP expressed the view that it was not necessary for the PDA to specify a prosecuting body, as any suspected criminal activity should be referred to the NSW Police Force and any agency that concludes that there may have been a breach of the PDA should be notifying the police. The police would then determine whether charges would be laid. The DPP noted that police prosecutors normally prosecute summary offences. However, in view of the nature and objectives of the PDA, he proposed that prosecutions for detrimental action should be referred to the DPP for prosecution:

Police prosecutors usually prosecute summary offences; however, because of the nature of the legislation and its objectives I am of the view that any prosecutions under section 20 of the Protected Disclosures Act should be referred to my Office for prosecution. This would ensure consistency in approach in dealing with the complainants and in the prosecutions themselves and also will provide police (and the relevant agencies) with guidance as to evidentiary requirements. The police may seek advice prior to laying charges. If it is accepted that this Office should prosecute I will liaise with the police to ensure such matters are referred to me.<sup>619</sup>

9.85 The Committee also sought the views of the NSW Police Force. The Police Force noted that the DPP is currently able to take over proceedings, based on the public interest. The Police Force indicated its support for the DPP taking over detrimental action offences, due to the public interest considerations involved in such cases:

... consideration ought be given to having the Office of Director of Public Prosecutions (DPP) as the specified prosecuting authority for these types of matters. You will note that under its prosecution guidelines the DPP may take over proceedings where "the public interest otherwise requires it". We would submit that section 20 PDA offences by their very nature involve a high level of public interest, and therefore ought be taken over by the DPP ...<sup>620</sup>

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<sup>616</sup> The officer was convicted of the following offences: Stalk/intimidate with intent to cause fear of physical/mental harm (s.562AB(1)) and obtain money/valuable thing/financial advantage by deception for a false claim that he performed rostered duty s.178BA(1): see answers to questions on notice, NSW Police Force, April 2009, question 2, pp. 4-5.

<sup>617</sup> Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 9.

<sup>618</sup> See letter from Mr Chris Wheeler to the Hon Morris Iemma MP, tabled at public hearing, 18 August 2008, and Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 3.

<sup>619</sup> Answers to questions on notice, Office of the Director of Public Prosecutions, question 3, p. 2.

<sup>620</sup> Answers to questions on notice, NSW Police Force, June 2009, question 3(a), p. 2.

## Committee comment

- 9.86 The Committee is seeking to improve the detrimental action provisions of the PDA, to make them more effective in terms of deterring reprisals and to ensure that where reprisals have occurred, they are prosecuted effectively.
- 9.87 The Committee notes that the issue of prosecutions has been considered in each review of the PDA, and recommendations for a specific prosecuting authority to be identified in the Act have been made on previous occasions.
- 9.88 The Committee considers that the lack of successful prosecutions for detrimental action under the PDA is a significant issue. It is unsatisfactory that people taking detrimental action against whistleblowers may escape prosecution due to technicalities. Consistency in terms of the prosecuting authority that undertakes such prosecutions may result in more successful outcomes for whistleblowers. In this regard, the Committee notes that the DPP submitted that by referring matters to his office for prosecution this would ensure consistency in dealing with these types of offences and may provide police and relevant agencies with guidance on evidentiary requirements for such prosecutions.
- 9.89 The NSW Police Force and the DPP stated that the DPP should prosecute detrimental action offences under s.20 of the PDA, due to the public interest associated with such offences. The Committee supports the DPP's comments on the potential for achieving consistency for complainants and in the conduct of prosecutions.
- 9.90 Despite the DPP's comments that it is not essential to specify in the PDA a prosecuting authority, the Committee recommends that as a means of improving the effectiveness of the PDA in encouraging disclosures and protecting whistleblowers from reprisals, an amendment to specify a prosecuting authority for the offence of taking detrimental action should be made. In the Committee's view, the DPP is the appropriate authority to undertake or supervise such prosecutions. The Committee concurs with the DPP's suggestion that such matters should be referred to the DPP for prosecution.
- 9.91 Section 29 of the PDA provides that proceedings for offences under the PDA be dealt with summarily before the Local Court. A further recommendation of the Committee is to increase the maximum penalty for offences under the PDA to two years.<sup>621</sup> The Committee notes that such an increase in the maximum penalty would not prevent offences under the PDA from continuing to be heard before the Local Court.<sup>622</sup> However, clarification is needed as to whether the prosecution of these offences in the Local Court may create difficulties for the DPP.
- 9.92 The Committee is, therefore, recommending that the DPP be fully consulted on any proposed amendments to the Act in relation to the prosecution of offences. For example, the DPP could be consulted on matters such as whether s.29 of the PDA should be amended to remove the requirement for offence proceedings under the Act to be dealt with summarily.
- 9.93 The Committee notes that the previous ICAC Committee's 2006 review of the PDA recommended that the DPP also be specified as the prosecuting authority for

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<sup>621</sup> The current maximum penalty for the offence of detrimental action under s.20 of the PDA is 50 penalty units or imprisonment for 12 months.

<sup>622</sup> The maximum term of imprisonment that the Local Court may impose is 2 years. *Criminal Procedure Act 1986* (NSW), s.6, 7, and 267. See also s.58 *Crimes (Sentencing Procedure) Act 1999* (NSW).

proceedings for false disclosures offences under s.28 of the Act. The Committee would support such an amendment, pending consideration and input from the DPP. The Steering Committee also could be consulted on this matter. The views of the Steering Committee and the DPP should be sought on the desirability of amending s.28 of the PDA to nominate the DPP as the prosecuting authority, in order to achieve consistency in the way that proceedings for all offences under the PDA are dealt with.

**RECOMMENDATION 29:** That the *Protected Disclosures Act 1994* be amended to provide that the Office of the Director of Public Prosecutions is the nominated prosecuting authority for offences under section 20 of the Act, and that these matters be referred to the Office of the Director of Public Prosecutions to undertake or supervise any prosecutions.

**RECOMMENDATION 30:** That the Office of the Director of Public Prosecutions be fully consulted by the Department of Premier and Cabinet on any proposed amendment, which would give effect to the Committee's recommendations 29 and 31, in regard to the prosecution of offences under the *Protected Disclosures Act 1994*.

## Penalty provisions for detrimental action

9.94 Section 20(1) of the PDA provides a maximum penalty of 50 penalty units or imprisonment for 12 months, or both, for the offence of taking detrimental action against another person substantially in reprisal for the person making a protected disclosure. This is the lowest penalty applicable to such offences by comparison with other jurisdictions.

### Other jurisdictions

9.95 Maximum penalties for comparable offence provisions found in other Australian jurisdictions are listed in the table below.

**Table 6: Civil, industrial and equitable remedies in other jurisdictions**

Jurisdiction	Legislation	Maximum penalty
Vic	Section 18 <i>Whistleblowers Protection Act 2001</i>	240 penalty units or 2 years imprisonment or both
Qld	Section 42 <i>Whistleblowers Protection Act 1994</i>	167 penalty units or 2 years imprisonment
WA	Section 14(1) <i>Public Interest Disclosure Act 2003</i>	\$24 000 or 2 years imprisonment
SA	<i>Whistleblowers Protection Act 1993</i>	No offence provisions
Tas	Section 19 <i>Public Interest Disclosures Act 2002</i>	240 penalty units or 2 years imprisonment or both
ACT	Section 25 <i>Public Interest Disclosure Act 1994</i>	100 penalty units or 1 year imprisonment or both
NT	Section 15 <i>Public Interest Disclosure Act 2008</i>	400 penalty units or 2 years imprisonment
Cth	Section 16 <i>Public Service Act 1999</i>	No offence provisions

## Other relevant legislation

- 9.96 The Committee notes that the penalty provisions for similar offences under ss.93(1) and 94(1) of the ICAC Act and ss. 37(4) and (5) of the Ombudsman Act provide for a maximum penalty of 200 penalty units or imprisonment for 5 years, or both:
- **ICAC Act:** A person who uses, causes, inflicts or procures, or threatens to use, cause, inflict or procure, any violence, punishment, damage, loss or disadvantage to any person for or on account of: his or her assisting the Commission, or any evidence given by him or her before the Commission, is guilty of an indictable offence (maximum penalty: 200 penalty units or imprisonment for 5 years, or both.)
  - An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence (maximum penalty: 200 penalty units or imprisonment for 5 years, or both.)
  - **Ombudsman Act:** A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of: his or her making a complaint to the NSW Ombudsman, or his or her assisting the NSW Ombudsman, or any evidence given by him or her to the NSW Ombudsman, is guilty of an indictable offence (maximum penalty: 200 penalty units or imprisonment for 5 years, or both.)
  - An employer who dismisses any employee from his or her employment, or prejudices any employee in his or her employment, for or on account of the employee assisting the NSW Ombudsman is guilty of an indictable offence (maximum penalty: 200 penalty units or imprisonment for 5 years, or both.)
- 9.97 Whistleblowers making disclosures through external avenues to the ICAC and NSW Ombudsman, as investigating authorities pursuant to the PDA, may therefore be protected by the higher penalty provisions applying to people assisting the Commission and NSW Ombudsman pursuant to the relevant Acts, as outlined above.

## Inquiry participants' views

- 9.98 The Committee wrote to the Director of Public Prosecutions, Mr Nicholas Cowdery QC, to seek his view on the adequacy of the penalty provisions in the PDA and on the possibility of increasing the maximum penalty for offences under s.20. The DPP supported an increase in the penalty provisions, noting that it may have a deterrent effect and would bring New South Wales into line with other jurisdictions:

I note the penalties for similar offences in legislation in other States are heavier penalties than provided in the NSW Act (other than SA and the Commonwealth). The NSW legislation should be brought into line with other States particularly as the legislation is important and amendments are anticipated which will provide for a more flexible process. Prosecutions may result and deterrence is a primary objective.<sup>623</sup>

- 9.99 The NSW Police Force also provided a comment on the penalty provisions, stating that, while there may be a need for consistency between jurisdictions, the penalty provisions of the PDA are consistent with those in the Police Act. The Police Force expressed the view that there is no need to amend the penalty provisions, observing that the low number of matters that have led to charges being laid under s.20 may

<sup>623</sup> Answers to questions on notice, Office of the Director of Public Prosecutions, question 2, pp. 1-2.

suggest that the current penalties are an adequate deterrent against detrimental action:

(a) A review of the maximum penalties for comparable offences found in other Australian jurisdictions (as listed in the table in your letter) suggests a need for some national consistency in relation to the offences: We note however that the current penalties under the PDA of a maximum of 12 months imprisonment and/or 50 penalty units are the same maximum penalties imposed for offences under section 206 of the *Police Act 1990* relating to reprisals made against police officers making protected allegations.

(b) The very small number of incidents where section 20 PDA charges have been laid suggests that the penalties under the Act may be providing sufficient deterrent to prevent many offences occurring. We do not therefore see any need to increase the maximum penalty for such offences, even though the maximum penalties are slightly higher in some of the other jurisdictions.<sup>624</sup>

## Committee comment

- 9.100 The prosecution of detrimental action offences under the PDA is an important aspect of the protection of whistleblowers, as it serves to deter reprisals while also providing for the prosecution of those who have taken reprisals against whistleblowers. The Committee acknowledges the WWTW research, which pointed to the difficulty of achieving the criminal threshold of proof for prosecution, and noted that in many instances reprisals are taken by managers rather than co-workers.
- 9.101 However, it is relevant to note that similar whistleblower legislation in other jurisdictions provides for more severe penalties for comparable offences. The Committee is seeking to achieve consistency with other jurisdictions, and to emphasise that detrimental action is a serious criminal offence. It is also relevant to note that the ICAC and Ombudsman Acts provide for more severe penalties for reprisals taken under those Acts.
- 9.102 The Committee notes that the Director of Public Prosecutions expressed support for increasing the penalty provisions in the PDA to bring them into line with other jurisdictions. Although the NSW Police Force acknowledged the desirability of consistency across jurisdictions, they commented that the small number of incidents leading to prosecution is an indication of the deterrent effect of the current penalty. However, the Committee heard evidence from the NSW Ombudsman about the lack of successful criminal prosecutions for offences under the PDA. The Committee is not convinced that the lack of prosecutions is an indication of the effectiveness of the current provisions. An increase in the penalty provisions will only serve to boost the deterrent effect of the detrimental action provisions and, in the Committee's view, it is vital that the PDA effectively deters reprisals to boost protection for whistleblowers.
- 9.103 The Committee envisages that effective offence provisions should be combined with better agency procedures, managerial training and external oversight to achieve a culture that does not tolerate reprisals against whistleblowers.
- 9.104 The Committee is, therefore, recommending that s.20 of the PDA be amended to provide a maximum penalty of 100 penalty units or imprisonment for two years, or both, for detrimental action offences under the Act.

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<sup>624</sup> Answers to questions on notice, NSW Police Force, June 2009, question 2, pp. 1-2.



**RECOMMENDATION 31:** That section 20(1) of the *Protected Disclosures Act 1994*, which provides that it is an offence to take detrimental action against a person, if the action is substantially in reprisal for the person making a protected disclosure, be amended to provide a maximum penalty of 100 penalty units or imprisonment for two years, or both.

## Appendix 1 – Submissions

Submission no	Name/Organisation	Publication status
<b>1</b> Supplementary 1a, 1b, 1c, 1d, 1e	Mr Rodney Edwards	Confidential
<b>2</b>	Mr Robert Cairns	Confidential
<b>3</b>	NSW Liberal & National Parties	Public
<b>4</b>	Whistleblowers Australia	Partially confidential
<b>5</b>	Mr Ben Blackburn	Partially confidential
<b>6</b>	Mr John Kite	Confidential
<b>7</b>	Mr Keith Potter	Partially confidential
<b>8</b>	Ms Gillian Sneddon	Confidential
<b>9</b>	Ms Margaret Penhall-Jones	Partially confidential
<b>10</b>	Medical Consumers Association Inc	Public
<b>11</b>	Bravehearts	Public
<b>12</b>	Ms Bimla Chand	Confidential
<b>13</b>	Australian Press Council	Public
<b>14</b>	Whistleblowers Action Group Queensland	Partially confidential
<b>15</b>	Mr Ian Faulks	Public
<b>16</b>	Dr Tom Benjamin	Partially confidential
<b>17</b>	NSW Council for Civil Liberties Inc	Public
<b>18</b> Supplementary 18a	Mr Michael McGuirk	Partially confidential
<b>19</b>	Mr William McPherson	Confidential
<b>20</b>	Mr Ivan Patrick	Confidential
<b>21</b>	NSW Ombudsman	Public
<b>22</b>	ICAC	Public
<b>23</b>	Mr Terence Doherty	Partially confidential
<b>24</b> Supplementary 24a	Name suppressed	Confidential
<b>25</b> Supplementary 25a	Mr Tony Grosser	Confidential
<b>26</b>	Ministry of Transport	Public
<b>27</b>	Department of Local Government	Public
<b>28</b>	Audit Office of NSW	Public
<b>29</b>	NSW Legislative Council	Public
<b>30</b>	Department of Environment and Climate Change	Public
<b>31</b>	NSW Police Force	Public
<b>32</b>	UNSW	Public
<b>33</b>	NSW Department of Health	Public
<b>34</b> Supplementary 34a	NSW Legislative Assembly	Public

<b>Submission no</b>	<b>Name/Organisation</b>	<b>Publication status</b>
35	NSW Maritime	Public
36	RailCorp	Public
37	Department of Education and Training	Public
38	Ms Cynthia Kardell	Partially confidential
39	Right to Know Coalition	Public
40	NSW Ombudsman	Public
41	Mr Ben Blackburn	Partially confidential
42	NSW Audit Office	Public
43	STOPLine	Public
44	Department of Education and Training	Public
45	Dr Tom Benjamin	Partially confidential
46	Mr Robert Cairns	Partially confidential
47	ICAC	Public
48	NSW Liberal and National Parties	Public
49	Ms Kay Pettit	Partially confidential
50	Ms Bev Brooker	Partially confidential
51	Department of Premier and Cabinet	Public
52 Supplementary 52a	Ms Cynthia Kardell	Public
53	Ms Margaret Penhall-Jones	Partially confidential
54	Name suppressed	Partially confidential
55	UNSW	Public
56	Name suppressed	Partially confidential
57	NSW Department of Health	Public
58	NSW Legislative Assembly	Public
59	NSW Legislative Council	Public
60	Mr William McPherson	Public
61	NSW Police	Public
62	Ministry of Transport	Public
63	Mr Andrew Patterson	Confidential
64	Mr Chris Heffernan	Confidential

## Appendix 2 – Witnesses

Date	Witness	Position	Organisation
<b>Monday, 18 August 2008</b> Parliament House, Sydney	Mr Chris Wheeler	Deputy Ombudsman	NSW Ombudsman's Office
	Ms Theresa Hamilton	Deputy Commissioner	Independent Commission Against Corruption
<b>Monday, 24 November 2008</b> Parliament House, Sydney	Professor Richard Henry AM	Acting Vice-Chancellor	University of New South Wales
	Mr Aaron Magner	Assistant University Solicitor	
	Mr Ross Woodward	Deputy Director-General	Department of Local Government
	Mr Peter Cribb	A/Principal Solicitor, Contract, Information and Audit, Legal Services Branch	NSW Maritime
	Ms Fran Simons Mr Andrew Patterson Ms Virginia Wills	Group General Manager, Human Resources and Communications Manager, Workplace Conduct Unit Manager, Investigations, Internal Audit	RailCorp
	Ms Karen Crawshaw Mr Terry Clout	Deputy Director-General, Health System Support CEO, South Eastern Sydney and Illawarra Area Health Service	NSW Department of Health
	Mr Tim Rogers Ms Catherine Donnellan	Executive Director, Performance Management and Communication Director, Corporate Governance	Department of Environment and Climate Change
	Mr Jim Glasson Mr Peter Scarlett	Director-General Executive Director, Transport Services Group	Ministry of Transport
	Mr Peter Achterstraat Mr Phil Thomas	Auditor-General Assistant Auditor-General	Audit Office of NSW
	Mr Barry O'Farrell MP	Leader of the Opposition	NSW Liberal/National Parties
<b>Monday, 1 December 2008</b> Parliament House, Sydney	Mr Grant Marley Ms Jane Thorpe	Senior Manager, Serious Misconduct Unit Director, Employee Performance and Conduct	Department of Education and Training
	The Hon Peter Primrose MLC Ms Lynn Lovelock	President Clerk of the Parliaments	Department of the Legislative Council

<b>Date</b>	<b>Witness</b>	<b>Position</b>	<b>Organisation</b>
	Dr Peter Bowden Ms Cynthia Kardell	President National Secretary	Whistleblowers Australia
	Assistant Commissioner Paul Carey Superintendent Karen McCarthy Chief Inspector Joanna Reed	Commander, Professional Standards Command Director, Employee Management Manager, Internal Witness Support Management	NSW Police Force
	Mr Russell D Grove	Clerk of the Legislative Assembly	Department of the Legislative Assembly
<b>Tuesday, 11 August 2009</b> Parliament House, Sydney	Mr Robert Falconer	Chairman	STOPLine
	Mr Chris Wheeler	Deputy Ombudsman	NSW Ombudsman
	The Hon Jerrold Cripps QC Ms Theresa Hamilton Mr Roy Waldon Mr Mick Symons Dr Robert Waldersee Mr Andrew Koureas	Commissioner Deputy Commissioner Solicitor to the Commission/ Executive Director, Legal Division Executive Director, Investigation Division Executive Director, Corruption Prevention, Education and Research Executive Director, Corporate Services	Independent Commission Against Corruption

## Appendix 3 – Minutes

### Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 13)

Thursday, 3 July 2008 at 10.02 am

Room 814-15, Parliament House

#### 1. Members present

Mr Terenzini (Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Mr Harris (Deputy Chair), Ms McMahon, Revd Nile, Mr O’Dea, Mr Stokes and Mr Turner.

*In attendance:* Helen Minnican, Jasen Burgess, Dora Oravec, Chris Papadopoulos and Mille Yeh.

#### 2. Apologies

Ms McKay.

#### 3. \*\*\*

#### 4. \*\*\*

#### 5. Deliberative meeting

The Committee commenced deliberations at 12:54pm. (Mr Turner and Ms McKay apologies)

##### i. \*\*\*

##### ii. \*\*\*

##### iii. Inquiry into the protection of public sector whistleblower employees

The Chair spoke to the terms of reference for the ICAC Committee to conduct an inquiry into the protection of public sector whistleblower employees, as resolved by both Houses on 26 June 2008. The Chair indicated that he had received procedural and jurisdictional advice in relation to the inquiry’s terms of reference from the Clerk-Assistant (Committees) and the Committee Manager, and outlined the nature of the issues raised. In view of this advice, the Chair proposed that the Committee seek legal advice to clarify the jurisdictional and procedural issues raised in relation to the inquiry’s terms of reference, preferably without delaying the inquiry. Discussion ensued.

Mr Coombs indicated that he would seek independent legal advice with regard to whether there would be any potential conflicts relating to his participation in the inquiry.

Further discussion ensued on issues relating to the inquiry’s terms of reference.

Revd Nile explained that the inquiry reference was originally moved in the Legislative Council because the ICAC Committee is a joint statutory committee that has previously reviewed the *Protected Disclosures Act 1994*. Discussion ensued.

The draft inquiry advertisement calling for submissions, and the proposed inquiry timetable were circulated. Discussion ensued.

Resolved, on the motion of Ms McMahon, seconded Mr Ajaka, that:

- i. the Committee’s approval of the advertisement and the timetable for the inquiry be postponed for discussion until the Committee’s next meeting scheduled for 9 July; and
- ii. in the interim, urgent legal advice be sought from the Crown Solicitor concerning the Committee’s jurisdiction to conduct the inquiry (as per the inquiry referral as it

stands), and the implications for the inquiry of those provisions of the *Independent Commission Against Corruption Act 1988*, which are relevant to the Committee.

- iv. \*\*\*
- 6. \*\*\*

Deliberations concluded, the meeting closed at 1.22 pm.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 14)**

Thursday, 9 July 2008 at 10.00 am  
Room 814-15, Parliament House

**1. Members present**

Mr Terenzini (Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Mr Harris (Deputy Chair), Ms McKay, Ms McMahan, Revd Nile, Mr O’Dea, and Mr Stokes.

*In attendance:* Les Gonye, Helen Minnican, Dora Oravec, Jacqueline Isles and Mille Yeoh.

**2. Apologies**

Mr Turner.

3. \*\*\*

4. \*\*\*

**5. Deliberative meeting**

The Committee commenced deliberations at 1.27pm. (Mr Donnelly not present - apologies)

**i. Minutes**

Resolved, on the motion of Revd Nile, seconded Mr Ajaka, that the minutes of the public and in camera hearings, and the deliberative meeting held on 3 July 2008 be confirmed.

**ii. Inquiry into the protection of public sector whistleblower employees**

The Chair advised the Committee that the Clerk had, shortly before the meeting, received the urgent advice requested from the Crown Solicitor, dated 9 July 2008, in relation to the Committee’s jurisdiction to conduct the inquiry (as per the referral), and the implications for the inquiry of the provisions of the Independent Commission Against Corruption Act 1988 relating to the Committee. The Chair addressed the Committee on the nature of the advice as summarised in a memorandum from the Committee Manager, copied to the Clerk-Assistant (Committees). Discussion ensued.

On the request of Mr Ajaka, the Committee directed that a further written summary clarifying the nature of the Crown Solicitor’s advice be supplied, for distribution to Committee members when it next met for deliberations on 18 August 2008. Discussion ensued.

Mr Ajaka sought clarification as to the extent of the Committee’s jurisdiction in relation to particular matters. Discussion ensued.

Mr Ajaka sought clarification of the confidentiality of the Committee’s proceedings and the Chair confirmed that, apart from the evidence taken by the Committee in public hearings during the course of an inquiry, Standing Orders required that the proceedings and records of the Committee were completely confidential, unless their disclosure was authorised by the Committee. Discussion ensued.

The Committee discussed advertising the inquiry.

Appendix 3 – Minutes

Resolved on the motion of Revd. Nile, seconded Mr O’Dea, advertise the inquiry and call for submissions as per the advertisement previously circulated at the meeting on 3 July. The advertisement would include the terms of reference for the inquiry, as agreed to by both Houses. Discussion ensued.

Resolved on the motion of Revd. Nile, seconded Mr Ajaka, to authorise the Chair to release a media statement announcing the advertisement of the inquiry and the call for submissions, and other relevant matters, including details of a revised inquiry timetable.

Mr O’Dea raised the interpretation of s.64(2) of the ICAC Act for further consideration. Discussion ensued.

Resolved on the motion of Ms McMahon, seconded Mr Coombs, to seek further legal advice from the Crown Solicitor on the implications of s.64(2) of the ICAC Act for the conduct of the inquiry.

iii. \*\*\*

Deliberations concluded, the meeting closed at 1.56 pm.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 15)**

Monday, 18 August 2008 at 10.07 am  
Jubilee Room, Parliament House

**1. Members present**

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Ms McKay, Ms McMahon, Revd Nile, Mr O’Dea, Mr Stokes and Mr Turner.

*In attendance:* Les Gonye, Jasen Burgess, Dora Oravec, and Emma Wood.

**2. Deliberative meeting**

**i. Minutes**

Resolved, on the motion of Revd Nile, seconded Mr Harris, that the minutes of the meeting of 9 July 2008 be confirmed.

ii. \*\*\*

iii. \*\*\*

iv. \*\*\*

v. \*\*\*

vi. \*\*\*

**vii. Inquiry into the protection of whistleblower employees**

- Mr Coombs advised the Committee that he was of the view that there could be a perception of a conflict of interest should he continue to participate in the whistleblower inquiry. Mr Coombs decided, therefore, to stand aside from any proceedings relating to this inquiry. Mr Coombs withdrew from the meeting at 10.20am.
- The Committee discussed the establishment of the inquiry into the protection of whistleblower employees in the public sector. The Chair proposed that the inquiry should look at operation and effectiveness of the *Protected Disclosures Act 1994*.
- The Chair spoke to a summary of legal advice received by the Clerk of the Legislative Assembly from the Crown Solicitor in relation to the terms of reference for the whistleblower inquiry and how they relate to the Committee’s statutory jurisdiction.



The advice received indicates that the Committee has jurisdiction to conduct the inquiry because the sections of PDA being reviewed by the Committee are relevant to the Committee's functions under s.64(1) (b) and (d) the ICAC Act. Notwithstanding, the restrictions at s.64(2) of the ICAC Act apply to the Committee in its conduct of the whistleblower inquiry. Thus the Committee is prohibited from investigating particular matters, or from questioning the decision to investigate or to not investigate a particular matter.

The Committee noted the summary of the Crown Solicitor's advice.

- The Chair raised certain media reports in relation to the current inquiry. The Chair reminded the Committee that the confidentiality of deliberations enabled free and frank discussion among Members.

### **3. Public hearing - Inquiry into the protection of whistleblowers in the public sector**

The press and the public were admitted. At 11.05am, the Chair opened the public hearing and welcomed the witness.

Mr Chris Wheeler, Deputy Ombudsman, Office of the NSW Ombudsman, affirmed.

The Chair questioned the witness, followed by other members of the Committee.

Mr Wheeler tabled a letter 28 March 2008 from the Protected Disclosures Steering Committee, which he Chairs, to the Premier.

Evidence concluded, the Chair thanked the witness for his attendance and the witness withdrew.

Ms Theresa Hamilton, Deputy Commissioner of the ICAC, sworn.

The Chair questioned the witness, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witness for her attendance and the witness withdrew.

The public hearing concluded at 1:44pm.

The public and the press withdrew and the Committee deliberated further.

### **4. Further deliberation**

The Committee deliberated.

Resolved, on the motion of Mr O'Dea, seconded by Ms McKay:

"That the corrected transcript of proceedings of the hearings conducted on 9 July 2008 and this day be published".

\*\*\*

The Committee noted the correspondence from Mr Leslie Staines and agreed that he be invited to make a submission to the whistleblower inquiry.

\*\*\*

The Committee adjourned at 1:50 pm.

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Deliberations concluded, the meeting closed at 1.50 pm.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 16)**

Wednesday, 10 September 2008 at 11.06 am  
Room 814-815, Parliament House

**1. Members Present**

Mr Terenzini (Chair), Mr Harris, Mr Coombs, Mr Donnelly, Mr Ajaka, Mr O’Dea, Mr Stokes, Revd Nile, Lylea McMahon.

*In attendance:* Helen Minnican, Jasen Burgess, Dora Oravec, Emma Wood and Millie Yeoh.

**2. Apologies**

Mr Turner

**3. \*\*\***

**4. Deliberative meeting**

The Committee commenced deliberations at 11:35am.

**i. \*\*\***

**ii. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Stokes, that the minutes of the meeting held on 18 August 2008 be confirmed.

**5. General business**

The Chair advised the Committee on the progress of the current inquiry into the protection of public sector whistleblowers. The Chair informed the Committee that the secretariat is currently processing and summarising the submissions. A full set of submissions, with accompanying summaries, will be provided to Committee members at the meeting scheduled for 24 September 2008.

The Chair reminded the Committee that pursuant to Standing Order 297 the submissions remain confidential to the Committee until they are made public during evidence or under the authority of the Committee.

The Committee discussed the process for selecting and calling witnesses, including the extent of the Committee’s powers. Discussion ensued.

\*\*\*

\*\*\*

Mr Harris raised with the Committee the current Federal inquiry into whistleblowing protections being conducted by the Standing Committee on Legal and Constitutional Affairs which he considered may be of assistance to the Committee and beneficial to monitor its progress. Discussion ensued.

\*\*\*

The Chair opened discussion on general issues relating to the current inquiry. Discussion ensued.

Deliberations concluded, the meeting closed at 12.08 pm.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 17)**

Wednesday, 24 September 2008 at 8.30 am  
Waratah Room, Parliament House

**1. Attendance:****Members Present**

Mr Terenzini (Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Mr Harris, Revd Nile, Mr O’Dea, Mr Stokes, Mr Turner.

\*\*\*

*In attendance* Helen Minnican, Jasen Burgess, Dora Oravec, and Emma Wood.

The Chair opened the meeting at 8.30am.

**2.** \*\*\*

**3.** \*\*\*

**4. Deliberative meeting**

The Committee commenced deliberations at 9:32am.

The vacancy in the membership of the Committee, created by Ms McMahon’s appointment as a Parliamentary Secretary, was noted.

**i. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Stokes, that the minutes of the in camera hearing and deliberative meeting held on 10 September 2008 be confirmed.

**ii.** \*\*\*

**iii. Distribution of papers in preparation for deliberations on 29 September 2008**

○ \*\*\*

○ Submissions and correspondence received in relation to the current inquiry into the protection of public sector whistleblower employees were distributed. The correspondence included two letters:

(a) Letter from the Auditor-General, Mr P Achterstraat, to the Chair dated 21 August 2008;

(b) Letter from the Commissioner of the PIC, Mr J Pritchard, dated 25 August 2008.

○ \*\*\*

**iv. General business**

\*\*\*

Mr Ajaka advised of his likely replacement as a member of the Committee and placed on the record his thanks to the Chair and members of the Committee.

Deliberations concluded, the meeting adjourned at 9:45am.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 18)**

Monday, 29 September 2008 at 10.03 am  
Room 814-5, Parliament House

**1. Attendance:**

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*Members present*

Mr Terenzini (Chair), Mr Donnelly, Mr Harris, Mr Khan, Mr Khoshaba, Ms Beamer, Revd Nile, Mr O’Dea, Mr Smith, Mr Stokes.

*Apologies*

Mr Coombs

*In attendance* Helen Minnican, Jasen Burgess, Dora Oravec, and Emma Wood.

The Chair opened the meeting at 10.03am and welcomed the new Committee members as follows:

**Legislative Assembly**

Diane Beamer and Ninos Khoshaba appointed to serve on the Committee in place of Jodi McKay and Lylea Anne McMahon; and Gregory Smith appointed to serve on the Committee in place of John Turner, discharged.

Votes and Proceedings of the New South Wales Legislative Assembly, Wednesday 24 September 2008

**Legislative Council**

Mr Khan appointed to the Committee in place of Mr Ajaka.

Legislative Council Minutes No. 67, Thursday 25 September 2008.

**2. Minutes**

Resolved, on the motion of Revd Nile, seconded Mr Harris, that the minutes of the private hearing and deliberative meeting held on 24 September 2008 be confirmed.

**3. \*\*\***

**4. Inquiry into the protection of public sector whistleblower employees**

For the information of new Committee members, the Chair addressed the Committee on the background to the inquiry, the Committee’s functions and the conduct of the inquiry to date, including the legal advice provided to the Committee by the Crown Solicitor, and the evidence taken thus far from the Deputy Ombudsman and the Deputy Commissioner of the ICAC.

The Chair outlined the aspects of the inquiry listed for consideration at the meeting, including the submissions received, inquiry related correspondence, and the witnesses and hearing schedule. He indicated that the latter involved examining the relevance of the submissions received by the committee in order to determine those individuals and organisations to take evidence from, and to identify any other individuals and organisations who have not made submissions who also should be called to give evidence.

The Chair proposed the following approach:

- the program for the next day of public hearings, should focus on the practices and procedures in place to protect whistleblowers and the fundamental issues with the operation of the legislation;
- the agencies to be called for the next day of hearings should include -
  - The NSW Liberal and National Parties (Submission 3)
  - Whistleblowers Australia (Submission 4)
  - The Department of Local Government
  - Universities
  - NSW Police Force
  - RailCorp
  - Department of Health
  - The Auditor-General
  - Department of Environment and Climate Change

- the following submissions were all relevant but their authors should not be called to give evidence at this stage of the inquiry –
  - Medical Consumers Association Inc (Submission 10)
  - Bravehearts (Submission 11)
  - Australian Press Council (Submission 13)
  - Mr Ian Faulks (Submission 15)
  - NSW Council for Civil Liberties Inc (Submission 17)
- at this stage, the remaining submissions, being submissions from –
  - Mr Rodney Edwards (Submission 1, supplementaries 1A-1E)
  - Mr Robert Cairns (Submission 2)
  - Mr Ben Blackburn (Submission 5)
  - Mr John Kite (Submission 6)
  - Mr Keith Potter (Submission 7)
  - Ms Gillian Sneddon (Submission 8)
  - Ms Margaret Penhall-Jones (Submission 9)
  - Ms Bimla Chand (Submission 12)
  - Whistleblowers Action Group Queensland (Submission 14)
  - Dr Tom Benjamin (Submission 16)
  - Mr Michael McGuirk (Submission 18 Supplementary 18A)
  - Mr William McPherson (Submission 19)
  - Mr Ivan Patrick (Submission 20)
  - Mr Terence Doherty (Submission 23)
  - [Author 2 – confidentiality and suppression of name by Committee resolution, at a subsequent meeting] (Submission 24)

should be noted but treated confidentially, until the Committee can consider at a later stage the extent to which the personal experiences cited in each individual case can be utilised for the inquiry as potential case studies, given the statutory limitations applicable to the Committee and the in-depth investigation each case would seem to require, counter to the Committee's jurisdiction and terms of reference.

Discussion ensued.

The Chair moved that:

- (a) the Government departments and agencies he had previously identified, then the NSW Liberal and National Parties, and Whistleblowers Australia, be called by the Committee to give evidence;
- (b) at a later stage, the Committee should determine what other individual submission makers and agencies should be called to give evidence;
- (c) at this stage, the submissions he had identified as being received from individuals about their particular cases, should remain confidential.

Upon which Mr Khan moved an amendment that the words "and submissions 5 (Mr Ben Blackburn), 8 (Ms Gillian Sneddon) and 20 (Mr Ivan Patrick)" be inserted after the word "Australia" in paragraph (a) of the motion.

Question put that Mr Khan's proposed amendment be agreed to.

The Committee divided:

Ayes: Mr Khan, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Mr Terenzini

There being an equal number of votes, the Chair exercised his casting vote pursuant to s.68(6) of the *Independent Commission Against Corruption Act 1988* and voted against the amendment.

Question resolved in the negative.

Copies of the summary of the Crown's Solicitor's advice to the Committee, circulated and discussed at a previous meeting, were distributed to Committee members for information.

Discussion ensued.

The Chair advised that Standing Order 326 specifies that the attendance of a member or officer of the House was to be made as a request, in writing.

Mr Donnelly moved, seconded Ms Beamer, that Mr Terenzini's motion be amended to include that:

- (a) in addition to the list of witnesses moved by the Chair, the Environmental Defender's Office, Maritime NSW and the Ministry of Transport be called as witnesses for the Committee's next hearing;
- (b) the Officers of the Parliament be requested to attend the next public hearing to give evidence.

Discussion ensued.

Mr Donnelly and Ms Beamer's motion was clarified to read as follows:

- (a) in addition to the list of witnesses moved by the Chair, the Environmental Defender's Office, Maritime NSW and the Ministry of Transport be called as witnesses for the Committee's next hearing;
- (b) the Officers of the Parliament and the Presiding Officers from both Houses be requested to attend the next public hearing to give evidence;
- (c) the Committee seek a submission from those witnesses, who have not previously submitted to the inquiry, prior to their appearance at the next public hearing.

Question on the proposed amendment not put.

Discussion ensued on the Chair's original motion. Question not put.

Revd Nile requested that the Chair provide a list of the individuals who had made submissions to the inquiry, who were not being called at this stage, identifying whether or not the Chair proposed hearing from each individual and the reasons why.

Discussion ensued.

The Chair clarified the motion before the Committee as follows:

- (a) the following agencies and organisations be called to give evidence by the Committee at the next public hearing for the inquiry –
  - NSW Parliament - the Clerks, Presiding Officers of both Houses (by request)
  - The NSW Liberal and National Parties (Submission 3)
  - Whistleblowers Australia (Submission 4)
  - The Department of Local Government
  - Universities
  - NSW Police
  - Railcorp
  - Department of Health
  - The Auditor-General

- Department of Environment and Climate Change (Environmental Defenders Office, if appropriate)
  - Maritime NSW
  - Ministry of Transport
- (b) a submission be sought from those agencies and organisations, who had not previously submitted to the inquiry, prior to their appearance to give evidence.

Discussion ensued.

The question was put that the Chair's motion be agreed to.

The Committee divided.

Ayes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd. Nile, Mr O'Dea, Mr Terenzini

Noes: Mr Khan, Mr Smith, Mr Stokes

Question resolved in the affirmative.

Mr Khan moved, seconded Mr O'Dea, that the Committee resolve forthwith which of the 24 individuals who had made submissions to the inquiry should be called to give evidence.

Discussion ensued.

Question put that Mr Khan's motion be agreed to. The Committee divided:

Ayes: Mr Khan, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Mr Terenzini

There being an equal number of votes, the Chair exercised his casting vote pursuant to s.68(6) of the Independent Commission Against Corruption Act 1988 and voted against the motion.

Question resolved in the negative.

The Committee discussed timetabling for the inquiry.

Resolved on the motion of Ms Beamer, seconded Revd. Nile, that as far as possible the Committee would hear evidence first from those agencies and organisations relevant to the submissions received from individuals.

Mr Khan moved, seconded Mr O'Dea, that the Committee authorise publication of the following submissions:

- Submission 3, The NSW Liberal and National Parties
- Submission 4, Whistleblowers Australia
- Submission 5, Mr Ben Blackburn
- Submission 8, Ms Gillian Sneddon
- Submission 10, Medical Consumers Association Inc
- Submission 13, Australian Press Council
- Submission 14, Whistleblowers Action Group Queensland
- Submission 17, NSW Council for Civil Liberties Inc
- Submission 20, Mr Ivan Patrick
- Submission 21, NSW Ombudsman
- Submission 22, ICAC

Discussion ensued.

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The Committee sought clarification from the Secretariat as to which submission authors had requested confidentiality for their submissions and were advised that no such requests had been received (Mr Patrick having advised by phone subsequent to making his submission that he no longer wished to make a request for confidentiality).

Discussion ensued.

Question put that Mr Khan's motion be agreed to. The Committee divided:

Ayes: Mr Khan, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd Nile, Mr Terenzini

Question resolved in the negative.

Mr Khan moved, seconded Mr Stokes, that the minutes of the meeting of the Committee on this day 29 September 2008 be published within seven days.

Discussion ensued.

The Chair indicated to the Committee that he intended to make a press release following the meeting outlining the decisions taken by the Committee in respect of the conduct of the inquiry.

Mr Stokes withdrew his seconding of the motion.

Question put that Mr Khan's motion be agreed to. The Committee divided:

Ayes: Mr Khan, Mr Smith

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Mr O'Dea, Revd Nile, Mr Stokes, Mr Terenzini

Question resolved in the negative.

Mr Smith moved, seconded Mr Khan, that the press release proposed by the Chair should indicate the differences of opinion on the Committee and that certain questions were decided on majority vote, based on the use of the Chair's casting vote.

Discussion ensued.

Question put that Mr Smith's motion be agreed to. The Committee divided:

Ayes: Mr Khan, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd Nile, Mr Terenzini

Question resolved in the negative.

The Secretariat was directed to send calendars to the members of the Committee canvassing availability for hearing dates.

The Chair consulted with the members of the Committee on his proposed media release.

The Committee discussed the confidential status of the submissions. The Chair noted that at this stage of the inquiry all of the submissions received by the Committee remained confidential.

**5. \*\*\***

Deliberations concluded, the meeting adjourned at 1.19 pm.



**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 19)**

Thursday, 13 November 2008 at 9.30 am  
Room 814-5, Parliament House

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Mr Amery, Mr Donnelly, Mr Harris, Mr Khan, Mr Khoshaba, Ms Beamer, Revd Nile, Mr O’Dea (from 10.55am), Mr Smith, Mr Stokes.

**In attendance** Helen Minnican, Jasen Burgess, Dora Oravec, Emma Wood and Jacqueline Isles.

**2. Membership change**

The Chair opened the meeting at 9.35am and announced that Mr Richard Amery had been appointed to serve on the Committee on the Independent Commission Against Corruption in place of Mr Robert Coombs, discharged (Votes and Proceedings of the New South Wales Legislative Assembly, 22 October 2008).

\*\*\*

**3. Minutes**

Resolved, on the motion of Mr Harris, seconded Mr Khoshaba, that the minutes of the deliberative meeting held on 29 September 2008 be confirmed.

**4. Inquiry into the protection of public sector whistleblower employees**

- i. **Publication of transcript of evidence** of Mr Chris Wheeler, Deputy Ombudsman at the public hearing on 18 August 2008. Briefing note distributed concerning the corrections to the transcript proposed by Mr Wheeler.

Resolved, on the motion of Revd. Nile, seconded Mr Khoshaba, that the corrected transcript of proceedings of the hearing conducted on 18 August 2008 be published including the letter from Mr Wheeler to the former Premier dated 28 March 2008 concerning the implementation of the recommendations arising from the Review of the Protected Disclosures Act.

- ii. **Publication of investigative agency submissions** (previously circulated).

Resolved, on the motion of Ms Beamer, seconded Mr Donnelly, that the submissions of the NSW Ombudsman and the Independent Commission Against Corruption to the inquiry be published.

- iii. **Conduct of the inquiry – jurisdictional issues**

**The scope of the inquiry** – The Chair spoke to the proposed resolution, previously circulated.

Moved Mr Terenzini, seconded Mr Donnelly, that,  
“the Committee’s inquiry into the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and Members of Parliament, will focus on:

- a. the adequacy of the protections available to employees who make bona fide disclosures about maladministration, illegality, corrupt conduct, misconduct and the misuse of public funds in the public sector, including reports about Members of Parliament;

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- b. the capacity of the *Protected Disclosures Act 1994* and other relevant legislation, such as the legislation governing the investigative authorities, the *Defamation Act 2005* and the *Occupational Health and Safety Act 2000*, to provide protection for employees who make such disclosures;
- c. the value of internal disclosures as a management tool and the efficacy of the internal reporting systems currently in place within the public sector for employees to make disclosures and receive protection;
- d. particular considerations in relation to the making of disclosures by employees about members of Parliament;
- e. trends in relation to disclosures made by employees concerning the conduct of government officials and Members of Parliament;
- f. measures to improve the protections available to employees in the public sector who make such disclosures.

The Committee is authorised to inquire into general matters but not particular acts, omissions or decisions made in relation to a particular whistleblower investigation.”

Discussion ensued. The Chair clarified that the resolution does not prevent the Committee from calling individual witnesses.

Moved Revd. Nile, seconded Mr Khan, that the words “without limiting the ability of the Committee to call individual witnesses and the study of case histories” be inserted after the word “investigation” in the last paragraph.

Discussion ensued.

Question put on the proposed amendment.

The Committee divided.

Ayes: Mr Khan, Revd. Nile, Mr Smith, Mr Stokes.

Noes: Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Mr Terenzini.

Question resolved in the negative.

Discussion ensued.

Question put on the original motion.

The Committee divided.

Ayes: Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd. Nile, Mr Terenzini.

Noes: Mr Khan, Mr Smith, Mr Stokes.

Question resolved in the affirmative.

**Committee’s jurisdiction to examine individual cases/particular conduct** - The Chair spoke to proposed resolution.

Moved Mr Terenzini, seconded Mr Amery, that,

“the inquiry terms of reference are general in scope, and do not make reference, to a particular incident, government official or Member of Parliament. Moreover, in accordance with the statutory limitations on the Committee’s jurisdiction found at s.64(2) of the *Independent Commission Against Corruption Act 1988*, the Committee can only make use of particular matters for the limited purpose of carrying out its general monitoring and review role, for example, to obtain relevant information to illustrate how disclosures are handled generally, or to determine if protections during investigations need strengthening. Such use

would need to demonstrate that there is a general problem or issue across many cases, as distinct from a problem confined to one particular case.

The Committee is not an investigator of particular conduct and any examination of submissions from individuals concerning their experiences must exclude:

- examining and weighing evidence;
- considering the significance of evidence and the motivation behind a decision, and;
- asking questions about the basis of, and the reasons for, findings made in a particular matter.

The Committee cannot canvass findings or decisions, or consider a decision a second time with a view to changing or amending that decision."

Discussion ensued.

Moved Mr Stokes, seconded Mr Khan, that the word "generally" in line 7 and the last sentence of the first paragraph, i.e. "Such use ...particular case", be deleted.

Mr Amery, Mr Smith and Mr Stokes left the meeting. Discussion ensued. Mr Smith returned.

Question on the proposed amendment put and passed.

Discussion ensued. Mr Stokes returned.

In response to enquiries from the Committee, the Secretariat confirmed that the legal advice had been sought by the Clerk of the Legislative Assembly from the Crown Solicitor and was retained by the Clerk. The legal advice was then summarised by the Committee Manager, in consultation with the Clerk-Assistant (Committees), and the summary provided to the Committee, in accordance with usual Legislative Assembly practice.

Moved Mr Khan, seconded Mr Smith, that consideration of the resolution be deferred until the full legal advice on the Committee's jurisdiction, as previously provided by the Crown Solicitor, is received by the Committee.

Discussion ensued.

Question put. The Committee divided.

Ayes: Mr Khan, Revd. Nile, Mr Smith, Mr Stokes.

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Mr Terenzini.

Question resolved in the negative.

Moved Mr Smith, seconded Mr Khan, that all the words after the word "strengthening" (ie. the last two paragraphs) be deleted.

Discussion ensued.

Question put on the proposed amendment. The Committee divided.

Ayes: Mr Khan, Revd. Nile, Mr Smith, Mr Stokes.

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Mr Terenzini.

Question resolved in the negative.

Question put that the motion, as amended, be adopted. The Committee divided.

Ayes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd. Nile, Mr Terenzini.

Noes: Mr Khan, Mr Smith, Mr Stokes.

Question resolved in the affirmative.

**iv. Hearing timetable** - Draft timetable for the public hearing on 24 November 2008 circulated for information.

**v. Outgoing and incoming correspondence** – The following correspondence to witnesses relating to the upcoming public hearings, previously circulated, noted:

- Letter from Chair to Ms Lynn Lovelock, Clerk of the Parliaments, dated 23 October 2008;
- Letter from the Chair to the Hon. Peter Primrose MLC, President of the NSW Legislative Council, dated 23 October 2008;
- Letter from the Hon. Peter Primrose MLC, President of the NSW Legislative Council, dated 22 October 2008;
- Letter from the Chair to the Hon. Peter Primrose MLC, President of the NSW Legislative Council, dated 17 October 2008;
- Letter from the Chair to Mr Russell Grove, Clerk of the NSW Legislative Assembly, dated 14 October 2008;
- Letter from the Chair to the Hon. Richard Torbay MP, Speaker of the NSW Legislative Assembly, dated 14 October 2008;
- Letter from the Chair to Dr Peter Bowden, dated 21 October 2008;
- Letter from the Chair to Mr Barry O'Farrell MP, NSW Opposition Leader, dated 21 October 2008;
- Pro forma letter inviting submissions to the inquiry and mailing list (copies attached).
- Letter to the Chair from Mr Jeff Smith, Director Environmental Defender's Office (NSW) Ltd, dated 3 November 2008, distributed at meeting.

**vi. Additional witnesses** – Department of Education and Training

Resolved on the motion of Revd Nile, seconded Ms Beamer, that the Committee invite the Department of Education and Training to provide a submission to, and give evidence before, the inquiry.

**vii. Further submissions** - Submissions received from the following agencies and individuals were noted:

- Mr Jim Glasson, Director-General, Ministry of Transport, dated 30 October 2008 (submission 26), previously circulated;
- Mr Garry Payne AM, Director-General, Department of Local Government, dated 31 October 2008 (submission 27), distributed at meeting;
- Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, dated 10 November 2008 (submission 28), distributed at meeting;
- Hon Peter Primrose MLC, President, NSW Legislative Council, dated 10 November 2008, distributed at meeting.

**viii. Briefing notes** – Briefing notes on:

- Agency reporting on protected disclosures and the lack of information available from which to judge the effectiveness of the *Protected Disclosures Act 1994*, previously circulated;
- Available protections for whistleblower employees, distributed at meeting; Noted for consideration at a later date.

5. \*\*\*

6. \*\*\*

7. **General business**

Publication of the minutes - Moved Mr Khan, seconded Mr Smith, that:

(a) the minutes of the Committee meetings held on 29 September and 13 November be published within seven days thereof; and

(b) individual members of the Committee be permitted to formally comment on the progress of the inquiry thus far.

Discussion ensued.

Mr O'Dea arrived at the meeting.

Question put. The Committee divided.

Ayes: Mr Khan, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd. Nile, Mr Terenzini.

Question resolved in the negative.

There being no further General Business, deliberations concluded and the meeting adjourned at 10.58am until Monday 24 November 2008 at 10.00 am.

### **Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no 20)**

Monday, 24 November 2008 at 10.00 am

Room 814/815, Parliament House

#### **1. Attendance:**

##### **Members present**

Mr Terenzini (Chair), Mr Donnelly, Mr Harris, Mr Khan, Mr Khoshaba, Ms Beamer, Revd Nile, Mr O'Dea, Mr Smith

##### **Apologies**

Mr Amery

Mr Stokes

*In attendance* Helen Minnican, Jasen Burgess, Dora Oravec, Emma Wood and Hilary Parker

#### **2. Inquiry into the protection of public sector whistleblower employees**

##### **i. Public hearing**

The press and the public were admitted. At 10.00am, the Chair opened the public hearing and welcomed the witnesses.

Professor Richard Henry AM, Deputy Vice-Chancellor (Academic), and Mr Aaron Magner, Assistant University Solicitor, Legal Office, University of NSW, affirmed.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

Mr Ross Woodward, Deputy Director General, Department of Local Government, sworn.

The Chair questioned the witness, followed by other members of the Committee.

Mr Woodward tabled an extract from the Department's website regarding a checklist for Promoting Better Practice Reviews of councils.

Evidence concluded, the Chair thanked the witness for his attendance and the witness withdrew.

Mr Peter Cribb, Acting Principal Solicitor, Contract Information and Audit, NSW Maritime, sworn.

The Chair questioned the witness, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witness for his attendance and the witness withdrew.

##### **ii. Deliberative meeting**

The Committee discussed matters raised during evidence and Mr O'Dea expressed concerns about the representation of NSW Maritime. The Committee agreed to follow-up matters taken on notice during the hearings with witnesses by letter.

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The Committee adjourned for lunch at 12.14pm.

**iii. Public hearing**

The public hearing resumed at 1.35pm.

Ms Frances Simons, Group General Manager, Human Resources and Communications, and Mr Andrew Patterson, Manager, Workplace Conduct Unit, RailCorp, affirmed, and Ms Virginia Wills, Manager, Investigations, Internal Audit, RailCorp, sworn.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

Ms Karen Crawshaw, Deputy Director General, and Mr Terry Clout, CEO, South East Sydney and Illawarra Area Health Service, New South Wales Department of Health, sworn.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

Mr Tim Rogers, Executive Director, Performance Management and Communication, and Ms Catherine Donnellan, Director, Corporate Governance, Department of Environment and Climate Change, affirmed.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

Mr Jim Glasson, Director General, and Mr Peter Scarlett, Executive Director, Transport Services Group, Ministry of Transport, sworn.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

The Committee adjourned for a short afternoon tea break (4.12pm-4.23pm)

The public hearing resumed.

Mr Peter Achterstraat, Auditor-General, Audit Office of New South Wales, sworn, and Mr Philip Thomas, Assistant Auditor-General, Performance Audit, Audit Office of New South Wales, affirmed.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

**iv. Deliberative meeting (4.56pm)**

• **Publication of submissions**

Resolved, on the motion of Revd Nile, seconded Ms Beamer, that the submissions relating to the public hearing today be published.

• **Providing confidential version of uncorrected transcript to witnesses**

Resolved, on the motion of Revd Nile, seconded Ms Beamer, that, to assist the witnesses appearing before the Committee on 1 December 2008, a copy of the uncorrected transcript be provided to them on a confidential basis.

**v. Public hearing**

The public hearing resumed at 5.01pm.

Mr Barry O'Farrell MP, Leader of the Opposition, NSW Liberal/National Parties, sworn.  
The Chair questioned the witness, followed by other members of the Committee.  
Evidence concluded, the Chair thanked the witness for his attendance and the witness withdrew.  
The hearing concluded at 5.32 pm.

The Committee adjourned at 5.32 pm until Monday, 1 December 2008 at 10.00 am in the Jubilee Room.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 21)**

Monday, 1 December 2008 at 10.00 am  
Jubilee Room, Parliament House

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Mr Amery, Mr Harris, Mr Khan, Mr Khoshaba, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes.

**Apologies**

Ms Beamer, Mr Donnelly

*In attendance* Helen Minnican, Jasen Burgess, Dora Oravec, Emma Wood and Jacqueline Isles.

**PUBLIC HEARING - Inquiry into the protection of public sector whistleblower employees**

The Chair opened the public hearing at 10.00am and gave a brief address on the Committee's inquiry.

Mr Grant Marley, Senior Manager, Serious Misconduct Investigation Team, and Ms Jane Thorpe, Director, Employee Performance and Conduct, Department of Education and Training, affirmed and examined.

Ms Thorpe provided the following additional documentation to be included in the Department's submission:

- Department of Education and Training, Code of Conduct Procedures
- Department of Education and Training, Complaints Handling Policy Guidelines

The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Hon. Peter Primrose MLC, President, NSW Legislative Council on former affirmation and Ms Lynn Lovelock, the Clerk of the Parliaments, NSW Legislative Council sworn and examined:

The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Committee took a short adjournment and resumed the public hearing at 12.30pm. The Chair advised that, as the hearing was behind schedule, timetabling difficulties would require deferral of the evidence from the representatives of NSW Police until the next public hearing.

Dr Peter Bowden, President, New South Wales Branch, Whistleblowers Australia, sworn and examined and Ms Cynthia Kardell, National Secretary, Whistleblowers Australia, affirmed and examined:

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The Chair commenced questioning of the witnesses followed by other members of the Committee. Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

The Committee took a short luncheon adjournment at 1.45pm. \*\*\*

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**PUBLIC HEARING - Inquiry into the protection of public sector whistleblower employees (cont.)**

Mr Russell D Grove, Clerk of the NSW Legislative Assembly, NSW Legislative Assembly, sworn and examined:

The Chair commenced questioning of the witness followed by other members of the Committee.

Mr Smith asked a question, which the Chair ruled out of order. Mr Smith objected to the ruling made by the Chair.

The witness was excused while the Committee deliberated.

**DELIBERATIVE MEETING**

The Committee commenced deliberations at 4.26pm.

Mr Smith dissented from the ruling made by the Chair.

Moved Mr Smith, seconded Mr Khan, that the Committee obtain advice from Senior Counsel as to the extent of the terms of reference for the inquiry and whether they allow questions on particular cases about particular individuals.

Discussion ensued.

Question put that Mr Smith's motion be agreed to. The Committee divided.

Ayes: Mr Khan, Revd Nile, Mr Smith

Noes: Mr Amery, Mr Harris, Mr Khoshaba, Mr Terenzini

Question resolved in the negative.

Mr Khan expressed dissent from the ruling made by the Chair.

Moved Mr Khan, seconded Mr Smith, that the question put by Mr Smith be ruled as relevant and within the terms of reference.

Question put that Mr Khan's motion be agreed to. The Committee divided.

Ayes: Mr Khan, Mr Smith

Noes: Mr Amery, Mr Harris, Mr Khoshaba, Revd. Nile, Mr Terenzini

Question resolved in the negative.

Discussion ensued.

Deliberations concluded at 4.50pm.

**PUBLIC HEARING - Inquiry into the protection of public sector whistleblower employees (cont.)**

The public hearing resumed at 4.51pm.

Mr Grove was readmitted to continue his evidence. Members of the Committee continued to question the witness. Questioning concluded, the Chair thanked the witness who withdrew.



The public hearing ended at 4.59pm and the Committee continued in deliberative session.

### DELIBERATIVE MEETING

- i. **Publication of transcripts of evidence** – Resolved on the motion of Revd. Nile, seconded Mr Khan, that the corrected transcripts of evidence for the public hearings held on 24 November and 1 December 2008 be authorised for publication.
- ii. **Publication of submissions** – Resolved on the motion of Mr Khan, seconded Revd. Nile, that the submissions relating to the evidence taken on 1 December 2008, excluding any references that may identify individuals be authorised for publication.
- iii. The Chair advised members of the Committee that the Premier's Department had expressed an interest in coming to give evidence in relation to the inquiry.
- iv. **Further submissions** – Supplementary Submission No 24A from [Author 2 – confidentiality and suppression of name by Committee resolution, at a subsequent meeting], dated 28 November 2008, distributed at meeting.
- v. **Independent Commission Against Corruption Amendment Bill 2008** – Copy of the Independent Commission Against Corruption Amendment Bill 2008 distributed at meeting.
- vi. **General Correspondence** - Copy of an email sent to the Committee from Ms Cynthia Kardell, National Secretary, Whistleblowers Australia inviting members of the Committee to attend the 2008 National Conference of Whistleblowers Australia in Melbourne on 6 and 7 December 2008, distributed at meeting.

Deliberations concluded, the Committee adjourned at 5.00 pm sine die.

### Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 22)

Thursday, 5 March 2009 at 9.30 am  
Room 814-15, Parliament House

#### 1. Attendance:

##### Members present

Mr Terenzini (Chair), Mr Harris, Mr Khoshaba, Ms Beamer, Mr Amery, Mr Khan, Revd Nile, Mr O'Dea, Mr Donnelly, Mr Smith, and Mr Stokes.

*In attendance* Jasen Burgess, Les Gonye, Dora Oravec, Amy Bauder, and Emma Wood.

#### 2. Minutes

Resolved, on the motion of Revd Nile, seconded Mr Donnelly, that the minutes of the meetings of 13 November, 24 November and 1 December 2008 be confirmed.

#### 3. Inquiry into the protection of public sector whistleblower employees

##### i. Correspondence received

The Committee noted the receipt of the following correspondence:

- letter from the Premier regarding amendments to Protected Disclosures Act 1994, dated 27 November 2008;
- answers to questions taken on notice from NSW Maritime, received 11 December 2008;
- answers to questions taken on notice from Legislative Council, received 15 December 2008;
- answers to questions taken on notice from Ministry of Transport, received 18 December 2008 ;
- answers to questions taken on notice from Department of Local Government, received 18 December 2008 and 12 January 2008;
- answers to questions taken on notice from RailCorp, received 19 December 2008

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- answers to questions taken on notice from NSW Health, received 28 January 2009;
- supplementary submission no 34a from Clerk of the Legislative Assembly, received 20 January 2009;
- letter from the Clerk of the Legislative Assembly concerning publication of the abovenamed supplementary submission, received 23 January 2009;
- submission no 39 received from the Right To Know Coalition, received 10 February 2009.

**ii. Publication of questions taken on notice**

Resolved, on the motion of Mr Donnelly, seconded Revd Nile, that answers to questions taken on notice at the hearings of 24 November and 1 December 2008 from the following departments be published:

- NSW Maritime (received 11 December 2008);
- Legislative Council (received 15 December 2008);
- Ministry of Transport (received 18 December 2008);
- Department of Local Government (received 18 December 2008 and 12 January 2009);
- NSW Health (received 28 January 2009).

**iii. Premier's letter dated 27 November 2008 regarding Protected Disclosures Act 1994**

Resolved, on the motion of Mr Khoshaba, seconded Ms Beamer that the Premier's letter dated 27 November 2008 informing the Committee of forthcoming amendments to the *Protected Disclosures Act 1994* be published.

**iv. Resolution to publish submissions**

Resolved, on the motion of Revd Nile, seconded Mr Amery that the following submissions be published:

- supplementary submission no. 34a from the Department of the Legislative Assembly;
- submission no. 31 from the NSW Police Force.

**v. Discussion paper**

The Chair spoke to the draft discussion paper which he indicated has been prepared as a means by which to canvass the views of submission makers and stakeholders with regard to issues raised during the course of the inquiry, and in relation to proposals for reform that are made in the discussion paper.

Discussion ensued.

Moved Mr Donnelly, seconded Mr Amery:

1. That the draft discussion paper previously circulated, as amended, be adopted as a report of the Committee and that it be signed by the Chair and presented to the House.
2. That the Committee distribute the Discussion Paper to submission makers and the Department of Premier and Cabinet, with responses due on 6 May 2009.
3. That the Chair, the Committee Manager and the Senior Committee Officer be permitted to correct stylistic, typographical and grammatical errors prior to tabling in the House.'

Discussion ensued.

Moved Mr Smith, seconded Mr O'Dea that the section dealing with officers of Parliament, paragraphs 4.9 to 4.13, be omitted from the discussion paper to allow further discussion and submissions on the matter.

Discussion ensued.

Question put on the proposed motion.

The Committee divided.

Ayes: Mr Smith, Mr Stokes, Mr O’Dea, Mr Khan.

Noes: Revd Nile, Mr Donnelly, Mr Amery, Ms Beamer, Mr Khoshaba, Mr Harris, Mr Terenzini.

Question resolved in the negative.

Discussion ensued.

Moved Mr Khan, seconded Mr Stokes, that each of the minutes of the meetings of the whistleblower inquiry be tabled with the discussion paper.

Question put on the proposed motion.

The Committee divided.

Ayes: Mr Smith, Mr Stokes, Mr O’Dea, Mr Khan.

Noes: Revd Nile, Mr Donnelly, Mr Amery, Ms Beamer, Mr Khoshaba, Mr Harris, Mr Terenzini.

Discussion ensued.

Question put on the original motion.

The Committee divided.

Ayes: Revd Nile, Mr Donnelly, Mr Amery, Ms Beamer, Mr Khoshaba, Mr Harris, Mr Terenzini.

Noes: Mr Smith, Mr Stokes, Mr O’Dea, Mr Khan.

Question resolved in the affirmative.

**vi. Inquiry program**

The Chair indicated that the Committee could convene mid-May to consider any further submissions submitted in response to the discussion paper, with a view to holding hearings in mid-June and tabling the report when the House resumes in September 2009.

**vii. Questions on notice - NSW Police Force**

The Chair proposed that questions on notice be sent to the NSW Police Force in lieu of their attendance at the 1 December 2008 public hearing when, due to extensions in time given to other witnesses appearing before the Committee and prior commitments on the part of NSW Police representatives, the NSW Police Force was unable to give evidence.

Resolved, on the motion of Mr Amery, seconded Ms Beamer, that the draft questions on notice to the NSW Police Force previously circulated be sent to the NSW Police Force with a request that a response be received by the Committee within four weeks of the date of the Chair’s letter.

**3.\*\*\***

**4.\*\*\***

Deliberations concluded, the meeting adjourned at 10.17am until 9.30am Thursday, 12 March 2009 in Room 814-815.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 23)**

Thursday, 12 March 2009 at 9.37 am

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Room 814-15, Parliament House

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Mr Harris, Mr Khoshaba, Mr Amery, Mr Khan, Mr O’Dea, Mr Donnelly, Mr Smith, and Mr Stokes.

**Apologies**

Revd Nile  
Ms Beamer

*In attendance* Jasen Burgess, Les Gonye, Dora Oravec, Amy Bauder, and Emma Wood.

**2. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Harris, that the minutes of the meeting of 5 March 2009 be confirmed.

**3. \*\*\***

**4. Resolution to publish RailCorp’s answers to questions taken on notice**

Resolved, on the motion of Mr Khoshaba, seconded Mr Harris, that RailCorp’s answers to questions taken on notice at the hearing of 24 November 2008 be published.

**5. \*\*\***

**6. \*\*\***

Deliberations concluded, the meeting adjourned at 10.09 am until 12:00 pm Tuesday, 21 April 2009, Room 814-15.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 24)**

Monday, 4 May 2009 at 10.00 am  
Waratah Room, Parliament House

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Ms Beamer, Mr Khoshaba, Mr O’Dea, Mr Donnelly, Revd Nile, Mr Smith

**Apologies**

Mr Amery  
Mr Harris  
Mr Khan  
Mr Stokes

*In attendance* Helen Minnican, Amy Bauder, Jasen Burgess, Dora Oravec, and Emma Wood.

**2. \*\*\***

**3. Deliberative meeting**

The Committee considered the following resolutions being items deferred from a deliberative meeting scheduled for 30 April 2009, which did not proceed due to the failure to achieve a quorum. The resolutions, previously circulated, were foreshadowed in discussions between Mr Terenzini, Ms

Beamer, Revd Nile, Mr Smith and Mr Stokes on 30 April and there was general agreement on the proposed resolutions at that time.

### **3.1 Minutes**

Resolved, on the motion of Ms Beamer, seconded Mr Khoshaba, that the minutes of the meeting of 12 March 2009 be confirmed.

### **3.2 Amendment to the minutes of 1 December 2008**

Resolved, on the motion of Mr Donnelly, seconded Revd Nile, that:

- i. the minutes of the meeting of 1 December 2008 be amended by inserting the words “Question resolved in the negative” on p.3 of the minutes in relation to the vote on Mr Khan’s motion of dissent; and
- ii. the minutes of 1 December 2008, as amended, be adopted.

**3.3 \*\*\***

**3.4 \*\*\***

**3.5 \*\*\***

**3.6 \*\*\***

### **3.7 Inquiry into public sector whistleblower employees**

- Correspondence received:
  - (a) Email from Jack Herman, Executive Secretary, Australian Press Council, received on 23 March 2009.
  - (b) Email from Professor Ken McKinnon, Chairman, Australian Press Council, received 9 April 2009 – for consideration (papers previously circulated).
  - (c) The Committee noted the correspondence. Resolved on the motion of Revd Nile, seconded Mr Donnelly, that the Chair write to the Australian Press Council, as per the draft reply previously circulated, explaining that the Council’s submission has been received and will be considered by the Committee.
  - (d) Email from Gillian Sneddon, received 15 April 2009 (previously circulated).
  - (e) Answers to questions on notice from NSW Police Force, received 20 April 2009 (previously circulated)

Items 3.7 d-e set down for the deliberative meetings scheduled for 7 and 14 May, together with remaining original submissions and further submissions in response to the discussion paper.

- Questions on notice to NSW Police and DPP – for consideration (previously circulated).

Resolved on the motion of Revd Nile, seconded Mr Khoshaba, that the questions on notice, previously circulated, be adopted and forwarded to NSW Police and the DPP for response.

- Submissions received in response to discussion paper (previously distributed).

Item set down for the deliberative meetings scheduled for 7 and 14 May.

**3.8 \*\*\***

**3.9 \*\*\***

Deliberations having concluded, the deliberative meeting adjourned at 11.24am and the Committee resumed the public hearing.

**4. \*\*\***

The public hearing concluded at 4.00pm and the Committee adjourned until Thursday, 7 May 2009 at 9.30 am in Room 1102.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 25)**

Thursday, 7 May 2009 at 9.35 am

Room 1102, Parliament House

**1. Attendance:**

**Members present**

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Mr Amery, Ms Beamer, Mr Khan, Mr Khoshaba, Mr O'Dea, Mr Donnelly, Revd Nile, Mr Smith, Mr Stokes

*In attendance* Helen Minnican, Amy Bauder, Jasen Burgess, Dora Oravec, and Emma Wood.

**2. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Revd. Nile, that the minutes of the public hearing and deliberative meeting of 4 May 2009 be confirmed.

**3. \*\*\***

**4. Inquiry into public sector whistleblower employees**

**i. Consideration of remaining submissions and Discussion Paper responses**

The Chair addressed the Committee on the submissions and responses to the Discussion Paper received to date and opened discussions.

Discussion ensued.

Revd Nile foreshadowed a motion to hear from a number of individuals who had made submissions to the inquiry as whistleblowers.

Discussion ensued.

Mr Khan moved that the Committee vote *seriatim* on those individuals he had previously moved<sup>625</sup> be called to give evidence, that is, Mr Ben Blackburn (submission 5), Ms Gillian Sneddon (submission 8) and Mr Ivan Patrick (submission 20).

Discussion ensued. Mr O'Dea foreshadowed making a related motion.

Question put that Mr Khan's motion that Mr Ben Blackburn be called to give evidence, be agreed to.

The Committee divided:

Ayes: Mr Khan, Revd. Nile, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Mr Terenzini, Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Question resolved in the negative.

Question put that Mr Khan's motion that Ms Sneddon be called to give evidence, be agreed to.

The Committee divided:

Ayes: Mr Khan, Revd. Nile, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Mr Terenzini, Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Question resolved in the negative.

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<sup>625</sup> See Mr Khan's previous motion during the meeting held on 29 September 2008.

Question put that Mr Khan's motion that Mr Patrick be called to give evidence, be agreed to.

The Committee divided:

Ayes: Mr Khan, Revd. Nile, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Mr Terenzini, Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Question resolved in the negative.

Mr Khan left the meeting.

Mr O'Dea moved, seconded Mr Stokes, that as a matter of principle the Committee should hear oral evidence from some relevant individual whistleblower employees as part of its inquiry.

Discussion ensued.

Question put that Mr O'Dea's motion be agreed to.

The Committee divided:

Ayes: Revd. Nile, Mr O'Dea, Mr Smith, Mr Stokes

Noes: Mr Terenzini, Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Question resolved in the negative.

Mr Terenzini moved, seconded Mr Amery, that:

- (a) those submissions received from individuals that are relevant to the terms of reference for the inquiry be accepted;
- (b) those submissions dealing with particular conduct and particular decisions are not relevant; and
- (c) the Committee hear from the following witnesses – Department of Premier and Cabinet, NSW Ombudsman, ICAC, NSW Police, Office of the Director of Public Prosecutions.

Question put that Mr Terenzini's motion be agreed to.

The Committee divided:

Ayes: Mr Terenzini, Mr Amery, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Noes: Revd. Nile, Mr O'Dea, Mr Smith, Mr Stokes

Question resolved in the affirmative.

Mr Khan returned to the meeting.

**ii. Publication of submissions (item to be considered on 14 May)**

**iii. Requests for extensions to the closing date for responses to the Discussion Paper**

The Chair advised that requests had been received from NSW Maritime and Ms Bimla Chand for an extension of time to respond to the Discussion Paper.

Resolved, on the motion of Mr Khoshaba, seconded Mr Amery, that:

- (a) the time available to respond to the Discussion Paper be extended until 14 May 2009; and
- (b) those responses, which are not confidential, be published on the Committee's website, pursuant to a formal resolution, after the Committee has considered all of the responses on 14 May 2009.

**5. General business**

There being no items of general business, deliberations concluded and the meeting closed at 10.56 am, until the public hearing at 10.00am on Monday 11 May 2009.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 27)**

Thursday, 14 May 2009 at 9.39 am  
Room 814-15, Parliament House

**1. Attendance:**

**Members present**

Mr Harris (Deputy Chair), Mr Amery, Ms Beamer, Mr Khoshaba, Mr Donnelly, Revd Nile, and Mr Stokes.

**Apologies**

Mr Terenzini (Chair)  
Mr Khan  
Mr O’Dea  
Mr Smith

*In attendance* Helen Minnican, Jasen Burgess, Dora Oravec and Amy Bauder

In the absence of the Chair, the Deputy Chair presided over the meeting.

**2. Minutes**

Resolved, on the motion of Mr Khoshaba, seconded Revd Nile, that the minutes of the deliberative meeting of 7 May and the public hearing of 11 May 2009 be confirmed.

**3. \*\*\***

**4. Inquiry into public sector whistleblower employees**

**i. Publication of submissions**

**Resolution a.**

Resolved, on the motion of Mr Amery, seconded Mr Donnelly, that:

- the resolutions regarding publication are made on the basis of the following considerations: where matters are outside jurisdiction, where matters contained unsubstantiated allegations about third parties, and where authors have requested confidentiality; and
- the following submissions are to be treated confidentially and not published by the Committee:

1a-e	Mr Rodney Edwards
2	Mr Robert Cairns
6	Mr John Kite
8	Ms Gillian Sneddon
12	Ms Bimla Chand
19	Mr William McPherson
20	Mr Ivan Patrick
24 & 24A	[Author 2 – confidentiality and suppression of name by Committee resolution, at a subsequent meeting]
25 & 25A	Mr Tony Grosser
50	Ms Bev Brooker
56	Author 1 – confidentiality and suppression of name at author’s request

**Resolution b.**

Resolved, on the motion of Mr Amery, seconded Ms Beamer, that the following submissions be published in part and posted on the Committee’s website:

5	Mr Ben Blackburn
7	Mr Keith Potter



9	Ms Margaret Penhall-Jones
14	Whistleblowers Action Group Queensland
16	Dr Tom Benjamin
18 & 18a	Mr Michael McGuirk
23	Mr Terence Doherty
Submissions in response to the Discussion Paper	
41	Mr Ben Blackburn
45	Dr Tom Benjamin
46	Mr Robert Cairns
49	Ms Kay Pettit
53	Ms Margaret Penhall-Jones
54	[Author 2 – confidentiality and suppression of name by Committee resolution, at a subsequent meeting]

**Resolution c.**

Resolved, on the motion of Mr Amery, seconded Mr Khoshaba, that in addition to those submissions which have already been published during evidence, the following submissions be published and posted on the Committee's website:

10	Medical Consumers Association Inc
11	Bravehearts
13	Australian Press Council
15	Mr Ian Faulks
17	NSW Council for Civil Liberties Inc
39	Right to Know Coalition
Submissions in response to the Discussion Paper	
40	NSW Ombudsman
42	NSW Audit Office
43	STOPLine
44	Department of Education and Training
47	ICAC
48	NSW Liberal and National Parties
51	Department of Premier and Cabinet
52	Ms Cynthia Kardell
55	University of NSW
57	NSW Department of Health
58	NSW Legislative Assembly
59	NSW Legislative Council
60	Mr William McPherson
61	NSW Police Force

Mr Stokes asked that it be noted in the minutes that he had previously voted in favour of making all submissions to the inquiry public.

Discussion ensued.

Resolved on the motion of Mr Stokes, seconded Revd. Nile, that:

- the authors of the submissions that are to be treated confidentially and those to be published only in part, be advised of the Committee's decision and be given an opportunity to resubmit their submission, or part thereof, in a form suitable for publication; and
- advice be obtained from the Clerks in relation to the procedure to be adopted.

Mr Stokes sought clarification as to whether the Committee will publish the fact it received submissions from individuals that have been treated as confidential. The Secretariat advised that the appendices to Committee reports contain a list of submissions and unless individuals request

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suppression of their names they would be included in the list of submission makers attached to the report.

**ii. Witnesses**

Resolved, on the motion of Ms Beamer, seconded Mr Amery, that STOPline (submission no.43), who made a submission in response to the Discussion Paper, be called to give evidence.

**iii. Late responses to the Discussion Paper**

The Committee noted a late response to the Discussion Paper from the NSW Police Force, Professional Standards Command, dated 8 May 2009, and distributed at the meeting. The Committee also noted that the only outstanding response known to the secretariat is that from the Ministry of Transport.

5. \*\*\*

**6. General business**

There being no items of general business, deliberations concluded and the meeting closed at 9:55am sine die.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 28)**

Tuesday, 11 August 2009 at 10.30am  
Jubilee Room, Parliament House

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes.

*In attendance* Helen Minnican, Jasen Burgess, Emma Wood and Amy Bauder

**2. PUBLIC HEARING - Inquiry into the protection of public sector whistleblower employees**

The Chair opened the public hearing at 10.30am and gave a brief address on the Committee's inquiry.

Mr Robert Falconer, Chairman, STOPLine Pty Ltd, sworn and examined. The submission from STOPLine Pty Ltd, dated 3 April 2009, including the additional comments on the submission made by Mr Falconer, was incorporated as part of Mr Falconer's evidence. The witness made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a short adjournment and the public hearing resumed at 11.45am.

Mr Christopher Charles Wheeler, Deputy Ombudsman, Office of the NSW Ombudsman, affirmed and examined. The submission from the NSW Ombudsman in response to the Discussion Paper was incorporated as part of Mr Wheeler's evidence. Mr Wheeler also provided the Committee with a copy of a speech he made at the Australian Public Sector Anticorruption Conference in July 2009. The witness made a short opening statement.

The Chair commenced questioning of the witness followed by other members of the Committee. Questioning concluded, the Chair thanked the witness and the witness withdrew.

The Committee took a short luncheon adjournment at 1.00pm.

## **PUBLIC HEARING**

- **Inquiry into the protection of public sector whistleblower employees**
- \*\*\*
- \*\*\*

The public hearing resumed at 1.35pm.

The Chair welcomed the witnesses.

The Hon Jerrold Sydney Cripps QC, Commissioner of the ICAC, Ms Theresa June Hamilton, Deputy Commissioner of the ICAC, Mr Michael Douglas Symons, Executive Director of the Investigation Division, and Mr Roy Alfred Waldon, Executive Director of Legal Division, Mr Robert William Waldersee, Executive Director of Corruption Prevention, Education and Research, and Mr Andrew Kyriacou Koureas, Executive Director of Corporate Services, all sworn and examined. The Commission's answers to question on notice in relation to the ICAC Annual Report for 2007-2008 and the submission in response to the Committee's Discussion Paper were included as part of the witnesses' evidence.

\*\*\*

The Commissioner made an opening statement.

The Chair questioned the witnesses, followed by other members of the Committee.

Evidence concluded, the Chair thanked the witnesses for their attendance. \*\*\* The witnesses withdrew.

The Chair made a short statement in closing the hearing.

The public hearing concluded at 3:17pm, at which point the Committee took a short adjournment.

## **3. DELIBERATIVE MEETING**

The deliberative meeting commenced at 3.40pm.

### **i. Minutes**

Resolved, on the motion of Ms Beamer, seconded Revd Nile, that the minutes of the deliberative meeting of 14 May 2009 be confirmed.

### **ii. Membership change**

The Chair announced that Mr Gerard Martin had been appointed to serve on the Committee on the Independent Commission Against Corruption in place of Mr Richard Amery, discharged (Votes and Proceedings of the New South Wales Legislative Assembly, 24 June 2009

### **iii. Inquiry into the protection of public sector whistleblower employees**

*Publication of late submissions and information* - The Committee noted the following correspondence and submissions, previously circulated:

- answers to questions on notice from the NSW Police Force, dated 26 May 2009 and answers received on 20 April 2009;

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- e-mail from NSW Police, dated 3 June 2009, confirming request for confidentiality for a section of the answers to questions on notice received on 20 April 2009 that pertain to a matter on appeal before District Court;
- answers to questions on notice from the Office of the DPP, dated 27 May 2009;
- submissions 52a, 61 and 62;

The Chair spoke to the items. Discussion ensued.

Resolved on the motion of Mr Harris, seconded Ms Beamer, that the Committee agree to the NSW Police Force's request for confidentiality in respect of a section of the answers to the questions on notice, received on 20 April 2009.

Resolved on the motion of Mr Donnelly, seconded Mr Khoshaba, that the corrected transcript of the public hearing on 11 August 2009 be published and posted on the Committee's website.

Resolved on the motion of Revd. Nile, seconded Ms Beamer, that the answers to questions on notice provided by the Office of the DPP, dated 27 May 2009, with the exception of the information requested by the DPP to be removed, be published and posted on the Committee's website.

Resolved on the motion of Mr Harris, seconded Revd. Nile, that the answers to questions on notice from NSW Police Force, dated 26 May 2009, and those answers received on 20 April 2009 with the exception of the attached fact sheet, requested by NSW Police Force to be treated confidentially, be published and posted on the Committee's website.

Resolved on the motion of Ms Beamer, seconded Mr Donnelly, that late submissions 52a and 62 made in response to the Discussion Paper on the inquiry, be published and posted on the Committee's website.

The Committee noted receipt of a letter from Ms Clover Moore MP, dated 5 August 2009, expressing support for proposal 3 in the Discussion Paper on the inquiry.

*Request for advice on the current status of the NSW Parliament's protected disclosure policy*

The Chair spoke to the need to obtain advice from the Department of Parliamentary Services, following on from the evidence of the NSW Legislative Council, in order to clarify the exact process by which the NSW Parliament's protected disclosures policy would be reviewed and, if necessary, amended in light of the recent organisational changes to administrative departments of the NSW Parliament. Discussion ensued.

Resolved on the motion of Revd. Nile, seconded Mr Martin, that the Chair write to Mr Brian Ward, the Executive Manager of the Department of Parliamentary Services, seeking formal advice for the Committee on:

- the current status of the NSW Parliament's protected disclosures policy, including any recent or proposed changes to the policy; and
- the process by which such a policy would be reviewed and adopted throughout the NSW Parliament.

*Procedural issues arising from deliberative meeting on 14 May 2009*

The Committee noted the following documents, previously distributed:

- Memorandum from the Committee Manager to the Clerk-Assistant (Committees), dated 17 July 2009, concerning procedural matters arising from the deliberative meeting on 14 May 2009; and
- Memorandum from the Clerk-Assistant (Committees) to the Chair and Committee Manager dated 21 July 2009.

The Chair spoke to the memoranda, which concerned several procedural issues arising from the previous deliberative meeting, and read the proposed resolutions. Discussion ensued.

Mr Martin moved, seconded Ms Beamer, that the authors of the submissions that the Committee has resolved to treat confidentially, or publish only in part, be formally advised of the decision taken in relation to their submission.

Question put that Mr Martin's motion be agreed to.

The Committee divided:

Ayes: Revd. Nile, Mr Terenzini, Mr Martin, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Noes: Mr Khan, Mr O'Dea, Mr Smith, Mr Stokes

Question resolved in the affirmative.

The Chair spoke to the procedural advice in respect of inviting authors of submissions, which were previously resolved to be treated confidentially in part or in full, to resubmit. Discussion ensued.

Mr Donnelly moved, seconded Mr Khoshaba, that having considered the procedural advice given by the Clerks, the Committee not proceed to give effect to the resolution taken at the previous meeting to invite the authors of the confidential submissions to resubmit.

Question put on Mr Donnelly's motion.

The Committee divided:

Ayes: Mr Terenzini, Mr Martin, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba

Noes: Mr Khan, Revd. Nile, Mr O'Dea, Mr Smith, Mr Stokes

Question resolved in the affirmative.

The Chair spoke to the procedural issues surrounding the publication of the names of individuals who had made submissions to the inquiry, which were treated as fully confidential. Discussion ensued.

Resolved on the motion of Revd Nile, seconded Mr Donnelly, that with the exception of the author of submission 56 (who requested their name be suppressed) and the author of submission 54 (who expressed concerns for their personal safety), the names of the authors of those submissions to be treated as completely confidential be made public.

### **Consideration of previous publication orders**

The Committee revisited the publication orders for submissions 54 and 56 to resolve whether to proceed with the orders, amend the orders, or keep the submissions confidential. Proposed omissions to the submissions for the purpose of publication, which would remove any identifying information and had been previously circulated, were considered by the Committee. Discussion ensued.

Resolved on the motion of Revd Nile, seconded Ms Beamer, that submissions 54 and 56 be published in part, as per the proposed omissions in the copies previously circulated, and that the names of both individuals be suppressed and any other identifying information contained within the submissions not be published.

Mr O'Dea moved, seconded Mr Smith, that the New South Wales Parliament be advised that the Committee is not hearing oral evidence from or considering the case of Gillian Sneddon. Mr O'Dea spoke to the motion. Discussion ensued. The question was not put on the motion and Mr O'Dea revised the motion.

Mr O'Dea moved, seconded Mr Smith, that the New South Wales Parliament be advised that the Committee is not investigating the case of, or hearing oral evidence from, Ms Gillian Sneddon. Discussion ensued. Question put on Mr O'Dea's motion. Discussion ensued.

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The Committee divided:

Ayes: Mr Khan, Mr O’Dea, Mr Smith, Mr Stokes

Noes: Mr Terenzini, Mr Martin, Ms Beamer, Mr Donnelly, Mr Harris, Mr Khoshaba, Revd. Nile

Question resolved in the negative.

iv. \*\*\*

v. \*\*\*

vi. \*\*\*

**vii. General business**

Ms Beamer requested that copies of all of the reports from the Whistling While They Work project, including the November 2006 Issues Paper, be distributed to the members of the Committee.

\*\*\*

The Chair addressed the Committee on two late items of correspondence. Discussion ensued.

Item 1: Late submissions from A. Patterson, an earlier witness to the inquiry, dated 11 August 2009. A briefing note and draft resolution were circulated.

Resolved on the motion of Revd Nile, seconded Mr Khoshaba, that:

- a. the Committee formally receive Mr Patterson’s submission;
- b. the Committee consider the issue of the publication of Mr Patterson’s submission at the next deliberative meeting, after the Secretariat has had a chance to contact Mr Patterson; and
- c. in the interim, Mr Patterson’s submission be treated as confidential.

\*\*\*

There being no items of general business, deliberations concluded and the meeting closed at 4.37pm sine die.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 29)**

Thursday, 3 September 2009 at 9.30am

Parkes Room, Parliament House

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O’Dea, Mr Smith, Mr Stokes.

*In attendance* Helen Minnican, Dora Oravec and Amy Bauder

2. \*\*\*

**3. DELIBERATIVE MEETING**

The deliberative meeting commenced at 10.01am.

i. \*\*\*

**ii. Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Harris, that the minutes of the deliberative meeting and public hearing held on 11 August 2009 be confirmed.

iii. \*\*\*

**iv. Inquiry into the protection of public sector whistleblower employees**

- Request for confidentiality, from Mr Bob Falconer, of sections of his transcript of evidence for public hearing on 11 August 2009.

The Chair addressed the Committee on the extent and nature of Mr Falconer's request.

Resolved on the motion of Mr Khan, seconded Ms Beamer, that the Committee agree to Mr Falconer's request for an omission to the published transcript of his evidence to the Committee, in order to protect the identity of a particular individual (website to be updated to reflect this resolution).

- Email from Dr Peter Bowden, regarding the Committee's Discussion Paper, received 28 August 2009. The Committee noted the item for information and also noted that the Chair would respond to Dr Bowden's correspondence indicating that his views would be taken into consideration.
- Publication status of submission no 63 (update)

The Committee noted advice from the Secretariat that it would write to the submission author as no contact phone number was available.

v. \*\*\*

vi. **General business**

There being no items of general business, deliberations concluded and the meeting closed at 10.11am sine die.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 30)**

Wednesday, 9 September 2009 at 9.47am

Room 814-815, Parliament House

1. **Attendance**

**Members present**

Mr Terenzini (Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Mr O'Dea, Mr Smith, Mr Stokes.

**Apologies** Mr Harris, Revd Nile

*In attendance* Helen Minnican, Jasen Burgess, Dora Oravec and Amy Bauder

2. **Minutes**

Resolved, on the motion of Ms Beamer, seconded Mr Khoshaba, that the minutes of the deliberative meeting and in camera hearing held on 3 September 2009 be confirmed.

3. **Correspondence received**

i. \*\*\*

ii. \*\*\*

iii. E-mail from Gillian Sneddon, dated 7 September 2009

The Committee noted the item for information.

iv. Letter from Brian Ward, Department of Parliamentary Services, in relation to the inquiry into protection of public sector whistleblower employees.

The Committee noted the item for information.

4. **General business**

There being no items of general business, deliberations concluded. The Chair thanked the members for attending the meeting at short notice and the meeting closed at 10.14am sine die.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 31)**

Thursday, 29 October 2009 at 9.32 am  
Room 814-815, Parliament House

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr Stokes.

**Apologies** Mr O’Dea, Mr Pearce, Mr Smith.

*In attendance* Les Gönye, Dora Oravecz and Emma Wood.

**2. Minutes**

Resolved, on the motion of Mr Khoshaba, seconded Mr Donnelly, that the minutes of the deliberative meeting of 9 September 2009 be confirmed.

**3. Membership change**

The Chair announced that Paul Pearce had been appointed to serve on the Committee on the Independent Commission Against Corruption, in place of David Harris, discharged. (*Votes and Proceedings of the New South Wales Legislative Assembly, 24 September 2009*)

**4. Election of Deputy Chair**

The Chair noted that Mr Harris’s discharge from the Committee had resulted in a vacancy in the office of Deputy Chair.

The Chair called for nominations for the office of Deputy Chair.

Resolved, on the motion of Mr Khoshaba, seconded by Mr Martin, that Mr Pearce be elected Deputy Chair of the Committee.

The Chair noted that he had received a letter from Mr Pearce, advising that he agreed to be nominated for the office of Deputy Chair.

**5. \*\*\***

**6. General business**

The Chair confirmed that at the next meeting of the Committee, scheduled for 12 November, the agenda would include consideration of the Chair’s draft report on the inquiry into the protection of public sector whistleblower employees.

The meeting closed at 9.37 am and the Committee adjourned until Thursday, 12 November 2009 at 9.30 am.

**Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 32)**

Thursday, 12 November 2009 at 9.32 am  
Room 814-815, Parliament House

**1. Attendance**

**Members present**

Mr Terenzini (Chair), Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O’Dea, Mr Pearce, Mr Smith, Mr Stokes.



**Apologies Ms Beamer**

*In attendance* Helen Minnican, Dora Oravec, Emma Wood and Amy Bauder.

**2. Minutes**

Resolved, on the motion of Mr Martin, seconded Mr Donnelly, that the minutes of the deliberative meeting of 29 October 2009 be confirmed.

**3. Amendment to the minutes of the meeting of 5 March 2009.**

Resolved on the motion of Mr Donnelly, seconded Revd Nile, that the minutes of 5 March 2009 be amended to insert the words 'Question resolved in the negative' after the first division that appears on p. 3, in relation to the question that Mr Khan's motion be agreed to.

**4. Protection of public sector whistleblower employees**

- (a) Consideration of publication of late submissions No. 63 (submission previously circulated with file note of conversation with submission maker) and No. 64 (previously circulated)  
Resolved on the motion of Mr Pearce, seconded Mr Donnelly, that submissions No. 63 and 64 not be published, in accordance with the principles previously adopted by the Committee in relation to the publication of submissions.
- (b) Publication of extract of letter received from Ms Clover Moore dated 5 August 2009

Resolved on the motion of Revd Nile, seconded Mr Pearce, that Ms Moore's letter dated 5 August 2009 and attachment, excluding references to the complainant's name and the company he worked for, be made public and posted on the Committee's website.

- (c) Publication of letter and attachment received from Mr Brian Ward dated 3 September 2009

Resolved on the motion of Mr Donnelly, seconded Mr Martin, that the letter from Mr Brian Ward, dated 3 September 2009, and the attachment be made public and posted on the Committee's website.

- (d) Correspondence received:
- i. Letter from Ms Clover Moore dated 3 September 2009

Resolved on the motion of Mr Khoshaba, seconded Mr Martin, that the Chair reply to Ms Moore as per the draft response previously circulated advising that:

- The Committee had considered the matters she has raised;
  - Noting the submission to which she referred had been published in part on the website and the author's name suppressed pursuant to a resolution of the Committee.
- ii. Email from Mr Les Bessenyei dated 30 September 2009 - The Committee noted the email
- iii. Letter from Clerk of the Legislative Assembly dated 14 October 2009 (copy attached) and attached document 'Electorate Officers Entitlements on Termination of Employment Agreement'

Resolved on the motion of Revd Nile, seconded Mr Khoshaba, that the letter from the Clerk of the Legislative Assembly, dated 14 October 2009 and the attachment 'Electorate Officers Entitlements on Termination of Employment Agreement' be made public and posted on the Committee's website.

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- iv. Copy of Legislative Council's 'Separation from Service Policy' received from President of the Legislative Council on 20 October 2009

Resolved on the motion of Revd Nile, seconded Mr Khoshaba, that the Legislative Council's 'Separation from Service Policy' be made public and posted on the Committee's website.

- (e) Consideration of Chair's draft report

The Committee discussed the distribution of the draft report and the schedules of proposed amendments, previously circulated. Discussion ensued on the draft report.

The Committee agreed to reconvene on Friday, 13 November 2009 at 9.30am to consider the report in detail.

5. \*\*\*

6. **General business**

There being no items of general business, deliberations concluded at 9.55 am and the Committee adjourned until Friday, 13 November 2009 at 9.30 am.

**Draft minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 33)**

Friday, 13 November 2009 at 9.37 am  
Room 1102, Parliament House

1. **Attendance**

*Members present*

Mr Terenzini (Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Pearce, Mr Smith (arrived 10.09am).

*Apologies* Mr Stokes

*In attendance* Helen Minnican, Dora Oravec, Emma Wood and Amy Bauder.

2. **Minutes**

Resolved, on the motion of Mr Donnelly, seconded Mr Martin, that the minutes of the deliberative meeting of 12 November 2009 be confirmed.

3. **Consideration of Chair's draft report on the inquiry into the protection of public sector whistleblower employees**

The Committee proceeded to consider the draft report, the amendments to the Executive Summary and chapters 4, 5, and 7, and e-mails received on 12 November from Mr Khan (containing his proposed amendments to the draft report) and Mr O'Dea (raising matters discussed on 12 November and minor amendments), all items having been previously distributed.

Mr O'Dea spoke to the matters contained in his e-mail. Discussion ensued. The Chair advised of the processes involved in drafting and amending the Chair's draft report. Discussion ensued.

The Committee proceeded to consider the amendments proposed by Mr Khan. Mr Khan addressed the amendments contained in his e-mail of 12 November 2009. Mr Khan spoke to the first proposed amendment.

Moved Mr Khan, seconded Mr O'Dea, that the following words be inserted after paragraph 4 of the section entitled Conduct of the inquiry in the Executive Summary:

'A minority of members of the Committee were concerned that the Legal Advice received by the Secretariat and/or the Chairman of the Committee, nor the brief which invited the legal advice, was not made available to the members of the Committee.'

Discussion ensued. The Chair foreshadowed a related proposed amendment to page 6 of the report. Mr Khan withdrew his proposed amendment.

Resolved on the motion of Mr Terenzini, seconded Revd Nile, that the following words be inserted after paragraph 1.28:

‘As per the established protocol, the Clerk of the Legislative Assembly, as requested by the Committee, sought legal advice from the Crown Solicitor. The formal advice received by the Clerk was distributed to the Chair and the members in summary form again as per the established protocol. It is noted at this point that certain Committee members voiced concern that the advice was provided to the Chair and Committee members in this form.’

Mr Khan spoke to his second proposed amendment.

Resolved on the motion of Mr Khan, seconded Ms Beamer, that the words ‘the confidentiality of committee deliberations’ be omitted from the fifth paragraph of the Conduct of the inquiry section in the Executive Summary.

Moved Mr Khan, seconded Mr O’Dea, that the seventh paragraph of the Conduct of the inquiry section in the Executive Summary, i.e. the words from ‘It is anticipated...explained in the report’, be omitted. Discussion ensued. Question put that the amendment be agreed to.

The Committee divided.

Ayes: Mr Khan, Mr O’Dea

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce

Question resolved in the negative.

Moved Mr Khan, seconded Mr O’Dea, that the eighth paragraph of the Conduct of the inquiry section in the Executive Summary, i.e. the words from ‘Specific allegations...such expectations’, be omitted. Discussion ensued. Question put that the amendment be agreed to.

The Committee divided.

Ayes: Mr Khan, Mr O’Dea

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce

Question resolved in the negative.

Moved Mr Khan, seconded Mr O’Dea, that paragraphs 1.18-1.25 inclusive, be omitted. Discussion ensued. Question put that the amendment be agreed to.

The Committee divided.

Ayes: Mr Khan, Mr O’Dea

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce

Question resolved in the negative.

Moved Mr Khan, seconded Mr O’Dea, that the following words be inserted at paragraph 1.29:

‘A minority of Members of the Committee were concerned that the Legal Advice received by the Secretariat and/or the Chairman of the Committee, nor the brief which invited the legal advice, was not made available to the members of the Committee.’

A minority of the Committee considered that it was impossible to consider the true extent of the powers of the Committee without a proper consideration of the precise terms of the legal advice received from the Crown Solicitor. The minority considered that the refusal to provide the Crown Solicitor’s advice was an unreasonable restriction on the decision-making functions of individual Committee Members designed to frustrate the proper operation and the effective debate on the issue of the Jurisdiction of the Committee.’

Discussion ensued. Question put that the amendment be agreed to.

The Committee divided.

Ayes: Mr Khan, Mr O’Dea

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Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce  
Question resolved in the negative.

(Mr O’Dea left the meeting to attend the Chamber.)

Moved Mr Khan, that the following words be inserted after paragraph 1.38:

‘The minority of the Committee sought at various times that the minutes of the deliberative meetings of the Committee be published so as to allow the opportunity for both the public to be informed of the direction in which the inquiry was heading and also for the possibility to exist of individual Members of the Committee seeking to bring the matter back before the Parliament for further consideration and debate.

The majority of the Committee refused to allow the minutes to be published thereby limiting the transparency of the deliberations of the Committee and rendering it impossible for individual members to return the matter to the Parliament for further consideration and debate.’

Mr Khan spoke to the proposed amendment. Discussion ensued. The Chair foreshadowed a related amendment. Question put that Mr Khan’s amendment be agreed to.

The Committee divided.

Ayes: Mr Khan

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce  
Question resolved in the negative.

Resolved on the motion of Mr Terenzini, seconded Ms Beamer, that the following words be inserted after paragraph 1.38:

‘Certain members of the Committee sought at various times throughout the inquiry, to have the minutes of deliberative meetings published. However, these motions were defeated due to concerns amongst members that the release of this information during the course of an inquiry was unprecedented and that this course of action may prejudice the course of the inquiry.

It should also be noted that it is open to members of the Committee during the course of an inquiry to move a motion for the Committee to consider having the inquiry or a matter returned to the Parliament for further consideration and debate.’

Mr Khan moved that the following words be inserted on pages 11 and 12, after paragraph 1.60:

‘A minority of the Committee is concerned that the conduct of the inquiry, and particularly the refusal of the majority of the committee to allow the taking of evidence from individuals who considered themselves the victims of the shortcomings of the Protected Disclosure Legislation in New South Wales created the impression for the makers of those submissions that they were being ignored.

Additionally, a minority of the Committee considered that it was not appropriate to simply receive evidence from Government Agencies as to the effectiveness or otherwise of the Protective Disclosures Legislation. The minority considered that it was appropriate to hear at least one case study from people who considered that they had suffered at the hands of Government Departments because of the shortcomings in the existing legislation.

The minority of the Committee considers that the refusal to allow individuals to give evidence of their experiences seriously undermines the quality and objectivity of the report.’

Mr Khan spoke to the proposed amendment. Discussion ensued. The Chair foreshadowed a related amendment. (Mr O’Dea returned.)

Question put that Mr Khan’s amendment be agreed to.

The Committee divided.

Ayes: Mr Khan, Mr O’Dea

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce

Question resolved in the negative. Discussion ensued.

Resolved on the motion of Mr Terenzini, seconded Revd Nile, that the following words be inserted after paragraph 1.60:

‘Members of the Committee expressed concern about the inquiry not being able to take evidence from individuals who had made submissions setting out specific claims and allegations. These individuals may have gained the impression that they were being ignored. It is important to note, however, that all submissions from individuals were made available to the Committee for consideration and were taken as pertinent to the inquiry.’

Members of the Committee considered that it would have been desirable to receive evidence from an individual who could have provided a relevant case study to demonstrate the effectiveness or otherwise of the protected disclosures legislation. However, this was not clearly discernible from the submissions received.’

Mr Khan moved that the following words be inserted in Chapter 1:

‘Committee Member Trevor Khan has expressed two additional concerns in relation to the carriage of the Committees deliberations. These are as follows:

1. A number of deliberative meetings were called during the course of the inquiry on Parliamentary Sitting Days. A number of these meetings continued into the time when Parliament was actually sitting. It is appropriate for the Parliament to consider whether meetings of a committee should be called (or continue) at a time which conflicts with an Individual Members obligations or desire to be present in the Chamber of the Parliament.
2. The draft report of the inquiry was made available to the Members on Friday 6 November 2009 with the Deliberations to consider the report set down for Thursday, 12 November 2009, commencing at 9.30 am on a Parliamentary Sitting day.

On a matter of such significant importance and complexity the time provided for consideration of the draft report was grossly inadequate and once again reflects upon the quality and objectivity of the report.’

Discussion ensued (Mr Smith arrived). Mr Khan withdrew the proposed amendment.

Resolved on the motion of Revd Nile, seconded Mr Donnelly, that the Chair raise with the Speaker the procedural issue of the Committee’s ability to meet and transact business during sitting times, pursuant to the provisions of the ICAC Act and in accordance with the Standing Orders of the NSW Legislative Assembly, and the apparent inconsistency of this practice with the Standing Orders of the NSW Legislative Council.

The Committee proceeded to consider amendments proposed by Mr O’Dea. Mr O’Dea spoke to his proposed amendments.

Moved Mr O’Dea, seconded Mr Khan, that the words ‘or chose not to’ be inserted after the word ‘position’ in paragraph 1.99. Discussion ensued.

Question put that Mr O’Dea’s amendment be agreed to.

The Committee divided.

Ayes: Mr Khan, Mr O’Dea, Mr Smith

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr Pearce

Question resolved in the negative.

Resolved on the motion of Mr O’Dea, seconded Mr Khan, that the following words be inserted in the Executive Summary, before the conclusion:

‘The Committee expresses its appreciation to all those who made oral or written submissions to the inquiry.’

Moved Mr O’Dea, seconded Mr Khan, that the following words be inserted immediately following the previous amendment:

‘However, it was disappointed at the response of NSW Maritime, such concerns having been expressed at the Committee’s meeting of 13 November 2008.’

Discussion ensued. Question put that the amendment be agreed to.  
The Committee divided.

Ayes: Mr Khan, Mr O’Dea, Mr Smith

Noes: Mr Terenzini, Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile

Abstained: Mr Pearce

Question resolved in the negative.

Mr O’Dea moved that the following words be inserted after paragraph 1.103:

‘The Committee notes the apparent lack of any consolidated statistics or information on how many public sector employees in NSW sought or were offered protection under the Protected Disclosures Act.’

Discussion ensued. The Chair advised members of the statistical information available in the ICAC and Ombudsman annual reports. Question on the proposed amendment not put.

Resolved on the motion of Revd Nile, seconded Mr Pearce, that the Chair would insert in the Foreword of the report an amendment confirming the lack of any collated and consolidated statistics concerning protected disclosures in New South Wales.

Resolved on the motion of Ms Beamer, seconded Revd Nile, that the following amendments (previously circulated) be adopted in globo:

#### **Executive Summary**

Insert after the last paragraph in the Inquiry outcomes section of the Executive summary, the following paragraph:

‘A period of five years from the implementation of the Committee’s proposed reforms should be an adequate period from which to gauge whether the reforms have acted as a catalyst for significant improvements to the scheme. It should enable a detailed view of how the protected disclosures scheme is operating and whether there is a need for an alternative, more focussed oversight system. One available model would be the recent scheme established in relation to public access to government information, including the establishment of a separate oversight body. The Committee has recommended that the oversight system be one of the matters considered by a parliamentary review of the protected disclosures scheme.’

#### **Chapter 4 – oversight, monitoring and review**

After paragraph 4.52 insert the following text:

##### **‘Review of the proposed oversight system**

The efficacy of the proposed oversight system outlined in the Committee’s report, and the role performed by the NSW Ombudsman’s Office within that system, are matters that the Committee considers should be assessed after an appropriate period of time. A period of five years should provide sufficient data on the operation of the system to allow a considered judgement about the merits of continuing to oversight and monitor the protected disclosures scheme in this way. It occurs to the Committee that, in view of the previous history of the PDA, it may be necessary to consider alternative models for the operation of this aspect of the scheme. One such alternative may be a separate oversight body, similar to that which has been legislated for public access to government information and the establishment of an Information Commissioner.<sup>626</sup>

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<sup>626</sup> The *Government Information (Information Commissioner) Act 2009* provides for the creation of the office of Information Commissioner

Insert an additional recommendation after Recommendation 1, as follows:

‘RECOMMENDATION: That the effectiveness of the oversight system proposed by the Committee, and the functions of the NSW Ombudsman’s Office within that scheme, be reviewed after a five year period with a view to assessing whether there is a need for an alternative oversight model. (see Recommendation 7).’

### **Chapter 5 – Policy development and legislative reform**

Omit the last sentence of paragraph 5.23 and insert instead the following words:

‘However, the Committee is proposing a change to the name of the Act as a positive measure, symbolic of the changes the Committee has recommended in this report.’

Insert an additional recommendation after paragraph 5.23 as follows:

‘RECOMMENDATION: That the *Protected Disclosures Act 1994* be amended to change the name of the Act to the Public Interest Disclosures Act.’

After para 5.25 insert the following paragraph:

‘A further recommendation of the Committee relates to the ongoing policy direction to be taken in relation to the protected disclosures scheme. The Committee considers that after a period of five years, there should be adequate data and information available on the operation of the changes to the scheme to permit a full review of the oversight system and the roles of the NSW Ombudsman’s Office and Steering Committee. It is the view of the Committee that this period of time should provide sufficient evidence to enable an informed decision as to whether the changes recommended by the Committee have worked or whether there is a need to institute further changes, including the necessity for a separate, dedicated oversight body.’

That Recommendation 7 be amended by

- replacing the words ‘from the date of tabling of this report’ in paragraph a) with the following words ‘from the implementation of the recommendations contained in this report’.
- inserting the words after paragraph b):
  - ‘c) That the next parliamentary committee review of the Act in five years time examine:
    - i. the extent to which the amendments proposed by the Committee have successfully addressed the problems with the protected disclosures scheme identified during this inquiry;
    - ii. whether the structures in place to support the operation and future direction of the protected disclosures scheme remain appropriate, including –
      - o the need to establish a separate body dedicated to overseeing the investigation of disclosures and the operation of the protected disclosures scheme; and,
      - o if such a need exists, the extent of the role and functions to be performed by such a body and the powers it should be able to exercise.’

### **Chapter 7 – The Parliament of New South Wales**

Insert after paragraph 7.2, the following paragraph:

‘References throughout this chapter to ‘parliamentary employees’ relate to two distinct groups of employees employed under different awards, namely:

- departmental staff (sometimes termed parliamentary staff) who are the employees working for the Departments of the Legislative Council, Legislative Assembly and Parliamentary Services; and
- members’ staff who are the employees working in the offices of members of the Legislative Council (entitled Secretary/Research Assistants) and the Legislative Assembly (Electorate Officers).’

Replace ‘arranged’ with ‘approved’ in the first sentence of paragraph 7.41.

Insert the following words after the first sentence in paragraph 7.55:

‘At present, there may be some doubt on two fronts:

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- Whether parliamentary employees are public officials for the purposes of the PDA; and
- Whether disclosures made to investigating authorities that may not fall within their jurisdiction, or that may not have been made in accordance with a strict interpretation of the requirements of the PDA, would be eligible for protection under the PDA.’

Insert the following paragraphs between paragraphs 7.55 and 7.56:

‘The Ombudsman would not be able to investigate disclosures of maladministration about members of Parliament and would instead need to refer such disclosures to the ICAC or the NSW Parliament, depending on the nature of the disclosure. However, as discussed in chapter 8 clarification is needed as to the provisions of the PDA concerning disclosures made to investigating authorities, particularly those disclosures that do not strictly conform to the provisions of the PDA. It is relevant to note, as recounted in chapter 8 of the report, that there is no clear consensus among the members of the Steering Committee on some of these matters of interpretation and the relevant provisions have not been considered by the courts.

The application of the PDA to parliamentary employees appears to rely upon the definition of ‘public official’ contained in s.4 of the Act.<sup>627</sup> (The Committee notes that there is a need for a consequential amendment to the definition, arising from the repeal of the *Public Sector Management Act 1988*.)

The submission received by the Committee from the NSW Legislative Council notes that ‘there is some ambiguity’ in relation to the interpretation of the definition of public official in the PDA, as s.4 of the *Public Sector Employment and Management Act 2002* (PSEM Act) does not apply ‘to any position of officer of either House of Parliament or any position under the separate control of the President or Speaker, or under their joint control’.

Consequently, the application of the PDA to parliamentary employees appears to turn on the section of the definition of ‘public official’ in the PDA that refers to ‘any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority.’

This part of the PDA definition may be interpreted to include parliamentary employees on the basis that the ICAC may investigate corrupt conduct by a public official, which is defined under s.3 of the ICAC Act to mean ‘an individual having public official functions or acting in a public official capacity’ including ‘a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both’. On this reading, the crucial point regarding the definition of ‘public official’ in the PDA is that the conduct and activities of parliamentary employees may be investigated by at least one of the investigating authorities (that is, the ICAC).

Nevertheless, the issues raised in the inquiry suggest that it would be desirable to clarify the application of the PDA to parliamentary employees and to put this issue beyond doubt.’

Omit the following words at the end of paragraph 7.56

‘and that this protection should, as a matter of consistency, be enshrined in the PDA. This would accord with the situation under the PDA in respect of disclosures concerning corrupt conduct, made in accordance with the ICAC Act.’

and insert instead:

‘under the PDA. This would accord with the much clearer situation in respect of protection for disclosures about corrupt conduct on the part of members of Parliament, made in accordance with the ICAC Act.’

Insert an additional recommendation before Recommendation 12 as follows:

‘RECOMMENDATION: That the *Protected Disclosures Act 1994* be amended to put beyond doubt that a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both, be included in the definition of ‘public official’ under the Act.’

Omit the following words from Recommendation 12,

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<sup>627</sup> ‘**public official** means a person employed under the *Public Sector Management Act 1988*, an employee of a State owned corporation, a subsidiary of a State owned corporation or a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority, and (without limitation and to avoid doubt), includes an individual in the service of the Crown or of a public authority, a member of the Police Service, a PIC officer or a PICI officer.’



‘of maladministration made against a member of parliament, taken to the Presiding Officers in accordance with NSW Parliament’s current policies and procedures, and disclosures to the Auditor General in relation to serious and substantial waste of public money, are eligible for protection under the Act.’

And insert instead the following:

‘about a member of Parliament:

- a) concerning maladministration, made to the NSW Ombudsman, or to the Clerk of the Legislative Assembly, the Clerk of the Parliaments or the Executive Manager of the Department of Parliamentary Services, in accordance with the NSW Parliament’s current policies and procedures; and
- b) concerning serious and substantial waste of public money, made to the Auditor General. are eligible for protection under the Act.’

Omit the words ‘an individual who as a’ from paragraph 7.57.

Insert the word ‘members’ instead of ‘parliamentary’ in the last sentence of paragraph 7.63.

Omit the words ‘the NSW Ombudsman, Auditor General or’ from paragraph 7.64

Insert the word ‘working’ instead of the word ‘employment’ in the last sentence of paragraph 7.77.

Omit the last sentence of paragraph 7.79 and insert instead the following additional recommendation after paragraph 7.79 :

‘RECOMMENDATION: That the Parliament of New South Wales review its current policies, procedures and codes of conduct for volunteers and interns relating to protected disclosures, including reviewing induction programs to ensure they provide adequate information and support on protected disclosures.’

Insert the word ‘generally’ at the end of the first sentence in paragraph 7.80.

That consequential amendments be made to the List of Recommendations and the numbering of recommendations.

#### Adoption of the report

Resolved on the motion of Revd Nile, seconded Ms Beamer, that the draft report as amended be the Report of the Committee and that it be signed by the Chair and presented to the Houses.

The Chair advised that he intended to table the report in the Legislative Assembly during the next sitting week, with the aim of holding the take note debate on the Friday of that week, if possible. Discussion ensued. The Chair indicated that he would table the report as soon as possible in the next sitting week prior to the debate, in the interim members had access to the draft report and amendments.

Resolved on the motion of Revd Nile, seconded Mr Martin, that the Chair, the Committee Manager and the Senior Committee Officer be permitted to correct stylistic, typographical and grammatical errors.

**4.** \*\*\*

#### **5. General business**

Mr O’Dea asked whether, in relation to his e-mail of 12 November 2009, the Premier’s Department had been contacted to obtain the statistical information sought in Questions on Notice nos. 8532, 7647 and 7031. The Premier’s Department had not been contacted as the Committee had not sought this information. However, the statistical information that was publicly available in the ICAC and NSW Ombudsman annual reports had been provided to the Chair by the Secretariat, as was referred to by the Chair earlier in the meeting.

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Appendix 3 – Minutes

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There being no further items of general business, the deliberations concluded at 10.41 am and the Committee adjourned sine die.