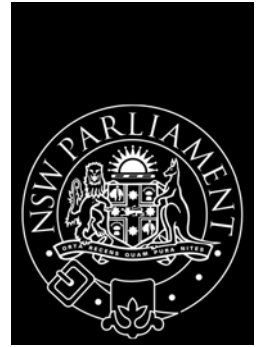


PARLIAMENT OF NEW SOUTH WALES



Committee on the Independent Commission
Against Corruption
Protection of public sector whistleblower employees

Discussion Paper

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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.

List of proposals

PROPOSAL 1:

a) That a Protected Disclosures Unit be established in a suitable oversight body to:

- monitor the operational response of public authorities (other than investigating authorities) to the *Protected Disclosures Act 1994* (the Act);
- act as a central coordinator for the collection and collation of statistics on protected disclosures;
- publish an annual report containing statistics on disclosures;
- identify systemic issues or problems with the operation of the Act;
- develop reform proposals for the Act; and
- monitor and report on trends in the operation of the Act, based on information received from public authorities in relation to the management and outcomes of all disclosures received.

b) That the Ombudsman's Office should be responsible for:

- providing advice in relation to protected disclosures to public officials and public authorities;
- auditing the internal reporting policies and procedures of public authorities;
- coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities; and
- providing advice on internal education programs to public authorities..... 11

PROPOSAL 2: That, pursuant to section 30 of the *Protected Disclosures Act 1994*, enforceable regulations on protected disclosures be made requiring 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. These protected disclosure regulations should require the internal policies to be consistent with, but not necessarily identical to, 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 Disclosure Guidelines*, 5th Edition. 13

PROPOSAL 3: That the *Protected Disclosures Act 1994* be amended to provide that, in addition to public officials, disclosures that are made by people who are in contractual relationships with public authorities are eligible for protection..... 19

PROPOSAL 4: That the *Protected Disclosures Act 1994* be amended to make it clear 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. 19

PROPOSAL 5: That the *Protected Disclosures Act 1994* 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. 22

List of proposals

PROPOSAL 6: 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 public officials.27

PROPOSAL 7: That the *Protected Disclosures Act 1994* be amended to provide for a public official to claim for civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.27

PROPOSAL 8: That section 22 of the *Protected Disclosures Act 1994* be amended to remove the requirement for confidentiality in cases where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.....27

PROPOSAL 9: That section 22 of the *Protected Disclosures Act 1994* be amended to 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.....28

PROPOSAL 10: That the *Protected Disclosures Act 1994* be amended to provide that detrimental action taken substantially in reprisal for a protected disclosure is a disciplinary offence for all public officials.28

PROPOSAL 11: That the *Protected Disclosures Act 1994* be amended to provide a detailed, stand-alone definition of a public authority along the lines of Schedule 5(2) of the *Whistleblowers Protection Act 1994* (Queensland).30

PROPOSAL 12: That section 14 of the *Protected Disclosures Act 1994* be amended to clarify that, to be protected by the Act, 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 authority or investigating authority where the public official honestly believes it is the appropriate authority to receive the disclosure.....31

PROPOSAL 13: That the *Protected Disclosures Act 1994* be amended to include definitions for “vexatious” and “frivolous” complaints, as provided for in section 16 of the Act, to enable agencies to more easily identify complaints that are not eligible for protection.35

PROPOSAL 14: That public authorities include in their Protected Disclosures policies advice:

- that complaints made substantially to avoid disciplinary action, or made vexatiously or frivolously, are not eligible for protection under the provisions of the *Protected Disclosures Act 1994*; and
- specifying appropriate avenues for resolving grievance and performance related issues.35

PROPOSAL 15: That section 27 of the *Protected Disclosures Act 1994* be amended to require agencies that receive a protected disclosure to keep the public official who has made the disclosure informed as to developments in relation to their disclosure.....37

PROPOSAL 16: That the *Protected Disclosures Act 1994* be amended to require public authorities to report on protected disclosures, along the lines of what is required for freedom of information applications under section 69 of the *Freedom of Information Act 1994*. This reporting requirement could take the form of a protected disclosures regulation requiring a public authority to publish in their annual report the following information on protected disclosures (as per Clause 10 of the Freedom of Information Regulation):

1. the number of disclosures made in the past 12 months;
2. outcomes;
3. policies and procedures;
4. year-on-year comparisons;
5. organisational impact of investigations of disclosures.

To ensure consistent reporting, the NSW Ombudsman's *Protected Disclosure Guidelines* could be revised to include an Appendix setting out a pro-forma for agency reporting of information on protected disclosures for annual reports, with the protected disclosures regulation requiring public authorities to adopt this pro-forma..... 39

Chapter One - Introduction

- 1.1 The purpose of this discussion paper is to outline the major issues and areas for reform that have arisen during the inquiry into the protection of public sector whistleblower employees, in addition to canvassing proposals for legislative change in relation to the *Protected Disclosures Act 1994* (PDA) and the protection of whistleblower employees generally. The paper does not discuss all of the issues raised by participants to the inquiry, rather it focuses on priorities that the Committee on the Independent Commission Against Corruption (the Committee) has identified following consideration of evidence and submissions received.
- 1.2 The chapters of the discussion paper that follow outline the current protections available to public sector whistleblower employees in New South Wales before turning to areas of the current protection regime that have been identified as deficient during the inquiry. In particular, the paper examines: the lack of coordination and oversight of the Act; the enforcement of standardised internal procedures in relation to whistleblowers; clarification of statutory protections for whistleblowers; preventing misuse of the statutory protections; and, increased transparency in relation to protected disclosures.
- 1.3 Throughout the discussion paper the Committee has made proposals for change to the current protection regime and, where appropriate, identified issues that are raised by these proposals. The proposals put forward by the Committee address the deficiencies, uncertainties and inadequacies in the current regime for protecting public sector whistleblowers. Many of the issues identified and proposals put forward have been extracted from the submissions received by the Committee or reflect ideas presented in evidence to the Committee.
- 1.4 The Committee invites comment on the proposals contained herein and on other issues raised in the discussion paper. In making its final report, the Committee will consider further submissions it receives in response to this paper.

Conduct of inquiry

Terms of reference

- 1.5 The Committee commenced its inquiry into the protection of public sector whistleblower employees following a referral from both Houses on 26 June 2008,¹ which directed it to inquire into and report on the effectiveness of current laws, practices and procedures in protecting whistleblower employees making allegations against government officials and members of Parliament. The terms of reference for the inquiry are reproduced at page iii, and the functions of the Committee under the *Independent Commission Against Corruption Act 1988* are reproduced at page iv.

Submissions

- 1.6 The Committee advertised for submissions on 30 July 2008. The Committee also wrote to relevant departments, organisations and political parties to inform them of the inquiry and invite them to make a submission. Appendix 1 contains a list of the 39 submissions received by the Committee to date.

¹ 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.

Public hearings

- 1.7 Public hearings were held by the Committee on 18 August 2008, 24 November 2008 and 1 December 2008. Evidence was taken from several departments and organisations, including the ICAC, the Office of the NSW Ombudsman, RailCorp, the University of New South Wales (UNSW), Maritime NSW, the Audit Office of New South Wales, the NSW Legislative Assembly and NSW Legislative Council and Whistleblowers Australia. A full list of witnesses appearing before the Committee can be found at Appendix 2. Transcripts of the evidence received during the Committee's public hearings can be found on the Committee's website at www.parliament.nsw.gov.au/icac.

Chapter Two - Protection regime for public sector whistleblower employees in NSW

2.1 This chapter outlines the current protection regime for public sector whistleblowers as it relates to statutory protections in the PDA and other statutes, as well as under the common law. It underscores the fact that the issue of protecting public sector whistleblowers is a much broader issue than the protections currently available in the PDA.

1. Background

2.2 Protections available to whistleblowers are frequently divided into two categories: statutory and administrative protections.²

2.3 *Statutory protections* are those that are provided for by legislation and 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;
- Possibility to seek civil, industrial or other remedies if detriment is suffered; and
- Possibility to seek injunctions or interventions to prevent the taking of detrimental action.

2.4 *Administrative protections* are those practices, procedures and policies that an agency implements to manage protected disclosures. They could be in the form of adopting an internal reporting and support policy, requiring staff to attend education and training programs or taking steps to induce cultural change.

2. Outline of protections

A. Statutory protections under the *Protected Disclosures Act 1994*³

i. Section 20: protection against reprisals

2.5 Section 20 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.⁴

2.6 Detrimental action means action causing, comprising or involving any of the following:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to employment;
- dismissal from, or prejudice in, employment; and

² NSW Ombudsman, *Protected Disclosure Guidelines*, 5th ed, May 2004, Sydney, at C-3; Brown A J, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation*, November 2006 at 34.

³ Sections 20, 21 and 22 of the *Protected Disclosures Act 1994* (PDA) are reproduced in full at Appendix 3.

⁴ South Australia and Commonwealth jurisdictions do not make reprisals a criminal offence.

- disciplinary proceeding.⁵

2.7 An offence under s 20 involves detrimental action taken *substantially* in reprisal for a person making a protected disclosure, rather than detrimental action taken only in reprisal for the protected 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.⁶

2.8 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 then lies upon the defendant to prove that the action was not substantially in reprisal for the person making the disclosure.

2.9 The effectiveness of this provision in the Act is difficult to assess given the limited number of prosecutions that have commenced under this section. In evidence to the Committee, NSW Deputy Ombudsman, Mr Chris Wheeler commented that of the limited number of prosecutions commenced in NSW, under either s 20 of the PDA or s 206 of the Police Act, all have been unsuccessful on technical grounds.⁷

ii. Section 21: protection against actions

2.10 The Act 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.

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

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

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

iii. Section 22: Confidentiality guidelines

2.13 The Act 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.

2.14 Exceptions to the above obligation are provided in the following circumstances:

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

⁵ *Independent Commission Against Corruption Act 1988* (ICAC Act), s 20(2).

⁶ Brown A J, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation, An Issues Paper*, Sydney, NSW Ombudsman, November 2006, p. 36.

⁷ Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, *Transcript of evidence*, 18 August 2008, p. 6.

B. Statutory protections available in other NSW legislation⁸**i. ICAC Act, Ombudsman Act and PIC Act**

2.15 The *Independent Commission Against Corruption Act 1988* (ICAC Act), *Ombudsman Act 1974* (Ombudsman Act) and *Police Integrity Commission Act 1996* (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, Ombudsman or PIC;⁹ and
- dismissal from employment, or prejudice in employment, of any person who provides assistance to the ICAC, Ombudsman or PIC.¹⁰

2.16 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.¹¹

ii. PSEM Act

2.17 Under the *Public Sector Employment and Management Act 2002* (PSEM Act) certain public officials are subject to disciplinary offences if they engage in misconduct. Misconduct is defined in s 43(1) (c) and (d) as:

- 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; and
- taking any action against another officer that is substantially in reprisal for an internal disclosure made by that officer.

iii. OH&S Act

2.18 Section 8 of the *Occupational Health & 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; and
- provide adequate facilities for the welfare of the employees at work.

iv. GREAT Act

2.19 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 they were made substantially in reprisal for a protected disclosure.

v. FOI Act

2.20 Under the *Freedom of Information Act 1989* (FOI Act) a document is exempt from release if it contains matters relating to a protected disclosure.

⁸ The relevant sections are reproduced at Appendix 4.

⁹ ICAC Act, s 93; *Ombudsman Act 1974*, s 37(4); *Police Integrity Commission Act 1996* (PIC Act), s 113.

¹⁰ ICAC Act, s 94; *Ombudsman Act* s 37(5); PIC Act, s 114.

¹¹ Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 14.

vi. Police Act

2.21 Section 206 of the *Police Act 1990* creates a criminal offence for any reprisals undertaken substantially in response to an allegation of misconduct or criminal activity made by a NSW police officer about one or more other NSW police officers.

C. Civil remedies

2.22 In NSW, 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* 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.¹²

2.23 In all jurisdictions other than the Commonwealth and NSW, a person who suffers detriment is entitled to seek damages by way of tort action.¹³ In South Australia and Western Australia an action for victimisation under equal opportunity legislation is also available.¹⁴

¹² 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. See NSW Ombudsman, *Protected Disclosure Guidelines*, 5th ed, May 2004, Sydney, at E-5. Information also cited in 'Duty of care owed to "whistleblowers"', *Client Newsletter*, Crown Solicitor's Office, March 2001, pp. 2-3.

¹³ *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: best-practice whistleblowing legislation for the public sector*, ANU E press, September 2008, p. 272.

¹⁴ *Whistleblowers Protection Act 1993* (SA) s 9(2)(b); *Public Interest Disclosure Act 2003* (WA) s 15(4).

Chapter Three - Improving accountability and internal administrative procedures

3.1 This chapter addresses two recurring themes with regard to the issue of protecting public sector whistleblowers: the need for better oversight and coordination in relation to the whistleblower protection regime; and, the need to enforce standardised practices and procedures among public sector agencies and local councils with regard to protected disclosures. This chapter builds upon the recommendations made in previous inquiries. Through a series of proposals it seeks to address the fact that no one “owns” the PDA, that is, there is no agency with responsibility for ensuring that the PDA is implemented in a manner that protects public sector whistleblowers.

1. Oversight and coordination

Background

3.2 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. Three previous Committee reviews of the PDA have recommended the establishment of a Protected Disclosures Unit within the Office of the Ombudsman, 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; and
- providing relevant education and training to public authorities.¹⁵

3.3 In addition, the final report of the Whistling While They Work 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 public sector employees to make disclosures internally.¹⁶

3.4 Currently agencies in New South Wales are not required to report on protected disclosures, or to submit statistics or information on protected disclosures to a co-ordinating agency. The investigating authorities¹⁷ to whom public officials may make external disclosures under the PDA, report on protected disclosures in their annual reports, but there is no provision for collection or publication of information relating to

¹⁵ 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.

¹⁶ 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. 269.

¹⁷ 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.

disclosures that have been made and investigated internally within an agency. While the NSW Ombudsman, in conjunction with the other investigating authorities, performs a de facto advisory and education role in relation to protected disclosures, no agency has the statutory powers or additional funding required to undertake a coordinating and monitoring role.

Submissions and evidence

3.5 Participants in the current inquiry have raised the lack of oversight and accountability of the management of protected disclosures by public authorities. The Deputy Ombudsman, Mr Chris Wheeler, told the Committee:

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.¹⁸

3.6 In its submission to the inquiry, the NSW Ombudsman's Office elaborated further on problems identified by Mr Wheeler, indicating that in relation to the PDA:

(1) there is no government organisation with ownership of the Act - with responsibility to make sure that the Act is working effectively

(2) there is far too little information available to determine how the Act is working, for example:

- how many disclosures are made each year and to which agencies
- the nature of those disclosures
- whether they indicate any systemic issues
- how well those disclosures were dealt with either generally or by particular agencies, and
- how things could be improved, etc

(3) while some of the larger organisations have the ability to designate and train specific staff to perform protected disclosure type roles, for most organisations the receipt of a protected disclosure is a rare event for which they have no staff who are appropriately trained or experienced

(4) there is no prosecuting body for offences under the Act.¹⁹

3.7 A number of inquiry participants suggested that some form of external oversight be implemented as a way of overcoming the problems with the protected disclosures regime outlined above. The University of New South Wales told the Committee that it would support an external body, such as the Independent Commission Against Corruption (ICAC), providing an advisory and review role in terms of protected disclosures. The University submitted 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.²⁰

¹⁸ Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 5.

¹⁹ NSW Ombudsman, *Submission 21*, p. 8.

²⁰ University of New South Wales, *Submission 32*, p. 6.

- 3.8 The Auditor-General told the Committee that it would assist agencies if the Ombudsman took on the role of collating, analysing and reviewing data on protected disclosures and providing feedback to agencies.²¹
- 3.9 Whistleblowers Australia supported the establishment of an oversight body, either as a new stand-alone agency, or, preferably, as a unit within the 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. Whistleblowers Australia proposed that the unit's role would 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.²²
- 3.10 The Liberal and National Parties submitted that the recommendation of the 2006 ICAC Committee report to establish a Protected Disclosures Unit within the Ombudsman's Office should be implemented.²³
- 3.11 However, other inquiry participants were less supportive of the idea of external oversight of protected disclosures. While expressing support for a more co-ordinated and consistent approach to protected disclosures, the ICAC did not support the proposal to set up an oversight unit based in the Ombudsman's Office, for the following reasons:
- the Ombudsman would be too directly involved in the operations of other agencies and the way they investigate disclosures;
 - the 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.²⁴
- 3.12 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.
- 3.13 The Department of Education did not support additional oversight, as it would result in additional administrative and reporting burdens being placed on Departments:
- 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.

...

²¹ Mr Peter Achterstraat, Auditor-General, Audit Office of NSW, *Transcript of evidence*, 24 November 2008, pp. 67-68.

²² 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.

²³ NSW Liberal and National Parties, *Submission 3*, p. 2.

²⁴ Independent Commission Against Corruption (ICAC), *Submission 22*, pp. 5-6 and Ms Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 18 August 2008, pp. 21, 26.

Improving accountability and internal administrative procedures

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.²⁵

Proposal

- 3.14 The Committee is mindful that the recommendation to establish a Protected Disclosures Unit in the Ombudsman's Office has been made several times and is yet to be taken up by the NSW Government. The Committee is also mindful of the ICAC's reservations in relation to locating a Protected Disclosures Unit in the Ombudsman's Office. On the other hand, the Committee is keen to promote better oversight of the whistleblower protection regime, in addition to providing a clearer picture of whether the current administrative and statutory protections are adequate. The effectiveness of the regime, including the adequacy of protections, is difficult to determine given the lack of information on agencies' use of the available statutory protections and their provision of administrative protections.
- 3.15 As a cost effective means of achieving these goals, the Committee is proposing to allocate the oversight of the PDA to a unit in a suitable oversight body, with the Ombudsman's Office continuing to have an educative role. In making this proposal, the Committee is aware of the need to address certain issues, including:
- Whether a central oversight unit would augment the current whistleblower protection regime through the monitoring of statutory protections and creation of more transparent administrative protections that are internal to agencies.
 - Whether the proposed unit's functions are currently being undertaken by another agency and, if so, whether the proposed unit would duplicate the work of other agencies.
 - How the proposed unit would work with the Ombudsman's Office.
 - What the unit's role should be in terms of internal investigations being conducted by public authorities, that is, whether it should have a monitoring role for current investigations and an appeal or review role for completed investigations.

PROPOSAL 1:

- a) That a Protected Disclosures Unit be established in a suitable oversight body to:
- monitor the operational response of public authorities (other than investigating authorities) to the *Protected Disclosures Act 1994* (the Act);
 - act as a central coordinator for the collection and collation of statistics on protected disclosures;
 - publish an annual report containing statistics on disclosures;
 - identify systemic issues or problems with the operation of the Act;
 - develop reform proposals for the Act; and
 - monitor and report on trends in the operation of the Act, based on information

²⁵ Department of Education and Training, *Submission 37*, p. 5.

received from public authorities in relation to the management and outcomes of all disclosures received.

b) That the Ombudsman's Office should be responsible for:

- providing advice in relation to protected disclosures to public officials and public authorities;
- auditing the internal reporting policies and procedures of public authorities;
- coordinating education and training programs and publishing guidelines, in consultation with the other investigating authorities; and
- providing advice on internal education programs to public authorities.

2. Enforcing standardised internal policies

Background

- 3.16 In the wake of the PDA being enacted, the Department of Premier and Cabinet (DPC) issued a memorandum in 1996 requiring 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 steps taken to inform staff of relevant procedures.²⁶ Research conducted during the Whistling While They Work project has pointed to the preference of whistleblowers to make disclosures internally.²⁷ It is therefore well-recognised that adequate administrative protections are vital in protecting and encouraging whistleblowers to disclose wrongful conduct.
- 3.17 As outlined in chapter 2, administrative protections available to whistleblowers encompass relevant policies, codes and procedures that have been adopted by agencies to protect employees who make disclosures.

Submissions and evidence

- 3.18 The Deputy Ombudsman advised the Committee that, following the release of the Premier's memorandum, his office wrote to agencies requesting them to provide a copy of their internal reporting policy. The Ombudsman's Office then assessed the adequacy of the policies against certain criteria. Mr Wheeler advised the Committee that the Ombudsman's assessment showed that most agencies had not adopted a policy, and where they had they were often inadequate. Following its initial assessment, the 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 Whistling While They Work project resulted in suggested improvements to agency

²⁶ 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>, 19 November 1996, accessed 8 January 2009.

²⁷ 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 final 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: enhancing the theory and practice of internal witness management in public sector organisations*, ANU E press, September 2008, pp. 83, 86-93.

policies, which the Ombudsman plans to include in its revised *Protected Disclosure Guidelines*.²⁸

- 3.19 As part of its role, 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. Seventy-four of the 152 New South Wales councils have been reviewed to date, of which eight councils did not have protected disclosures policies in place. Seven of these councils have now adopted a policy in response to the Department's review.²⁹

Comment

- 3.20 Submissions received by the Committee indicate that agencies participating in the inquiry have developed protected disclosures policies that inform staff of their rights under the Act, in addition to detailing the investigation processes and the relevant agency contacts. However, the Committee notes that it is difficult 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. 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 aim of Proposal 1 detailed above is to enable administrative protections to be assessed for their adequacy and for areas of reform to be identified.
- 3.21 In the interim, however, regulations could be enacted, pursuant to s 30 of the PDA³⁰, to require agencies and local councils to have in place internal reporting systems that facilitate the making of disclosures and protect whistleblowers when they make disclosures. Such regulations could 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 Disclosure Guidelines*.³¹ Internal policies should be consistent with, but need not be identical to, the NSW Ombudsman's "Model internal reporting policy for state government agencies" and "Model Internal Reporting Policy for Councils".³²

Proposal

- 3.22 The Committee is interested in receiving input on whether the proposal to establish greater oversight of the protected disclosures regime, as discussed in section 1 of this chapter would lead to the development, on the part of agencies and local councils, of standardised internal policies and procedures in relation to protected disclosures. It is imperative that public sector agencies and local councils take a consistent and robust approach to protecting whistleblowers.

²⁸ Mr Wheeler, *Transcript of evidence*, 18 August 2008, pp. 2-3.

²⁹ 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.

³⁰ Section 30 of the PDA provides: 'The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act'.

³¹ See NSW Ombudsman, *Protected Disclosure Guidelines*, 5th ed, May 2004, Sydney, Table 1 pp. 22-23, Table 2 A-15, A21-22, A1-3.

³² *Ibid*, Annexures 1 and 2.

- 3.23 The proposal listed below seeks to ensure that public sector agencies and local councils have appropriate, adequate and consistent policies across the board in relation to assessing and dealing with protected disclosures. It also seeks to ensure that such policies provide robust protection to whistleblowers. Proposals to improve reporting by agencies and local councils to a body charged with providing central oversight are discussed by the Committee in chapter 5 of this paper.

PROPOSAL 2:

That, pursuant to section 30 of the *Protected Disclosures Act 1994*, enforceable regulations on protected disclosures be made requiring 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. These protected disclosure regulations should require the internal policies to be consistent with, but not necessarily identical to, 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 Disclosure Guidelines*, 5th Edition.

Chapter Four - Improving protections

4.1 This chapter deals with ways to broaden the current administrative and statutory protections available for whistleblowers. In particular, the Committee looks at improving the protection provisions available under the Act; broadening the definition of “public official” to clarify the status of certain types of employees; and amending the tests that disclosures must satisfy to include a subjective test. The chapter also addresses issues raised in relation to the confidentiality guidelines of the Act.

1. Who should be eligible for protection

Statutory provisions

4.2 The PDA provides that public officials may make a disclosure. The definition of a public official, whose conduct and activities may be investigated by an investigating authority, 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.³³

4.3 The issue of whether area health service staff meet the definition of a public official under the PDA was raised during the current inquiry, and during the previous ICAC Committee’s 2006 review of the PDA.³⁴ The definition of public official in the PDA was recently amended by the Independent Commission Against Corruption Amendment Act 2008, in order to remove doubt about the application of the definition to area health service staff. In the second reading speech to the Bill, the Hon John Aquilina 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.³⁵

Evidence and submissions

i. Members of the public

4.4 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 encouraging and facilitating disclosures.³⁶ The Commission noted that an increasing

³³ 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.

³⁴ See Department of Health, *Submission 33*, pp. 3-4 and Committee on the ICAC, *Review of the Protected Disclosures Act 1994*, November 2006, report 12/53, recommendation 6.

³⁵ The Hon John Aquilina MP, Legislative Assembly Hansard, 28 November 2008, p. 12076.

³⁶ ICAC, *Submission 22*, p. 2.

number of complaints are likely to come from members of the public, given moves to privatise government services and contract out government work.³⁷

4.5 The Ombudsman did not support the extension of current protections 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 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.³⁸

4.6 Whistleblowers Australia submitted that both current and former public sector employees should be protected under the Act, and recommended that the Committee investigate the extension of protections to the private sector.³⁹

ii. Contractors

4.7 Both the ICAC and the Ombudsman submitted that, given the increasing trend for government services to be privatised or contracted out, the Act should be extended to provide protection for disclosures made by people in contractual relationships with government.⁴⁰ The Ombudsman noted that:

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.⁴¹

4.8 In suggesting the extension of the protections available under the Act to include contractors, the Commission referred the Committee to 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.'⁴²

³⁷ 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: see ICAC, *Submission 22*, p. 2.

³⁸ NSW Ombudsman, *Submission 21*, pp. 4-5.

³⁹ Whistleblowers Australia, *Submission 4*, p. 9.

⁴⁰ NSW Ombudsman, *Submission 21*, p. 4 and ICAC, *Submission 22*, p. 2.

⁴¹ NSW Ombudsman, *Submission 21*, p. 4.

⁴² ICAC, *Submission 22*, p. 2.

iii. Officers of the Parliament

- 4.9 The NSW Legislative Council submitted to the Committee that, although the PSEM 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.'⁴³ The Parliament's joint Protected Disclosures Policy, which was submitted to the Committee by both the NSW Legislative Assembly and NSW Legislative Council, 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'.⁴⁴ In addition, the Parliamentary Staff Code of Conduct includes a section on whistleblowing, which states that disclosures will be handled in confidence in accordance with the requirements of the Act.⁴⁵
- 4.10 Notwithstanding these policies, the situation of an Electorate Officer who makes a protected disclosure against a member is in many ways unique in the public sector, due to the terms of the Award under which Electorate Officers are employed.⁴⁶ The Clerk of the Legislative Assembly, Mr Russell D Grove outlined the relevant conditions of employment to the Committee:

Mr GROVE: They are employed by the Speaker, separate staff to the public service. They are not employed under the same system of merit in terms of selection panels, et cetera, that we would normally go through with a normal parliamentary officer. The member makes the selection, makes the recommendation to the Speaker and the Speaker is actually the legal employer of the staff.

CHAIR: ... Do parliamentary staff come under the definition of people who can be protected for protected disclosures?

Mr GROVE: Yes they are.

CHAIR: We are not just talking about protected disclosures; we are talking about people who come forward with information as well.

Mr GROVE: Yes.

CHAIR: Are electorate officers protected if they come forward?

Mr GROVE: They would be deemed to be protected under the Act, yes.

...

CHAIR: So their particular situation is that they are there because of the member of Parliament usually—they are answerable to the member of Parliament—but they are employed by the Speaker. It is a funny situation. If the member of Parliament was not re-elected in an election ...

CHAIR: —then it is a matter for the member of Parliament as to whether or not that staff stays.

Mr GROVE: That is correct. It is part of their award.

CHAIR: And they are aware of that?

⁴³ NSW Legislative Council, *Submission 29*, p. 2.

⁴⁴ 'Protected Disclosures NSW Parliament' August 1997, p. 1: see Legislative Assembly, *Submission 34*, Attachment 2 and Legislative Council, *Submission 29*, Attachment.

⁴⁵ NSW Legislative Assembly, *Submission 34*, Attachment 2: Parliamentary Staff Code of Conduct, May 2005, p. 8.

⁴⁶ The Crown Employees (Parliamentary Electorate Officers) Award: see Legislative Assembly, *Submission 34a*, for the relevant terms of the Award.

Mr GROVE: Yes they are.⁴⁷

- 4.11 It is clear, then, from the evidence given by Mr Grove, that the terms of employment for an Electorate Officer are precarious since if a member loses their seat or resigns from Parliament, the new member elected in their place can choose not to employ the Electorate Officer who worked for the previous member. The NSW Legislative Assembly noted that these terms of employment limit employment protection available to Electorate Officers 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.⁴⁸

- 4.12 Mr Grove told the Committee that the circumstances under which Electorate Officers are appointed can present difficulties when it comes to finding them alternative employment elsewhere in the public sector:

CHAIR: If an electorate officer had a problem with the member of Parliament—and it could be all sorts of problems that could arise because it is a very close working relationship, given the nature of the job and the closeness in proximity—and came to you with a problem, have you ever had cause to have a situation where you have attempted to find another position or location for the electorate officer? Do you have procedures in place for that? What I am talking about is if an electorate officer feels as though they are having a difficult time in that particular office, do you have procedures in place for that?

...

Mr GROVE: ... 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 not appointed on merit and have no right to sort of 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.⁴⁹

- 4.13 In terms of finding alternate employment for whistleblower employees, Mr Grove told the Committee that it would be preferable to have a central coordinating agency with responsibility for, where necessary, assisting Electorate Officers if their employment ceases in circumstances where a protected disclosure has been made:

⁴⁷ Mr Russell D Grove, Clerk of the Legislative Assembly, NSW Legislative Assembly, *Transcript of evidence*, 1 December 2008, p. 44.

⁴⁸ Legislative Assembly, *Submission 39*, p. 3.

⁴⁹ Mr Grove, *Transcript of evidence*, 1 December 2008, p. 45.

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Mr GROVE: ... It would give a certain amount of certainty if there were a coordinating unit. We do not have direct access to the broader public sector where jobs are available, where temporary positions are available. It is problematic in areas that are non-metropolitan. If you are someone who works in Hornsby and you are on stress leave and we find a job in the Department of Housing in Maroubra, you are hardly likely to want to take up that position.

...

... To find a job in Tamworth in another agency is difficult. You have the issue of confidentiality. If someone leaves the Tamworth Electorate Office and goes and works in another agency in Tamworth, people will say "Why has that person left?" I do not know what I can do as someone who is responsible to ensure that the fact that they have made a protected disclosure and you are moving them out of the situation because the office is very tense, et cetera, when other people draw their own conclusions. The parliamentary environment is reasonably well known for its rumour and suggestion of what is going on when people do not necessarily know all the facts involved. That may be a way of overcoming that.⁵⁰

iv. Volunteers and interns working for members of Parliament

- 4.14 Staff of the Parliament, including NSW Legislative Assembly electorate office staff and NSW Legislative Council secretary/research assistants to Members, are employed by the Speaker of the Legislative Assembly and the President of the Legislative Council respectively. The Clerk of the Parliaments advised the Committee that Members of the Legislative Council also employ volunteer staff.⁵¹ The Legislative Council Members' Guide states that the Department has established a policy for non-staff persons, 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.'⁵² In addition to volunteers organised by a political party, the Member's Guide notes that the NSW Legislative Council supports the participation of members in formal university internships that are part of public policy or social science programs. The Parliamentary website also states that the Education Section co-ordinates internships at Parliament for students who are studying specific courses at several universities.⁵³
- 4.15 While volunteers and interns are not employed by the Parliament, and therefore may not be included in the definition of 'public official' under the Act, the Parliament's Code of Conduct for members' staff states that the code also applies to 'volunteers and people engaged in work experience programs with Members.'⁵⁴ 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 Act. 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 Ombudsman and would be eligible for the similar protections that are available under the ICAC and Ombudsman Acts.⁵⁵

⁵⁰ Mr Grove, *Transcript of evidence*, 1 December 2008, p. 45.

⁵¹ Ms Lynn Lovelock, Clerk of the Parliaments, NSW Legislative Council, *Transcript of evidence*, 1 December 2008, p. 17.

⁵² Legislative Council, *Submission 29*, Appendix: extract from Legislative Council Members' Guide, p. 107.

⁵³ Ibid and <<http://www.parliament.nsw.gov.au/prod/web/common.nsf/key/TertiaryEducationPrograms>> accessed 21 January 2009.

⁵⁴ Mr Grove, *Transcript of evidence*, 1 December 2008, p. 48.

⁵⁵ For example under the ICAC Act:

Comment

4.16 The Committee notes that the employment conditions of staff who work for parliamentarians, such as Electorate Officers, are precarious by nature. This exacerbates the potential for negative impacts to ensue from the making of a protected disclosure. The Committee notes that the NSW Legislative Assembly seeks to find parliamentary staff such as Electorate Officers new employment when needed. 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 as to ensure that such staff are not discouraged from making protected disclosures as a consequence of their precarious employment situation.

Proposals

4.17 The Committee invites comments on the following proposals, which aim to make it clear that disclosures made by the following may be eligible for protection:

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

4.18 In making the proposals the Committee invites comment on whether an amendment to extend the protections available under the Act to volunteers and interns working in the office of a member of Parliament is necessary, given that complaints regarding corruption and maladministration may currently be made to the ICAC and the Ombudsman.

PROPOSAL 3: That the *Protected Disclosures Act 1994* be amended to provide that, in addition to public officials, disclosures that are made by people who are in contractual relationships with public authorities are eligible for protection.

PROPOSAL 4: That the *Protected Disclosures Act 1994* be amended to make it clear 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.

2. Objective and subjective tests

Background

4.19 The Act 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 (eg. corrupt conduct);

S 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. ...

S 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.

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- For disclosures made to a member of Parliament or a journalist: the disclosure must be substantially true.⁵⁶
- 4.20 In terms of disclosures to a member of Parliament or a journalist, public officials must also satisfy a subjective test: in making the disclosure they must have reasonable grounds for believing the disclosure is substantially true.⁵⁷
- 4.21 The 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 a 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 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.⁵⁸

Submissions and evidence

- 4.22 The ICAC submitted that the Act 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.’⁵⁹ The Commission noted that the Queensland *Whistleblower Protection Act* 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.⁶⁰

- 4.23 The Liberal and National Parties also submitted in favour of amending the Act to protect persons who have an “honest belief on reasonable grounds” that their

⁵⁶ PDA, subss 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). In terms of disclosures made to members of Parliament or journalists, the Act 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 6 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 6 months of the disclosure being made.

⁵⁷ PDA, subs 19(4).

⁵⁸ NSW Ombudsman, *Submission 21*, pp. 3-4.

⁵⁹ ICAC, *Submission 22*, p. 3.

⁶⁰ *Ibid.*

disclosure meets the grounds for protection specified in the Act⁶¹, while Whistleblowers Australia expressed support for requiring an “honest and reasonable belief” in the truth of relevant allegations.⁶²

- 4.24 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:

Mr WHEELER: ... 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.⁶³

- 4.25 In response, the Deputy Commissioner of the ICAC told the Committee that an assessment of a disclosure might involve both an objective and subjective test:

Ms HAMILTON: ... 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.⁶⁴

Comment

- 4.26 The 2006 review of the PDA conducted by a 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’.⁶⁵ The Committee concluded that such an amendment was 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.⁶⁶

⁶¹ NSW Liberal and National Parties, *Submission 3*, p. 2.

⁶² Whistleblowers Australia, *Submission 4*, p. 5.

⁶³ Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 16.

⁶⁴ Ms Hamilton, *Transcript of evidence*, 18 August 2008, p. 24.

⁶⁵ Committee on the ICAC, report 12/53, p. 27.

⁶⁶ *Ibid.*, pp. 26-27.

Improving protections

4.27 The final report of the Whistling While They Work project, published in 2008, 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, regardless of the person's belief).⁶⁷ In the Committee's view, the evidence would appear to suggest that the adoption of best practice in relation to the whistleblower legislation would mean the inclusion of a subjective test for protected disclosures in the PDA.

Proposal

4.28 The Committee invites comments on the following proposal, which aims to broaden the current tests that a disclosure must satisfy in order to attract protection to include a subjective test. The Committee is mindful of the importance of encouraging public officials to make disclosures, without making the relevant tests difficult for agencies to apply in their assessment of complaints. In making the proposal below the Committee invites comment on:

- Whether the subjective test would be difficult for investigating authorities and public authorities to apply in assessing disclosures.
- Whether a subjective test is workable or necessary, if investigating and public authorities would continue to primarily rely on the objective test in assessing disclosures.

PROPOSAL 5: That the *Protected Disclosures Act 1994* 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.

3. Statutory protections

Background

4.29 The current statutory protection provisions are outlined by the Committee in chapter 2 of this paper. Previous Committees have supported a proposal to amend the protection provisions of the Act to include the right to seek civil damages, with the Committee on the Office of the Ombudsman and the PIC, which conducted the 2000 review, commenting that 'it would be preferable for damages to be confined to actual financial loss as a result of the detrimental action rather than punitive damages.'⁶⁸ The 2006 review undertaken by the previous ICAC Committee expressed in principle support for such an amendment and recommended that the Steering Committee review and develop the proposal, in addition to recommending that the Act be

⁶⁷ 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, pp. 283-84.

⁶⁸ Committee on the Office of the Ombudsman and the PIC, *Second Review of the Protected Disclosures Act 1994*, August 2000, p. 83.

amended to provide for a person who has made a disclosure, or a public authority acting on their behalf, to apply for an injunction against the making of a reprisal.⁶⁹

- 4.30 The final report of the Whistling While They Work research project noted the lack of success by whistleblowers seeking compensation in Australian jurisdictions, and concluded that ‘a general problem is that these statutory mechanisms do not locate the avenue for enforceable legal compensation within the employment relationship, where duty of care is most obvious, as shown by *Wheadon v State of New South Wales*.⁷⁰ The final report concluded that:

First, 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.

...

Second, a more appropriate compensation avenue should be found than those presently existing under Australian legislation. In particular, ... the assumption should be revisited that the appropriate compensation mechanism is by way of application to a superior court, in a manner analogous with personal injuries. The guiding principle should be that an employer’s workplace responsibilities include a duty to ensure that detrimental acts and omissions do not occur and to protect and support employees in the face of risks of detrimental action.⁷¹

Submissions and evidence

i. Injunctions and civil damages

- 4.31 The Deputy Ombudsman told the Committee that he supported the availability of injunctions and civil damages provisions, as they act as a deterrent and send a signal that whistleblowers will be protected from reprisals.

Mr WHEELER: ... 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.⁷²

- 4.32 The Independent Commission Against Corruption also supported amendments to the Act, with the Deputy Commissioner citing the Queensland *Corruption and Misconduct Commission Act 2001* as an example of the deterrent effect of injunction provisions.

⁶⁹ Committee on the ICAC, report 12/53, recommendation 13.

⁷⁰ 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. 275.

⁷¹ Ibid, pp. 276-77.

⁷² Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 7.

Case study 1: Injunction powers⁷³

'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.'

4.33 The Deputy Commissioner of the ICAC 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.⁷⁴ With regard to civil damages, Ms Hamilton made the following points against an amendment to 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.⁷⁵

4.34 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.⁷⁶

ii. Confidentiality guidelines

4.35 The confidentiality guidelines at s 22 of the Act are outlined in chapter 2 of this paper. The NSW Ombudsman has identified three main aspects of confidentiality in relation to protected disclosures:

- the fact that a disclosure has occurred;
- the whistleblower's identity; and
- the subject of the allegations (including individuals' identities).⁷⁷

4.36 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:

⁷³ Ms Hamilton, *Transcript of evidence*, 18 August 2008, p. 22.

⁷⁴ *Ibid*, p. 22.

⁷⁵ *Ibid*, p. 29.

⁷⁶ Whistleblowers Australia, *Submission 4*, pp. 6 & 9.

⁷⁷ 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>, accessed January 2009.

Mr WHEELER: ... 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.⁷⁸

- 4.37 The evidence of the University of New South Wales (UNSW) illustrated to the Committee the difficulty with keeping a whistleblower's identity confidential in a situation where the allegations relate to a workplace with a very small number of employees (Case study 2 below).

Case study 2: Difficulties with maintaining confidentiality⁷⁹

'Two members of staff made quite serious allegations against a third member of staff, which was well publicised in the media. It related to the handling of body parts as part of university business. In particular, the issues related to a component of the anatomy work that we do.

Orthopaedic surgeons, as part of their training, dissect and practise doing things like hip joint replacements or knee joint replacements. Accusations were made that there was not sufficient care and diligence in ensuring that the dissected specimens were put back together so that the bodies were discrete and there was certainty that all the body parts for one person were put together and buried with that individual. Clearly, those allegations were very serious and the two people who made them were anxious to protect their identities.

They made the protected disclosures through the union representative and initially talked to the Director, Human Resources. ... The situation was difficult because of the nature of the small workplace. The people making the protected disclosures were immediately identifiable by nature of the fact that there were four people in the workplace and two of them were complaining about the other two people in the workplace. ...'

- 4.38 The Deputy Vice Chancellor (Academic) of UNSW, Professor Richard Henry, also told the Committee of the difficulties that can arise in relation to confidentiality, in cases where the identity of a whistleblower becomes known and the University is still obliged to maintain confidentiality (Case study 3 below).

⁷⁸ Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 4.

⁷⁹ Professor Richard Henry, Deputy Vice-Chancellor (Academic), University of New South Wales, *Transcript of evidence*, 24 November 2008, pp. 3-5.

Case study 3: Confidentiality when identities are publicised⁸⁰

‘The other well-publicised case from the University of New South Wales involved allegations of research misconduct against a professor of medicine.

...

If we take the case relating to the professor of medicine, we have had television coverage where the complainants have appeared on television identifying themselves and putting their point of view and the university is still precluded from releasing any information which would identify those complainants who have, in fact, self-declared. I think that is one fairly clear extreme where I would have thought that if self-declaration occurs then the university should be free to put its side of the story.

...I think when the confidentiality really has objectively been lost then all that is created at the moment is the sense that the university is not serious about dealing with the matter and is not serious about public scrutiny and its duties as an institution.’

- 4.39 UNSW submitted that a situation such as that detailed above can lead to ‘artificiality and ... to the appearance of lack of transparency and honesty’.⁸¹ As an example, UNSW noted that, in order to comply with the Act, it had been obliged to refuse Freedom of Information requests and had also been involved in proceedings before the Administrative Decisions Tribunal in relation to FOI requests, in order to withhold material that related to a case in which the identity of the whistleblower was a matter of public record.⁸² UNSW proposed that the confidentiality guidelines in the Act 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. It should be made clear that if confidentiality is voluntarily breached, other than by the relevant public authority, the confidentiality guidelines no longer apply.⁸³

iii. Detrimental action as a disciplinary offence

- 4.40 The Deputy Ombudsman proposed that detrimental action should be classed as a disciplinary offence for all public officials, not just those employed under the PSEM Act.⁸⁴ Commenting on the effectiveness of s 20 of the PDA, Mr Wheeler suggested that the Act should establish the responsibility of agencies to take action in cases of detrimental action:

Mr WHEELER: ... 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

⁸⁰ Ibid, pp. 3-5.

⁸¹ University of New South Wales, *Submission 32*, p. 3.

⁸² Ibid, p. 3.

⁸³ Ibid, p. 4.

⁸⁴ Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 7.

through disciplinary procedures, I think that would be a much more effective way of proceeding.⁸⁵

iv. Prosecutions

- 4.41 The Committee has received a small number of submissions outlining allegations of detrimental action. Evidence received by the Committee indicates that there have been no successful prosecutions for detrimental action under the relevant provisions 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.⁸⁶
- 4.42 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.⁸⁷

Proposals

- 4.43 The Committee invites comments on the following proposals, which aim to improve the effectiveness of the protections available under the Act:

PROPOSAL 6: 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 public officials.

PROPOSAL 7: That the *Protected Disclosures Act 1994* be amended to provide for a public official to claim for civil damages for detrimental action taken against them substantially in reprisal for a protected disclosure.

PROPOSAL 8: That section 22 of the *Protected Disclosures Act 1994* be amended to remove the requirement for confidentiality in cases where a public official has voluntarily and publicly identified themselves as having made a protected disclosure.

⁸⁵ Ibid, p. 7.

⁸⁶ Ibid, p. 6.

⁸⁷ NSW Police Force, *Submission 31*, p. 8; Section 60 *Police Act NSW 1990*:

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.

PROPOSAL 9: That section 22 of the *Protected Disclosures Act 1994* be amended to 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.

PROPOSAL 10: That the *Protected Disclosures Act 1994* be amended to provide that detrimental action taken substantially in reprisal for a protected disclosure is a disciplinary offence for all public officials.

4. How disclosures attract protection

4.44 In order to be protected by the PDA, disclosures by public officials must be made to:

- the ICAC if they are concerning corrupt conduct;
- the Ombudsman if they are concerning maladministration;
- the Auditor-General if they are concerning serious and substantial waste;
- the Director-General of the Department of Local Government if they are concerning serious and substantial waste in local government.⁸⁸

4.45 Section 14(1) of the PDA further provides that, to attract protection, disclosures by public officials to the principal officer of a public authority must be disclosures relating to 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.⁸⁹

Submissions and evidence

4.46 The Audit Office noted that 'allegations of waste tend to be caused by maladministration or possible corrupt conduct'.⁹⁰ 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.

4.47 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 they, in good faith, make a disclosure to the incorrect agency:

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.

⁸⁸ PDA, ss 10, 11, 12, 12B. Section 12A provides that disclosures relating to corrupt conduct, maladministration or serious and substantial waste of public money by a police officer must be made to the PIC.

⁸⁹ In addition s 14(2) provides: To be protected by this Act, a disclosure by a public official to:

- (a) another officer of the public authority to which the public official belongs, or
- (b) an officer of the public authority to which the disclosure relates,

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 or any of its officers must be a disclosure of information that shows or tends to show such corrupt conduct, maladministration or serious and substantial waste (whether by that authority or any of its officers or by another public authority or any of its officers).

⁹⁰ Audit Office of NSW, *Submission 28*, p. 1.

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. ...⁹¹

- 4.48 For its part, the ICAC proposed to the Committee an amendment along the lines of the provisions in the Queensland *Whistleblowers Protection Act 1994*⁹²:

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.⁹³

- 4.49 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.⁹⁴

- 4.50 To remedy the situation the DLG proposed that:

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.⁹⁵

⁹¹ ICAC, *Submission 22*, pp. 3-4.

⁹² See ss 25 and 26 of the *Whistleblowers Protection Act 1994* (Qld).

⁹³ ICAC, *Submission 22*, pp. 3-4.

⁹⁴ Department of Local Government, *Submission 27*, p. 7.

⁹⁵ *Ibid*, p. 8.

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The DLG would then work closely with the Ombudsman in determining who would be the most appropriate body to deal with the disclosure.⁹⁶

Comment

- 4.51 One of the objects of the Act is to encourage and facilitate disclosures, by enhancing established procedures for making disclosures. The Committee has heard from participants who have 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.
- 4.52 It is also the case that the definition of a 'public authority' in the PDA is not a stand-alone definition. Section 4 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 the Acts of the investigating authorities in order to find a detailed list of public authorities that the relevant investigating authority may investigate.⁹⁷ By contrast, the definition in the Queensland Whistleblowers Protection Act provides a detailed list of public authorities.⁹⁸
- 4.53 The Committee notes that the *Public Finance Administration Act 1983* does not have parallel provisions to s 93 of the ICAC, which makes it an indictable offence to cause or threaten to cause injury to a person assisting the Commission, inclusive of persons who are not public officials. However, the Auditor-General has indicated that to date this lack of protection in the Public Finance Administration Act has not been an issue.⁹⁹

Proposals

- 4.54 The Committee invites responses to the proposals below, which seek to simplify the provisions that set out how disclosures must be made to attract the protection of the Act. The aim of the proposals is to ensure that a disclosure made in good faith by a public official will attract protection under the PDA regardless of the investigating authority or public authority to whom it is made.

PROPOSAL 11: That the *Protected Disclosures Act 1994* be amended to provide a detailed, stand-alone definition of a public authority along the lines of Schedule 5(2) of the *Whistleblowers Protection Act 1994* (Queensland).

⁹⁶ Mr Woodward, *Transcript of evidence*, 24 November 2008, p. 14.

⁹⁷ For example, s 3 of the ICAC Act.

⁹⁸ See schedule 5(2) of the *Whistleblower Protection Act 1994*, where they are defined as a "public sector entity". Public sector entities are listed include departments, universities, TAFE colleges, commissions, and authorities.

⁹⁹ Mr Achterstraat, *Transcript of evidence*, 24 November 2008, p. 67.

PROPOSAL 12: That section 14 of the *Protected Disclosures Act 1994* be amended to clarify that, to be protected by the Act, 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 authority or investigating authority where the public official honestly believes it is the appropriate authority to receive the disclosure.

Chapter Five - Preventing misuse of protections

5.1 This chapter concerns the issue of clarifying which types of complaints do not meet the criteria of a protected disclosure, specifically those that are primarily made to avoid disciplinary action, or made frivolously or vexatiously. The Committee makes proposals to clarify the relevant provisions under the Act, and to encourage agencies to include advice on the criteria for what constitutes a protected disclosure in their policy documents.

Relevant provisions and guidelines

5.2 Section 16(1) of the PDA provides that authorities may decline to investigate, or stop investigating, matters raised by a disclosure that the authority considers to have been made on frivolous or vexatious grounds. Such disclosures do not attract the protections of the Act. In terms of disclosures that are solely or substantially made to avoid dismissal or other disciplinary action, the Act provides that such disclosures do not attract the statutory protections.¹⁰⁰ Similarly, under s 17, disclosures that principally involve questioning the merits of government policy are not protected by the Act.

5.3 The Ombudsman's guidelines on protected disclosures state that, in assessing complaints, agencies should 'determine whether the complaint falls under the PDA or into another category which may be handled by other internal mechanisms.'¹⁰¹ The Ombudsman's guidelines include a checklist to help agencies assess whether a disclosure is protected. The criteria includes the following: whether it was made substantially to avoid disciplinary action; and, whether it was made frivolously or vexatiously.¹⁰²

5.4 The Ombudsman's guidelines identify appropriate internal mechanisms and contacts for handling concerns relating to personnel problems, such as performance issues, and workplace conflicts or grievances.¹⁰³ The DPC's *Personnel Handbook* includes detailed guidelines for Departments dealing with unsatisfactory employee performance.¹⁰⁴ In terms of employee grievances, the DPC has encouraged agencies to adopt the Director of Equal Opportunity in Public Employment's guidelines for dealing with employee work-related concerns and grievances.¹⁰⁵

Submissions and evidence

5.5 Agencies indicated to the Committee 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

¹⁰⁰ PDA, s 18.

¹⁰¹ NSW Ombudsman, *Protected Disclosure Guidelines*, 5th ed, May 2004, p. A-14 at 4.3.

¹⁰² Ibid, p. A-17 at 4.6.2.

¹⁰³ For example, agencies' Grievance, Dispute Handling, Discipline and Performance Management Policies, Ibid, p. A-15 at 4.3, table 2.

¹⁰⁴ Department of Premier and Cabinet, *Personnel Handbook*, Chapter 9, <http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0019/739/Chapter_9.pdf>, accessed 9 February 2009. The *Public Sector Employment and Management Act 2002* provides that Department Heads may take remedial action in response to unsatisfactory performance.

¹⁰⁵ See Department of Premier and Cabinet, *M96-11 Dealing with employee work-related concerns and grievances, and harassment free workplace*, 1 July 1996, <http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/1996/m1996-11>, accessed 9 February 2009.

determining whether certain complaints involving grievances are eligible for the protections available under the Act.

- 5.6 The Department of Education (DET) noted that on occasion staff seek protection after reporting matters relating to personal grievances. Mr Grant Marley, the Protected Disclosures Co-ordinator for DET indicated to the Committee that prior to determining whether a complaint is a protected disclosure, there is an initial phase of assessment that involves meeting with the person making the disclosure and filtering out some of 'those matters that quite easily could be declared to be grievances rather than protected disclosures'.¹⁰⁶ DET submitted that clearer legislation and guidelines would be of assistance in terms of determining which types of disclosures attract protection, particularly 'in relation to protected disclosures not being an avenue to resolve personal grievances'.¹⁰⁷
- 5.7 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.¹⁰⁸
- 5.8 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 Health submitted that the definition of protected disclosure is overly broad and has resulted in attempts to use the Act for matters relating to internal staffing matters, which should, in the Department's view, be addressed through separate mechanisms such as grievance policies. The Department submitted that it supported an amendment to the definition of maladministration 'to indicate that it has to involve "public interest" not "personal interest"'.¹⁰⁹
- 5.9 Whistleblowers Australia 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.¹¹⁰ In evidence to the Committee, Ms Cynthia Kardell, National Secretary of the NSW branch of Whistleblowers Australia, commented that it is relatively easy to determine whether complaints involve a public interest issue:

Ms KARDELL: ... It really is a very simple business to think about what does the person making the disclosure want out of it? Do they want something personally for themselves? Do they want compensation for something? ... What I am trying to get you to see is you can get very clear-cut complaints which are very obviously a grievance;

¹⁰⁶ Mr Grant Marley, Senior Manager, Serious Misconduct Investigation Team, Department of Education and Training, *Transcript of evidence*, 1 December 2008, p. 3.

¹⁰⁷ Department of Education and Training, *Submission 37*, pp. 3, 6.

¹⁰⁸ Mr Terry Clout, Chief Executive, South Eastern Sydney and Illawarra Area Health Service, Department of Health, *Transcript of evidence*, 24 November 2008, p. 40.

¹⁰⁹ Department of Health, *Submission 33*, p. 3.

¹¹⁰ Whistleblowers Australia, *Submission 4*, pp. 4-5. Whistleblowers Australia submitted that complaints involving interpersonal conflicts should be eligible for protection in cases of serial bullying or discrimination, as they are issues of wider public interest, as well as those involving independent observation by an outsider, and complaints about reprisals. Dr Peter Bowden told the Committee that up to 50% or 60% of whistleblowers approaching Whistleblowers Australia have complaints relating to personal grievance issues: see *Transcript of evidence*, 1 December 2008, p. 31.

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they are not a public interest disclosure: the interest that they serve is the person's self-interest. ...¹¹¹

5.10 In evidence to the Committee, the Deputy Ombudsman, made several points in relation to disclosures that are motivated by personal grievances:

- The difficulty with determining 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.¹¹²

5.11 Mr Wheeler also told the Committee that the provisions of the Act mean that it is necessary to identify complaints made vexatiously or frivolously, and expressed some uncertainty 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.¹¹³

Comment

5.12 In an issues paper produced as part of the Whistling While They Work research project, Dr A J Brown noted that six Australian jurisdictions use the terms "frivolous" and "vexatious" to discourage inappropriate disclosures. Dr Brown identified the term "vexatious" as a useful means of separating complaints, provided that it is appropriately defined:

The remaining term 'vexatious' can serve as a useful and valid filter, provided it is understood to mean more than simply that a disclosure should not be frivolous, misconceived, malicious, made in 'bad faith', or otherwise 'not well intentioned'. A clear meaning is important because 'vexatious' can be assumed to mean 'vexing' or intended to make trouble, which again is a poor basis for excluding what may be a difficult, but nevertheless legitimate and serious allegation.

Best practice would involve reliance on the term 'vexatious' alone as a general barrier to other inappropriate complaints, with suitable definition of 'vexatious' to make clear that this means an 'abuse of process' – i.e. a disclosure that is made for reasons outside the scope or purpose of the Act and which raises no substantive or significant point to be answered.¹¹⁴

¹¹¹ Ms Cynthia Kardell, National Secretary, New South Wales Branch, Whistleblowers Australia, *Transcript of evidence*, 1 December 2008, p. 32.

¹¹² Mr Wheeler, *Transcript of evidence*, 18 August 2008, pp. 10, 17-18.

¹¹³ *Ibid*, p. 17.

¹¹⁴ Brown A J, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation, An Issues Paper*, Sydney, NSW Ombudsman, November 2006, pp. 24-25.

5.13 The Committee is mindful of the importance of assisting agencies to encourage and investigate disclosures from staff of public interest issues, regardless of the motivation behind them. However, the Committee notes that the object of the Act is to facilitate disclosures in the public interest, and that complaints that primarily involve personal grievances are not captured by the Act and may be dealt with through appropriate internal policies.

Proposals

5.14 The Committee invites responses to the proposals below, which seek to clarify the provisions that exclude frivolous and vexatious complaints from the protections under the Act. The aim of the proposals is to make it easier for agencies to determine which complaints do not meet the criteria of being a protected disclosure and would more appropriately be dealt with using internal grievance or performance management processes. The Committee is also proposing that agencies seek to educate and inform their staff of the types of complaints that are not eligible for protection under the Act, as well as alternate means for resolving complaints that do not meet the criteria of a protected disclosure. In making these proposals the Committee invites comment on the following issues:

- Whether amending the Act to include definitions for “frivolous” and “vexatious” complaints would assist agencies in identifying complaints that are not eligible for protection because they are primarily concerned with personal grievances.
- Whether agencies would be aided by more detailed guidelines and education, for example from the NSW Ombudsman.

PROPOSAL 13: That the *Protected Disclosures Act 1994* be amended to include definitions for “vexatious” and “frivolous” complaints, as provided for in section 16 of the Act, to enable agencies to more easily identify complaints that are not eligible for protection.

PROPOSAL 14: That public authorities include in their Protected Disclosures policies advice:

- that complaints made substantially to avoid disciplinary action, or made vexatiously or frivolously, are not eligible for protection under the provisions of the *Protected Disclosures Act 1994*; and
- specifying appropriate avenues for resolving grievance and performance related issues.

Chapter Six - Increased transparency

6.1 This chapter addresses information provided by agencies in relation to protected disclosures, both to the public official making the disclosure and to the general public. Both of these issues have arisen during the course of this inquiry and warrant further investigation and possible reform to ensure that whistleblowers are kept informed as to the status of their complaint and the general public is sufficiently informed as to the general situation with regard to public sector whistleblowers.

1. Notification provisions

Provisions in the Act

6.2 Section 27, 'Notification to person making the disclosure' of the PDA, provides:

The investigating authority, public authority or officer to whom a disclosure is made under this Act or, if the disclosure is referred, the investigating authority, public authority or officer to whom the disclosure is referred must notify the person who made the disclosure, within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

Submissions and evidence

6.3 Professor Henry outlined the issues arising out of the provisions in s 27 for reporting within 6 months at the hearing on 24 November 2008:

The Hon. TREVOR KHAN: In regards to the six months rule of the report back, do you think there is a possibility that what one faces with people, whistleblowers, who make what we will call protected disclosures, the six months time for reporting back in a sense is too long? Let me explain a bit further. Somebody has got to a point where they betray a confidence, which is a significant emotional step to take. They are told, "We will report back to you within the formalised period of six months." Having lit the fuse, you are just waiting for that person to go off, in a sense, are you not?

Professor HENRY: I think the six months means very different things in different situations. With the body parts scenario, I would have thought a month to six weeks would have been the total time for the wrap-up of the matter, and to wait for six months would have been really idle behaviour on the part of the university. With the professor of medicine case, the allegations were very complicated, and even when the university sought external and very experienced legal opinion and external and very experienced medical immunology opinion, it still took a very long time to try to unravel the details of things. I am not sure that it is easy to identify what is the proper length of time needed to be taken to do a proper investigation. I do not think universities should be hiding behind six months as a way of delaying an outcome, but I do not think that is what we have done.

The Hon. TREVOR KHAN: And I was not suggesting you have.

Professor HENRY: No. 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.¹¹⁵

6.4 Ms Kardell's submission also suggested ways of keeping the whistleblower informed:

I can envisage a system of public disclosure requiring the receipt of a PID [Public Interest Disclosure] to be disclosed on the basis that it is in the public interest to do so. A system that: routinely required the authority or agency to issue a formal notice or circular in general terms, with copy to the whistleblower, but with sufficient identifying information to disclose the nature of the PID or any other milestone as follows.

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

Another example is the final outcome of the investigation itself, including the reasons, outcomes and any other matter arising, where it would be in the public interest to do so.¹¹⁶

Comment

- 6.5 The Committee can see real benefits for a whistleblower in keeping them regularly updated as to the status of the investigation of their disclosure where an investigation is complex and may last up to six months or more; however, there is a risk that a system of public reporting by agencies of their receipt of a protected disclosure would undermine the confidentiality provisions within the Act, especially in a situation such as that outlined in Case study 2.

Proposal

- 6.6 The Committee invites responses to the proposal below designed to keep public officials apprised as to developments in relation to their disclosure where the investigation of this disclosure may take some time to complete.

PROPOSAL 15: That section 27 of the *Protected Disclosures Act 1994* be amended to require agencies that receive a protected disclosure to keep the public official who has made the disclosure informed as to developments in relation to their disclosure.

2. Reporting by agencies

Background

- 6.7 The relevant statutory provisions concerning the information required to be included by agencies in their annual reports are ss 10 and 11 of the *Annual Reports (Departments) Act 1985* and ss 8 and 9 of the *Annual Reports (Statutory Bodies) Act 1984*. Neither Act requires departments or statutory bodies to report on protected disclosures, nor is this a requirement under the PDA.
- 6.8 Of the eleven public bodies that the Committee heard evidence from on 24 November and 1 December 2008, only one provided information in their 2007-2008

¹¹⁵ The Hon. Trevor Khan MLC, and Professor Henry, *Transcript of evidence*, 24 November 2008, p. 7.

¹¹⁶ Ms Cynthia Kardell, *Submission 38*, p. 8.

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annual report on the number of protected disclosures received and their outcome. Four public bodies provided information on policies and four public bodies did not provide any information at all. At the time of publication, two public bodies had not released an Annual Report for 2007-2008. Of these two public bodies one had provided information regarding the number of protected disclosures received and their outcome in their 2006/2007 Annual Report and the other had not provided any information at all in their 2006/2007 Annual Report.

Submissions and evidence

- 6.9 The Deputy Ombudsman told the Committee that there is insufficient information in relation to the operation of the PDA because no single agency is responsible for monitoring the Act and agencies are not required to report on protected disclosures via their annual report 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 Ombudsman has on protected disclosures is mainly gained from Ombudsman investigations, or from what Mr Wheeler can glean when talking to agency staff.¹¹⁷
- 6.10 The DLG also noted that councils currently do not provide the Department with any data or information on protected disclosures they receive.¹¹⁸
- 6.11 In evidence to the Committee Ms Theresa Hamilton, Deputy Commissioner of the ICAC, supported a coordinated approach to gathering data on protected disclosures, perhaps via some overarching body.¹¹⁹

Comment

- 6.12 One option for making more information available regarding the operation of the PDA would be to bring forth an amendment to the PDA requiring agencies to report on protected disclosures in their annual report.

FOI Act as a model

- 6.13 The FOI Act provides a model for such an amendment. Section 69 of the FOI Act enables the Governor to promulgate regulations to give effect to the Act. Under clause 10 of the Freedom of Information Regulation 2005 agencies are required to provide in their annual report information on FOI applications as well as an assessment of this information, including comparisons with previous years and the impact of FOI requirements on the agency's operations. The format for setting out this information is contained in Appendix B of the *NSW FOI Manual* jointly produced by the DPC and the NSW Ombudsman.¹²⁰ The regulation stipulates that the information on FOI applications in the annual report must be set out as per Appendix B.
- 6.14 Furthermore, the information provided by agencies pursuant to their statutory requirements in relation to FOI provides an important source of information to assess the operation of the FOI legislation. For example, the NSW Ombudsman's *Audit of FOI Annual Reporting 2005-2006* is based on information contained in annual reports

¹¹⁷ Mr Wheeler, *Transcript of evidence*, 18 August 2008, p. 5.

¹¹⁸ Mr Woodward, *Transcript of evidence*, 24 November 2008, p. 14.

¹¹⁹ Ms Hamilton, *Transcript of evidence*, 18 August 2008, p. 21.

¹²⁰ 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>.

from state government bodies (including universities), local councils and ministerial offices.¹²¹

Mirror provisions for the PDA

- 6.15 If a similar legislative reporting regime was adopted in relation to protected disclosures as is used in relation to FOI applications, the information provided by agencies in annual reports could form the basis for an audit of the effectiveness of the PDA. This audit could be carried out by a suitable oversight body, or by a parliamentary committee, approximately two years after the legislative amendments came into effect, and would offer data from which to draw conclusions in relation to the effectiveness of the PDA. The proposed statutory reporting requirements form a low cost option for gaining information in relation to protected disclosures being made in the public sector.
- 6.16 To ensure consistent reporting on protected disclosures a pro-forma would need to be developed, with Appendix B of the *FOI Manual* providing a possible model. The NSW Ombudsman's *Protected Disclosure Guidelines* could be revised to set out in an appendix the appropriate format for reporting on protected disclosures in an agency's annual report. A clause in the protected disclosures regulation could then prescribe that agencies set out information on disclosures in their annual report as per this appendix.
- 6.17 The Chair questioned a range of agencies on the feasibility of publishing information on protected disclosures, for example in their annual reports, and the general response was supportive.¹²² The Committee notes that a reporting requirement similar to that outlined in the FOI Act should not pose any particular problems to agencies.

Proposal

- 6.18 The Committee invites responses to its proposal to inform the general public and interested stakeholders as to the prevailing situation with regard to protected disclosures being made by public officials. This proposal has the potential to provide an efficient and cost effective means of improving transparency and the flow of information with regard to protected disclosures.

PROPOSAL 16: That the *Protected Disclosures Act 1994* be amended to require public authorities to report on protected disclosures, along the lines of what is required for freedom of information applications under section 69 of the *Freedom of Information Act 1994*. This reporting requirement could take the form of a protected disclosures regulation requiring a public authority to publish in their annual report the following information on protected disclosures (as per Clause 10 of the Freedom of Information Regulation):

1. the number of disclosures made in the past 12 months;
2. outcomes;
3. policies and procedures;

¹²¹ See NSW Ombudsman, *Audit of FOI Annual Reporting 2005-2006*, October 2007, p. 1.

¹²² See evidence from Professor Henry; 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: *Transcript of evidence*, 24 November 2008, pp. 12, 22-23, 25, 37, 50-51, 67.

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4. year-on-year comparisons;
5. organisational impact of investigations of disclosures.

To ensure consistent reporting, the NSW Ombudsman's *Protected Disclosure Guidelines* could be revised to include an Appendix setting out a pro-forma for agency reporting of information on protected disclosures for annual reports, with the protected disclosures regulation requiring public authorities to adopt this pro-forma.

Appendix One – Submissions

Submission	Individual/organisation
Nos 1a to 1e	Confidential
No 2	Confidential
No 3	NSW Liberal and National Parties
No 4	Whistleblowers Australia
No 5	Confidential
No 6	Confidential
No 7	Confidential
No 8	Confidential
No 9	Confidential
No 10	Confidential
No 11	Confidential
No 12	Confidential
No 13	Confidential
No 14	Confidential
No 15	Confidential
No 16	Confidential
No 17	Confidential
Nos 18 and 18a	Confidential
No 19	Confidential
No 20	Confidential
No 21	NSW Ombudsman
No 22	Independent Commission Against Corruption
No 23	Confidential
No 24	Confidential
Nos 25 and 25a	Confidential
No 26	NSW Ministry of Transport
No 27	NSW Department of Local Government
No 28	Audit Office of NSW
No 29	NSW Legislative Council
No 30	NSW Department of Environment and Climate Change
No 31	NSW Police Force
No 32	University of New South Wales
No 33	NSW Department of Health
Nos 34 and 34a	NSW Legislative Assembly
No 35	NSW Maritime
No 36	RailCorp
No 37	NSW Department of Education and Training
No 38	Ms Cynthia Kardell
No 39	Confidential

Appendix Two – Witnesses

Public hearing

Monday 18 August 2008, Parliament House

Mr Christopher Wheeler, Deputy Ombudsman, NSW Ombudsman

Ms Theresa Hamilton, Deputy Commissioner, Independent Commission Against Corruption

Public hearing

Monday 24 November 2008, Parliament House

Professor Richard Henry AM, Deputy Vice Chancellor (Academic), University of New South Wales

Mr Aaron Magner, Assistant University Solicitor, University of New South Wales

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 Andrew Patterson, Manager, Workplace Conduct Unit, RailCorp

Ms Virginia Wills, Manager, Investigations, Internal Audit, RailCorp

Ms Karen Crawshaw, Deputy Director-General, NSW Department of Health

Mr Terry Clout, CEO South East Sydney and Illawarra Area Health Service, NSW Department of Health

Mr Tim Rogers, Executive Director, Performance Management and Communication, Department of Environment and Climate Change

Ms Catherine Donnellan, Director, Corporate Governance, Department of Environment and Climate Change

Mr Jim Glasson, Director-General, NSW Ministry of Transport

Mr Peter Scarlett, Executive Director, NSW Ministry of Transport

Mr Peter Achterstraat, Auditor-General, Audit Office of NSW

Mr Philip Thomas, Assistant Auditor-General, Performance Audit, Audit Office of NSW

Mr Barry O'Farrell MP, Leader of the Opposition, NSW Liberal/National Parties

Public hearing

Monday 1 December 2008

Ms Jane Thorpe, Director, Employee Performance and Conduct, NSW Department of Education and Training

Mr Grant Marley, Senior Manager, Serious Misconduct Investigation Team, NSW Department of Education and Training

The Hon Peter Primrose MLC, President, NSW Legislative Council

Ms Lynn Lovelock, Clerk of the Parliaments, NSW Legislative Council

Dr Peter Bowden, President (NSW Branch) Whistleblowers Australia

Ms Cynthia Kardell, National Secretary, Whistleblowers Australia

Mr Russell D Grove, Clerk of the Legislative Assembly, NSW Legislative Assembly

Appendix Three – Protections available under the *Protected Disclosures Act 1994*

Section 20: Protection against reprisals

(1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

(1A) In any proceedings for an offence against this section, 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.

(2) In this Act, detrimental action means action causing, comprising or involving any of the following:

- (a) injury, damage or loss,
- (b) intimidation or harassment,
- (c) discrimination, disadvantage or adverse treatment in relation to employment,
- (d) dismissal from, or prejudice in, employment,
- (e) disciplinary proceeding.

(3) Proceedings for an offence against this section may be instituted at any time within 2 years after the offence is alleged to have been committed.

Section 21: Protection against actions etc

(1) A person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.

(2) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person.

(3) The following are examples of the ways in which this section protects persons who make protected disclosures. A person who has made a protected disclosure:

- has a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in proceedings for defamation
- on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act
- who is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law relevant to the oath, rule or practice
- is not liable to disciplinary action because of the disclosure.

Section 22 Confidentiality guideline

An investigating authority or public authority (or officer of an investigating authority or public authority) or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless:

- (a) the person consents in writing to the disclosure of that information, or
- (b) it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern, or
- (c) the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

Appendix Four – Statutory protections available in other NSW legislation

Legislation	Section
<p><i>Independent Commission Against Corruption Act 1988</i></p>	<p>Section 93 Injury to witness or person assisting Commission</p> <p>(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:</p> <ul style="list-style-type: none"> (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. <p>Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.</p> <p>(2) In this section, a reference to a person assisting the Commission is a reference to a person who:</p> <ul style="list-style-type: none"> (a) has appeared, is appearing or is to appear as a witness before the Commission, or (b) has complied with or proposes to comply with a requirement under section 21 or 22, or (c) has assisted, is assisting or is to assist the Commission in some other manner. <p>Section 94 Dismissal of witness, or person assisting Commission, by employer</p> <p>(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.</p> <p>Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.</p> <p>(2) In this section, a reference to a person assisting the Commission is a reference to a person who:</p> <ul style="list-style-type: none"> (a) has appeared, is appearing or is to appear as a witness before the Commission, or (b) has complied with or proposes to comply with a requirement under section 21 or 22, or (c) has assisted, is assisting or is to assist the Commission in some other manner. <p>(3) In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (1).</p>

<p><i>Ombudsman Act 1974</i></p>	<p>Section 37 Offences</p> <p>(5) 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 Ombudsman is guilty of an indictable offence.</p> <p>Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.</p> <p>(6) In any proceedings for an offence against subsection (5), it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (5).</p> <p>(7) In this section, a reference to a person assisting the Ombudsman is a reference to a person who:</p> <ul style="list-style-type: none"> (a) has appeared, is appearing or is to appear as a witness before the Ombudsman, or (b) has complied with or proposes to comply with a requirement under section 18, or (c) has assisted, is assisting or is to assist the Ombudsman in some other manner.
<p><i>Police Integrity Commission Act 1996</i></p>	<p>Section 113 Injury to witness or person assisting Commission</p> <p>(1) Offence (cf ICAC Act s 93) A person who uses, causes, inflicts or procures any violence, punishment, damage, loss or disadvantage to any person for or on account of:</p> <ul style="list-style-type: none"> (a) his or her assisting the Commission, or (b) any evidence given by him or her before the Commission, <p>is guilty of an indictable offence.</p> <p>Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.</p> <p>(2) Meaning of assisting the Commission (cf RC (PS) Act s 26 (2)) In this section, a reference to a person assisting the Commission is a reference to a person who:</p> <ul style="list-style-type: none"> (a) has appeared, is appearing or is to appear as a witness before the Commission, or (b) has complied with or proposes to comply with a requirement under section 25 or 26, or (c) has assisted, is assisting or is to assist the Commission in some other manner. <p>Section 114 Dismissal of witness, or person assisting Commission, by employer</p> <p>(1) Offence (cf ICAC Act s 94 (1)) An employer who dismisses any employee from his or her employment, or</p>

	<p>prejudices any employee in his or her employment, for or on account of the employee assisting the Commission is guilty of an indictable offence.</p> <p>Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.</p> <p>(2) Meaning of assisting the Commission (cf RC (PS) Act s 26 (2)) In this section, a reference to a person assisting the Commission is a reference to a person who:</p> <ul style="list-style-type: none"> (a) has appeared, is appearing or is to appear as a witness before the Commission, or (b) has complied with or proposes to comply with a requirement under section 25 or 26, or (c) has assisted, is assisting or is to assist the Commission in some other manner. <p>(3) Onus on employer (cf ICAC Act s 94 (2)) In any proceedings for an offence against this section, it lies on the employer to prove that any employee shown to have been dismissed or prejudiced in his or her employment was so dismissed or prejudiced for some reason other than the reasons mentioned in subsection (1).</p>
<p>Public Sector Employment and Management Act 2002</p>	<p>Section 43 Meaning of “misconduct” (1988 Act, s 66)</p> <p>(1) For the purposes of this Part, misconduct includes, but is not limited to, any of the following:</p> <ul style="list-style-type: none"> (a) a contravention of any provision of this Act or the regulations, (b) performance of duties in such a manner as to justify the taking of disciplinary action, (c) 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, (d) taking any action against another officer that is substantially in reprisal for an internal disclosure made by that officer. <p>(2) For the purposes of this Part, the subject-matter of an allegation of misconduct may relate to an incident or conduct that happened:</p> <ul style="list-style-type: none"> (a) while the officer concerned was not on duty, or (b) before the officer was appointed to his or her position. <p>3) In this section, internal disclosure means a disclosure made by an officer regarding the alleged misconduct of another officer belonging to the same Department as that to which the officer belongs.</p>
<p>Occupational Health and Safety Act 2000</p>	<p>Section 8 Duties of employers</p> <p>(1) Employees</p> <p>An employer must ensure the health, safety and welfare at work of all the employees of the employer. That duty extends (without limitation) to the following:</p>

	<ul style="list-style-type: none"> (a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health, (b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used, (c) ensuring that systems of work and the working environment of the employees are safe and without risks to health, (d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work, (e) providing adequate facilities for the welfare of the employees at work. <p>(2) Others at workplace</p> <p>An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.</p> <p>Section 12 Penalty for offence against this Division</p> <p>A person who contravenes, whether by act or omission, a provision of this Division is guilty of an offence against that provision and is liable to the following maximum penalty:</p> <ul style="list-style-type: none"> (a) in the case of a corporation (being a previous offender)—7,500 penalty units, or (b) in the case of a corporation (not being a previous offender)—5,000 penalty units, or (c) in the case of an individual (being a previous offender)—750 penalty units or imprisonment for 2 years, or both, or (d) in the case of an individual (not being a previous offender)—500 penalty units. <p>Section 20 Duties of employees</p> <p>(1) An employee must, while at work, take reasonable care for the health and safety of people who are at the employee's place of work and who may be affected by the employee's acts or omissions at work.</p> <p>(2) An employee must, while at work, co-operate with his or her employer or other person so far as is necessary to enable compliance with any requirement under this Act or the regulations that is imposed in the interests of health, safety and welfare on the employer or any other person.</p> <p>Maximum penalty:</p> <ul style="list-style-type: none"> (a) in the case of a previous offender—45 penalty units, or (b) in any other case—30 penalty units.
<p>Government and Related Employees</p>	<p>Section 24 Right of appeal</p>

<p>Appeal Tribunal Act 1980</p>	<p>(1) Notwithstanding anything contained in any other Act, an employee may, subject to and in accordance with this Part, appeal to the Tribunal against a decision of his or her employer, being a decision of a kind referred to in section 23 (1).</p> <p>(2) Such an appeal may be made on the ground that the decision appealed against was made substantially in reprisal for a protected disclosure within the meaning of the Protected Disclosures Act 1994.</p> <p>Section 23 Notice of certain decisions etc</p> <p>(1) Where, in relation to an employee, an employer makes a decision:</p> <ul style="list-style-type: none"> (a) to defer, for a period in excess of 6 months, the payment of an increment to the employee, (b) to reduce the rank, classification, position, grade or pay of the employee, (c) to impose a fine or forfeit pay, (d) to annul the appointment of an employee appointed on probation, (e) to suspend the employee as a punishment where the employee is held to be guilty of misconduct or contravention of any law or any rule or direction of the employer, (f) to dismiss the employee, or (g) to direct or to require the employee to resign, <p>the employer shall, except as may be otherwise provided by an order made under subsection (3), give the employee notice, in writing, of the decision as soon as practicable after the decision is made.</p> <p>(2) Where an employer is unable to give an employee notice, under subsection (1), of a decision within 14 days after the decision is made, the employer may apply to the Senior Chairperson for an order as to the giving of the notice.</p> <p>(3) On receipt of an application under subsection (2), the Senior Chairperson may make such order as the Senior Chairperson thinks fit as to the giving of the notice or may make an order dispensing with the giving of the notice.</p> <p>(4) A notice may be given, or the giving of a notice may be dispensed with, in accordance with an order made under subsection (3).</p> <p>(5) In subsection (1) (f): dismiss includes dispensing with the services of an employee (including under any right or power of the Crown to dispense with the services of an employee).</p> <p>(6) For the purposes of this Division:</p> <ul style="list-style-type: none"> (a) a decision of a kind referred to in subsection (1) (d), (f) or (g) is a decision that may, subject to this Act, be appealed against under section 24 regardless of whether the decision was made for disciplinary reasons, and (b) a reference to an employer making a decision of a kind referred
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	<p>to in subsection (1) includes a reference to any other person (including the Crown) who is authorised by or under any law to make that decision or to carry it into effect.</p>
<p>Freedom of Information Act 1989</p>	<p>Schedule 1 Clause 20 Miscellaneous documents</p> <p>(1) A document is an exempt document if it contains matter the disclosure of which would disclose:</p> <p style="padding-left: 40px;">(d) matter relating to a protected disclosure within the meaning of the Protected Disclosures Act 1994</p>
<p>Police Act 1990</p>	<p>206 Protection against reprisals</p> <p>(1) This section applies to an allegation of misconduct or criminal activity made by a police officer about one or more other police officers where the allegation (a protected allegation) is made:</p> <p style="padding-left: 40px;">(a) in the performance of the duty imposed on the police officer by or under this or any other Act, or</p> <p style="padding-left: 40px;">(b) in accordance with the procedures for making allegations set out in this or any other Act,</p> <p>and so applies even if the person who is the subject of the allegation is no longer a police officer.</p> <p>(2) A police officer who takes detrimental action against another police officer or former police officer (being action that is substantially in reprisal for the other police officer or former police officer making a protected allegation) is guilty of an offence.</p> <p>Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.</p> <p>(2A) In any proceedings for an offence against this section, it lies on the defendant to prove that the detrimental action shown to be taken against a person was not substantially in reprisal for the person making a protected allegation.</p> <p>(2B) Subsection (2A) applies only in relation to a protected allegation that is a protected disclosure within the meaning of the Protected Disclosures Act 1994.</p> <p>(3) It is a defence to a prosecution under this section that the allegation was made frivolously, vexatiously or in bad faith.</p> <p>(4) This section does not limit or affect the operation of the Protected Disclosures Act 1994. In particular, nothing in this section prevents a police officer who makes a protected allegation from making a disclosure relating to the same conduct or activities under that Act.</p> <p>(4A) Proceedings for an offence against this section may be instituted at any time within 2 years after the offence is alleged to have been committed.</p> <p>(5) In this section:</p>

	<p>detrimental action means action causing, comprising or involving any of the following:</p> <ul style="list-style-type: none">(a) injury, damage or loss,(b) intimidation or harassment,(c) discrimination, disadvantage or adverse treatment in relation to employment,(d) dismissal from, or prejudice in, employment,(e) disciplinary proceedings,(f) the making of a complaint, or the furnishing of a report, under this Act or the regulations.
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