

**NORTHERN TERRITORY DEPARTMENT OF  
JUSTICE (POLICY DIVISION)**

**WHISTLEBLOWERS PROTECTION  
LEGISLATION**

**DISCUSSION PAPER  
JUNE 2004**

This paper has been prepared for discussion purposes only.

Comments should be provided by:  
**Close of Business 30 August 2004** to:

The Director  
Policy Division  
Department of Justice  
GPO BOX 1722

or  
45 Mitchell Street  
DARWIN NT 0801

or  
emailed to: [ceo\\_feedback.doj@nt.gov.au](mailto:ceo_feedback.doj@nt.gov.au)

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## **1. INTRODUCTION**

Whistleblower legislation provides a scheme that, in the public interest, gives special protection to disclosures about unlawful, negligent or improper public sector conduct or danger to public health or safety or the environment.

Whistleblower legislation has now been enacted in all Australian States and the ACT.

The purpose of whistleblowers protection legislation is to:

- facilitate the making and the investigation of public interest disclosure complaints;
- to establish appropriate and effective protection for persons making public interest disclosures; and
- to accommodate any necessary protection for those against whom allegations are made.

## **2. PURPOSE OF PAPER**

This paper sets out:

- an overview of Australasian whistleblower legislation;
- core objects of whistleblower legislation;
- key elements of whistleblower legislation; and
- issues for consideration.

The paper invites comments and suggestions as to the most appropriate whistleblower scheme for the Northern Territory.

## **3. BACKGROUND**

One of the Government's election commitments for Good Government was to introduce whistleblowers legislation *"to protect those who reveal Government and public sector mismanagement and corruption."*

On 18 October 2002, the Northern Territory Law Reform Committee ("NTLRC") was requested to inquire into and report on:

- (a) an analysis of the current interstate Whistleblower's legislation and its effectiveness in revealing corruption or creating a more ethical working culture; and
- (b) recommendations for the most appropriate model of legislation available for the Northern Territory to follow.

On 5 March 2003, the NTLRC reported that:

*“Generally the Victorian and Tasmanian Acts would be a better model for the NT for these reasons:*

- (a) they provide a complete statutory scheme dealing with the processes for receiving processing and taking action, to disclosure;*
- (b) it is noteworthy that, with the later Acts, the responsibility for dealing with applications falls more frequently on the Ombudsman (e.g. particularly Tasmania and Victoria), the observable trend being to locate the responsibility for overseeing the operation of the statutory scheme with one independent statutory entity; that entity having corresponding jurisdiction and expertise, particularly in the investigation process, and capable of developing guidelines and procedures for agencies;*
- (c) the later Acts also specify the need for the establishment of good internal complaints mechanisms balancing the need for Agencies to handle such issues appropriately with external oversight and where appropriate independent investigation;*
- (d) the Victorian Act appears to have absorbed most usefully the more relevant parts of the earlier legislation of other States;*
- (e) if the NT adopted generally the scheme of the Victorian Act and generally the expressions used in the Victorian Act, then together with the Tasmanian Act which is in generally similar to the Victorian Act, the NT would have the advantage of a broadly similar body of law in three jurisdictions and the benefit of decisions of the Victorian and Tasmanian Courts toward interpretation of the statutory terms;*
- (f) the Victorian and Tasmanian Acts also usefully cover all aspects of improper conduct, including corrupt conduct, and operate in an environment similar to that of the NT where there are no specialist bodies established to deal with particular types of conduct, such as corrupt conduct (i.e. The Crime and Misconduct Commission in Queensland, the Independent Commission Against Corruption and Police Integrity Commission in NSW and the Anti-Corruption Commission in WA).*

*We do, however, repeat that the NT Act should go beyond the confines of the Victorian and Tasmanian Acts in extending the right of application to “any persons”.*

The recommendation by the NTLRC that the Victorian model be adopted as a framework for the Northern Territory legislation is supported from other sources. For example, in a recent article published in the *‘Australian Institute of Administrative Law Forum*<sup>1</sup> it was stated as follows:

*“The Victorian legislation differs from the legislation in the other four jurisdictions in the primacy which it gives to the Ombudsman as complaint investigator, and the level of detail it prescribes about the conduct of investigations...None of the other four states contain any detail about how investigations are to be conducted, or provide for the monitoring of investigations. The Victorian legislation is unique in this regard, and in its provision for the Ombudsman to set standards for government departments and agencies to adopt in their internal dealing with complaints made by whistleblowers. It represents a model which could usefully be adopted in other jurisdictions considering amendment to their legislation.”*

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<sup>1</sup> *‘Who Guards the Guardians? Recent Developments Concerning the Jurisdiction and Accountability of Ombudsmen*, Katrein Del Villar, AIAL Forum No. 36, March 2003.

#### **4. AUSTRALIAN WHISTLEBLOWER LEGISLATION**

Specific whistleblower legislation has been enacted in all States and the Australian Capital Territory.

The first whistleblower protection legislation was enacted in South Australia in 1993, the *Whistleblowers Protection Act*, followed in 1994 by the Queensland *Whistleblowers Protection Act*, the ACT *Public Interest Disclosure Act* in 1994 and NSW *Protected Disclosures Act* in 1994. Victoria enacted the *Whistleblowers Protection Act* in 2001, followed by the Tasmanian *Public Interest Disclosures Act* in 2002 and the WA *Public Interest Disclosure Act* in 2003.

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

For example, ACT, Queensland and Tasmania only allow for disclosures to be made by public officials (Queensland allows for any person to make disclosures in relation to substantial dangers to health and safety or the environment, and Tasmania allows government contractors to make disclosures about Public Bodies. Others allow disclosures to be made by any person, in the case of NSW, a “natural person”. Some legislation allows for protection in relation to disclosures about judicial officers and offices, authorities and corporations established under an Act for public or government purposes, courts and tribunals and universities (eg Qld) others specifically exclude courts and tribunals and judicial officers (eg Tasmania).

The scope of available reporting options varies widely as does the criminal and non-criminal protections that are available. For example, in NSW disclosures can be made to the Auditor-General, the Independent Commission Against Corruption, the Ombudsman, the Police Integrity Commission, the CEO of the Department of Local Government, to the relevant public authority, to Parliament or to a journalist; whereas in Qld disclosures can be made to the relevant public sector entity to which the disclosure relates, and in Victoria and Tasmania they are made generally to the Ombudsman, and to the relevant public body, Speaker of the House of Assembly or President of the Legislative Council if relating to members of those bodies and to the Commissioner of police, if about a member of the police force, and to the Ombudsman if relating to a councillor the Commissioner of Police.

A detailed comparison of aspects of the interstate legislation is contained at Attachment “A”.

##### **4.1 Core Objectives of Whistleblower Legislation.**

The core objectives of whistleblower legislation are:

1. protection from detrimental action resulting from the making of a public interest disclosure;
2. ensuring that appropriate action will be taken by the recipient of the disclosure (ie that the disclosure will serve some good purpose); and
3. awareness of the whistleblower protection scheme and how to use it (facilitating the making of disclosures).

## **4.2 Key Elements of Whistleblower Legislation.**

The key aspects for consideration are:

- scope of persons protected;
- scope of conduct covered by the Act;
- scope of reporting options;
- scope of criminal protections; and
- scope of non-criminal protections.

Options regarding the key elements of whistleblower legislation are contained in Attachment "E".

## **4.3 Criticisms of Existing Legislation.**

Some of the shortcomings of existing whistleblower protection Acts are that:

- they do not create an independent whistleblower authority to receive, investigate and take action in relation to disclosures;
- they do not extend to the private sector;
- (except for NSW which is limited) they do not give protection to disclosures made to the media;
- some do not allow disclosures to be made in relation to members of Parliament;
- they do not offer appropriate services to whistleblowers eg. counselling, administrative compensation, feedback to whistleblowers about their disclosure, right to relocation.

Attachment "B" sets out general information in relation to each legislative scheme, Attachment "C" sets out what services are provided for whistleblowers in each jurisdiction and Attachment "D" sets out the types of protection afforded by each legislative scheme.

## **4.4 Proposed Model for the Northern Territory.**

As recommended by the NTLRC, it is proposed to adopt generally the Victorian *Whistleblower Protection Act* and the expressions used in it. A draft Discussion Bill will be prepared using that framework because, as stated by the NTLRC, it covers all aspects of improper conduct, including corrupt conduct, and operates in an environment similar to that of the NT. It provides a complete statutory scheme dealing with the processes for receiving, processing and taking action to disclosure. However, it is also accepted that while the Victorian Act has overcome many of the deficiencies of the earlier legislation, some aspects of it will not be appropriate for the Northern Territory to adopt. One of the key elements of the legislation which the NTLRC did not specifically consider is "who can you make a disclosure about?" There is little consistency in the existing schemes (see Attachment A) and the protections offered by the legislation can be as wide or as narrow as is considered appropriate for the Northern Territory. This will be a matter for comment and consideration.

Comment and suggestions are sought on the issues raised in this paper, and generally, regarding whistleblower protection schemes, to ensure that the Northern

Territory legislation will reflect best practice and be appropriately tailored to the needs of this jurisdiction. The Department will carefully consider all written submissions in developing the draft Discussion Bill, which will also be released for comment before final preparation and presentation of the Bill to Cabinet.

## **5. ISSUES FOR CONSIDERATION**

### **5.1 Effect of Proposed legislation Upon Public Sector Agencies.**

Agencies are requested to comment on the proposed model with particular reference to its effect upon the operations of the agency. The proposed model would:

- Require that each public sector agency establish internal procedures whereby employees and the public may make a public interest disclosure which relates to an employee or the conduct of that agency or which relates to a matter which that agency has the responsibility to investigate;
- Require that each public sector agency be responsible for providing protection against reprisals for employees who make disclosures under the established procedures;
- Require that each public sector agency publish and make readily available its internal reporting procedures for public interest disclosures;
- Establish an advice unit to provide advice to any person about the categories of disclosures, to whom they may be made and the protection and remedies available;
- Require the Ombudsman to monitor, assist and offer guidance to public sector agencies in the formulation of procedures;
- Enable each public sector agency to be a proper authority to receive a public interest disclosure regarding its employees, its own conduct or a matter for which it has regulatory or investigatory powers;
- Empower the ombudsman to be a proper authority to receive, and investigate if necessary, a public interest disclosure;
- Require that a public sector agency receiving a public interest disclosure immediately notify the Ombudsman that it has received such a disclosure, its nature and the steps it intends to take in relation to it.

Public bodies will be required to have procedures in place as soon as practicable after the commencement of the legislation, which is proposed to be introduced in the October 2004 Sittings of the Legislative Assembly.

Under the proposed model, the Ombudsman will have a monitoring role in relation to disclosures and has the function of preparing and publishing guidelines for procedures to be followed by public bodies in relation to disclosures and investigations.

### **5.2 Title of Legislation.**

Although a minor issue, it is worth noting that the interstate jurisdictions have called their legislation something along the lines of 'Whistleblowers Protection Act' or 'Public Interest Disclosure Act.'

It is arguable that the term 'whistleblower' has a negative implication and that naming the legislation 'Public Disclosure Act' could be argued to be more consistent with the

overall objective of the Act and carries the stronger message that protection is given to disclosures that are made for the public good.

***What is the most suitable title for the legislation?***

### **5.3 What is a Public Interest Disclosure?**

What information engages the public interest sufficiently to warrant protection? Legislation about public interest disclosures will need to define a “public interest disclosure” and set the parameters of the protection it will provide.

For the purposes of this paper, a disclosure would be about particular actions, or inactions, of a public sector agency or a public officer of the Northern Territory Government.

Therefore, if a person wished to make a disclosure about issues of waste or mismanagement in private companies, this model would not provide protection for that individual, unless the issues implicated a Northern Territory Government agency or official as well.

The categories of public interest disclosure in the Victorian legislation provide that public interest disclosures can be made about public officers or public bodies in relation to:

- improper conduct; or
- detrimental action.

**Improper conduct** is defined to mean –

- (a) *corrupt conduct;*
- (b) *substantial mismanagement of public resources;*
- (c) *conduct involving substantial risk to public health or safety;*
- (d) *conduct involving substantial risk to the environment – that would, if proved, constitute –*
  - (i) *a criminal offence; or*
  - (ii) *reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public officer who was, or is, engaged in that conduct.*

**Corrupt conduct** is defined to mean –

- (a) *conduct of person (whether or not a public officer) that adversely affects, or could adversely affect, either directly or indirectly, the honest performance of a public officer's or public body's functions; or*  
*conduct of a public officer that amounts to the performance of any of his or her functions as a public officer dishonestly or with inappropriate partiality;*
- (b) *conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust;*
- (c) *conduct of a public officer, a former public officer or a public body that amounts to misuse of information or material acquired in the course of the performance of their functions as such (whether for the benefit of that person or body or otherwise); or*
- (d) *a conspiracy or attempt to engage in conduct referred to in paragraphs (a) to (d).*

**Detrimental action** is defined to mean –

- (a) *action causing injury, loss or damage;*

- (b) *intimidation or harassment; and*
- (c) *discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action.*

***Are the Victorian provisions relating to categories of public disclosures appropriate?***

***Are there any particular areas of Government activity that require different or special treatment in a whistleblower protection scheme?***

***Is the threshold test for "improper conduct" appropriate – (the model requires that the conduct would, if proved, constitute a criminal offence or reasonable grounds for dismissal.)***

#### **5.4 Scope – Who can you make a public interest disclosure about?**

The Victorian legislation provides for disclosures to be made about "public officers" or "public bodies". This gives the legislation wide scope concerning disclosures, as "public bodies" include Government Departments, bodies established for public purposes, statutory boards, commissions and tribunals, a body supported directly or indirectly by Government funds, Government owned corporations, Universities, municipal councils and community government councils.

"Public officers" include members of the Legislative Assembly, local and community government councillors, employees of Government Departments, officers or employees of municipal and community government councils, statutory appointment holders, officers or employees of the Universities and contractors in limited circumstances.

For reasons of public policy, such as independence of Office and accountability to Parliament and to be consistent with the operation of the Ombudsman legislation, the Victorian and Tasmanian legislation expressly prevent disclosures being made about judges, magistrates, the DPP, the Auditor-General, the Ombudsman, the Electoral Commissioner and judicial employees. The SA and QLD legislation allows disclosures to be made about judicial officers, but only to the Chief Judicial Officer. Northern Territory legislation would be drafted to be consistent with exemptions contained in the *Ombudsman (Northern Territory) Act*.

***Is the proposed application of the legislation to 'public bodies' and 'public officers' sufficient (i.e. too wide or too narrow)?***

***Who should be excluded from disclosure?***

*eg. Should it be possible for disclosures to be made about the judiciary?*

*Should it be possible for disclosures to be made about entities that contract with the Northern Territory Government (as is the case in ACT and WA)?*

#### **5.5 Scope – Who can make a public interest disclosure and be protected?**

The NTLRC while recommending that the Northern Territory adopt the Victorian legislative model, also recommended that *"the class of person to be protected should*

*not be in the category of 'public officer' as in the Tasmanian legislation or 'natural persons' as in the Victorian legislation but, rather in the category of 'any person' as in the South Australian legislation."* This terminology is also used in the most recently enacted whistleblower legislation, the WA *Public Interest Disclosure Act 2002*, which received assent in May 2003.

While the most likely operation for a whistleblower protection scheme will be in employment, the operation of any scheme should not be unduly confined. For instance an former employee may be provided with sufficient incentive to disclose improper conduct by a former employer if protection is available from the threat of legal action for defamation, or the threat of prosecution for breach of statutory obligations of secrecy. An independent contractor may also become aware of illegal conduct and be prepared to disclose it if protection is available.

- 1. Should protection be available only to employees and former employees of agencies or public bodies included in the scope of the legislation, or should any person (which under NT legislation would include a corporation) be protected?**
- 2. Should protection only be available to individuals who disclose government wrongdoing when the disclosure is in the public interest? (i.e. what if the disclosure is not in the public interest but the whistleblower made an honest and in good faith disclosure)?**
- 3. Should the protection be extended to media whistleblowers?**

## **5.6 To whom does a person report a public interest disclosure, and what obligations should be imposed upon the body receiving the disclosure?**

Under the Victorian legislation a public interest disclosure may generally be made to:

- (i) the relevant public body that it relates to – thus resulting in a purely internal investigation; or
- (ii) the Ombudsman.

There are also specific rules. For example, where a disclosure relates to a member of Parliament, the disclosure must be made to the President of the Legislative Council or the Speaker of the Legislative Assembly.

The Ombudsman has an oversight/monitoring role in relation to all disclosures that are made and can review decisions made by an agency not to investigate a disclosure and can also take over investigations being conducted by a public body. The Ombudsman also has the function of preparing and publishing guidelines for the procedures to be followed by the public bodies in relation to disclosures and investigations.

In any event where the disclosure is made to a public body or to the Ombudsman, a decision must be made when the disclosure is received as to whether the disclosure is a public interest disclosure.

A disclosure is a 'public interest disclosure' only if it is determined that the disclosure **shows or tends to show** that the public officer or public body to whom the disclosure relates – has engaged, is engaging or proposed to engage in improper conduct or has taken, is taking or is proposing to take detrimental action.

If it is determined to be a public interest disclosure, the legislation provides that the disclosure must be investigated (unless it is frivolous or vexatious) and appropriate action taken. The whistleblower must be informed of the results of the investigation

and of the relevant action taken. Where, following an investigation, the Ombudsman considers that the response to recommendations has been insufficient, he or she may cause a report to be laid before Parliament on any matter to which the investigation report and recommendations or comments relate.

Both the Ombudsman and each public body are required to provide information in their annual reports with respect to their activities under the legislation.

There is no ability to obtain the protection of the legislation where a disclosure is made outside the framework of the legislation eg. the media.

- 1. Should it be necessary for an employee to first make a disclosure internally before making a disclosure to the Ombudsman? If so, are there any exceptions where internal reporting should not be required as a first step?**
- 2. Should all disclosures be made to the Ombudsman rather than having a choice to go to the Ombudsman or the relevant public body? Should whistleblower protection be offered to all individuals who legitimately disclose wrongdoing, irrespective of what body the disclosure is made to?**
- 3. Should protection for certain disclosures involving sensitive information only be given if the disclosure is made to a specified body capable of respecting the sensitivity of the information?**
- 4. Is it necessary that when a disclosure is made, the relevant receiving body must determine if it is a 'public interest disclosure' (i.e. it shows or tends to show that the public officer or public body to whom the disclosure relates – has engaged, is engaging or proposed to engage in improper conduct or has taken, is taking or is proposing to take detrimental action) or should there be an obligation to investigate the disclosure immediately?**
- 5. What should the timeframes be in determining whether a disclosure is a public interest disclosure? (it is 45 days from receipt of disclosure under Victorian legislation). Should there be a specific time limit within which investigations and findings should be made about public interest disclosures?**
- 6. Should the Ombudsman have the power to compel a public body to take actions to rectify the subject of a public interest disclosure or make recommendations?**
- 7. Should there be an appeal process from decisions by the independent authority not to investigate or that a disclosure is not a public interest disclosure?**
- 8. Should documents in the possession of a public body which reveal information about a disclosure be exempt from the Information Act? If so, for how long should the documents be exempt?**
- 9. Is the Office of the Ombudsman the appropriate independent authority to have disclosure reception, investigatory and educative powers under the Act?**

## 5.7 Disclosure Characteristics.

The Victorian legislation provides protection for a whistleblower where he or she makes a disclosure **believing on reasonable grounds** that a public officer or public body has engaged in improper conduct etc.

Other interstate jurisdictions also have a similar requirement in their legislation whereby the whistleblower only obtains protection from the legislation if he or she makes the disclosure in good faith or based on reasonable grounds.

It is arguable that if the legislation protects a person who makes a disclosure either in bad faith or based on unreasonable grounds it could lead to abuse which has the potential to harm otherwise innocent public officials.

1. ***Should protection be available where the employee reasonably believes in the accuracy of the allegations or (if a public interest requirement is adopted as is the case in the Victorian legislation) reasonably believes that the disclosure is in the public interest?***
2. ***Should there be any circumstances when truth of the allegation is a prerequisite to protection?***
3. ***Should employees who disclose government wrongdoing only receive protection if they are acting on a belief based on reasonable grounds, or good faith?***
4. ***Should protection be offered where good faith or 'belief on reasonable grounds' was not the sole motivation? (Such as is the case with police informants who may provide information out of malice, but are still given protection when public interest disclosures are made.)***

## 5.8 What protections and rights should the legislation contain?

The Victorian legislation contains the following rights and protections for a whistleblower:

- Reprisals against a whistleblower are prohibited (\$24,000 fine or maximum of 2 years imprisonment);
- Whistleblower is protected from civil and criminal actions (including disciplinary process);
- Whistleblower is protected from contravening secrecy provisions contained in legislation or under any agreement;
- Whistleblower is able to obtain an injunction to prevent or stop reprisals;
- Whistleblower has the defence of absolute privilege in any defamation action; and
- Whistleblower is entitled to damages if a person has taken a reprisal against him or her.

These legal protections and rights are much wider in comparison to the other interstate legislation, although it is noted that there is no statutory right to request relocation from an agency.

- 1. Are there any other protections or rights which can be provided to a whistleblower?**
- 2. Should a whistleblower have a right to request relocation from an agency in certain circumstances?**
- 3. Should there be a mechanism for appealing adverse decisions made by management in response to damaging disclosures?**
- 4. Should compensation and/or restoration of status/reputation be available to victimised whistleblowers?**
- 5. Should the act place a limit on the amount or resources that each party is allowed to commit to conflicts that follow a disclosure?**
- 6. Should the penalties for reprisal extend to an organisation?**

#### **5.9 Anonymous disclosures/retrospectivity/involuntary disclosures/time limits.**

- 1. Should persons who wish to disclose government wrongdoing be able to make such disclosures anonymously?**
- 2. Should it be possible to obtain the protection of the legislation where a disclosure is made involuntarily?**
- 3. Should the legislation apply retrospectively to an action of a public body or public officer?**
- 4. What time limits, if any, should be imposed in respect of making a disclosure in order to qualify an individual for protection?**
- 5. Should there be a statutory requirement for formal review of the workings of the legislation?**

#### **5.10 False Disclosures.**

“The Victorian legislation contains the offence of knowingly provide false information under this Act, intending that it be acted on as a disclosed matter.”.

The penalty under the Victorian legislation is \$24,000 or 2 years imprisonment or both.

It is proposed to provide a similar provision in the Northern Territory legislation.

***What form should such penalties take in the Northern Territory legislation (if or when enacted): for example, a criminal offence (if so fine or imprisonment or both? or, a disciplinary matter?***

## **6. COMMENTS**

Comments should be directed to:

The Director  
Policy Unit  
Department of Justice  
PO Box 1722,  
or  
45 Mitchell Street  
DARWIN NT 0801

**Comments should be provided by Close of Business 30 August 2004**

## ATTACHMENT A – COMPARISON OF INTERSTATE WHISTLEBLOWERS PROTECTION LEGISLATION

|  | VIC  | NSW  | TAS  | ACT   | QLD  | SA                            |
|--|--|--|--|---|--|-------------------------------|
| <b>Who can make a disclosure?</b>              | A natural person                               | A public official (ie. Public sector employees, employee of a Govt. owned corporation, any individual having public official functions). | Public Officers. <sup>2</sup><br><br>Contractors (persons who at any time have entered into a contract with a public body for the supply of goods or services to, or on behalf of, the public body). | Any person may make a public interest disclosure to a proper authority.                     | Public Officers. <sup>3</sup>                            | Any person.                   |
| <b>In relation to the conduct/ actions of.</b> | Public officers or public bodies. <sup>4</sup> | Public authorities, including local government authorities.  | Public Bodies <sup>5</sup>   | Public Officials, <sup>6</sup> former public officials or government agencies. <sup>7</sup> | Any public officer or public sector entity. <sup>8</sup> | Public Officers. <sup>9</sup> |

<sup>2</sup> S.3 *Public Interest Disclosures Act 2002* (Tas) defines 'public officer' to mean members of Parliament, Local Govt. councillors, member officer or employee of a public body, member of the governing body of a public body, employee of a council or the holder of an office established under an Act to which the right to appoint is vested in the Governor or a Minister.

<sup>3</sup> Schedule 6 *Whistleblowers Protection Act* (Qld) 1994 – defines 'public officer' as person who is an officer of a public sector entity (including a public sector corporation and a member to the Legislative Assembly).

<sup>4</sup> S.3 *Whistleblowers Protection Act 2001* (Vic) defines 'public bodies' to include Govt. Dept's, bodies established for a public purpose, bodies whose members are appointed by Govt. or the Governor, GCO's where majority of share held by the State, a body supporters directly or indirectly by Govt. finds, universities, CEO of a municipal council.. 'Public officers' defined to include members of Parliament, councillors, employee of public bodies of municipal councils, statutory appointment holders etc.

<sup>5</sup> S.3 *Public Interest Disclosures Act 2002* (Tas) defines 'public body' to mean an agency, general manager of a council, but only in relation to an employee of that council, a body established under an Act for a public purpose, a body whose members are appointed by the Government, a Government business enterprise and a state owned company.

<sup>6</sup> S.3 *Public Interest Disclosure Act 1994* (ACT) defines 'public official' to mean an officer or employee of a government agency, a person employed by or on behalf of ACT or in the service of an ACT authority or instrumentality whether under a contract of service.

<sup>7</sup> S.3 *Public Interest Disclosure Act 1994* (ACT) defines 'government agency' to mean an administrative unit, an ACT instrumentality or a statutory office holder and the staff required to assist the statutory office holder.

<sup>8</sup> Schedule 5 *Whistleblowers Protection Act* (Qld) 1994 – defines 'public sector entity' as a committee of the Legislative Assembly, the Parliamentary service, a court or tribunal, the administrative office of a court or tribunal, the executive Council, a department, a local government, a university, a commission authority officer corporation or instrumentality established under an Act, a GOC, a corporatised corporation, certain associations within the meaning of Education (General Provisions) Act eg. a parents and citizens association.

<sup>9</sup> S.4 *Whistleblowers Protection Act 1993* (SA) defines 'public officer' to mean a person appointed in public office by the Governor, a member of Parliament, a person employed in the Public

|                                       | VIC  | NSW  | TAS  | ACT  | QLD  | SA  |
|---------------------------------------|--|--|--|--|--|---|
|                                       |  |  |  | 'A person' (whether or not a public official) that adversely affects or could adversely affect either directly or indirectly the honest or impartial performance of official functions by a public official or government agency.  |  |   |
| <b>Disclosures can be made about?</b> | Improper conduct (corrupt conduct, mismanagement of public resources, conduct involving substantial risk to public health/safety or to the environment that would if proved be a criminal offence or grounds for dismissal the public officer engaged in that conduct).<br><br>Detrimental action (action causing injury/loss or | Corrupt conduct.<br><br>Maladministration – actions or inaction of a serious nature that is unlawful, unreasonable, unjust, improperly discriminatory or based wholly or partly on improper motives.<br><br>Substantial waste of public money. | Where a public officer or contractor believes on reasonable grounds that another public officer or a public body:<br><br>(a) has engaged, is engaging or proposes to engage in improper conduct <sup>10</sup> ;<br>(b) has taken, is taking or propose to take detrimental action. | Conduct of a public official, former public official or government agency:<br><br>- that amounts to the performance of any of his functions dishonestly or without partiality;<br>- that amounts to a breach of the public trust;<br>- that amounts to the misuse of information or material acquired in the course of performance of official | Maladministration. <sup>11</sup><br><br>Official misconduct.<br><br>Substantial waste of public funds.<br><br>Substantial and specific danger to public health or safety or the environment. | That an adult person is or has been involved in:<br><br>- an illegal activity;<br>- in an irregular and unauthorised use of public money;<br>- in substantial mismanagement of public resources; or<br>- in conduct that causes substantial risk to public health or safety, or to the environment. |

Service, a member of the police, any employee of the Crown, a member officer or employee of an instrumentality of the Crown, a member officer or employee of a local government body.

<sup>10</sup> S.3 *Public Interest Disclosures Act 2002* (Tas) defines 'improper conduct' to mean corrupt conduct, substantial mismanagement of public resources, conduct involving substantial risk to public health or safety, conduct involving substantial risk to the environment that would if proved constitute a criminal offence or reasonable grounds for dismissal of a public officer.

<sup>11</sup> Schedule 6 *Whistleblowers Protection Act* (Qld) 1994 – defines 'maladministration' as administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory taken for an improper purpose.

|  | VIC  | NSW   | TAS   | ACT  | QLD  | SA  |
|--|--|---|---|--|--|---|
|  | damage, intimidation/harassment, discrimination, disadvantage or adverse treatment).   |   |   | functions, provided that the relevant conduct could constitute a criminal offence, a disciplinary offence or reasonable grounds for dismissing a public official.  |  | That a public officer is guilty of maladministration. <sup>12</sup>   |
| <b>Who can disclosures be made to?</b> | Generally to Ombudsman <sup>13</sup><br><br>The relevant public body (if the disclosure relates to an employee/ officer of that public body).<br><br>Speaker of Legislative Assembly or President of Legislative Council – if disclosure relates to members of those bodies).<br><br>Ombudsman - if it | Disclosures can be made to an 'investigating authority' who are as follows:<br><br>- Auditor-General,<br>- Independent Commission Against Corruption<br>- Ombudsman<br>- Police Integrity Commission<br>- CEO of the Dept. of Local Govt.<br><br>Disclosures may also be made to the relevant public authority, to Parliament | Generally to Ombudsman <sup>14</sup><br><br>The relevant public body (if the disclosure relates to an employee/ officer of that public body).<br><br>Speaker of House of Assembly or President of Legislative Council – if disclosure relates to members of those bodies).<br><br>Ombudsman - if it relates to a councillor | Each government agency is a proper authority to receive a public interest disclosure where the disclosure relates to that particular agency. <sup>15</sup><br><br>The Ombudsman are also proper authorities to receive a public interest disclosure from any person. | To an appropriate entity that is a public sector entity. <sup>16</sup> (ie. to the relevant public sector entity to which the public interest disclosure relates). | Generally to a Minister, an appropriate authority or specifically :<br><br>- to the Police Complaints Authority if it relates to illegal activity of a police officer;<br>- to the Auditor General where it relates to public moneys;<br>- to the Commissioner for Public Employment or the Ombudsman |

<sup>12</sup> S.4 *Whistleblowers Protection Act 1993* (SA) defines 'maladministration' to include impropriety or negligence.

<sup>13</sup> Ss.6(7) and 7 *Whistleblowers Protection Act 2001* (Vic) - Disclosures can be made orally or in writing and can be anonymous.

<sup>14</sup> S.3 *Public Interest Disclosures Act 2002* (Tas) - Disclosures can be made orally or in writing and can be anonymous

<sup>15</sup> S.10 *Public Interest Disclosure Act 1994* (ACT) requires each government agency to establish procedures on the making of public interest disclosures, how they are to be dealt with, acting on public interest disclosures and on how person who make a public interest disclosure is to be protected.

<sup>16</sup> S 27 *Whistleblowers Protection Act* (Qld) 1994 – provides that a public interest disclosure may be made to an appropriate entity in any way including anonymously.

|                                      | VIC  | NSW   | TAS  | ACT  | QLD  | SA   |
|--------------------------------------|--|---|--|--|--|--|
|                                      | <p>relates to a councillor, Chief Commissioner of Police.</p> <p>If relates to a member of police – the Ombudsman or the Commissioner of Police.</p>   | <p>or to a journalist.</p> <p>The Act sets out provisions as to who disclosures should be made to in certain circumstances for eg. a disclosure about 'corrupt conduct' of a public official must be made to the Independent Commission Against Corruption.</p> | <p>or the Chief Commissioner of Police.</p> <p>If relates to a member of police – the Commissioner of Police.</p>  |  |  | <p>if it relates to a public service employee;</p> <ul style="list-style-type: none"> <li>- to the Chief Justice if it relates to a member of the judiciary;</li> <li>- to the relevant instrumentality, agency department etc. if the matter relates to that instrumentality, agency or department ;</li> <li>- if it relates to a local government body then to that local government body.</li> </ul> |
| <b>Receiving bodies obligations.</b> | <p>If disclosure made to Ombudsman – Ombudsman must determine if the disclosure is a 'public interest disclosure'<sup>17</sup></p> <p>If disclosure is to another body eg. a public body – that body must determine if the disclosure is a 'public interest disclosure.'</p> | <p>There are no provisions in the Act which spell out what steps or procedure must be followed by an investigating authority after it receives a disclosure ie. Investigation, interviews etc.</p>  | <p>There is an obligation on a proper authority to either investigate the public interest disclosure or refer it to a more appropriate proper authority (ie. another Department).</p> <p>When the investigation is complete, if it is revealed that a person has engaged, is engaging, or proposes</p> | <p>There is an obligation on a proper authority to either investigate the public interest disclosure or refer it to a more appropriate proper authority (ie. another Department).</p> <p>When the investigation is complete, if it is revealed that a person has engaged, is engaging, or proposes to engage, in</p> | <p>If asked by a person who has made a public interest disclosure – an appropriate entity must give reasonable information about action taken on the disclosure and the results.</p> <p>Although not set out in the Act, it is implied that the appropriate entity would carry out appropriate</p> | <p>To investigate the disclosure.</p> <p>To notify the person who made the disclosure of the outcome of the investigation.</p>   |

<sup>17</sup> In deciding if a disclosure is a 'Public interest disclosure' – **within 45 days** of receiving the disclosure, the relevant body must consider whether the disclosure shows or tends to show that the public officer to whom the disclosure relates – has engaged, is engaging or proposed to engage in improper conduct **or** has taken, is taking or is proposing to take detrimental action.

|   | VIC   | NSW  | TAS   | ACT   | QLD   | SA         |
|---|---|--|---|---|---|------------|
|   | <p>If the disclosure is investigated, the Ombudsman or public body must report back as to any action taken as a result of the investigation eg. the taking of all reasonable steps to prevent the conduct from re-occurring or the taking of action to remedy any harm or loss arising from the conduct.</p>                                  |  | <p>to engage, in disclosable conduct, public wastage, an unlawful reprisal or in conduct that amounts to a substantial and specific danger to the health or safety to the public – the proper authority must take appropriate action to ensure that the conduct does not re-occur and to discipline any person responsible.</p>   | <p>disclosable conduct, public wastage, an unlawful reprisal or in conduct that amounts to a substantial and specific danger to the health or safety to the public – the proper authority must take appropriate action to ensure that the conduct does not re-occur and to discipline any person responsible.</p> | <p>investigations as to the public interest disclosure.</p>   |            |
| <p><b>Is there an oversight mechanism of the way disclosures are handled?</b></p> | <p>Yes – the Ombudsman has a function to monitor investigations by public bodies and to review the implementation of procedures by public bodies.</p> <p>There is also a type of review mechanism in that a person may refer a disclosure made to a public or other body to the Ombudsman for his/her determination.</p> <p>The Ombudsman</p> | <p>No.</p> <p>However the Act provides for situations where certain disclosures must be made to particular bodies eg. disclosures about substantial waste of public money must be made to the Auditor General.</p> <p>There is also a mechanism in the Act which allows an investigating authority to refer a disclosure to another investigating authority where appropriate.</p> | <p>Yes – the Ombudsman has a function to monitor investigations by public bodies and to review the implementation of procedures by public bodies.</p> <p>There is also a type of review mechanism in that a person may refer a disclosure made to a public or other body to the Ombudsman for his/her determination.</p> <p>The Ombudsman also has a function under the Act to prepare and publish guidelines</p> | <p>No.</p> <p>Generally each proper authority handles its own investigations and takes the relevant action required.</p>  | <p>Not under the Act.</p> <p>The Criminal Justice Commission however has a role to investigate suspected official misconduct in Queensland. Accordingly official disclosures can be made to it.</p> | <p>No.</p> |

|                               | VIC  | NSW  | TAS  | ACT  | QLD   | SA  |
|-------------------------------|--|--|--|--|---|---|
|                               | also has a function under the Act to prepare and publish guidelines for the procedures to be followed by public bodies in relation to disclosures and investigations.  |  | for the procedures to be followed by public bodies in relation to disclosures and investigations.  |  |   |   |
| <b>Protective provisions.</b> | <p>The Act provides that:</p> <ul style="list-style-type: none"> <li>- A person making a disclosure is immune from civil or criminal liability or any liability by way of administrative process (including disciplinary action);</li> <li>- confidentiality provisions in an act or agreement do not apply in relation to a disclosure;</li> <li>- protection from defamation action;</li> <li>- protection from reprisals (criminal offence) and gives the disclosing party</li> </ul> | <p>The Act in Part 2, provides in the various sections that where a disclosure is made, it <b>must</b> show or tend to show for eg. corrupt conduct or substantial waste of money etc. in order to be protected by the Act.</p> <p>The protection provided by Part 3 of the Act includes:</p> <ul style="list-style-type: none"> <li>- protection against reprisals (ie criminal offence) and detrimental action (ie. action causing, comprising, involving injury, damage or loss, intimidation or harassment, discrimination, disadvantage or adverse treatment in relation to employment, dismissal from or prejudice in</li> </ul> | <p>The Act provides that:</p> <ul style="list-style-type: none"> <li>- A person making a disclosure is immune from civil or criminal liability or any liability by way of administrative process (including disciplinary action);</li> <li>- confidentiality provisions in an act or agreement do not apply in relation to a disclosure;</li> <li>- protection from defamation action;</li> <li>- protection from reprisals (criminal offence) and gives the disclosing party the right to claim damages or to apply for an injunction.</li> </ul> | <p>There is a power in the Act which permits a government agency to relocate a person who has made a public interest disclosure in certain circumstances eg. is a danger that the person will be the target of unlawful reprisal.</p> <p>A person who engages in unlawful reprisals is liable to damages.</p> <p>Injunctions can be applied for where a person is suffering from an unlawful reprisal.</p> <p>A person who makes a public interest disclosure is protected from liability and does not commit any offence or breach by breaching a duty of</p> | <p>Part 5 of the Act provides that a person who makes a disclosure is declared not to be liable, civilly, criminally or under an administrative process.</p> <p>Causing or attempting to cause detriment to a person because of a public interest disclosure is declared to be a reprisal and unlawful both under the civil law of tort and the criminal law.</p> <p>Under Part 5 – public sector entities must establish reasonable procedures to protect their officers from reprisals.</p> | <p>Causing detriment<sup>18</sup> to a person because of a public interest disclosure is declared to be victimisation and unlawful both under the civil law of tort and as it were victimisation under the Equal Opportunity Act.</p> |

<sup>18</sup> S.9(4) *Whistleblowers Protection Act 1993* (SA) defines 'detriment' to include injury, damage or loss, intimidation or harassment, or discrimination, disadvantage or adverse treatment in relation to a person's employment, threats of reprisal.

|                               | VIC  | NSW  | TAS  | ACT   | QLD   | SA   |
|-------------------------------|--|--|--|---|---|--|
|                               | the right to claim damages or to apply for an injunction.  | employment, disciplinary proceeding)<br>- protection against liability for protected disclosures including against defamation (which has effect despite any duty of secrecy or confidentiality).   |  | secrecy or confidentiality under a provision of another Act or in an agreement.   | Public officers who have made a public interest disclosure have a right to appeal against, or to apply for a review of, disciplinary action, appointments, transfers or unfair treatment.<br><br>There is also the right to apply for injunctions to prevent or stop the continuation reprisals from occurring. |  |
| <b>Balancing provisions</b>   | The protections provided in the Act only apply to protected disclosures.<br><br>If a person goes outside this framework of disclosing to the Ombudsman etc. by eg. making a public disclosure, the protection mechanisms do not apply. | A public official in making a disclosure must not make false or misleading disclosures.<br><br>Disclosures about the merits of Government policy or for the purposes of avoiding disciplinary action are not protected under the Act.<br><br>Investigating authorities have a discretion not to investigate a matter where it is considered that the disclosure is frivolous or vexatious. | The protections provided in the Act only apply to protected disclosures.<br><br>If a person goes outside this framework of disclosing to the Ombudsman etc. by eg. making a public disclosure, the protection mechanisms do not apply. | The Act provides that a proper authority can decline to act on a public interest disclosure if it considers that the disclosure is frivolous, vexatious, misconceived, lacking substance, trivial or that the matter has already been dealt with.<br><br>It is an offence for a person to provide a false or misleading statement to a proper authority with the intention that it be acted on as a public interest disclosure. | It is an offence (and also official misconduct) for a public officer to give false or misleading information as a public interest disclosure.   | A person only receives protection under the Act if the person making the public interest disclosure believes it on reasonable grounds to be true and if it is made to an appropriate authority.<br><br>Accordingly there is no protection if a disclosure is made for eg. to the media.<br><br>It is also an offence to make a false disclosure. |
| <b>Reporting requirements</b> | The Ombudsman, public bodies and municipal councils are required to publish in their   | The investigating authority, public official or public authority to whom a disclosure is made, must notify the person who  | The Ombudsman and public bodies are required to publish in their annual reports:   | Every government agency is required to include in its annual report details of its relevant procedures for dealing with public  | Public sector entities receiving public interest disclosures are required to keep proper records about them.  | To notify the person who made the disclosure of the outcome of the investigation.  |

|   | VIC   | NSW   | TAS  | ACT   | QLD  | SA          |
|---|---|---|--|---|--|-------------|
|   | <p>annual reports:</p> <ul style="list-style-type: none"> <li>- their procedures for dealing with disclosures;</li> <li>- number and type of disclosures made;</li> <li>- how they were dealt with etc.</li> </ul> <p>The Ombudsman also is given a specific power to lay a report before Parliament in relation to a disclosed matter.</p>         | <p>made the disclosure, within 6 months of the action taken or proposed to be taken in respect of the disclosure.</p> | <ul style="list-style-type: none"> <li>- their procedures for dealing with disclosures;</li> <li>- number and type of disclosures made;</li> <li>- how they were dealt with etc.</li> </ul> <p>The Ombudsman also is given a specific power to lay a report before Parliament in relation to a disclosed matter.</p> | <p>interest disclosures, statistical information and how they were dealt with (including any remedial action taken as a result by the government agency).</p> | <p>Public sector entities are also required to include in their annual report details of statistical information, procedures, outcomes and like matters with respect to its handling of public interest disclosures.</p> <p>There is also an obligation on the Minister to report to the Legislative Assembly on the Act's administration.</p> |             |
| <b>Bodies and persons exempted from the Act</b> | <p>Courts.<br/>Boards, tribunal or other body presided over by a judge, magistrate or legal practitioner presiding as such by virtue of a statutory appointment.</p> <p>Judges, Master of Supreme/ County Courts, magistrates, members of Victorian Civil and Administrative Tribunal, DPP, Auditor-General, Ombudsman, Electoral Commissioner.</p> | <p>None expressed in the Act.</p>   | <p>Courts, Tasmanian Industrial Commission, tribunals.</p> <p>Judges, Master of the Supreme Court, Magistrates, DPP, Auditor-General, Ombudsman and State Service Commissioner.</p>  | <p>No.</p>  |  | <p>Nil.</p> |

**ATTACHMENT "B"**

**WHISTLEBLOWER PROTECTION: GENERAL**

| <b>JURISDICTION</b>                 | <b>NAME OF ACT</b>                  | <b>DATE YEAR ENACTED</b> | <b>INDEPENDENT AUTHORITY</b> | <b>QUALIFICATION FOR PROTECTION</b>  | <b>DISCLOSURE DEFINED</b> | <b>REPRISALS PROHIBITED</b>  |
|-------------------------------------|-------------------------------------|--------------------------|------------------------------|--|---------------------------|--|
| <b>Australian Capital Territory</b> | Public Interest Disclosure Act      | 1994                     | NO                           | Disclosure to a proper authority   | YES                       | YES<br>\$10,000 fine and/or prison   |
| <b>New South Wales</b>              | Protected Disclosures Act           | 1994                     | NO                           | Disclosure by public official to relevant authority, shows or tends to show wrongdoing | YES                       | YES<br>Max 1 year prison   |
| <b>Queensland</b>                   | Whistleblowers Protection Act       | 1994                     | NO                           | Disclosure to an appropriate entity  | YES                       | YES<br>Max 2 years prison  |
| <b>South Australia</b>              | Whistleblowers Protection Act       | 1993                     | NO                           | Good faith disclosure to relevant authority  | YES                       | YES<br>Tort of victimisation established and victimisation under the Equal Opportunity Act |
| <b>Tasmania</b>                     | Public Interest Disclosure Act      | 2002                     | NO                           | Good faith disclosure to the Ombudsman or appropriate authority                        | YES                       | YES<br>\$24,000 fine or max 2 years prison   |
| <b>Victoria</b>                     | Whistleblowers Protection Act       | 2001                     | NO                           | Good faith disclosure to the Ombudsman or appropriate authority                        | YES                       | YES<br>\$24,000 fine or max 2 years prison   |
| <b>Western Australia</b>            | Public Interest Disclosure Act 2003 | N/A                      | NO                           | Disclosure to a proper authority. Is a valid disclosure if made in good faith.         | YES                       | YES<br>\$24,000 fine or max 2 years prison   |

## ATTACHMENT "C"

### LEGAL PROTECTIONS FOR WHISTLEBLOWERS

| NAME  | CIVIL AND CRIMINAL INDEMNIFICATION AND INCLUDING FROM DISCIPLINARY PROCESS | PROTECTION FROM CONTRAVENING SECRECY ENACTMENTS OR CONFIDENTIALITY AGREEMENTS | INJUNCTIONS AGAINST REPRISALS | ABSOLUTE PRIVILEGE IN DEFAMATION |
|---|--|---|-------------------------------|----------------------------------|
| <b>Australian Capital Territory – Public Interest Disclosure Act (1994)</b> | YES  | YES   | YES                           | YES                              |
| <b>New South Wales – Protected Disclosures Act (1994)</b>                   | YES  | YES   | NO                            | YES                              |
| <b>Queensland – Whistleblowers Protection Act (1994)</b>                    | YES  | YES   | YES                           | YES                              |
| <b>South Australia – Whistleblowers Protection Act (1993)</b>               | YES  | NO  | NO                            | NO                               |
| <b>Tasmania – Public Interest Disclosure Act (2002)</b>                     | YES  | YES   | YES                           | YES                              |
| <b>Victoria – Whistleblowers Protect Act (2001)</b>                         | YES  | YES   | YES                           | YES                              |
| <b>Western Australia – Public Interest Disclosure Act (2003)</b>            | YES  | YES   | NO                            | NO                               |

**ATTACHMENT "D"**

**SERVICES AND RIGHTS OF WHISTLEBLOWERS**

| <b>NAME</b>  | <b>COUNSELLING</b> | <b>COMPENSATION TO VICTIMISED WHISTLEBLOWER</b>  | <b>ENTITLEMENT TO DAMAGES</b> | <b>WHISTLEBLOWER FEEDBACK</b>  | <b>RIGHT TO RELOCATION</b> |
|--|--------------------|--|-------------------------------|--|----------------------------|
| <b>Australian Capital Territory – Whistleblowers Protection Act (1994)</b> | NO                 | NO   | YES                           | Report on request, every 90 days thereafter, find report   | YES                        |
| <b>New South Wales – Protected Disclosures Act (1994)</b>                  | NO                 | NO   | NO                            | Must report back to whistleblower within six months  | NO                         |
| <b>Queensland – Whistleblowers Protection Act (1994)</b>                   | NO                 | NO   | YES                           | When asked - "reasonable" information about action taken and results achieved                              | YES                        |
| <b>South Australia – Whistleblowers Protection Act (1993)</b>              | NO                 | YES<br>Victimisation is established as a tort. Therefore compensation or damages may be awarded. | NO                            | YES<br>Notified of outcome of the investigation  | NO                         |
| <b>Tasmania – Public Interest Disclosure Act (2002)</b>                    | NO                 | NO   | YES                           | YES<br>Strict requirement to report back to whistleblower as to action taken as a result of the disclosure | NO                         |
| <b>Victoria – Whistleblowers Protection Act (2001)</b>                     | NO                 | NO   | YES                           | YES<br>Strict requirement to report back to whistleblower as to action taken as a result of the disclosure | NO                         |
| <b>Western Australia – Public Interest Disclosure Act (2003)</b>           | NO                 | YES<br>Victimisation is established as a tort. Therefore compensation or damages may be awarded  | NO                            | YES<br>Informed of action taken as a result of the investigation   | NO                         |

| KEY ELEMENTS                                  | OPTIONS   |
|---|---|
| <b>1. Scope of persons to be protected.</b>   | <ul style="list-style-type: none"> <li>• Public officials generally</li> <li>• Employees of the public sector agency concerned</li> <li>• Government contractors</li> <li>• Private Citizens</li> <li>• Legal representatives</li> <li>• Anonymous disclosures</li> <li>• Voluntary or mandatory reporting</li> </ul>                   |
| <b>2. Scope of conduct covered by the Act</b> | <ul style="list-style-type: none"> <li>• Nature of conduct</li> <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> |
| <b>3. Responsibility for conduct:</b>         | <p>Public sector</p> <ul style="list-style-type: none"> <li>• State</li> <li>• Local</li> <li>• Legislative</li> <li>• Judicial</li> </ul> <p>Private sector</p> <ul style="list-style-type: none"> <li>• Government contractors</li> <li>• Corporations</li> <li>• Any person or body</li> </ul>                                       |
| <b>4. Reporting Options</b>                   | <p>Internal:</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</li> </ul> <p>External:</p>   |

<sup>19</sup> Table extracted from the NSW Ombudsman Discussion Paper "Adequacy of the Protected disclosures Act to Achieve its Objectives" January 2004

|   |  |
|---|--|
|   | <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>   |
| <b>5. Internal reporting systems</b>                                    | Mandatory adoption and implementation or Discretionary adoption and implementation   |
| <b>6. Threshold tests for protection</b>                                | <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</li> <li>• Made in good faith/reasonable belief</li> <li>• Suspicion on reasonable grounds</li> <li>• Disclosure shows or tends to show the conduct alleged</li> <li>• Misconduct/maladministration/waste</li> <li>• Serious misconduct/maladministration/waste</li> <li>• Public interest</li> <li>• Warranting disciplinary action/dismissal/criminal charge (high threshold if the sole test)</li> <li>• Corrupt conduct/illegality (high threshold if the sole test)</li> </ul> |
| <b>7. Circumstances when disclosures are not protected:</b>             | <p>Motivation - disclosure known to be false/made in bad faith</p> <p>Conduct – whistleblower fails to assist investigation</p> <p>whistleblower makes further unauthorised disclosure</p>   |
| <b>8. Obligations on whistleblowers</b>                                 | <p>To maintain confidentiality</p> <p>To assist/cooperate with investigators</p>   |
| <b>9. Obligations on persons/organisations that receive disclosures</b> | <p>Adopt and implement an internal reporting system</p> <p>Confidentiality – 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>Protect whistleblowers</p> <p>Implement sanctions for detrimental/reprisal action (eg. Disciplinary action, dismissal, criminal charges, injunctions or orders to restrain conduct)</p> <p>Deal with disclosures</p>  |

|  |   |
|--|---|
|  | <ul style="list-style-type: none"> <li>• Adopt and implement procedures for investigating disclosures</li> <li>• Investigate disclosures</li> <li>• Appoint or select investigators</li> <li>• Provide/ensure procedural fairness in the conduct of investigations</li> </ul> <p>Notify whistleblowers:</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>Notify any central monitoring/coordinating agency:</p> <ul style="list-style-type: none"> <li>• of disclosures received each year</li> <li>• of outcomes of investigations</li> </ul> |
| <p><b>10. Coordinating/monitoring role</b></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>Powers and functions of the coordinating/monitoring body</p> <p>Reporting on the operation of the legislation</p>  |
| <p><b>11. Determinative function as to whether a disclosure is protected under the legislation</b></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 of 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><b>12. Protection for whistleblowers</b></p>  | <p>Protections from exposure of identity confidentiality obligations (with listed exceptions) implemented by:</p> <ul style="list-style-type: none"> <li>- discretionary guidelines</li> <li>- statutory obligations with or without a criminal offence for breach, and</li> <li>• provisions for disclosures to be made anonymously</li> <li>• secrecy provisions/Information Act 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> </ul>                        |

|  |  |
|--|--|
|  | <ul style="list-style-type: none"> <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</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/secretcy</li> <li>• Indemnities 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 and/or</li> <li>• Compensation</li> </ul> |
| <p><b>13. Criminal offence for detrimental/reprisal action</b></p> | <p>Onus of proof – on prosecution/or defendant</p> <p>Evidentiary tests:</p> <ul style="list-style-type: none"> <li>• Substantially in reprisal for the making of a disclosure, or</li> <li>• Because a disclosure was made (ie a “but for” test )</li> </ul> <p>Admissibility of Evidence</p> <p>Time periods for commencement of proceedings/limitation periods</p> <p>Nomination of a person or 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><b>14. Referral of disclosures</b></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>   |

|                                   |  |
|-----------------------------------|--|
| <b>15. Records of disclosures</b> | Kept by receiving agency<br>Reporting in receiving agency annual report<br>Reported to any monitoring/coordinating body<br>Reporting in any monitoring/coordinating body annual report on the implementation of the Act<br>Secrecy provisions/Information Act exemptions.  |
| <b>16. Other</b>                  | Powers to investigate: <ul style="list-style-type: none"> <li>• Generally, or</li> <li>• For particular agencies/organisations/persons who otherwise have insufficient powers to do so effectively</li> </ul> Sanctions for false or misleading disclosures<br>Timelines for action<br>Any other obligations for reporting of outcomes |