



Changes to public interest disclosure systems in NSW

CPN Breakfast event Museum of Sydney

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Chris Wheeler
NSW Deputy Ombudsman

Thank you Michael.

I am very pleased to have the opportunity to speak with you today.

As Bruce has mentioned, I will be providing some brief background on some of the recent changes to the protected disclosure, soon to be public interest disclosure landscape in NSW, both to the role of the Ombudsman as well as to the roles and responsibilities of agencies. I will also be discussing a couple of the practical issues that have traditionally been challenging for agencies when dealing with public interest disclosures.

The *Public Interest Disclosures Act 1994* is aimed at encouraging and facilitating the disclosure, in the public interest, of wrongdoing in the public sector. As I am sure you would all be aware, this includes corrupt conduct, maladministration, serious and substantial waste, breaches of the GIPA Act. If an amending Bill currently before Parliament passes, local government pecuniary interest breaches will be included as well.

There have been a number of important changes to what was called the *Protected Disclosures Act 1994*.

The first was a name change, to reflect the objective of the legislation, whereas the old title reflected the means to achieve that objective.

Role of the Ombudsman

The Ombudsman's office has been provided with a number of additional roles. Our office has had a long relationship with protected disclosures/public interest disclosures. We have been an avenue of reporting since the Act first came into force and have published guidelines for agencies on how to manage disclosures and the people who make them. Our responsibilities were expanded significantly on 1 July.

The Ombudsman is now responsible for promoting public awareness and understanding of the objects of the PID Act, as well as providing advice and guidance to those who can make a disclosure and those who can receive a disclosure.

We will do this through education and training, as well as targeted publications. We have prepared a model internal reporting policy to provide the foundation for each agency's internal systems. This will be accompanied by guidelines aimed at helping everyone involved in making, assessing, handling, investigating, and managing disclosures. All of our guidance is available at our website, and several of our publications are available at the table just outside the auditorium this afternoon.

The model policy is a baseline against which we would encourage agencies to develop and review their own policies and procedures. If they wish to build on it, that is fantastic.

We have taken a slightly different approach with our new guidance materials to our previous manual. Rather than preparing one single manual, we are providing a pack of approximately 30 short, targeted practice notes. Each part will deal with a particular issue. This will allow those tasked with dealing with public interest disclosures, and this includes general managers and mayors, to use them as a reference tool. This format also allows us to update our guidance quickly and easily, both to reflect any developments in our thinking as well as any legislative changes.

Finally, we will be offering free education and training to organisations to help them meet their obligations under the PID Act. The initial training will be targeted at nominated disclosures coordinators and disclosures officers. We are also close to finalising an e-learning program. While we will be trying to get out and speak with as many public sector staff as possible, we just can't reach everyone. E-learning will allow us to provide some clear and concise information to public officials

across the public sector. We will also be developing specific e-learning modules for supervisors, disclosures officers and disclosures coordinators.

The second new area of responsibility of the Ombudsman involves making sure the system is working as it should. Legislation is only one part of a successful system. It is vital to ensure the objects of the legislation are being achieved in practice.

In order to measure the success of the system, we now have responsibilities to monitor, audit and report on how public authorities handle disclosures. The Act requires us to report findings from our monitoring work once a year and the outcomes of our auditing work at least once a year, and more often if necessary.

We will continually assess the effectiveness of the PID Act in line with what comes out of our auditing and monitoring work, as well as our investigations and other research, so that we can make informed recommendations for changes when they are needed. This information will be communicated to the Premier as the responsible Minister, as well as being built into our various public interest reports to Parliament.

Agency responsibilities

But enough about us. There have also been a number of important changes to the roles and responsibilities of agencies. Under the former Act, there used to be only two express requirements for agencies. They had to tell the person who made the disclosure what they were doing about it within six months of the disclosure. The second is that they had to try to keep the identity of the person making the disclosure confidential. I have always argued that these carried with them another responsibility – they had to actually read and assess the disclosure!

The recent amendments mean agencies now have to:

- As the Attorney General noted, by 1 October this year, have internal reporting policy and procedures in place. In developing these policies and procedures, agencies have to have regard to our office's guidance.
- Agencies have to report to Parliament annually on their obligations under the Act, and provide a copy of that report to our office. This requirement will not come into effect until 1 January 2012, but it is something that you should start thinking about now. How you are going to record and register disclosures, collect data, record and report it.
- If the amending Bill currently before Parliament passes, agencies will be required to report statistical information to our office. The Bill currently provides for this to happen each quarter, but we have asked that this be changed to every six months. We will make sure you are aware of the final form this takes.
- Again, if the Bill passes, agencies will be required to include a requirement in their internal reporting policy to acknowledge receipt of disclosures within 45 days. This is not ideal, and our model policy suggests acknowledging reports within 2 working days.
- Again as the Attorney and Ombudsman both noted, if the Bill passes, principal officer of agencies will be obliged:
 - to ensure there is an internal reporting policy and that staff are aware of the policy and the protections under the Act – which many CEOs may not be aware has been an obligation in their contracts of employment for many years
 - to ensure the agency complies with the policy and its obligations under the Act.

This is a very brief summary, and if you would like any further information, please feel free to contact our Public Interest Disclosures Unit.

Appropriate investigations

One of the biggest challenges with public interest disclosures is that we do not know how many are made each year in NSW. We also do not know how they are being dealt with. Some will be able to be dealt with informally, in some situations staff reporting wrongdoing may just need to be provided with the full picture in order to overcome their concerns. And in some matters, there will be a need for some form of investigation.

Agencies, particularly smaller agencies who receive very few reports of wrongdoing from staff, have traditionally struggled to deal with disclosures effectively. The major area of difficulty has been properly investigating the allegations that are made. Small agencies often either fail to look into the allegations properly, or they go to the other extreme by bringing in a large consulting firm or local legal firm who then conduct a lengthy and costly investigation. While there are some consultants who have considerable experience and competence in investigating public interest disclosures, other people and organisations that hold themselves out to do such work do not have such a good track record.

To assist agencies to avoid this trap, our office has been working with the Internal Audit Bureau, the IAB, to come up with a practical, sensible and appropriate option to assist agencies to obtain the services of competent investigators.

We are working on a system where the IAB will have a panel of appropriately experienced and qualified investigators with an understanding of public interest disclosures. Organisations that do not have the in-house capacity to be able to professionally and appropriately investigate a disclosure will have the option to access this panel to obtain the services of an appropriate investigator.

One major advantage to this approach would be cost. IAB Services is a government body. It works in the public interest, and while it charges a fee for its work, this is to recoup its costs. This means that agencies will have to pay for the service they provide, but they will be paying far less than if they were to engage private sector consultants and lawyers. The other major benefit is that under a memorandum of understanding being developed with the Ombudsman, the IAB will be responsible for ongoing quality control in terms of the quality of the investigations and professionalism of investigators.

I am pleased to say that we are very close to an agreement between our office and IAB on a Memorandum of Understanding to formalise this arrangement, and once this happens we and the IAB will provide information to agencies about this alternative.

Effectively managing the people involved

Another issue that has come up time and again is the management of problematic situations that arise as a result of a public interest disclosure that can continue on well after the substance of the disclosure has been dealt with.

Most public interest disclosure legislation, including the NSW Act, is drafted in such a way as to suggest that public interest disclosures happen in several neat, well defined stages.

- Firstly, a member of staff makes a single report of wrongdoing.
- The report is then investigated.
- The allegation is either substantiated or it is not.
- If it is, disciplinary action is taken against the subject of the disclosure.
- The workplace then returns to normal.

As we have seen from our work, and as I am sure many of you well know, this is rarely the case in practice. On occasion staff reporting wrongdoing do so because they are disillusioned with the organisation, or some form of management or disciplinary action is being taken, or is about to be taken against them in relation to their performance or conduct. In many of these cases they may have known about the subject matter of their report for some time, and chosen to look the other way. It is important to remember, the motive of the person making the disclosure is not important. What matters is the substance of their allegation. Clean hands are not a requirement for the PID Act to apply. But dirty hands can muddy the waters considerably.

We have also seen many situations over the years where the agency is not merely dealing with one report. The staff member has made a number of different complaints and allegations at the same time. Some are grievances, and some may well be unfounded. It is important that agencies are able to triage these matters from the start, recognising matters that need to be dealt with a public interest disclosures and deal with them appropriately.

Another complicating factor is what happens after the matter the subject of the disclosures has been dealt with. Public interest disclosures involve people. With these people come their emotions, and these cannot be turned on and off like a tap.

A matter can very rarely be finalised on a Friday, and when everyone comes back in on Monday everything has returned to how it was. To be very simplistic, it is regularly very difficult to put the sauce back in the bottle.

The PID Act does provides protection against detrimental action taken in reprisal for making a public interest disclosure. But there is a difference between taking retribution and a workplace simply becoming dysfunctional. We have seen this type of situation time and again. The subject matter of the actual PID has been dealt with, and the process has done irreparable damage to the workplace. Staff no longer trust one another. Some leave. Some stay – which can be worse!

While it is totally inappropriate to conciliate a public interest disclosure, it may be appropriate to conciliate the issues that arise out of such a disclosure. The Ombudsman Act provides our office with the ability to conciliate a matter, but only when we have received a complaint. The Bill currently before Parliament will allow regulations to provide the Ombudsman with the ability to conciliate disputes arising out of the making of public interest disclosures. For example, where we become aware of problems with public interest disclosures from our advice and assistance roles without ever receiving a formal complaint This is a worthwhile addition, and I am hopeful it will mean that through ‘robust’ conciliations conducted by people with practical experience in this area we can help to prevent some of the ongoing damage that can be done to an agency arising out of the making and handling of public interest disclosures.

I hope you have found this morning useful, and I would encourage anyone wishing to gain additional information, guidance or assistance to contact our office’s Public Interest Disclosures Unit. Staff from the unit can be reached at the unit email address, which is pid@ombo.nsw.gov.au. You or staff from your organisation can also call our central number and ask to speak with them.

We will be breaking for breakfast in a moment. Bruce and I will both be around, so please feel free to come up and ask any questions you may have. There are also staff from the unit at a table just outside the auditorium. Please feel free to approach them if you would like any further information.

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