

**Submission  
No 27**

## **INQUIRY INTO PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES**

**Organisation:** Department of Local Government

**Name:** Mr Garry Payne

**Position:** Director General

**Telephone:**

**Date received:** 7/11/2008

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Department of Local Government  
5 O'Keefe Avenue NOWRA NSW 2541  
Locked Bag 3015 NOWRA NSW 2541

OUR REFERENCE  
YOUR REFERENCE  
CONTACT

A160974

John Davies

Mr Frank Terenzini MP  
Chair  
Committee on the Independent Commission  
Against Corruption  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000



Dear Mr Terenzini

I am writing in reply to your letter of 14 October 2008 requesting a submission to the Inquiry being conducted by the Committee on the Independent Commission Against Corruption into the effectiveness of current laws, practices and procedures for whistleblower employees who make allegations against government officials and Members of Parliament.

### **The role of the Department of Local Government**

The NSW Department of Local Government is the state agency responsible for local government across NSW. Our specific role is to provide a clear policy and legislative foundation to local government in NSW so councils are able to deliver quality services to their communities in a sustainable manner.

We are principally a policy advice and regulatory agency, acting as a central agency for local government, with a key role in managing the relationship between councils and the State Government. We are responsible for the overall legal, management and financial framework for local government.

Broadly speaking, the Department performs the following functions:

- We develop and review legislation to make sure community needs are being met. The main piece of legislation we are responsible for is the *Local Government Act 1993* and Regulation. We also administer the *Companion Animals Act 1998* and Regulations, the *Swimming Pools Act 1992* and Regulations and the *City of Sydney Act 1988*.
- We advise and provide information to the State Government and local councils on a range of local government issues to facilitate effective decision-making within and for the sector.
- We collect and evaluate financial data and help local councils strengthen their financial performance. We monitor local councils' financial reporting practices and manage the application of the national accounting standards.

We also monitor council rates and charges and administer Commonwealth Grants to councils.

- We work with local councils to help them improve their delivery of services to their communities. For example, we issue standards and guidelines, review council operations and investigate problems in local government performance.

### **The regulation of the conduct of council officials**

In addressing issues affecting the implementation and application of the *Protected Disclosures Act 1994* in the local government sector, it is perhaps appropriate that I first explain the regulatory context that applies to the conduct of council officials.

In December 2004, the Department issued a mandatory Model Code of Conduct for Local Councils in NSW (the Model Code). The Model Code came into force on 1 January 2005. The Model Code prescribes a set of standards that council officials are required to comply with in the performance of their functions and procedures for dealing with breaches.

The Model Code has recently been reviewed and a revised Model Code was issued that came into operation on 27 June 2008.

Under section 440 of the Local Government Act, all councils are required to adopt a code of conduct that incorporates the provisions of the Model Code. Councils may supplement the provisions of the Model Code in their adopted codes, but the provisions of a council's adopted code will be invalid to the extent that they are inconsistent with the provisions of the Model Code, unless they impose a more onerous requirement.

The Model Code applies to all council officials (ie, councillors, council staff and delegates of council).

The Model Code prescribes a process for reporting and dealing with allegations of breaches of the code of conduct. The council's general manager is responsible for receiving complaints alleging a breach of the code of conduct by councillors, council staff, council delegates and council committee members. The Mayor is responsible for receiving complaints alleging a breach of the code of conduct by the general manager.

The Model Code prescribes 3 different complaint handling procedures, depending on whether the person the subject of the complaint is a:

- staff member, delegate or member of a council committee
- general manager
- councillor.

The general manager is responsible for making enquiries, or causing enquiries to be made into complaints alleging a breach of the code of conduct by a staff

member, delegate or member of a council committee and, where appropriate, imposing an appropriate sanction.

In relation to complaints alleging a breach of the code of conduct by the general manager or a councillor, upon receiving such an allegation, the general manager or Mayor must make a preliminary assessment and determine whether to:

- take no action
- resolve the complaint by use of alternative and appropriate strategies (eg, mediation)
- discontinue and refer to an appropriate external agency
- refer the matter to the conduct committee or a sole conduct reviewer.

In relation to the latter option, under the Model Code, councils must appoint at least 3 people who are independent, qualified persons of high standing in the community to act as conduct reviewers. More than 3 people can be appointed if a council feels that it is likely that there will be circumstances where one or more conduct reviewers are not available to participate in a matter. The number of persons who will undertake the review of an allegation of a breach of the code of conduct will depend on the nature, complexity and seriousness of the allegations.

The conduct committee or conduct reviewer is responsible for making enquiries into complaints about councillors or the general manager referred to it/him/her. The conduct committee or conduct reviewer may determine whether to:

- take no action
- resolve the complaint by use of alternative and appropriate strategies (eg, mediation)
- make enquiries into the complaint
- engage another appropriately qualified person to make enquiries into the complaint
- discontinue and refer to an appropriate external agency.

The complaint handling procedures in section 12 of the Model Code requires that complainants be informed in writing of the outcome of their complaint. Complainants must be advised when:

- enquiries are not to be made into the complaint and why
- the complaint is to be resolved by use of alternative strategies
- the complaint is to be referred to another body or person

- the conduct review committee/sole conduct reviewer has made its findings, the nature and reasons of those findings.

If complaints are to be declined, complainants should be given clear reasons for this.

Where the conduct committee or conduct reviewer makes enquiries or causes enquiries to be made into the conduct of a councillor or the general manager, it must make a finding on whether, in its view, the conduct represents a breach of the code of conduct, may make recommendations and must report its findings and recommendations to the governing body of the council. It is a matter for the governing body of the council to determine whether a councillor or the general manager has breached the code of conduct and impose an appropriate sanction.

The Department of Local Government takes the view that councils themselves are primarily responsible for determining whether the actions of their members and staff constitute a breach of the standards of behaviour set out in the code of conduct. It is also for councils to determine what should occur in cases of a breach of those standards.

This approach is consistent with the objectives of the *Local Government Act 1993*, which allows councils a significant degree of autonomy in their day-to-day activities.

However, the Department may intervene in circumstances where it is apparent that a council has failed to implement or apply its code of conduct appropriately.

The Model Code is underpinned by a statutory disciplinary regime that applies to councillors. The Local Government Act confers on me as Director General the power to suspend a councillor from civic office for a period of up to one month for misbehaviour. The Act also confers on the Pecuniary Interest and Disciplinary Tribunal the power, amongst other things, to suspend a councillor for a period of up to six months.

For the purposes of the Act, "misbehaviour" means:

- a contravention by a councillor of the Act or the Regulation
- a failure by a councillor to comply with an applicable requirement of a code of conduct
- an act of disorder committed by the councillor at a meeting of the council or a committee of the council.

The suspension process can be initiated by a number of means, namely:

- a request made by the council by resolution communicated to me as Director General, in which the council states its belief that grounds may exist that warrant the councillor's suspension, or

- a request made by me, as Director General, to the council for a report from the council in relation to the councillor's alleged misbehaviour, or
- a report made by the Ombudsman in which the Ombudsman states that the Ombudsman is satisfied that grounds exist that warrant the councillor's suspension, or
- a report made by ICAC in which it recommends that consideration be given to suspending the councillor.

A councillor may be suspended on the following grounds:

- the councillor's behaviour has been disruptive over a period, and involved more than one incident of misbehaviour during that period, and the pattern of behaviour during that period is of such a sufficiently serious nature as to warrant the councillor's suspension, or
- the councillor's behaviour has involved one incident of misbehaviour that is of such a sufficiently serious nature as to warrant the councillor's suspension.

#### **The application of the *Protected Disclosures Act 1994* to local government**

The definition of "public official" under the *Protected Disclosures Act 1994* includes councillors, staff and delegates of local and county councils.

Under section 14 of the Act, council officials may make protected disclosures that show or tend to show maladministration, corrupt conduct or serious and substantial waste of local government money to the "principal officer" of the council or another officer of the council in accordance with any established procedure.

The Department of Local Government takes the view that the general manager is the "principal officer" of a council for the purposes of section 14(1). Councils may also nominate other officers who may receive protected disclosures under their established procedures. In cases where disclosures are made that show or tend to show corrupt conduct, maladministration or serious and substantial waste on the part of the general manager and the alleged conduct also represents a breach of the council's adopted code of conduct, such disclosures will need to be made to the Mayor in accordance with the procedures prescribed under the Model Code of Conduct.

Council officials may also make protected disclosures to ICAC that show or tend to show corrupt conduct, the NSW Ombudsman with respect to maladministration and the Department of Local Government with respect to serious and substantial waste of local government money.

In its *Guidelines for the Model Code of Conduct* issued in October 2008, the Department states that councils should adopt a separate internal reporting policy for the making of protected disclosures and that any such policy should be consistent with the reporting procedures under the council's code of conduct. The Guidelines also state that any procedures a council adopts for the making of

complaints alleging breaches of the code of conduct should be consistent with any internal reporting procedures a council has adopted under the Protected Disclosures Act.

### **Monitoring councils' practices**

The Department of Local Government monitors the performance of councils. One of the key mechanisms the Department uses to monitor the performance of councils is the Promoting Better Practice Review Program.

A Promoting Better Practice Review of a council involves a review team closely evaluating the effectiveness and efficiency of key aspects of council operations and giving feedback. This will involve assessing the council's overall strategic direction, checking compliance, examining appropriate practices and ensuring that council has frameworks in place to monitor its performance.

A review may focus on specific areas of council activities that have been identified as a result of an analysis of council's information and data.

Councils are asked to complete a self-assessment of their strategic management and operating practices. An analysis of this will assist the review team to appropriately focus the review. The review team conducts a reality check as part of the on-site review. It tests what the review team reads, sees or hears.

As part of the self-assessment process, councils are asked whether they have an internal reporting system in place under the *Protected Disclosures Act 1994*. As part of the review process, a review team will check, among other things, that:

- the council has in place an internal reporting policy and clear procedures for making protected disclosures
- any procedures for making protected disclosures are consistent with procedures for reporting breaches of the code of conduct
- council officials know of the organisation's nominated disclosure officers
- staff and councillor induction processes contain information about procedures for making protected disclosures and the obligations of council officials in relation to protected disclosures and that this is supported by ongoing training.

To date, the Department has commenced 81 Promoting Better Practice reviews of councils; of these 74 are completed. The Department has found that most councils it has reviewed under the Promoting Better Practice Review Program had satisfactory internal reporting systems in place.

Where a council does not have an internal reporting system in place, the review report will recommend that the council put such a system in place and promote it by training councillors and staff. The Department recommends that councils adopt an internal reporting policy based on the Model Internal Reporting Policy for Councils contained in the NSW Ombudsman's *Protected Disclosure Guidelines*.

The Department monitors the implementation by councils of recommendations made by Promoting Better Practice Reviews.

**The Department's role as an investigating authority for the purposes of the Protected Disclosures Act 1994**

The Department of Local Government is an "investigating authority" for the purposes of the Protected Disclosures Act.

Under section 12B of the Act, disclosures made to me as the Director General of the Department of Local Government that show or tend to show serious and substantial waste of local government money by a local government authority, a delegate of a local government authority, a councillor, a member of a county council or a member of staff of a local government authority, are protected under the Act. Local government money is defined to include all revenue, loans and other money collected, received or held by, for or on account of a local government authority.

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. As implied by the above, 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.

As a general rule, the Department deals with protected disclosures in accordance with its normal processes for dealing with complaints. These are consistent with the statutory notification requirements under section 27 of the Act.

However, in relation to meeting the requirements of the confidentiality guideline contained in section 22 of the Act, the Department requires that potential protected disclosures be entered on its document management system with no identifying details of the complainant other than noting that the person's name is "Protected Disclosure". The responsible officer is required to take steps to preserve confidentiality in all communications necessary to investigate the matter, and not to leave relevant material in open office situations.

The Department has found that members of the community (ie, persons who are not "public officials" for the purposes of the Protected Disclosures Act) often purport to make protected disclosures to the Department about their local councils in the mistaken belief that they can do so. The Department does not treat these as protected disclosures and deals with such complaints as it would any other complaint.



## **Possible reform**

As discussed above, protected disclosures can only be made to me as Director General of the Department of Local Government in relation to matters that relate to the serious and substantial waste of local government money. However, the Department of Local Government has a much broader oversight role of councils that extends beyond the management by councils of their finances.

In particular:

- Under section 430 of the Local Government Act, as Director General I may authorise the investigation of any aspect of a council or of its work and activities.
- Under section 462 of the Act, as Director General I may investigate complaints alleging breaches of the pecuniary interest provisions of the Act.
- As discussed above, as Director General I am empowered under the Act to authorise the investigation of allegations of councillor misbehaviour and to suspend councillors for misbehaviour or refer misbehaviour matters to the Pecuniary Interest and Disciplinary Tribunal for further action.
- As discussed above, the Department of Local Government has an oversight role in relation to the implementation and application by councils of their codes of conduct.

Given the Department's jurisdiction and powers with respect to the above matters, 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.

## **Internal Protocols for the Department of Local Government**

In addition to our role in regard to local councils, in common with all NSW State Government agencies, the Department of Local Government has responsibility to ensure that Departmental staff are able to make protected disclosures concerning corrupt conduct, maladministration, or serious and substantial waste of public money.

To facilitate staff disclosures, the Department has made information available to staff via our Intranet on the *Protected Disclosures Act 1994* and Departmental internal reporting procedures. The information available to staff includes:

- What disclosures are protected
- Who disclosures can be made to
- What protection is available to staff making protected disclosures
- Departmental reporting procedures

- Roles and responsibilities of staff to report incidences of corrupt conduct, maladministration or serious waste and the protocols to be followed in dealing with disclosures
- Procedures for managing protected disclosures and
- Alternative avenues for disclosures.

The Department is a small agency with approximately 65 staff members. It has in place a robust system of controls to minimise the risk of corrupt conduct, maladministration or serious and substantial waste of public money. These controls include:

- A staff code of conduct – available to all staff via the Intranet and as part of the staff induction process
- An internal audit and risk management committee, which meets at least quarterly
- A Co-ordinator of Governance, Business Assurance and Planning responsible for managing corporate governance and risk of the Department under the direction of the Deputy Director General
- A three year risk based internal audit program developed on the basis of the findings of the triennial Departmental wide risk assessment
- Clear financial and non-financial delegations of authority
- Where appropriate, segregation of duties and
- The provision of monthly financial reports to branch managers and the executive.

#### **Attendance at hearings**

Finally, I would like to confirm that Mr Ross Woodward, Deputy Director General of the Department of Local Government, will be attending the public hearings of the Committee on the Independent Commission Against Corruption on 24 November 2008 to give evidence on behalf of the Department.

Should you wish to discuss this submission or any other matter in connection with it, please do not hesitate to contact Mr John Davies of the Department's Investigations and Review Branch

Yours sincerely

*Ross Woodward* 31/10/08  
for **Garry Payne AM**  
**Director General**