



Issues Paper:

# The Adequacy of the Protected Disclosures Act to Achieve its Objectives

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## 1. Introduction

Whistleblowers perform an essential service in our society. They can bring to light serious problems with the management or operations of an organisation. This includes matters relating to systems, competence and resources, as well as the integrity of an organisation. In many respects disclosures by whistleblowers provide an invaluable early system for management about problems that, if unaddressed, can sometimes reach catastrophic proportions.

It would be reasonable to think that whistleblowers would be rewarded for performing this service. Instead, we know that, at least in our society, someone who reports these problems is considered to have done something special, something beyond the ordinary. It is even implicit in the very language that we use to discuss this issue – to ‘blow the whistle’.

Ideally, reporting these kinds of concerns would be considered to be part of doing a good job; being a responsible and effective employee. It can be noted that many employees do draw attention to organisational problems as part of their day-to-day responsibilities – they are called supervisors.

The critical difference is a cultural one. It is widely accepted that there continues to be a deep-seated culture within Australian workplaces that disapproves of people who criticise their colleagues or superiors. These people are considered to be ‘dobbers’, a derogatory term implying personal disloyalty. Interestingly, there does not appear to be as much disapproval of people who criticise *systems*, as opposed to individuals, although our experience shows that sometimes even they are considered to be ‘troublemakers’ if they go outside established reporting channels.

Our experience has shown that this attitude often leads to mishandling of a situation when someone comes forward with genuine concerns. The whistleblower often suffers retribution. The organisation as a whole often also suffers.

This issue has been the subject of much discussion and over the last 10 years each Australian State has introduced legislation to try to prevent the mishandling of such situations. Our experience has shown that internal reporting systems do help management avoid some of the pitfalls associated with handling reports by whistleblowers. We believe that statutorily requiring such systems to be in place is still the most effective way of supporting the whole public sector to handle these matters properly. The systems found throughout Australia and New Zealand differ in many respects. This paper outlines some of the differences and looks critically at whether the *NSW Protected Disclosures Act 1994* achieves its purported aims.

## 2. Purpose of paper

The *Protected Disclosures Act 1994* (NSW) (PD Act) is required to be reviewed every two years (s.32). Only two reviews of the Act have been conducted so far, and these were carried out by the NSW Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission. The review required in 2002 has not yet commenced.

A number of the recommendations made by the two reviews have been implemented by the government. **Appendix A** indicates those recommendations that have not been implemented.

To help inform the next review of the Act we undertook a project to compare and contrast all whistleblowing legislation currently in force in Australia and New Zealand. This review included:

- identification and tabulation of the various types of provisions contained in the whistleblower legislation the subject of the review;
- comparison of the provisions in the whistleblower legislation to identify alternative approaches to common issues;
- ranking the scope of each Act on the basis of a range of measures;
- a survey of Australasian Ombudsmen seeking information about the experience of each jurisdiction in the implementation of its legislation;
- assessment of the adequacy of the PD Act to achieve its objects; and
- identification of options to address any identified deficiencies in the PD Act.

## 3. Australasian whistleblower legislation

Specific whistleblower legislation has been enacted in the six Australian States, the Australian Capital Territory (ACT) and New Zealand. There is no specific whistleblower legislation enacted in the Northern Territory or the Commonwealth, although a draft *Public Interest Disclosure Bill 2000* [2002] is currently the subject of consideration by the Finance and Public Administration Legislation Committee of the Australian Senate and there is a limited whistleblowing scheme under the *Public Service Act 1999* (Cth) (see **Appendix B**).

The first whistleblower protection legislation was enacted in South Australia in 1993, followed in 1994 by legislation in Queensland, the ACT and NSW. There was then a gap of six years before the enactment of the New Zealand legislation followed by Victoria in 2001, Tasmania in 2002 and Western Australia in 2003.

There is little uniformity in the titles given to whistleblower legislation in the various jurisdictions with three using *Public Interest Disclosure(s) Act* (four if and when the Commonwealth Bill is enacted), three using *Whistleblowers Protection Act* and two using *Protected Disclosure(s) Act*.

For the purposes of this project it is relevant to note that the Western Australian Act only commenced on 1 July 2003 and the Tasmanian Act commenced by proclamation on 1 January 2004.

## 4. Comparison of provisions of whistleblower legislation

Apart from Victoria and Tasmania, each jurisdiction has adopted often dramatically different approaches to the encouragement of disclosures, the protection of whistleblowers and the obligations on agencies receiving disclosures.

In this regard, while some legislation only applies to protect disclosures made by public officials, others apply to disclosures to be made by any person. In some legislation the conduct that can be the subject of a disclosure (for that disclosure to be protected) is very broad in scope while in others it is particularly narrow. The scope of available reporting options varies widely as does the criminal and non-criminal protections that are available. The obligations on agencies to protect whistleblowers and to investigate disclosures, as well as the legal of coordination and oversight of each scheme, also vary widely.

The various legislative schemes are tabulated in **Appendix C** and compared in **Appendix D**.

## 5. Ranking the scope of legislative schemes

We have ranked the various legislative schemes on the basis of the scope of five key aspects (see **Appendix E**). These five key aspects are the:

- 1) scope of persons protected
- 2) scope of conduct the subject of a disclosure
- 3) scope of reporting options
- 4) scope of criminal protections, and
- 5) scope of non-criminal protections.

As can be seen from **Appendix E**, the ranking of each legislative scheme in terms of the five key aspects indicates that, over all, the Queensland Act has the broadest in scope, followed by NSW, then the ACT, New Zealand, WA, Victoria and Tasmania, with South Australia having the narrowest scope, particularly in terms of the protections that are available.

On the other side of the coin, the level of detail and complexity in the legislation is greatest in Queensland, followed by Victoria and Tasmania. The SA legislation has the least level of detail and complexity. While the ACT, NSW, New Zealand and WA occupy the middle ground, the ACT, NSW and WA legislation, at least, are quite complex. In this regard the Commonwealth Ombudsman has described the ACT Act as “*unexpectedly complex*”, the former NSW Solicitor General has referred to the “*generous opacity*” of the NSW PD Act and the WA Ombudsman has raised significant concerns about the interpretation of various provisions of that Act.

A summary description of the provisions of each Act is set out in **Appendix F**.

## 6. Core objectives of whistleblower legislation

### **Objectives**

There are three almost universal pre-requisites for the vast majority of employees to make a disclosure when they become aware of serious problems within the management or operations of their organisation:

- first and foremost they must be confident that they will be protected from suffering reprisals or from being punished if they do so
- secondly they must believe that making a disclosure will serve some good purpose, ie, that appropriate action will be taken by the recipient of the disclosure, and
- thirdly they must be aware that they can make a disclosure and how they should go about doing so, ie, to whom, how, what information should be provided, etc.

These pre-requisites are reflected in the PD Act, which sets out its object in the following terms:

*“The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:*

*(a) enhancing and augmenting established procedures for making disclosures concerning such matters, and*

*(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and*

*(c) providing for those disclosures to be properly investigated and dealt with.” (s.3(1)).*

The three pre-requisites can be translated into the three core objectives that need to be addressed if whistleblower legislation is to be effective:

- 1) ensuring the protection of whistleblowers
- 2) ensuring their disclosures are properly dealt with, and
- 3) facilitating the making of disclosures.



## 7. Key elements of whistleblower legislation

Based on the various approaches adopted in Australasian whistleblower legislation (see **Appendix G**), and our experience implementing the PD Act since 1995, the key elements that need to be addressed to achieve the core objectives appear to be:

- 1) the scope of conduct covered by the Act
- 2) potential whistleblowers
- 3) reporting options
- 4) internal reporting systems
- 5) threshold tests for protection
- 6) circumstances when disclosures are not protected
- 7) obligations on whistleblowers
- 8) obligations on persons/organisations that receive disclosures
- 9) coordinating/monitoring body or role
- 10) determinative function as to whether a disclosure is protected under the legislation
- 11) protections for whistleblowers
- 12) criminal offence for detrimental reprisal action
- 13) beneficial treatment of whistleblowers
- 14) referral of disclosures, and
- 15) records of disclosures (ie, statistics to assist identifying systemic problems and serial offenders).

## 8. Achieving the core objectives of whistleblower legislation

### *Protections for whistleblowers*

Looking at the first objective for effective whistleblower legislation, the long held and widespread view has been that the best protection that can be provided for a whistleblower is confidentiality. This is often the first thing that whistleblowers themselves will ask for. The reason is obvious. If no one knows you 'dobbed', you cannot suffer reprisals.

There are three main things that may be kept secret: the fact of the disclosure, the identity of the whistleblower and the allegations themselves (including individuals' names). In some cases it may be possible to keep all three confidential and still handle the disclosure effectively. Certainly this would provide the most effective protection for a whistleblower.

In practice, however, two main problems arise with expecting confidentiality to protect a whistleblower from retribution. Firstly, an organisation may not be able to realistically guarantee confidentiality. It is often difficult to make even preliminary inquiries into allegations without alerting someone in the organisation to the fact that allegations have been made. Further, to ensure procedural fairness, anyone who is the subject of an allegation should be given an opportunity to answer them. Once it is known that a disclosure has been made, it is often not difficult to surmise who has blown the whistle. Sometimes the whistleblower has made confidentiality even more difficult by previously telegraphing his or her concerns about an issue, or even his or her intention to complain, before making a formal disclosure.

Secondly, even if the agency is able to take all measures to ensure confidentiality, there is no way it can know for sure if those measures have succeeded. Human error and indiscretion cannot be discounted. The agency and its relevant staff may not be aware or be able to predict that certain information they think can be revealed (eg allegations that certain systems are failing) is sufficient to identify the whistleblower. Someone may have simply seen the whistleblower approaching management to report his/her concerns.

In these circumstances, if the whistleblower subsequently suffers detrimental action from the person who was the subject of their allegations, it would be open to *suspect* that this was a result of the person finding out and taking retribution. However, this may be difficult to prove. Indeed, in NSW we have seen cases where a person accused of taking 'detrimental action' against a whistleblower has been able to use the agency's measures to guarantee confidentiality to argue that s/he could not have known about the disclosure, and therefore, could not have taken that action *because of* the disclosure.

This happened in a recent case involving a NSW police officer. On the basis that the identity of the whistleblower had not been disclosed by the NSW Police or its investigators (as required by s.169A of the *Police Act 1990*), the prosecution could not prove that any detrimental action taken against the whistleblower was 'substantially in reprisal' for the making of a disclosure.

A further complication arises in those cases where people find out that a disclosure has been made and take retributive action against the wrong person; a person who did not actually make the disclosure. A system for protecting whistleblowers should also aim to prevent this kind of behaviour taking place.

Given these difficulties, it is clear that the promise of confidentiality, of itself, is often not sufficient protection for a whistleblower. Whistleblowers need to be provided with appropriate support, to be reassured that they have done the right thing and to be given legal rights against anyone who does not support them or takes retribution.

To achieve adequate protection for whistleblowers, effective whistleblower legislation might include:

- 1) protection from exposure of identity, ie, confidentiality and secrecy
- 2) protection from detrimental/reprisal action, eg:
  - obligations on employers/CEOs to protect whistleblowers
  - the right to complain to an independent external body
  - criminal and disciplinary sanctions for detrimental action/reprisal
  - the right to seek injunction or order to restrain or require action
  - relocation of whistleblowers (at least within or between state government agencies, although this may be difficult for local councils), and/or
  - witness protection (in exceptional circumstances)
- 3) protection from liability, eg, from any criminal or civil liability arising out of a disclosure, including in defamation, and
- 4) redress for detriment, eg, damages in tort and/or compensation (see **Appendix G** at point 11).

Criminal sanctions aim to act as a deterrent and as a punishment. Although it is impossible to know how much retribution has been prevented by the existence of the statutory offence, we could surmise that one reason criminal sanctions have rarely been used is that retributive action has been prevented. What our experience *has* shown is that the sanctions have not been very effective as a punishment. To date the only criminal actions for detrimental/reprisal action in Australasia have been taken in NSW. Each was unsuccessful.

Further, the results of a survey of Australasian Ombudsman (see **Appendix I**) have found that the criminal and disciplinary sanctions for detrimental reprisal/action are seldom if ever used/imposed. Reasons for this include the absence in all jurisdictions of any official person or body with responsibility to implement such sanctions, leaving it up to the whistleblower to take personal action; evidentiary problems in some jurisdictions (eg, where criminal sanctions require a 'but for' test).

### *Ensuring disclosures are properly dealt with*

Looking at the second core objective for effective whistleblower legislation, provisions that could be included in whistleblower legislation to ensure that disclosures are properly dealt with include:

- 1) obligations on whistleblowers to maintain confidentiality and assist/cooperate with investigators
- 2) obligations to properly investigate/deal with disclosures (eg, to adopt and implement procedures for the investigation of disclosures, to investigate disclosures, to provide/ensure procedural fairness in the conduct of investigations)
- 3) powers to investigate disclosures (either generally or for particular organisations/ persons who otherwise have insufficient powers to do so effectively)
- 4) time lines for action (in relation to both the investigation or disclosures and the information to be provided to whistleblowers)
- 5) obligations to notify whistleblowers and any relevant central agency as to action taken or proposed
- 6) referral of disclosures to more appropriate agencies/persons where the original recipient does not have the jurisdiction or power to appropriately deal with it in (**Appendix G** at points 7,8,14 &15)
- 7) obligations to provide ongoing support for whistleblowers, and
- 8) obligations to periodically review/audit how organisations are handling protected disclosures.

### *Facilitating the making of disclosures*

In relation to the third core objective for effective whistleblowing legislation, provisions that could be included in whistleblower legislation to facilitate the making of disclosures include:

- 1) identification of the scope of the conduct about which disclosures made will be protected
- 2) identification of the persons to whom and the circumstances where disclosures made will be protected
- 3) provision for disclosures to be made anonymously
- 4) identification of the reporting options for disclosures (both internal and external),
- 5) obligations on agencies to adopt and implement internal reporting systems (**Appendix G** at points 2,3 & 4)
- 6) obligations on agencies to keep staff informed of the existence of an internal reporting system and how to use it.

## 9. Adequacy of the Protected Disclosures Act

We have assessed the provisions of the PD Act to see whether they are adequate to achieve the core objectives for effective whistleblower legislation. To this end we considered the major provisions of the PD Act (other than machinery provisions and those designed to ensure that the legislation is not misused) to identify whether:

- they facilitate the achievement of one or more of the core objectives, and
- the Act as a whole incorporates adequate mechanisms to achieve each of the core objectives.

**Appendix H** indicates which of the whistleblower legislation options set out in **Appendix G** are currently addressed in the PD Act. As can be seen, there are a number of important options that are not currently addressed in the PD Act.

### *Protections for whistleblowers*

While the PD Act contains significant statutory protections for whistleblowers (including a reversed onus of proof in criminal proceedings for detrimental action), NSW is the only jurisdiction in which a whistleblower who has been the subject of detrimental/reprisal action has no rights in the Act to seek damages. Another key failing in the Act is that there is no statutory obligation on senior managers and/or CEOs to protect whistleblowers, or even to establish procedures to protect whistleblowers (obligations imposed in five of the other seven Australasian jurisdictions). Further, only NSW and two other jurisdictions do not make provision for injunctions or orders to remedy or restrain breaches of the Act.

To address these and other significant issues, matters that should be considered in the next review for inclusion in the PD Act include:

- 1) specific provision for disclosures to be made anonymously (currently implied)
- 2) obligations on employers/senior managers/CEOs to protect whistleblowers
- 3) obligations on employers/senior managers/CEOs to investigate disclosures
- 4) availability of injunctions or orders to remedy or restrain a breach of the Act
- 5) damages for detrimental/reprisal action
- 6) compensation for detrimental/reprisal action from employer or government
- 7) nomination of a person or body responsible for prosecuting breaches, and
- 8) relocation of whistleblowers within or between agencies.

Consideration should also be given to discussing what purpose is served by several provisions in the Act that limit the circumstances where the protections of the Act apply, for example:

- 1) disclosures made “*frivolously or vexatiously*” (s.16), which relates to the motive of the whistleblower and not to the content of the disclosure – often invaluable information can be brought to light by people motivated by malice or disaffection – what is crucial is the content of the disclosure not the motive of the whistleblower (although it may be more appropriate to limit a malicious whistleblower from accessing any private rights the Act might confer)
- 2) disclosures concerning the “*merits of government policy*” (s.17) – a term not defined in the Act - the NSW Act is the only Australasian legislation which contains such a provision

- 3) disclosures motivated by the object of avoiding disciplinary action (s.18), which relates to the motive of the whistleblower and not to the content of the disclosure - the NSW Act is the only Australasian legislation which contains such a provision, and
- 4) that disclosures to members of Parliament or journalists “*must be substantially true*” (s.19(5)) – in practical terms a requirement that could seldom if ever be met by a whistleblower where the preconditions in s.19(3) apply.

*Ensuring disclosures are properly dealt with*

The PD Act almost completely fails to address the core objective of ensuring disclosures are properly dealt with.

To remedy this serious defect, matters that should be considered for inclusion in the PD Act include obligations:

- 1) to appropriately deal with disclosures, including:
  - a) to adopt and implement procedures for assessing and investigating, or otherwise appropriately dealing with disclosures
  - b) to appropriately investigate or otherwise handle disclosures (including investigation powers for organisations/ persons who otherwise have insufficient powers to do so effectively)
  - c) to appoint investigators (to ensure an impartial or independent investigation)
  - d) to provide procedural fairness in the conduct any of investigations (where this is not already dealt with in relevant legislation),
- 2) to notify whistleblowers:
  - a) of progress
  - b) of the outcome of investigations,
- 3) to notify a central monitoring/coordinating agency:
  - a) of disclosures received each year
  - b) of outcomes of investigations,
- 4) to make and retain adequate records of disclosures made to receiving organisations, and to report in receiving organisation annual reports and in any monitoring/coordinating body’s annual report on the implementation of the Act.

[Note: The nature of the investigation required in each particular case will depend on the nature and content of the disclosure.]

At present no information is available as to how many protected disclosures are being made to any particular agencies or agencies generally, or whether such disclosures and the people who made them are being dealt with properly by those agencies. The NSW Ombudsman is only aware of disclosures made directly to the Office, and disclosures made to agencies where the whistleblower or agency has sought advice from the Office.

Given the complexity of issues arising in relation to the PD Act and whistleblowing generally, and the need for a close eye to be kept on how agencies deal with disclosures and whistleblowers, consideration should be given to the establishment of a coordinating/monitoring role as recommended by the Parliamentary Committee in its reports arising out of the two reviews of the PD Act. This would include identifying appropriate functions and powers, determining whether the agency carrying out this role would need to coordinate/monitor investigating authorities, considering obligations on agencies to report on the operation of the legislation.

### *Facilitating the making of disclosures*

The PD Act fails to adequately address the core objective of facilitating disclosures by public officials.

There are a number of issues that need to be considered for the Act to better address this objective, for example:

- 1) whether the avenues for making a disclosure should be expanded to include any person or body with jurisdiction to deal with the subject matter of the disclosure (the current provision as to the avenues for the making of disclosures is one of the main sources of complexity in the Act)
- 2) whether the scope of the conduct covered by the Act is wide enough (eg, should it be expanded to include public health and safety issues and environmental damage as in most other Australasian jurisdictions)
- 3) whether private citizens should be protected if they make disclosures about conduct covered by the Act (as is the case in five of the other seven jurisdictions)
- 4) whether specific provision should be included in the Act for anonymous disclosures (the present position is that we have read the Act to imply that disclosures can be made anonymously), and
- 5) whether agencies should be required to adopt and implement an internal reporting system for the purposes of the Act (currently a discretionary issue).

A further, and far more contentious, issue relates to beneficial treatment of whistleblowers. Some countries have legislation which makes provision for the payment of rewards to whistleblowers, or payment of a share of the moneys recovered as a result of their disclosure. The PD Act prohibits beneficial treatment in favour of a person if the purpose (or one of the purposes) for doing so is to influence the person to make, to refrain from making or to withdraw a disclosure (s.3(2)(b)).

It is important to ensure that no inducements (either financial or preferential treatment) to make or withdraw disclosures are offered or given, particularly where the evidence of the whistleblower, and therefore his or her credibility, will be crucial to the case. For the same reason prohibition should extend to the automatic payment or provision of any rewards or benefits on the making of a disclosure.

The payment of rewards, or a share of any recovered moneys, at the conclusion of any investigation where a disclosure is substantiated, or on conviction or imposition of a penalty, may, however, be an option to consider. This approach has been found to be effective in the USA in relation to fraud in Federal government contracting and in Korea in relation to disclosures about corruption. But before adopting any such approach, serious consideration would have to be given to the fundamental intention of any whistleblowing scheme, which presumably is to facilitate and encourage a change of culture within public sector agencies so that it is part of a public official's public duty and employee responsibilities to report serious problems with their agency's management or operations.

### *Other issues to be considered*

Other issues that need to be considered in a review of the PD Act, include:

- 1) circumstances when disclosures should not be protected, eg, where:
  - a) the whistleblower knows the disclosure to be false or it is made in bad faith
  - b) the whistleblower fails to assist any investigation
  - c) the whistleblower makes further unauthorised disclosure
- 2) obligations on whistleblowers:
  - a) to maintain confidentiality
  - b) to assist/cooperate with investigators
- 3) confidentiality in relation to the subject(s) of disclosures (where possible, practical, and appropriate).

## 10. Conclusions

The PD Act, as it is currently drafted, is inadequate to achieve two of its three core objectives.

While the two previous reviews of the PD Act have identified a range of largely operational issues that need to be addressed (with mixed success), it is now time for the Act to be comprehensively reviewed.

The required review of the Act (s.32) should be commenced as a matter of urgency. This review should include consideration of the issues raised at 9 above.

A handwritten signature in black ink, appearing to read 'B. A. Barbour', with a stylized flourish at the end.

**Bruce Barbour**  
*NSW Ombudsman*



## Appendix A

### Recommendations arising out of reviews of the Protected Disclosures Act that have not been implemented or have been partly implemented

Recommendation	Source
1. Protected Disclosures Unit (PDU)  Establish a Protected Disclosures Unit within the Office of the Ombudsman to perform various monitoring and advisory functions, including to: <ul style="list-style-type: none"> <li>• monitor the response of public sector agencies to the Act, including investigations</li> <li>• provide advice and guidance, and</li> <li>• coordinate the collection of statistics on protected disclosures and training programs.</li> </ul>	1 <sup>st</sup> review (rec. 1) and  2 <sup>nd</sup> review (rec.3)
2. To enable the PDU to monitor trends in the operation of the protected disclosures scheme by requiring public sector agencies to regularly provide it with certain information.	1 <sup>st</sup> (rec. 2) & 2 <sup>nd</sup> review (rec. 4)
3. Statutorily require public sector agencies to provide to the PDU statistics on protected disclosures received.	1 <sup>st</sup> review (rec. 17)
4. Include in the Act a statement of the Legislature's intent that public authorities and officials should act in a manner consistent with, and supportive of, the objects of the Act and that they should ensure that persons who make protected disclosures are not subject to detrimental action.	1 <sup>st</sup> review (rec. 7)
5. Provide a right to seek damages where a person who has made a protected disclosure suffers detrimental action.	1 <sup>st</sup> review (rec.8)
6. Require each investigating authority to refer any evidence of an offence under section 20 to the Director of Public Prosecutions.	1 <sup>st</sup> review (rec. 10)
7. Extend protection against detrimental action to any person/body engaged in a contractual arrangement with a public sector agency who makes a protected disclosure.	1 <sup>st</sup> review (rec. 11)
8. Extend protection against detrimental action to any person who makes a protected disclosure to the Internal Audit Bureau.	1 <sup>st</sup> review (rec. 12)
9. Clarify that the protections do not apply to Members of Parliament and local government councillors.	1 <sup>st</sup> review (rec. 15)
10. Statutorily require public sector agencies to adopt uniform standards and formats for statistical reporting.	1 <sup>st</sup> review (rec. 16)
11. Require investigating authorities to develop uniform reporting categories, standards and formats.	1 <sup>st</sup> review (rec. 18)
12. Require all public sector agencies to periodically report to the Parliamentary Joint Committee on protected disclosures.	1 <sup>st</sup> review (rec. 20)
13. Require all investigating authorities to periodically report to the Parliamentary Joint Committee on protected disclosures.	1 <sup>st</sup> review (rec. 21)



Recommendation		Source
14.	Have the Premier comprehensively evaluate the priority areas for reform of the protected disclosures scheme.	2 <sup>nd</sup> review (rec. 1)
15.	Provide for the Ombudsman to make disclosures to the Director of Public Prosecutions or the police for the purpose of conducting prosecutions.	2 <sup>nd</sup> review (rec. 5)
16.	To require public sector agencies to tell staff about internal reporting systems and require the Ombudsman to monitor compliance with this.	2 <sup>nd</sup> review (rec. 7)
17.	Provide explicitly for courts to make orders suppressing the publication of material which would tend to disclose the identity of a whistleblower.	2 <sup>nd</sup> review (rec. 8)
18.	Provide that detrimental action includes payback complaints made in retribution for a protected disclosure.	2 <sup>nd</sup> review (rec. 9)
19.	Have the PDU examine the merits of a false claims statutory scheme for NSW.	2 <sup>nd</sup> review (rec. 11)
20.	Require all investigating authorities to provide reasons to a whistleblower for not proceeding with an investigation into their protected disclosure.*	1 <sup>st</sup> review (rec. 2)
21.	Require public sector agencies to include certain statements relating to protected disclosures in their codes of conduct.*	1 <sup>st</sup> review (rec. 4)
22.	Have the Steering Committee continue to play a central role in determining the strategic direction of the development of the protected disclosures scheme.*	2 <sup>nd</sup> review (rec. 2)

\* Recommendation partly implemented.

The following recommendations have been implemented:

1<sup>st</sup> review - recommendations 5, 6, 9, 14, 19, 22 and 23.

2<sup>nd</sup> review - recommendations 6 and 12.

## Appendix B

### Australasian whistleblower legislation

South Australia	1993	<i>Whistleblowers Protection Act</i>
Queensland	1994	<i>Whistleblowers Protection Act</i>
Australian Capital Territory	1994	<i>Public Interest Disclosure Act</i>
New South Wales	1994	<i>Protected Disclosures Act</i>
New Zealand	2000	<i>Protected Disclosure Act</i>
Victoria	2001	<i>Whistleblowers Protection Act</i>
Tasmania	2002	<i>Public Interest Disclosures Act</i>
Western Australia	2003	<i>Public Interest Disclosure Act</i>

## Appendix C

### Comparison of legislative schemes

<b>Table 1: Scope of Act</b>		<b>ACT</b>	<b>NSW</b>	<b>NZ</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
<b>Scope of conduct covered by Act</b>									
Improper conduct, maladministration or matters of administration		ss.3, 4	s.11	s.3	s.16	s.4	s.3	s.3	s.3
Waste of public money/ mismanagement of public resources		s.3	ss.12, 12B	s.3	s.17	s.4	s.3	s.3	s.3
police misconduct, illegal activity or corrupt conduct		s.3	ss.10, 12A	s.3	ss.15, 16	s.4	s.3	s.3	s.3
public health and safety		ss.3, 4	-	s.3	ss.18	s.4	s.3	s.3	s.3
environmental damage		-	-	s.3	ss.18, 19	s.4	s.3	s.3	s.3
private sector		s.4(2)	-	s.6	s.19	s.4	-	s.3	-
<b>Threshold test</b>									
disciplinary action		s.4(1)*	-	-	-	-	-	-	-
dismissal		s.4(1)*	-	-	-	-	s.3	s.3	-
criminality		s.4(1)*	-	-	-	-	s.3	s.3	-
<b>Persons and bodies that can be the subject of a disclosure</b>									
state public officials		s.3	s.4	s.3	Pt 3	s.4	s.6	s.3	s.3
state agencies		s.3	s.4	s.3	Pt 3	s.4	s.6	s.3	s.3
bodies performing public official functions		s.3	s.4	-	Pt 3	s.4	-	s.3	s.3
MIPs		?	s.4	-	Pt 3	s.4	ss.3, 7(4)	s.3	s.3
local council staff		NA	s.4	s.3	Pt 3	s.4	s.3	s.3	s.3
local councils		NA	s.4	s.3	Pt 3	s.4	s.3	s.3	s.3
Councillors		NA	s.4	s.3	Pt 3	s.4	s.3	s.3	s.3
private individuals or organizations		s.4(2)	-	s.6	s.4	-	-	s.3	-

\* Threshold only applies to “disclosable conduct”, not to public wastage, unlawful reprisal or danger to public health and safety.

<b>Table 2: Making of disclosures</b>		<b>ACT</b>	<b>NSW</b>	<b>NZ</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Persons whose disclosures are covered by the Act									
public officials		s.15	s.8	s.6	ss.8, 15, 16, 17, 18	s.5	s.6(1)	s.5	s.5(1)
private citizens		s.15	-	s.6	ss.9, 19, 20	s.5	***** s.6 (2)	s.5	s.5(1)
anonymous disclosures		s.16	Yes	Yes	s.27(1)	?	s.8	s.7	?
External reporting options									
Ombudsman		ss.13, 14	s.11	Ss.9, 10	s.25	s.5(4)(g)	s.7	ss.6(1) (a), (3), (4), (5) (a)	s.5(3)(c)
Audit Office/Auditor General		ss.13, 14	s.12	s.9	s.25	s.5(4)(c)	-	-	s.5(2), (3)(b)
corruption body		-	s.10, 12A	-	s.25	-	-	-	s.5(2), (3)(a)
MPs generally		-	s.19	-	-	-	-	-	-
journalists		-	s.19	-	-	-	-	-	-
Other		-	s.12B*	s.9 (various)	s.25	s.4(b), (d), (e)**	s.7***	s.6(5)****	s.5(2) (3)(d)*****

\* Department of Local Government  
 \*\* Police Complaints Authority, Chief Justice, Commissioner of Public Employment  
 \*\*\* Commissioner of Police and State Service Commission  
 \*\*\*\* Chief Commissioner of Police  
 \*\*\*\*\* Commissioner of Police and Chief Justice

<b>Table 2: Making of disclosures</b>		<b>ACT</b>	<b>NSW</b>	<b>NZ</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Internal reporting options									
CEO		ss.3, 9	s.14(1)	s.3	s.27(3)	s.5(4)	-	s.6(1)	s.5(1)
other officer nominated in Act		-	-	s.11 (2) (b)	s.27(3)	-	-	s.6(2), (5)	-
other officer		s.11	s.14(2)	s.7	s.27(2)	-	-	-	s.23(1)(a)
Internal Reporting Systems									
mandatory adoption		s10	-	s.11 (public sector)	-	-	ss.38 (1)(c), 60	s.68(1)	s.23(1)(e)
discretionary adoption		NA	ss.8(1) (c), 14(2)	s.7 (private sector)	s.27	-	NA	NA	NA

<b>Table 3: Requirements for protection</b>		<b>ACT</b>	<b>NSW</b>	<b>NZ</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Threshold tests for protection									
made in writing only		-	-	-	-	-	-	-	-
made orally or in writing		-	Yes	?	s.27(1)	Yes	s.7(6)	s.6(6)(a) & Reg.	Yes
made to proper/specified person or authority		s.15	s.8	s.7-14	s.27, 28	s.5(2)(b),(3)	s.7	s.6	s.5(3)
made in good faith		-	-	s.6(1)(b),(c)	-	s.5(2)(a)	-	-	s.5(2)
reasonable belief in truth:			-						
a. generally		ss.3, 4	-	ss.6(1)(b), 8-10	s.14(2)	s.5(2)(a)	s.6	s.5	s.5(2)(a), (b)
b. only in relation to certain disclosures		-	s.19(4)*	-	-	-	-	-	-
substantial truth:									
a. generally		-	-	-	-	-	-	-	-
b. only in relation to certain disclosures		-	s.19(4)*	-	-	-	-	-	-
shows or tends to show conduct alleged		s.3	ss.10, 11, 12, 12A, 12B, 13, 14	-	s.14(2)	s.4(1)	ss.30(2), 33(2)	ss.24(2), 28(2)	s.3(1)
made voluntarily		-	s.9	-	-	-	-	-	-
made confidentially		-	-	-	-	-	-	-	s.17(1)(b)

\*Disclosures to MPs or Journalists

<b>Table 3: Requirements for protection</b>		<b>ACT</b>	<b>NSW</b>	<b>NZ</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Disclosures not protected if									
made maliciously (ie, motivation)	-	-	-	-	-	-	-	-	-
made frivolously or vexatiously (ie, motivation)*	-	s.16	-	-	-	-	-	-	-
trivial, frivolous or vexatious (ie, content)	-	-	-	-	-	-	-	-	s.8(2)(b)
known to be false or in bad faith (ie, conduct)**	-	-	s.20	s.14(2)	s.10	-	-	-	-
made to avoid disciplinary action (ie, motivation)	-	s.18	-	-	-	-	-	-	-
they question the merits of government policy (ie, content)	-	s.17	-	-	-	-	-	-	-
there is a further unauthorised disclosure by whistleblower (ie, conduct)	-	-	-	s.56	-	-	-	-	s.17(1)(b)
information is legally professionally privileged (ie content)	s.8	-	s.22	-	-	-	s.11	s.10***	s.5(6)
the disclosure is determined not to be a public interest disclosure	-	-	-	-	-	-	s.24	ss.23, 24****	-
whistleblower fails to assist any investigation (ie, conduct)	-	-	-	-	-	s.6(3)	-	-	s.17(1)(a)

\* At least implied under all Acts

\*\* Could be implied under certain Acts

\*\*\* The position is unclear whether it applies to the content or the investigation of a disclosure

\*\*\*\* Only in relation to subsequent disclosures

<b>Table 4: Statutory obligations</b>		<b>ACT</b>	<b>NSW</b>	<b>NZ</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>VIC</b>	<b>WA</b>
Obligations on agencies/offices									
confidentiality		s.33	s.22	s.19	s.55	s.7	s.23	s.15	s.16
to investigate disclosures		s.19	-	-	-	-	ss.39, 63	ss.39*, 72, 84	s.8
to protect whistleblowers		s.22	-	-	-	-	-	-	s.23(1)(b)
to notify whistleblowers of action taken or proposed:									
a. in all cases		-	s.27	-	-	-	SS.29, 34(1), 35(1), 65	ss.29(1), 30(1), 34(1), 35(1), 40, 46, 67(1)	s.10(1)
b. only on request		s.23(1), (2)	-	-	s.32(1)	-	-	-	-
to provide whistleblower with progress reports		s.23(1), (2)	-	-	s.32(1)***	-	s.74	s.80	s.10(2), (3)
to notify whistleblowers of the outcome of investigations:									
a. in all cases		-	-	-	-	s.8	ss.59, 77	ss.67, 83, 95	-
b. only where improper conduct disclosed		-	-	-	-	-	-	-	-
c. only on request		s.23(2)	-	-	s.32(1)	-	-	-	s.10(4)(a)
to notify central body of a disclosure		-	-	-	-	-	ss.34(1)	s.31***	s.23(1)(f)**
to notify central body of the outcome of an investigation		-	-	-	-	-	s.76	ss.82, 93	s.23(1)(f)
to establish an internal reporting system		s.10(1), (3)	-	s.11****	-	-	ss.38(1), 60	ss.68(1)	s.23(1)(e)



to establish procedures to protect whistleblowers	s.10(3)(c)	-	-	s.44	-	s.60	s.68(1)(c)	s.23(1)(b)
Obligations on informants								
confidentiality	-	-	-	-	-	-	-	s17(1)(b)
cooperation with investigation	-	-	-	-	s.6	-	-	s17(1)(a)

\* Obligation on Ombudsman

\*\* On request

\*\*\* Annually

\*\*\*\* Public sector organizations only

## Appendix D

### A comparison of the provisions of Australasian whistleblower legislation

#### **Scope of conduct**

Seven out of eight jurisdictions cover risks to public health and safety (not NSW).

Six jurisdictions cover risks of environmental damage (not NSW and the ACT).

Three jurisdictions have threshold tests that primarily require criminality or conduct for which a public official could be dismissed (ACT, Tas, Vic).

Five jurisdictions allow for disclosures to be made about private sector persons or individuals, at least in certain circumstances (ACT, NZ, Qld, SA, Vic).

#### **Making of disclosures**

In five jurisdictions the Act applies to disclosures made by any person ie, including private individuals (apart from NSW, NZ and Tas). NZ restricts its disclosures to employees of the agency concerned and Tasmania allows for government contractors to make disclosures about “*public bodies*” (but not public officials).

Half the jurisdictions explicitly provide for anonymous disclosures (ACT, Qld, Tas, Vic). It is assumed that anonymous disclosures can also be made under the NSW and NZ Acts.

Only in NSW does the Act cover disclosures made to any MP or journalist (although in limited circumstances), although some jurisdictions provide for disclosures by MPs to be made to specified officers of their Parliament.

Five jurisdictions require public sector agencies to adopt internal reporting systems (ACT, NZ, Tas, Vic, WA).

#### **Requirements for protection**

Only the NSW Act specifically denies protection to disclosures:

- made frivolously or vexatiously (although this is implied under the other Acts);
- made to avoid disciplinary action;
- that question policy.

Only NSW does not require a reasonable belief in the truth of the allegation(s), other than where disclosures are made to an MP or journalist.

Five jurisdictions specifically refer to legal professional privilege, stating or implying that information that is so privileged may not be disclosed pursuant to the Act, or that the privilege is not affected by the Act (ACT, NZ, Tas, Vic, WA).

In all jurisdictions other than Tasmania and Victoria the formal determination as to whether a disclosure comes within the provisions of the Act is made, in appropriate circumstances, by a court or tribunal. In Tasmania and Victoria the Ombudsman and receiving agencies make formal determinations as to whether a disclosure is a public interest disclosure for the purposes of the Act.

**Obligations on agencies**

The only obligation common to all jurisdictions is confidentiality in relation to the identity of the informant (discussed further below).

Four jurisdictions oblige recipients of disclosures to investigate the disclosures, although in two this only applies if a disclosure is determined to be a public interest disclosure (Tas & Vic).

Four jurisdictions require CEOs or agencies to protect whistleblowers (ACT, Qld, Vic & WA).

In five jurisdictions agencies are required to establish procedures to protect whistleblowers (ACT, Qld, Tas, Vic, WA).

Five jurisdictions require public sector agencies to adopt an internal reporting system (ACT, NZ, Tas, Vic, WA).

**Notifications**

In four jurisdictions the person or body receiving a disclosure is required to notify the informant of the action taken or proposed, and in a further two is required to do so on request (NSW, Tas, Vic, WA).

In four jurisdictions, the recipients of disclosures are required to give progress reports to informants (ACT, Tas, Vic, WA).

**Monitoring coordination**

The three most recent whistleblower Acts have identified a body to perform a monitoring/ coordinating role for the implementation of the legislation (Tas, Vic, WA).

**Confidentiality and secrecy**

All jurisdictions require confidentiality in relation to the informant.

Five jurisdictions require confidentiality in relation to the subject(s) of a disclosure (ACT, Qld, Tas, Vic, WA).

Five jurisdictions provide that a breach of confidentiality is a criminal offence (ACT, Qld, Tas, Vic, WA). Of these two have only limited exceptions to their confidentiality obligation (ACT, Tas).

Five jurisdictions specifically provide an FOI exemption clause for disclosures covered by the Act (NSW, NZ, Tas, Vic, WA, although the NZ exception is only in relation to identifying material).

In two jurisdictions information in or arising out of a disclosure is inadmissible as evidence in legal proceedings (Tas, Vic). At the same time the legislation in these States imposes a threshold test for conduct to be covered by the Act requiring that the conduct warrant dismissal or criminal action.

### **Reporting**

Four jurisdictions require agencies to include relevant statistics in their annual report (ACT, Qld, Tas, Vic).

Three jurisdictions require agencies to report relevant statistics to a central body (Qld, Vic, WA).

### **Protections**

Four jurisdictions require CEOs or agencies to protect whistleblowers (ACT, Qld, Vic & WA), and in one other jurisdiction agencies are required to establish procedures to protect whistleblowers (Tas).

Six jurisdictions provide that detrimental action/reprisal is a criminal offence (not SA & NZ).

Seven jurisdictions provide that a person the subject of detrimental action/reprisal may seek damages or equivalent (not NSW).

Five jurisdictions provide for both a criminal offence and a remedy in tort or equivalent (not NSW, NZ and SA). Four jurisdictions provide for a criminal offence, a remedy in tort and the capacity to seek an order or injunction (ACT, Qld, Tas, Vic).

There is no nominated prosecuting body in any jurisdiction.

Two jurisdictions have adopted a very narrow evidentiary test for the criminal offence of detrimental action, ie, “because” or “but for” (ACT, WA). The other four jurisdictions in which detrimental action is a criminal offence have adopted the broader “substantially in reprisal” test (NSW, Qld, Tas, Vic).

All jurisdictions include a protection against civil and criminal liability.

In seven jurisdictions it is specifically provided that a disclosure made pursuant to the Act is not a breach of confidence or secrecy (not SA).

In four jurisdictions applications can be made for injunctions or orders to remedy actions (ACT, Qld, Tas, Vic).

Two jurisdictions provide for relocation of public sector employees who made disclosures (ACT, Qld).

### **Records of disclosures**

Four jurisdictions require agencies, either explicitly or by implication, to keep a register or other records of disclosures received (ACT, Qld, Vic, WA).

## Appendix E

### Ranking of scope of legislative schemes



**Narrow**

**Broad**

Scope of persons protected		NSW	Tas <sup>1</sup>	NZ <sup>2</sup> , Vic, WA	ACT, Qld <sup>3</sup> , SA,
Scope of conduct covered by Act		ACT <sup>4</sup> , Tas, Vic	NZ, Qld <sup>5</sup> , SA	NSW	WA <sup>6</sup>
Scope of reporting options			SA, Tas, Vic, WA	ACT, NSW, NZ	Qld
Scope of criminal protections	SA (nil)	ACT, NZ, Qld, WA <sup>7</sup>	Tas, Vic <sup>8</sup>		NSW
Scope of non-criminal protections	SA		NSW, NZ, WA	Tas, Vic	ACT, Qld <sup>9</sup>

<sup>1</sup> Government contractors may make disclosures about public bodies

<sup>2</sup> Any person may make disclosures about public sector conduct

<sup>3</sup> Any person may make disclosures about public and certain private sector conduct

<sup>4</sup> Conduct must meet a high threshold test

<sup>5</sup> Scope of Act includes limited private sector conduct

<sup>6</sup> Although the WA Act does not include private sector conduct, it covers the broadest scope of public sector activity

<sup>7</sup> Very narrow “but for” or “because” evidentiary test

<sup>8</sup> Significant limits on the use of information obtained from disclosure and investigation in legal proceedings

<sup>9</sup> Non-criminal protections include damages in tort, absolute or at least qualified privilege, injunctions and relocation of public sector employees

## Appendix F

### Summary Of Whistleblower Legislation

#### **AUSTRALIAN CAPITAL TERRITORY**

**Title** *Public Interest Disclosure Act 1994*

#### ***What is the level of detail in Act***

The Act contains a moderate level of detail relative to the other whistleblower legislation in Australia.

#### ***The scope of the conduct that can be reported***

The Act covers improper conduct, maladministration or matters of administration, waste of public money/ mismanagement of public resources, police misconduct, illegal activity or corrupt conduct, public health and safety, environment damage (ss.3 & 4).

The Act covers disclosures made about conduct of private citizens (s.15).

There is a high threshold test that the alleged conduct could constitute a disciplinary or criminal offence or reasonable grounds for dismissal before allegations about certain conduct will be protected.

#### ***Does the Act protect only public officials, or all persons, or non public officials in certain circumstances?***

Any person.

#### ***What are the reporting options under the Act?***

Reporting options are broad.

Disclosures may be made to any government agency about the conduct of that agency or its staff, or about a matter or conduct that the agency has a power or function to investigate (s.9).

Disclosures may also be made to the Ombudsman or the Auditor General (s.13).

#### ***What protections are available under the Act ?***

The identity of whistleblowers is to be kept confidential (s.19).

The Act establishes obligations on agencies/officials to establish procedures to protect whistleblowers (s.10(3)).

The Act requires agencies to take necessary and reasonable action to prevent unlawful reprisals against whistleblowers from continuing or occurring in the future (s.22(1)).

Detrimental action/reprisal against whistleblowers is a criminal offence (s.25).

A person who is affected by unlawful reprisal may seek damages in tort (s.29).

Application can be made by a whistleblower, or the Ombudsman, for an injunction or order to take action or restrain action.

The Act provides for relocation of public sector employees who make disclosures (s.s.27, 28).

The Act protects whistleblowers from civil and criminal liability (s.35(1)).

Disclosures made pursuant to the Act do not constitute a breach of confidence or secrecy (s.33).

#### ***Is there a central agency responsible for coordination/training/advice, etc?***

No.

#### ***Is there an agency that determines whether a disclosure is a public interest disclosure or not?***

No.

## **NEW SOUTH WALES**

### **Title      *Protected Disclosures Act 1994***

#### ***What is the level of detail in Act?***

The Act contains a moderate level of detail relative to other whistleblower legislation in Australia.

#### ***What is the scope of the conduct that can be reported?***

The Act covers maladministration (s.11), serious and substantial waste of public money (ss.12, 12A, 12B), police misconduct(s.12A), and corrupt conduct (ss.10, 12A).

#### ***Does the Act protect only public officials, or all persons or non public officials in certain circumstances?***

The protections of the Act only extended to public sector employees (s.8).

#### ***What are the reporting options under the Act***

Reporting options can be made reasonably broad (to an extent at the discretion of agencies).

Disclosures may be made to any government agency about the conduct of that agency or its staff, or about a matter conduct that the agency has a power or function to investigate (s.8).

Disclosures may also be made to the Ombudsman (s.11), Auditor General (s.12), the ICAC and PIC (s.10), or to the Department of Local Government about serious and substantial waste in local government (s.12B)

Disclosures may be made to MPs or journalists, but only in certain very limited circumstances

#### ***What protections are available under the Act?***

The identity of whistleblowers is to be kept confidential (s.22).

Detrimental action against a whistleblower is a criminal offence (s.20).

The Act protects whistleblowers from civil and criminal liability, including absolute privilege in defamation (s.21).

Disclosures made pursuant to the Act do not constitute a breach of confidence or secrecy (s.21).

There is **no** remedy in tort and **no** power to seek an order or injunction to require or restrain conduct.

#### ***Is there a central agency responsible for coordination/training/advise, etc?***

No.

#### ***Is there an agency that determines whether a disclosure is a public interest disclosure or not?***

No.

## **QUEENSLAND**

### **Title      *Whistleblowers Protection Act 1994***

#### ***What is the level of detail in Act?***

The Act contains the highest level of detail of any whistleblower legislation in Australia.

#### ***What is the scope of the conduct that can be reported?***

The Act covers, maladministration (s.16), official misconduct/corrupt conduct (s.15) waste or improper management of public funds (s.17), danger to public health and safety(s.18), danger to the health or safety of a person with a disability (s.19), and environment damage (ss.18,19).

The Act covers disclosures made about certain conduct of private citizens (ss.17-19).

Does the Act protect only public officials, or all persons or non public officials in certain circumstances?

The Act protects public sector employees who disclose official misconduct or maladministration, and any person who discloses risk relating to the environment, or the health and safety of a person with a disability or alleges that a reprisal has been taken against them for making public interest disclosure (Pt 3).

#### ***What are the reporting options under the Act?***

Reporting options are broad.

Disclosures may be made to any government agency about the conduct of that agency or its staff, or about a matter or conduct that the agency has a power or function to investigate (ss.26 & 27).

Disclosures may also be made to the Ombudsman, Auditor General, and Crime and Misconduct Commission (s.25).

#### ***What protections are available under the Act?***

The identity of whistleblowers is to be kept confidential (s.55).

The Act requires obligation agencies/officials to establish reasonable procedures to protect whistleblowers (s.38).

Reprisal action against whistleblowers is a criminal offence (s.42).

A person who is affected by a reprisal may seek damages in tort (s.43).

The Act provides for relocation of public sector employees who made disclosures (s.46).

Applications can be made for injunctions or orders to remedy actions (ss.47-49).

The Act protects whistleblowers from civil and criminal liability (s.39(1)).

Disclosures made pursuant to the Act do not constitute a breach of confidence or secrecy (s.39(2)).

#### ***Is there is a central agency responsible for coordination/training/advise, etc?***

No.

#### ***Is there is an agency that determines whether a disclosure is a public interest disclosure or not?***

No.



## **SOUTH AUSTRALIA**

**Title      *Whistleblowers Protection Act 1993***

### ***What is the level of detail in Act?***

The Act contains the least level of detail of any whistleblower legislation in Australia.

### ***What is the scope of the conduct that can be reported?***

The Act covers, maladministration, irregular or unauthorised use of public money, substantial mismanagement of public resources, illegal activity, substantial risk to public health and safety or the environment (s.4).

The Act covers disclosures made about conduct by private citizens (s.4).

### ***Does the Act protect only public officials, or all persons or non public officials in certain circumstances?***

Any person.

### ***What are the reporting options under the Act?***

Reporting options are broad.

Disclosures may be made to the agency concerned or to an agency with power or function to investigate (s.3).

### ***What protections are available under the Act?***

The identity of whistleblowers is to be kept confidential (s.7).

A person who is affected by the detrimental action/reprisal may seek damages in tort, or make a complaint about victimisation (s.9).

The Act protects whistleblowers from civil and criminal liability (s.5(1)).

### ***Is there is a central agency responsible for coordination/training/advise, etc?***

No.

### ***Is there is an agency that determines whether a disclosure is a public interest disclosure or not?***

No.

## **TASMANIA**

### **Title      *Public Interest Disclosures Act 2002***

#### ***What is the level of detail in Act?***

The Act contains a high level of detail relative to other whistleblowing legislation in Australia.

#### ***What is the scope of the conduct that can be reported?***

The Act covers improper conduct, substantial mismanagement of public resources, corrupt conduct, substantial risk to public health and safety, or to the environment (s.3).

There is a very high threshold test of dismissal or criminality for alleged improper conduct to be covered by the Act (s.3).

#### ***Does the Act protect only public officials, or all persons or non public officials in certain circumstances?***

The protections of the Act cover public officials and government contractors (s.6).

What are the reporting options under the Act?

Reporting options are broad.

Disclosures may be made to the agency concerned, the Ombudsman, the Commissioner of Police and/or the State Service Commissioner (s.7).

#### ***What protections are available under the Act?***

The identity of whistleblower is to be kept confidential (s.23).

The Act requires agencies/officials to establish procedures to protect whistleblowers (ss. 38(1)(c)(iii), 60).

Detrimental action/reprisal against whistleblowers is a criminal offence (s.19).

A person who is affected by the detrimental action/reprisal may seek damages (s.20).

Applications can be made for injunctions or orders to remedy actions (ss.21, 22).

The Act protects whistleblowers from civil and criminal liability (s.16).

Disclosures made pursuant to the Act do not constitute a breach of confidence or secrecy (s.17).

#### ***Is there a central agency responsible for coordination/training/advise, etc?***

The Ombudsman.

#### ***Is there an agency that determines whether a disclosure is a public interest disclosure or not?***

The receiving agency and the Ombudsman.

## **VICTORIA**

### **Title      *Whistleblowers Protection Act 2001***

#### ***What is the level of detail in Act?***

The Act contains a high level of detail relative to other whistleblowing legislation in Australia.

#### ***What is the scope of the conduct that can be reported?***

The Act covers improper conduct, substantial mismanagement of public resources, corrupt conduct, substantial risk to public health and substantial risk to the environment damage (s.3).

Disclosures may be made about alleged improper conduct by private citizens (s.5).

There is a very high threshold test of dismissal or criminality for alleged improper conduct to be covered by the Act (s.3).

#### ***Does the Act protect only public officials, or all persons or non public officials in certain circumstances***

Any person.

#### ***What are the reporting options under the Act?***

Reporting options are broad.

Disclosures may be made to the agency concerned or to the Ombudsman, Deputy Ombudsman and/or the Chief, Commissioner of Police (s.6).

#### ***What protections are available under the Act?***

The identity of whistleblowers is to be kept confidential (s.22).

The Act requires agencies/officials to establish procedures to protect whistleblowers (s.68(1)(c)).

Detrimental action/reprisal against a whistleblower is a criminal offence (s.18).

A person who is affected by the detrimental action/reprisal may seek damages (s.19).

Applications can be made for injunction or orders to remedy actions (ss.20, 21).

The Act protects whistleblowers from civil and criminal liability (s.14), including absolute privilege in defamation (s.16).

Disclosures made pursuant to the Act do not constitute a breach of confidence or secrecy (s.15).

#### ***Is there a central agency responsible for coordination/training/advise, etc?***

The Ombudsman.

#### ***Is there an agency that determines whether a disclosure is a public interest disclosure or not?***

The receiving agency and/or the Ombudsman.

## **WESTERN AUSTRALIA**

### **Title      *Public Interest Disclosure Act 2003***

#### ***What is the level of detail in Act?***

The Act contains a moderate level of detail relative to other whistleblower legislation in Australia.

#### ***What is the scope of the conduct that can be reported?***

The Act covers improper conduct, matters of administration substantial unauthorised or irregular use of, or substantial mismanagement of public resources, illegal activity (s.3), injury to public health or safety, or harm to the environment (s.3).

#### ***Does the Act protect only public officials, or all persons or non public officials in certain circumstances?***

Any person (s.5(1)).

#### ***What are the reporting options under the Act?***

Reporting options are broad.

Disclosures may be made to the agency concerned, to the Ombudsman (s.5), Auditor General (s.5), Anti-Corruption Commission, Commissioner of Police and/or Chief Justice (s.5(2)).

#### ***What protections are available under the Act?***

The identity of whistleblowers is to be kept confidential (s.16).

The Act requires the principal executive officer of a public authority to establish procedures to protect whistleblowers (s.23(1)(e)).

The Act requires the principal executive officer of a public authority to provide protection from detrimental action or the threat of detrimental action against whistleblowers.

Detrimental action against a whistleblower is a criminal offence (s.14).

A person affected by detrimental action may seek damages in tort (s.15).

The Act protects whistleblowers from civil and criminal liability (s.13) .

Disclosures made pursuant to the Act do not constitute a breach of confidence or secrecy (s.13).

#### ***Is there a central agency responsible for coordination/training/advise, etc?***

The Public Sector Standards Commissioner.

#### ***Is there an agency that determines whether a disclosure is a public interest disclosure or not?***

No.

## Appendix G

### Key elements of whistleblower legislation

The following list of key elements and options for inclusion in whistleblower legislation does not purport to be a comprehensive list. Some elements may be implemented through other legislation, for example relating to powers of investigation for watchdog bodies, witness protection, etc.

Key Elements	Options
1. Scope of conduct covered by the Act	<p><b>Nature of conduct:</b></p> <ul style="list-style-type: none"> <li>• criminal/illegal activity</li> <li>• corrupt conduct</li> <li>• misconduct/improper conduct</li> <li>• maladministration</li> <li>• waste/mismanagement of public resources</li> <li>• public health and safety issues</li> <li>• environmental damage</li> </ul> <p><b>Responsibility for conduct:</b></p> <ul style="list-style-type: none"> <li>• public sector: <ul style="list-style-type: none"> <li>state/national</li> <li>local/provincial</li> <li>legislative</li> <li>judicial</li> </ul> </li> <li>• private sector: <ul style="list-style-type: none"> <li>government contractors</li> <li>corporations</li> <li>any person or body</li> </ul> </li> </ul>
2. Potential whistleblowers (ie, persons who may make disclosures and be protected under the legislation)	<p>Public officials generally</p> <p>Employees of the public sector agency concerned</p> <p>Government contractors</p> <p>Private citizens</p> <p>Legal representatives</p> <p>Anonymous disclosures</p> <p>Voluntary or mandatory reporting</p>

Key Elements	Options
3. Reporting options	<p>Internal reporting options:</p> <ul style="list-style-type: none"> <li>• CEOs</li> <li>• nominated disclosure officers</li> <li>• supervisors and managers generally</li> <li>• the organisation concerned</li> <li>• the employing organisation (about another organisation)</li> </ul> <p>External reporting options:</p> <ul style="list-style-type: none"> <li>• ombudsman or equivalent</li> <li>• public sector standards body</li> <li>• auditor general or equivalent</li> <li>• any anti corruption body</li> <li>• police</li> <li>• government ministers</li> <li>• members of the legislature [possibly subject to limitations or pre-conditions]</li> <li>• journalists [possibly subject to limitations or pre-conditions]</li> <li>• other relevant agency</li> </ul>
4. Internal reporting systems	<p>Mandatory adoption and implementation; or Discretionary adoption and implementation</p>
5. Threshold tests for protection	<p><b>Procedural:</b></p> <ul style="list-style-type: none"> <li>• written and/or oral disclosure</li> <li>• made to proper/specified person, position or organisation</li> <li>• voluntary or mandatory reporting</li> </ul> <p><b>Factual:</b></p> <ul style="list-style-type: none"> <li>• made in good faith/with reasonable belief in truth</li> <li>• suspicion on reasonable grounds of the existence of conduct alleged; or</li> <li>• disclosure shows or tends to show the conduct alleged</li> </ul> <p><b>Seriousness:</b></p> <ul style="list-style-type: none"> <li>• misconduct/maladministration/waste generally</li> <li>• serious misconduct/maladministration/waste</li> <li>• public interest</li> <li>• warranting disciplinary action/dismissal/criminal charge [a high threshold if the sole test]</li> <li>• corrupt conduct/illegality [a high threshold if the sole test]</li> </ul>

Key Elements	Options
6. Circumstances when disclosures are not protected	<p><b>Motivation:</b></p> <ul style="list-style-type: none"> <li>• disclosure known to be false/made in bad faith</li> </ul> <p><i>[NB – As a general principle, the content of the disclosure is what is important, not the motivation of the whistleblower]</i></p> <p>Sanctions for false or misleading disclosures</p> <p><b>Conduct:</b></p> <ul style="list-style-type: none"> <li>• whistleblower fails to assist investigation</li> <li>• whistleblower makes further unauthorised disclosure</li> </ul>
7. Obligations on whistleblowers	<p>To maintain confidentiality</p> <p>To assist/cooperate with investigators</p>
8. Obligations on persons/ organisations that receive disclosures	<p>Adopt and implement an internal reporting system</p> <p><b>Confidentiality (where possible, practical, appropriate, etc) for:</b></p> <ul style="list-style-type: none"> <li>• whistleblowers</li> <li>• subjects of disclosure</li> </ul> <p>Adopt and implement procedures for the protection of whistleblowers</p> <p>Protect whistleblowers</p> <p><b>Implement sanctions for detrimental/reprisal action, eg:</b></p> <ul style="list-style-type: none"> <li>• disciplinary action</li> <li>• dismissal</li> <li>• criminal charges</li> <li>• injunctions or orders to restrain conduct</li> </ul> <p><b>Deal with disclosures:</b></p> <ul style="list-style-type: none"> <li>• adopt and implement procedures for investigating disclosures</li> <li>• investigate disclosures (with the necessary powers)</li> <li>• appoint or select investigators [to ensure impartial or independent investigation]</li> <li>• provide/ensure procedural fairness in the conduct of investigations</li> </ul> <p><b>Notify whistleblowers:</b></p> <ul style="list-style-type: none"> <li>• of receipt of disclosure</li> <li>• of action taken or proposed</li> <li>• of progress</li> <li>• of outcome of investigations</li> </ul> <p><b>Notify any central monitoring/coordinating agency:</b></p> <ul style="list-style-type: none"> <li>• of disclosures received each year</li> <li>• of outcomes of investigations</li> </ul> <p><b>Any other obligations for reporting of outcomes</b></p> <p>Timelines for action</p> <p>Periodically review how internal reporting systems are working.</p>

Key Elements	Options
<p>9. Coordinating/monitoring role</p>	<p>Establish a monitoring/coordinating body/role performed:</p> <ul style="list-style-type: none"> <li>• by a separate watchdog body established for the purpose</li> <li>• by an existing watchdog body, or</li> <li>• by a central government agency</li> </ul> <p>Functions and powers of any coordinating/monitoring body</p> <p>Reporting on the operation of the legislation</p>
<p>10. Determinative function as to whether a disclosure is protected under the legislation</p>	<p>By a court/tribunal</p> <p>By an ombudsman/auditor general/public sector standards agency or equivalent</p> <p>By the receiving agency or official:</p> <ul style="list-style-type: none"> <li>• generally</li> <li>• in specified circumstances</li> </ul> <p>By some other person or body</p>
<p>11. Protections for whistleblowers</p>	<p>Protections from exposure of identity:</p> <ul style="list-style-type: none"> <li>• confidentiality obligations (with listed exceptions) implemented by: <ul style="list-style-type: none"> <li>- discretionary guidelines</li> <li>- statutory obligations with or without a criminal offence for breach, and</li> </ul> </li> <li>• provisions for disclosures to be made anonymously</li> <li>• secrecy provisions/Freedom of Information exemptions</li> <li>• suppression orders in court proceedings</li> </ul> <p>Protections from detrimental/reprisal action:</p> <ul style="list-style-type: none"> <li>• obligation on employer/management/CEO to protect whistleblowers and investigate disclosures</li> <li>• complaints to external watchdog body about detrimental/reprisal action</li> <li>• sanctions for detrimental/reprisal action: <ul style="list-style-type: none"> <li>- disciplinary action, and</li> <li>- criminal charges [see 12 below]</li> </ul> </li> <li>• injunctions or orders to remedy or restrain a breach</li> <li>• relocation of whistleblowers within or between organisations</li> <li>• witness protection</li> </ul> <p>Protection from liability arising out of a disclosure:</p> <ul style="list-style-type: none"> <li>• from all criminal liability or any civil action, claim or demand, including protection against actions in defamation</li> <li>• from actions for breach confidence/secrecy</li> <li>• indemnifies from: <ul style="list-style-type: none"> <li>- prosecution, or</li> <li>- disciplinary action</li> </ul> </li> </ul> <p>Redress for detrimental/reprisal action:</p> <ul style="list-style-type: none"> <li>• damages for detrimental/reprisal action (eg, in tort); and/or</li> <li>• compensation from employer or government</li> </ul>



Key Elements	Options
<p>12. Criminal offence for detrimental/reprisal action</p>	<p>Onus of proof:</p> <ul style="list-style-type: none"> <li>• on prosecution, or</li> <li>• on defendant (ie, a reversed onus of proof)</li> </ul> <p>Evidentiary tests:</p> <ul style="list-style-type: none"> <li>• “<i>substantially in reprisal</i>” for the making of a disclosure; or</li> <li>• “<i>because</i>” a disclosure was made [ie, a “but for” test that would generally be very difficult to meet]</li> </ul> <p>Admissibility of evidence</p> <p>Time periods for commencement of proceedings/limitation periods</p> <p>Nomination of a person or a body responsible for prosecuting breaches, eg:</p> <ul style="list-style-type: none"> <li>• police/DPP</li> <li>• a watchdog body</li> <li>• the employing agency or its CEO</li> <li>• the whistleblower personally</li> </ul>
<p>13. Beneficial treatment of whistleblowers</p>	<p>Provision of beneficial treatment for whistleblowers is either:</p> <ul style="list-style-type: none"> <li>• prohibited, <b>or</b></li> <li>• authorised</li> </ul> <p>Nature and scope of the benefits/rewards that may be offered/ provided where beneficial treatment is authorised (eg, on substantiation of allegations, on conviction, etc)</p> <p>Timing of offer/provision of beneficial treatment:</p> <ul style="list-style-type: none"> <li>• on receipt of a disclosure [NB – beneficial treatment offered as inducement for the making of a disclosure, or provided automatically on receipt, are likely to prejudice the credibility of the whistleblower and their disclosure]</li> <li>• on conclusion of any investigation where the disclosure is substantiated</li> <li>• on conviction or imposition of a penalty</li> </ul>
<p>14. Referral of disclosures</p>	<p>When:</p> <ul style="list-style-type: none"> <li>• in what circumstances</li> <li>• at what stages in the process</li> </ul> <p>Where:</p> <ul style="list-style-type: none"> <li>• between agencies</li> <li>• to an external watchdog body</li> <li>• between external watchdog bodies</li> </ul>

Key Elements	Options
15. Records of disclosures (ie, statistics)	<p>Kept by receiving agency</p> <p>Reported in receiving agency annual report</p> <p>Reported to any monitoring/coordinating body</p> <p>Reported in any monitoring/coordinating body annual report on the implementation of the Act</p> <p>Secrecy provisions/Freedom of Information exemptions</p>

## Appendix H

### Comparison of whistleblower legislation options to equivalent provisions in Protected Disclosures Act

WHISTLEBLOWER LEGISLATION OPTIONS		
Key Elements	Options	Equivalent provisions in PD Act
1. Scope of conduct covered by the Act	<p>Nature of conduct:</p> <ul style="list-style-type: none"> <li>• criminal/illegal activity</li> <li>• corrupt conduct</li> <li>• misconduct/improper conduct</li> <li>• maladministration</li> <li>• waste/mismanagement of public resources</li> <li>• public health and safety issues</li> <li>• environmental damage</li> </ul> <p>Responsibility for conduct:</p> <ul style="list-style-type: none"> <li>• public sector: <ul style="list-style-type: none"> <li>state/national</li> <li>local/provincial</li> <li>legislative</li> <li>judicial</li> </ul> </li> <li>• private sector: <ul style="list-style-type: none"> <li>government contractors</li> <li>corporations</li> <li>any person or body</li> </ul> </li> </ul>	<p>-</p> <p>ss.4,7,10,12A,13,14</p> <p>-</p> <p>ss.4,7,11(2),13</p> <p>ss.7,12,12B</p> <p>-</p> <p>-</p> <p>s.4</p> <p>s.4</p> <p>s.4</p> <p>s.4</p> <p>-</p> <p>-</p> <p>-</p>
2. Potential whistleblowers (ie, persons who may make disclosures and be protected under the legislation)	<p>Public officials generally</p> <p>Employees of the public sector agency concerned</p> <p>Government contractors</p> <p>Private citizens</p> <p>Legal representatives</p> <p>Anonymous disclosures</p> <p>Voluntary or mandatory reporting</p>	<p>s.7,8</p> <p>ss.7,8,14</p> <p>-</p> <p>-</p> <p>-</p> <p>Assumed</p> <p>s.9</p>

Key Elements	Options	Equivalent provisions in PD Act
3. Reporting options	<p>Internal reporting options:</p> <ul style="list-style-type: none"> <li>• CEOs</li> <li>• nominated disclosure officers</li> <li>• supervisors and managers generally</li> <li>• the organisation concerned</li> <li>• the employing organisation (about another organisation)</li> </ul> <p>External reporting options:</p> <ul style="list-style-type: none"> <li>• ombudsman or equivalent</li> <li>• public sector standards body</li> <li>• auditor general or equivalent</li> <li>• any anti corruption body</li> <li>• police</li> <li>• government ministers</li> <li>• members of the legislature [possibly subject to limitations or pre-conditions]</li> <li>• journalists [possibly subject to limitations or pre-conditions]</li> <li>• other relevant agency</li> </ul>	<p>ss.8,14 ss.8,14 - - s.14</p> <p>s.11 - s.12 ss.10,12A - - s.19 s.19 s.12B</p>
4. Internal reporting systems	Mandatory adoption and implementation; or Discretionary adoption and implementation	- ss.8,14
5. Threshold tests for protection	<p><b>Procedural:</b></p> <ul style="list-style-type: none"> <li>• written and/or oral disclosure</li> <li>• made to proper/specified person, position or organisation</li> <li>• voluntary or mandatory reporting</li> </ul> <p><b>Factual:</b></p> <ul style="list-style-type: none"> <li>• made in good faith/with reasonable belief in truth</li> <li>• suspicion on reasonable grounds of the existence of conduct alleged; or</li> <li>• disclosure shows or tends to show the conduct alleged</li> </ul> <p><b>Seriousness:</b></p> <ul style="list-style-type: none"> <li>• misconduct/maladministration/waste generally</li> <li>• serious misconduct/ maladministration/waste</li> <li>• public interest</li> <li>• warranting disciplinary action/dismissal/criminal charge [a high threshold if the minimum test]</li> <li>• corrupt conduct/illegality [a high threshold if the minimum test]</li> </ul>	<p>ss.8,11-14, 19</p> <p>s.9</p> <p>s.19(4)</p> <p>-</p> <p>ss.10-14</p> <p>ss.8,11,13,14 ss.12.12B - -</p> <p>ss.8,10,12A,13,14</p>

Key Elements	Options	Equivalent provisions in PD Act
6. Circumstances when disclosures are not protected	<p><b>Motivation:</b></p> <ul style="list-style-type: none"> <li>disclosure known to be false/made in bad faith [NB – As a general principle, the content of the disclosure is what is important, not the motivation of the whistleblower]</li> </ul> <p>Sanctions for false or misleading disclosures</p> <p><b>Conduct:</b></p> <ul style="list-style-type: none"> <li>whistleblower fails to assist investigation</li> <li>whistleblower makes further unauthorised disclosure</li> </ul>	<p>-</p> <p>ss. 28,29</p> <p>-</p> <p>-</p>
7. Obligations on whistleblowers	<p>To maintain confidentiality</p> <p>To assist/cooperate with investigators</p>	<p>-</p> <p>-</p>
8. Obligations on persons/ organisations that receive disclosures	<p>Adopt and implement an internal reporting system</p> <p>Confidentiality (where possible, practical, appropriate, etc) for:</p> <ul style="list-style-type: none"> <li>whistleblowers</li> <li>subjects of disclosure</li> </ul> <p>Adopt and implement procedures for the protection of whistleblowers</p> <p><b>Protect whistleblowers</b></p> <p>Implement sanctions for detrimental/reprisal action, eg:</p> <ul style="list-style-type: none"> <li>disciplinary action</li> <li>dismissal</li> <li>criminal charges</li> <li>injunctions or orders to restrain conduct</li> </ul> <p><b>Dealing with disclosures:</b></p> <ul style="list-style-type: none"> <li>adopt and implement procedures for investigating disclosures</li> <li>investigate disclosures (with the necessary powers)</li> <li>appoint or select investigators [to ensure impartial or independent investigation]</li> <li>provide/ensure procedural fairness in the conduct of investigations</li> </ul> <p><b>Notify whistleblowers:</b></p> <ul style="list-style-type: none"> <li>of receipt of disclosure</li> <li>of action taken or proposed</li> <li>of progress</li> <li>of outcome of investigations</li> </ul> <p><b>Notify any central monitoring/coordinating agency:</b></p> <ul style="list-style-type: none"> <li>of disclosures received each year</li> <li>of outcomes of investigations</li> </ul> <p>Any other obligations for reporting of outcomes</p> <p>Timelines for action</p> <p>Periodically review how internal reporting systems are working.</p>	<p>-</p> <p>s.22</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>s.26</p> <p>-</p> <p>-</p> <p>-</p> <p>s. 27</p>

Key Elements	Options	Equivalent provisions in PD Act
9. Coordinating/monitoring role	<p>Establish a monitoring/coordinating body/role performed:</p> <ul style="list-style-type: none"> <li>• by a separate watchdog body established for the purpose</li> <li>• by an existing watchdog body, or</li> <li>• by a central government agency</li> </ul> <p>Functions and powers of any coordinating/monitoring body</p> <p>Reporting on the operation of the legislation</p>	<p>-</p> <p>-</p> <p>-</p> <p>-</p> <p>-</p>
10. Determinative function as to whether a disclosure is protected under the legislation	<p>By a court/tribunal</p> <p>By an ombudsman/auditor general/public sector standards agency or equivalent</p> <p>By the receiving agency or official:</p> <ul style="list-style-type: none"> <li>• generally</li> <li>• in specified circumstances</li> </ul> <p>By some other person or body</p>	<p>ss.20,21</p> <p>-</p> <p>-</p> <p>-*</p> <p>-</p>

\* Only in certain very limited circumstances set out in s.16.

## Appendix I

### Whistleblowing – Survey Of Australasian Ombudsman

#### 1. Numbers and types of disclosures

***Are any statistics available as to the number of disclosures made, pursuant to your whistleblower legislation in 2001-2002 and/or 2002-2003 by public officials and private citizens?***

*In Queensland 151 disclosures were made in 2001-2002. In Victoria a total of 95 public interest disclosures were received during 2002-2003.*

As the Western Australian Act only commenced on 1 July 2003 and the Tasmanian Act is yet to commence, no information is yet available from those States.

No other jurisdiction was able to provide these statistics as the information is not available. In those jurisdictions no central agency has the responsibility of collating and analysing data relating to public interest disclosures.

***Are any statistics available as to the broad subject matters of such disclosures?***

No jurisdiction was able to provide statistics as to the broad subject matters of disclosures as the information is not available.

***Are any statistics available as to the number of such disclosures made to your organisation in 2001-2002 and/or 2002-2003?***

Only the ACT, NSW and Queensland Ombudsman were able to provide this information. In the ACT, one public official and one private citizen made disclosures in 2001-2002 and no disclosures were made in 2002-2003. In NSW, 75 disclosures were made in 2001-2002 and 75 were made in 2002-2003. In Queensland an average of up to five public interest disclosures are made annually to the Ombudsman and 147 were made last year to the CMC.

As the Western Australian Act only commenced on 1 July 2003 and the Tasmanian Act is yet to commence, no information is yet available from those States.

No other jurisdiction was able to provide these statistics.

***What were the broad subject matters of such disclosures?***

In the ACT, NSW and Queensland the broad subject matter of disclosures to the Ombudsman was maladministration, which is only to be expected as this is the jurisdiction of those bodies.

## 2. Criminal action

### ***How many criminal actions have been instituted alleging detrimental action/reprisal?***

In NSW three criminal actions have been instituted alleging detrimental action/reprisal; in 1997, 2001-2002 and 2002-2003.

The NSW legislation also has been raised in various proceedings before the Industrial Relations Commission and Federal Court, in each case unsuccessfully.

The Ombudsman in each of the other jurisdictions was unaware of any criminal proceedings alleging detrimental action/reprisal

### ***If any such actions have been instituted, which person or body prosecuted the proceedings?***

Of the criminal proceedings instituted in NSW, one was prosecuted by the whistleblower and the other two by NSW Police (as the actions were against police officers)

### ***If any such actions have been completed, what were the outcomes?***

All of the proceedings in NSW were unsuccessful.

## 3. Civil actions

### ***How many civil actions have been instituted by whistleblowers seeking damages for detrimental action/reprisal?***

There is no provision for such proceedings in the NSW Act.

The Ombudsman in all other jurisdictions indicated they were unaware of any such civil actions having been instituted.

### ***If any such actions have been completed, what were the outcomes?***

N/A

## 4. Injunctions and orders

### ***How many proceedings have been commenced applying for an injunction or an order to remedy action?***

There is no provision for such proceedings in the NSW, NZ, SA or WA Acts.

The Ombudsman in all other jurisdictions indicated they were unaware of any such proceedings having been commenced.

### ***If any such actions have been completed, what were the outcomes?***

N/A

## 5. Relocation of employees

### ***How many public sector employees have been relocated using provisions in the ACT and Queensland Acts?***

The Acts in the ACT and Queensland provide for relocation of public sector employees who make disclosures. The Ombudsman for those States were unaware of any public sector employees having been relocated under those provisions. However, the Commonwealth Ombudsman has advised that in a recent matter an agency offered to move the discloser on request, but the discloser was not satisfied with the level of separation created.