

15 October 2001



NSW Ombudsman

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Ms Helen Donaldson
Secretary
Finance and Public Administration
Legislation Committee
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Donaldson

Re: Public Interest Disclosure Bill 2001

I refer to your letter of 28 September 2001 concerning the *Public Interest to Disclosure Bill 2001* (the Bill) that has been referred to the Senate Finance and Public Administration Legislation Committee for inquiry and report by 18 April 2002.

We have reviewed the contents of the Bill in the light of our experience with the *Protected Disclosures Act 1994* (the NSW Act). Our role in relation to that Act includes:-

- advising public officials contemplating making a protected disclosure (equivalent to a public interest disclosure under the Bill);
- advising public officials responsible for dealing with protected disclosures;
- investigating or otherwise dealing with protected disclosures made to this office;
- publishing detailed guidelines to assist public officials to implement the Act to prepare and adopt internal reporting policies and to appropriately deal with whistleblowers.

In relation to the Bill, I make the following brief comments for your consideration:-

- (1) I note that the definition of "*detriment*" in clause 3 does not refer to disciplinary proceedings (which is a separate head under the definition of "*detrimental action*" in s.20 of the NSW Act);
- (2) I note that the definitions of "*public interest disclosure*" and "*disclosable conduct*" in clauses 3 and 4 do not refer to maladministration (the NSW Act refers to three categories of conduct, one of which is "*maladministration*" which is defined in s.11 as conduct which "...involves action or inaction of a serious nature that is:
 - a) *contrary to law; or*
 - b) *unreasonable, unjust, oppressive or improperly discriminatory; or*
 - c) *based wholly or partly on improper motives.*");

- (3) The definition of "*public wastage*" in clause 3 refers to "*substantial waste*" which is undefined (the term "*serious and substantial waste*" in the NSW Act is also undefined and this has resulted in considerable confusion – the issue is discussed at pages A7 – A8 in the enclosed copy of the *Protected Disclosure Guidelines* (4th edition) soon to be published by this office);
- (4) I note that clause 8 provides that the Bill does not entitle a person to disclose information which would otherwise be the subject of legal professional privilege – it is unclear why such information should be treated differently to other confidential information which is dealt with in clause 32 of the Bill, particularly given the nature of the proper authorities to whom disclosures can be made. If this is a significant issue it may be better to provide that the privilege is not lost where the information is disclosed in a public interest disclosure;
- (5) Given the role of the Commonwealth Ombudsman and the Commonwealth Auditor General, it is not immediately apparent why those agencies are not included in the list of proper authorities in clause 9 (1);
- (6) The provisions of clauses 9 and 10 appear to provide that internal disclosures may only be made to the head of an agency and that there is no discretion allowed for an agency to nominate another officer or officers as persons who may receive public interest disclosures (s.8(1)(c) and s.13 of the NSW Act enable agencies to adopt policies which identify other officers of the agency as persons who can receive protected disclosures);
- (7) I note that clause 13 provides that a proper authority is not required to investigate a public interest disclosure if the person making the disclosure does not identify him or herself (our experience in NSW, particularly with police complaints, is that anonymous disclosures are often found to be substantiated - the crucial issue is whether sufficient information is provided with the disclosure to enable an effective investigation to be conducted);
- (8) The heading of clause 14 does not reflect most of the contents of the clause;
- (9) It may be helpful to provide that clause 16 is subject to s.14;
- (10) The offence provision in clause 22 may serve little good purpose - in practice it will usually require a person to take their own criminal proceedings against either their employer or a colleague, which is something that the vast majority of public officials are unlikely to do (the equivalent provision in the NSW Act (s.20) was amended to address this issue by reversing the onus of proof – once it has been shown that there has been a protected disclosure and "detrimental action", then it lies on the defendant to prove that the detrimental action taken against the person was not substantially in reprisal for the person making a protected disclosure);
- (11) It may be useful to include specific reference in clause 32 to defamation or to a defence of absolute privilege in respect of a public interest disclosure to a proper authority;

(12) I note that there is no equivalent provision to s.19 of the NSW Act which enables a public official, in certain, admittedly very limited, circumstances to make a disclosure to an MP or journalist.

I hope the above comments are of some assistance. For your information I enclose a copy of our:-

- *Protected Disclosures Guidelines (4th edition) – to be published soon;*
- *Options for Redress – Guidelines for Redress for Detriment Arising out of Maladministration.*

Should you wish to discuss any of the above matters, please contact my Deputy, Chris Wheeler, who has primary responsibility within this office for matters relating to the NSW Act. Mr Wheeler can be contact directly on cwheeler@ombo.nsw.gov.au or (02) 9286-1004.

Yours sincerely



Bruce Barbour
Ombudsman

Encs