The Whistleblowers Protection Amendment Bill 2006 (Qld)

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This Research Brief provides an overview of the Whistleblowers Protection Act 1994 and discusses those aspects that various committees, a Commission of Inquiry and commentators have considered to be in need of reform. In particular, the recommendations for changes to the Whistleblowers Protection Act 1994 made in the Report of the Queensland Public Hospitals Commission of Inquiry will be discussed in the context of the amendments proposed by the Whistleblowers Protection Amendment Bill 2006. The Brief will then consider the operation of whistleblowers legislation in other Australian jurisdictions.

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EXECUTIVE SUMMARY

On 7 June 2006, the Leader of the Opposition, Mr Lawrence Springborg MP, introduced a private member’s Bill into the Queensland Legislative Assembly. The Whistleblowers Protection Amendment Bill 2006 (Qld) seeks to amend the Whistleblowers Protection Act 1994 (Qld) to give effect to recommendations of the Report of the Queensland Public Hospitals Commission of Inquiry: page 1.

Given that, within a government entity, serious misbehaviour or misconduct can impact upon the integrity of the entity and upon the welfare of the general community it serves, it is important that alleged wrongdoing is reported and effectively dealt with: pages 1-3.

The Whistleblowers Protection Act 1994 (Qld) (WPA) was enacted in the wake of the recommendations of the Report of the Commission of Inquiry into the Possible Illegal Activities and Associated Police Misconduct and the Electoral and Administrative Review Commission’s Report on Protection of Whistleblowers. Its purpose is to promote the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector; danger to public health or safety; or danger to the environment: In passing the WPA, Queensland was one of the first Australian jurisdictions to enact whistleblowers legislation: pages 3-4.

Over time, certain limitations of the legislative scheme have been observed. More recently, the Report of the Queensland Public Hospitals Commission of Inquiry (Davies Report) specifically recommended that reforms be made to the WPA to address three areas of concern to the Inquiry. The first was that relevant disclosures must be made to an ‘appropriate entity’ to gain protection under the WPA and a member of the Legislative Assembly and the media are not ‘appropriate entities’. Secondly, many types of disclosures can be made only by ‘public officers’, not by ordinary members of the public. Finally, there is no central body, such as the Ombudsman, with a general oversight function: pages 4-6. Mr Springborg’s private member’s Bill seeks to implement the recommendations of the Davies Report: page 6.

This Research Brief discusses the three areas of concern, outlining the present situation under the WPA; the suggestions for reform; and the proposals for amendment by the Whistleblowers Protection Amendment Bill 2006. The first area considered is Part 3 of the WPA dealing with who may make ‘public interest disclosures’, as it is only a public interest disclosure that is protected (from legal action, reprisals etc.) under the WPA. Pages 7-9 set out the conduct that may be the subject of a public interest disclosure and the persons who may make such a public interest disclosure. In most cases it will only be a ‘public officer’ who may do so. Page 9 considers the Davies Report recommendation that the range of persons entitled to make a public interest disclosure be expanded and pages 9-10
consider new provisions proposed under the Bill to enable a broader range of public interest disclosures to be made by anyone.

The second issue considered is the need (provided for in Part 4 of the WPA) for the public interest disclosure to be made to an ‘appropriate entity’ if it is to be protected under the WPA. The ‘appropriate entity’ will depend upon the type of disclosure. This term does not encompass a Member of Parliament or a member of the media, unlike the case in New South Wales in certain circumstances: pages 10-12. The Davies Report recommended that disclosers should be able to escalate their complaints if no satisfactory action is taken on it within a certain timeframe to involve, first, a member of Parliament, then the media; pages 12-14. The Bill amends the WPA to make provision for public interest disclosures to a member of the Legislative Assembly and then to a member of the media in certain situations: pages 14-15.

The third issue concerns the lack of a central body having oversight of public interest disclosures. The Davies Report adopted a submission by the Queensland Ombudsman that agencies must refer public interest disclosures involving serious maladministration to the Ombudsman who would either investigate the matter or refer it back to the agency for investigation (with monitoring by the Ombudsman). Disclosures concerning official misconduct would continue to be referred to the Crime and Misconduct Commission: pages 15-17. The Bill implements this recommendation: page 17.

While there are no suggestions for amendments to any of the protections for disclosers, a discussion of this aspect on pages 17-20 seeks to provide the reader with some appreciation of the significance of establishing a scheme within which persons should feel able to make disclosures about misconduct and maladministration without fear of retribution and legal consequences. Part 5 of the WPA sets out the protections given to disclosers and makes reprisal action against a person as a result of a public interest disclosure an offence.

The Brief then goes on to consider whistleblowers protection legislation in other Australian jurisdictions. The Protected Disclosures Act 1994 (NSW) and the Whistleblowers Protection Act 1993 (SA) are older types of legislative schemes and are similar to the Queensland WPA. On the other hand, the Whistleblowers Protection Act 2001 (Vic) and the Public Interest Disclosures Act 2002 (Tas) are examples of more recent enactments providing for oversight of all referrals by the Ombudsman. The Public Interest Disclosures Act 2003 (WA) also ensures consistency in dealing with disclosures but does not confer an oversight role on the Ombudsman. A Public Interest Disclosures Bill has recently been introduced into the Australian Capital Territory Legislative Assembly to improve the current legislative scheme and a Bill to protect whistleblowers has been proposed for the Northern Territory. The Commonwealth does not have general whistleblowers protection legislation: pages 20-33:
1 INTRODUCTION

On 7 June 2006, the Leader of the Opposition, Mr Lawrence Springborg MP, introduced a private member’s Bill into the Queensland Legislative Assembly. The Whistleblowers Protection Amendment Bill 2006 (Qld) seeks to amend the Whistleblowers Protection Act 1994 (Qld) to give effect to recommendations of the Report of the Queensland Public Hospitals Commission of Inquiry.

This Research Brief provides an overview of the Whistleblowers Protection Act 1994 and discusses those aspects that various committees, a Commission of Inquiry and commentators have considered to be in need of reform. In particular, the recommendations for changes to the Whistleblowers Protection Act 1994 made in the Report of the Queensland Public Hospitals Commission of Inquiry will be discussed in the context of the amendments proposed by the Whistleblowers Protection Amendment Bill 2006 (the Bill). The Brief will then consider the operation of whistleblowers legislation in other Australian jurisdictions.

2 BACKGROUND

A modern definition of ‘whistleblowing’ is “the disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.”

A study analysing business crises between 1990 and 2000 found that management is frequently unaware of problems and may even ignore them until a crisis develops around the issue or an employee ‘blows the whistle’ on the activity. In addition, if the ‘whistleblower’ is not satisfied with management’s response, he or she may take their allegations to the media.

Given that, within a government entity, serious misbehaviour or misconduct can impact upon the integrity of the entity and upon the welfare of the general community it serves, it is important that alleged wrongdoing is reported and

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effectively dealt with. To facilitate such reporting, it is essential that systems are established within organisations to enable disclosures to be made and to protect the whistleblower or (the preferred term) ‘discloser’ from reprisal action and other consequences following their revelations.

The Queensland Ombudsman has noted that government entities stand to gain from the early identification of conduct requiring redress; identification of possible systemic weaknesses; and from the maintenance of corporate integrity and accountability. This should result in benefits to the public those entities deal with. These comments apply also to private organisations but this Research Brief is confined to a consideration of public interest disclosures involving government entities.

The former Chairperson of the Crime and Misconduct Commission, Mr Brendan Butler, has observed that internal reporting of “… suspected misconduct and maladministration is vital to the integrity of the Queensland public sector … and our experience reveals that it is often managers’ handling of their workplace, as much as formal legislative provisions and systems, that determines whether conscientious staff speak up.”

2.1 DEVELOPMENT OF THE QUEENSLAND LEGISLATION


At the time, in Queensland and elsewhere in Australia, there was no statutory protection for people who sought to disclose misconduct and maladministration and the common law provided few safeguards.

The Fitzgerald Report pointed out that –


5 Report of the Commission of Inquiry into the Possible Illegal Activities and Associated Police Misconduct (Chairman T Fitzgerald QC), July 1989, p 370.
Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.

It is enormously frustrating and demoralising for conscientious and honest public servants to work in a department or instrumentality in which maladministration and misconduct are present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority.

Even if they do report their knowledge to a senior officer, that senior officer might be in a difficult position. There may be none who can be trusted with the information.

... ... ... ... 

There is an urgent need ... for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities. Such measures have recently been made law in the United States by the Whistle Blowers Protection Act 1989.

Obviously, there will be some within the bureaucracy who will make malicious and untrue allegations. Any legislation should prescribe penalties for people who make damaging public statements knowing them to be untrue.

... ... What is required is an accessible, independent body to which disclosures can be made ... free from fear of reprisals. ... The body must be able to investigate any complaint.6

In October 1991, EARC tabled its Report on Protection of Whistleblowers. EARC also recognised that there was a public interest in providing special protection for public officers who expose wrongdoing in the workplace and recommended the enactment of comprehensive whistleblowers protection legislation, a draft Bill for which was appended to the Report.7

The Whistleblowers Protection Act 1994 (Qld) (WPA) was enacted in the wake of the above recommendations and has the purpose of promoting the public interest by protecting persons who disclose –

- unlawful, negligent or improper conduct affecting the public sector
- danger to public health or safety

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6 Fitzgerald Report, p 134.

7 At the time, the then Criminal Justice Act 1989 (Qld) provided some protection to whistleblowers regarding disclosure of misconduct but had certain shortcomings identified by EARC (para 4.29) and the Parliamentary Committee for Electoral and Administrative Review in its Whistleblowers Protection Report, April 1992, paras 3.2.7-3.2.9.
• danger to the environment: s 3.

In addition, the *Public Sector Ethics Act 1994*, the *Public Service Act 1996*, and the *Crime and Misconduct Act 2001* provide the legislative framework for proper ethical standards in the Queensland public sector. Under these pieces of legislation, public officers must report serious wrongdoing and private individuals are encouraged to do so as well.8

The *WPA* can be regarded as reinforcing those requirements by making it clear that an official is protected from the legal and other retributive consequences of making a disclosure.9 Reports of serious wrongdoing – known under most whistleblowers legislation as ‘public interest disclosures’ – should be made within a framework that enables action to be taken to address the relevant conduct and so as not to cause unfair damage to someone’s reputation in the process.10

### 2.2 PERCEIVED LIMITATIONS

The *WPA* was one of the first pieces of whistleblowers legislation in Australia. However, over time, certain limitations have been noted, most recently by the Hon Geoff Davies AO, in the *Report of the Queensland Public Hospitals Commission of Inquiry* (Davies Report).

The first is that it is not possible for any member of the public to make a public interest disclosure about unlawful, negligent or improper conduct affecting the public sector or a danger to public health or safety or the health or safety of a person and thereby gain protection under the *WPA*.11 Members of the public can only make a public interest disclosure regarding unlawful, negligent or improper conduct constituting a substantial and specific danger to either the health or safety of a person with a disability or to the environment, or a disclosure about a reprisal action against a discloser.

Secondly, the relevant disclosures must be made to an ‘appropriate entity’ in order for the discloser to receive the protections provided by the scheme – a concept

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explained further later in this Research Brief. For example, disclosure to a member of the Legislative Assembly would not be a disclosure to an ‘appropriate entity’ and nor would disclosure to the media.\textsuperscript{12}

Another matter perceived to be in need of redress is the lack of a central body to oversee and manage public interest disclosures. While the Office of Public Service, Merit and Equity (OPSME) is charged with the administration of the \textit{WPA} and provides guidance to agencies about its application, it does not have any oversight function. Each public sector entity develops its own policy and procedures for managing public interest disclosures and for ensuring that employees do not suffer reprisal action but there is no external oversight or monitoring.\textsuperscript{13} The Parliamentary Crime and Misconduct Committee’s (PCMC’s) \textit{Three Year Review of the Crime and Misconduct Commission}, echoing similar observations made by earlier Committees, also noted that the \textit{WPA} did not establish a centralised system for protecting whistleblowers.\textsuperscript{14} The PCMC recommended the Government give consideration to a full review of the \textit{WPA}.

On 10 September 2004, the Government responded that –

\begin{quote}
[T]he Government supports a review of the Act. However, the Government is not convinced that a full review of the Act (re-opening the Act’s core principles and purpose to public consideration) is required. Instead, the Government will conduct a whole-of-Government review of the experience of public service agencies in relation to the operation of the Act and make any necessary amendments to the Act in light of the review.
\end{quote}

As part of the Government’s response to the PCMC’s Report, the OPSME has embarked on a review of the administration of the \textit{WPA}.\textsuperscript{15} The review was held in abeyance until the inquiries into Queensland Health were completed but it is understood that a final report from the OPSME, incorporating issues raised in the \textit{Davies Report} and the \textit{Queensland Health Systems Review}, headed by Mr Peter Forster, will be submitted to Cabinet soon.\textsuperscript{16} Preliminary findings made by the OPSME indicated a need for ongoing education and cultural change to bring about

\begin{thebibliography}{16}
\bibitem{12} Davies Report, p 470.
\bibitem{13} Davies Report, pp 470-471.
\bibitem{14} Queensland Parliamentary Crime and Misconduct Committee, \textit{Three Year Review of the Crime and Misconduct Commission}, Report No 64, 10 September 2004, p 96 also referring to observations made by the 4\textsuperscript{th} Queensland Parliamentary Criminal Justice Committee, \textit{Three Year Review}, Report No 55, p 141ff.
\end{thebibliography}
an environment that is more supportive of public officials who wish to make disclosures.\textsuperscript{17}

While commentators have, at various times, noted the various limitations on the scheme established by the \textit{WPA} and similar whistleblowers legislation in other jurisdictions,\textsuperscript{18} the \textit{Davies Report}, specifically recommended that reforms be made to address the above issues and provided proposals for such changes.\textsuperscript{19}

The \textbf{Whistleblowers Protection Amendment Bill 2006}, a private member’s Bill, introduced by Mr Laurence Springborg MP,\textsuperscript{20} seeks to implement the recommendations of the \textit{Davies Report} by –

\begin{itemize}
  \item providing the Queensland Ombudsman with the role of central oversight of all public interest disclosures, apart from those involving official misconduct, so that all such disclosures are referred to the Ombudsman who may then either investigate the matter or refer it back to the relevant public sector entity for investigation, subject to monitoring by the Ombudsman;
  
  \item increasing the range of persons who may make public interest disclosures and be given the protections provided by the \textit{WPA} so that anybody may make disclosures about dangers to public health or safety, or health and safety of a person, or about negligent or improper management involving public funds;
  
  \item expanding the ‘appropriate entities’ to which a public interest disclosure may be made to allow disclosures to a member of Parliament if there is no satisfactory resolution of the matter within 30 days of the disclosure to the appropriate entity and then, if no satisfaction is received within a further 30 days, to the media.
\end{itemize}

\section{3 \textbf{OVERVIEW OF THE CURRENT LEGISLATION}}

The \textbf{Whistleblowers Protection Act 1994 (Qld)} (\textit{WPA}) provides a scheme for giving special protection to disclosures made about specified conduct of others and

\begin{itemize}
  
  
  \item \textit{Davies Report}, pp 472ff.
  
  \item Queensland Office of Parliamentary Counsel’s website at \url{http://www.legislation.qld.gov.au/Bills/51PDF/2006/WhistleAmdB06_P.pdf}.
\end{itemize}
contains a number of balancing mechanisms intended to focus the protection where it is needed.

3.1 DISCLOSURES THAT MAY BE MADE

The following discussion focuses upon disclosures under the WPA. It should also be noted, however, that there are other legislative provisions – such as under the Public Sector Ethics Act 1994 – that require public officials to disclose fraud, corruption and maladministration of which they are aware – an obligation reinforced in agencies’ codes of conduct. The WPA supports these obligations by making it clear that an official is protected from defamation, breach of confidence and breach of secrecy for making a disclosure.21

3.1.1 Whistleblowers Protection Act 1994

Part 3 of the WPA provides for the making of ‘public interest disclosures’. It is only public interest disclosures that are protected under the Act. ‘Public interest disclosures’ are disclosures of the types of information set out in ss 15-20.

Certain public interest disclosures – those set out in ss 15-18 – will be shielded only if the person making them is a public officer of a public sector entity. A ‘public officer’ is defined as a person who is an officer of a public sector entity. A ‘public sector entity’ is widely defined in Sch 5 to include government departments, local government, educational bodies, judicial bodies, commissions etc., statutory GOCs and corporatised corporations (established under the Local Government Act 1993) and, in certain circumstances, the Parliamentary Service and the Executive Council.22 In addition, for the purpose of allowing a member of Legislative Assembly to make a public interest disclosure, a ‘public officer’ also includes a member of the Legislative Assembly: Sch 6.

The following public interest disclosures, which can only be made by a public officer, are –

- disclosures about conduct that the officer honestly believes on reasonable grounds tends to show official misconduct, as defined under the Crime and Misconduct Act 2001 (Qld): s 15;


22 See Schedule 5, cl 2(2) for what are not public sector entities.
disclosures about conduct that the officer honestly believes on reasonable grounds tends to show maladministration (i.e. administrative action that is unlawful, arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose) that adversely affects anybody’s interests in a substantial and specific way: s 16;

disclosures about conduct of another public officer, a public sector entity or a public sector contractor that the officer honestly believes on reasonable grounds tends to show negligence or improper management directly or indirectly resulting, or likely to result, in a substantial waste of public funds: s 17;

disclosures about conduct that the officer honestly believes on reasonable grounds tends to show a substantial and specific danger to public health or safety or to the environment: s 18. In this context ‘public health or safety’ includes the health or safety of persons under lawful care or control (such as a patient under the care of a health professional or a prisoner in a gaol), or persons using community facilities or services provided by the public or private sector, or persons in workplaces. ‘Environment’ has a broad definition as under the *Environmental Protection Act 1994 (Qld)*.

Other types of public interest disclosures – those in ss 19-20 – can be made by anybody – members of the public or public officers – and are protected under the scheme of the *WPA*. Anybody may make a public interest disclosure of information that they have about –

- a substantial and specific danger to the health or safety of a person with a disability (as defined under the *Disability Services Act 2006*);

- the commission of an offence against certain legislative provisions listed in Sch 2 if the commission would be a substantial and specific danger to the environment;

- a contravention of a condition imposed under certain legislative provisions listed in Sch 2, if the contravention would be a substantial and specific danger to the environment: s 19;

- someone else’s reprisal conduct taken against a person: s 20. A ‘reprisal’ is to cause, or attempt, or conspire to cause, detriment to another person because, or in the belief that, anybody has made a public interest disclosure: s 41. The issue of protection against reprisals is considered later in this Research Brief.

A disclosure can still be a public interest disclosure even though it is made under a legal requirement (s 22), and it can be about the conduct of somebody that the person making the disclosure cannot identify: s 21.
Note that a person will commit an indictable offence (fine of up to $12,525\(^{23}\) or a 2 year prison term) if they make a public interest disclosure that is intentionally false or misleading in a material particular: s 56. If such a false disclosure is made by a public officer it also amounts to misconduct which could lead to dismissal or disciplinary action: s 57.

### 3.1.2 Categories of Persons Who May Make Disclosures - Possible Reforms

The *Davies Report* recommended that the categories of persons who may make a public interest disclosure, and be protected by the *WPA*, be expanded. This would mean that disclosures about danger to public health and safety and negligent or improper management of public funds could be made by any person or body. This suggestion came upon the Commission’s finding that, patients or their family would not be able to gain the protections under the *WPA* if they wished to make a public interest disclosure about patient care. The *Queensland Health Systems Review* headed by Mr Peter Forster (Forster Review) also supported this proposal.\(^{24}\)

A number of jurisdictions, including South Australia, Western Australia and Victoria, allow members of the public, not just public officers, to make disclosures (see below).

### 3.1.3 Whistleblowers Protection Amendment Bill 2006

One of the major reforms intended by the Whistleblowers Protection Amendment Bill 2006 (the Bill) is to expand the categories of persons who can make disclosures about certain matters.

A proposed new s 19A (see cl 10) will provide that anyone may make a public interest disclosure about the conduct of a public officer, a public sector entity or a public sector contractor if the conduct is negligent or improper management directly or indirectly resulting, or likely to result, in a substantial waste of public funds. Accordingly, s 17 – which permits only a public officer to make such disclosure – is removed by cl 7.

Also, s 19 of the *WPA* is amended by cl 9 so that anyone can now make a public interest disclosure about a substantial and specific danger to public health or safety

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\(^{23}\) See s 5 of the *Penalties and Sentences Act 1992 (Qld).*

or to the health or safety of a person. The disclosure is no longer limited to being about persons with a disability. Section 18 is also amended to reflect this change so that a public officer may disclose a danger to the environment but, under amended s 19, anyone can make a disclosure about public health or safety or health or safety of a person: cl 8.

Thus, anybody will be able to make a public interest disclosure about negligent or improper management involving a substantial waste of public funds and about public health or safety or the health or safety of a person.

In a recent Estimates Committee hearing, the Premier indicated that the recently enacted *Health Quality and Complaints Commission Act 2006 (Qld)* allows anyone, not just public officials, to make a disclosure about a danger to public health and safety.25 Under the Act, the newly established Commission can receive two types of complaints – ‘health quality complaints’ and ‘health service complaints’. The former are complaints about the quality of a health service and any person, including health service staff, can make a health quality complaint to the Commission. Health service complaints are complaints by a consumer or their representative about a health service provider.26

### 3.2 Disclosure Process

Perhaps the most important matter to highlight in this context is that the disclosure must be made to an ‘appropriate entity’. The range of appropriate entities is currently limited in scope, as explained below.

#### 3.2.1 Whistleblowers Protection Act 1994

**Part 4** of the *WPA* describes the ways in which a person may make a public interest disclosure.

The public interest disclosure must be made to an ‘appropriate entity’. A public sector entity is an ‘appropriate entity’ to receive a public interest disclosure –27

- about its own or any of its officers’ conduct. An example of this given in Sch 3 of the *WPA* is of W, a State instrumentality employee, who has information that

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26 *Health Quality and Complaints Commission Act 2006 (Qld)*, Chapter 5, Parts 1 and 2.

27 See *WPA* s 26. Schedule 3 gives some examples of what are appropriate entities in certain circumstances.
a senior officer has misappropriated funds from the instrumentality (which is official misconduct under s 15). W discloses that conduct to the instrumentality. The WPA will protect the disclosure because the instrumentality is a appropriate entity to receive the disclosure about the conduct of one of its officers;

• about anything it has power to investigate or remedy. An example of this provided in Sch 3 is of F, a corrective service officer employed by the chief executive of Corrective Services who has information that another officer has assaulted a prisoner (i.e. conduct covered by s 18 – danger to public health or safety). F discloses the conduct to the Queensland Police Service (QPS). The QPS is an appropriate entity to receive the disclosure as it is conduct it may investigate. Another example is a disclosure to the CMC by D, an employee of a department. D discloses that officers of a disability service run by the department have been abusing clients. The CMC is an appropriate entity to receive the disclosure as it is conduct it has power to investigate (official misconduct under s 15).

• made to it by anybody entitled to make a public interest disclosure and who honestly believes it is an appropriate entity to receive the disclosure. However, this will not permit the receipt of the disclosure if there are limitations imposed on the disclosure process because of the type of disclosure. Under Divisions 4-6 of Part 4, there are limitations placed on the disclosure process made about certain bodies and persons. The first limitation concerns disclosures made administratively about judicial officers[^28] and those made in court or tribunal proceedings[^29] to ensure that the legislation does not detrimentally affect judicial work or independence. The second limitation concerns disclosures about GOCs and corporatised corporations or their officers so that the WPA does not detrimentally affect GOCs’ or corporatised corporations’ commercial operation[^30] or

• referred to it by another public sector entity under s 28. This referral occurs where the disclosure received by an appropriate entity is about the conduct of another public sector entity or its officers, or the conduct of anybody (including itself), or anything that another public sector entity has power to investigate or remedy. Before the referral is made to the other entity, it first must be

[^28]: Disclosure can only be made to the chief judicial officer or to the CMC, depending upon the conduct in question.

[^29]: Disclosure must be made to the court or tribunal to which the information is relevant and admissible.

[^30]: Disclosure must be made to the statutory GOC (or corporatised corporation) or to the CMC, depending upon the conduct in question.
considered whether there is an unacceptable risk of reprisal against someone and not make the referral if it is believed that there is such risk.

The disclosure can be made to the appropriate entity anonymously. Generally, the disclosure can be made in any way but if there is a procedure established by the appropriate entity for making a public interest disclosure, this should be followed. Often, the appropriate entity will have designated an officer who has the function of receiving or taking action on the information being disclosed. For example, an internal auditor may be the officer who receives information about negligent or improper management affecting public funds while a departmental health officer might be the officer charged with the responsibility of investigating a danger to public health or safety. In any event, the disclosure can always be made to specified persons within the entity, including to the chief executive: see s 27.

If the disclosure comes within the jurisdiction of the appropriate entity and raises a reasonable suspicion of improper conduct, the entity will decide whether it should investigate or whether it should refer the matter (with the discloser’s consent) to another body such as the QPS or the CMC. If there is no serious wrongdoing involved, the matter might be resolved informally. Disciplinary action may result if the evidence discloses a breach of internal procedures, regulations, or constitutes misconduct. If official misconduct is revealed, the matter should be sent to the CMC.  

3.2.2 Possible Reforms to Expand Bodies Receiving Public Interest Disclosures

The Davies Report observed that “findings made in respect of Bundaberg, Rockhampton and Queensland Health show that Ms Hoffman had no choice but to complain to her local member of Parliament and that another person felt the need to disclose a confidential report to the Courier Mail, in my opinion, demonstrates that the protection to whistleblowers in the Queensland public sector needs reform.”

The Davies Report recommended that a discloser should be able to escalate his or her complaint if there is no satisfactory action taken on it and that there be a scale of persons/bodies to which the complaint may be made. The scale should be first, a complaint to the relevant department or public sector entity (with strict time limits for investigation imposed by the WPA – such as 30 days). If the matter is not resolved satisfactorily within that timeframe, the discloser ought to be able to make a public interest disclosure to a member of Parliament (and not just a local

31 OPSME, ‘Whistleblowing: Answering Your Questions’.

32 Davies Report, p 470.
member). The third stage of recourse is to a member of the media if the disclosure to the Member of Parliament does not result in satisfactory resolution.  

The Forster Review supported the proposal that disclosers should be able to make public interest disclosures to a Member of Parliament and gain the protections conferred by the WPA. However, it did not support the proposal to allow disclosure to the media, believing that there were already a number of options available to a whistleblower and such a move could allow untested allegations to be made public that unjustly impugn those against whom allegations have been made.  

In the Explanatory Notes to the WPA on its introduction to Parliament in 1994, it is pointed out that the WPA does not confer statutory protection on public interest disclosures made to the media because the intention of the legislation is to ensure that disclosures are made to agencies that can take appropriate action to deal with the information disclosed. It goes on to state that disclosures to the media would not necessarily further this objective and could engender unwarranted damage to the reputations of persons named or implicated in the disclosures.

As the WPA will protect disclosures made by a discloser who honestly believes on reasonable grounds that the information disclosed shows the relevant wrongdoing, the Explanatory Notes point out that quite damaging information could be disclosed that eventually turns out to be inaccurate. Provided that the disclosure was honestly made, the person about whom the disclosure is against cannot bring a defamation action or other action against the discloser. Thus, according to the Explanatory Notes, the WPA attempts to minimise unnecessary public damage to reputations by requiring that the disclosure be made to entities with power to investigate the complaint and ensuring that the investigating body must not disclose confidential information received in a disclosure any further than is necessary for the purpose of carrying out a lawful function.

The NSW Protected Disclosures Act 1994 allows disclosures to be made to a member of Parliament or to a journalist in certain circumstances. However, s 19 provides that such disclosure is protected only if –

33  Davies Report, p 472.

34  Forster Report, p 194.


• the public official has already made substantially the same disclosure to an investigating authority, public authority or officer of such in accordance with the Act;

• the authority has decided not to investigate, or has not completed the investigation within 6 months of the original disclosure being made, or has investigated the matter but not recommended the taking of any action, or has failed to notify the person making the disclosure, within 6 months of it being made, of whether it will be investigated;

• the public official must have reasonable grounds for believing that the disclosure is substantially true;

• the disclosure must be substantially true.

No other jurisdiction appears to have adopted this course.

Research has tended to find that going outside the organisation to make disclosures is generally not an action an employee will take, except as a last resort. An American study came to the view that most whistleblowers will go outside their organisation only after it begins to cover up the wrongdoing and intensify its retaliation against the whistleblowing employee but if senior management responded positively, then this step was not taken.

3.2.3 Whistleblowers Protection Amendment Bill 2006

A proposed new s 26A is inserted into the WPA by cl 12. This provision will enable public interest disclosures to be made to a member of the Legislative Assembly or to the media in certain situations.

Firstly, if a person makes a public interest disclosure to a public sector entity and, if after a period of 30 days, the Ombudsman has not advised the person that the matter has been resolved to the Ombudsman’s satisfaction, a member of the Legislative Assembly will be an ‘appropriate entity’ to receive the public interest disclosure.

Secondly, if the person makes a public interest disclosure to a member of the Legislative Assembly and 30 days pass without the Ombudsman advising that the matter has been resolved to the Ombudsman’s satisfaction, a representative of the

37 S Dawson, p 11.
mass media will be an appropriate entity to receive the public interest disclosure.\(^39\)

The notes to the proposed provision explain that these persons – the member of the Legislative Assembly and the representative of the media – will not be able to exercise the same investigative powers relating to the disclosure as a public sector entity can and that provisions of the \textit{WPA} applying to public sector entities will not apply to those persons.

During a recent Estimates Committee hearing, the Premier said that –

\[\text{We have already indicated that we will amend the Whistleblowers Protection Act 1994 (Qld) to enable it to cover disclosures made to members of parliament. …[T]he recommendations of the Davies Report about the circumstances in which such disclosures could be made have turned out to be somewhat difficult to implement but we will.}\(^40\)

\section*{3.3 OVERSIGHT OF DISCLOSURES}

\subsection*{3.3.1 Possible Reforms Regarding Oversight of Public Interest Disclosures}

In a \textit{submission} to the Queensland Public Hospitals Commission of Inquiry, the Queensland Ombudsman considered interstate models of dealing with public interest disclosures and considered that, despite some jurisdictional differences, the essential features of the Victorian and Tasmanian models should be adopted in Queensland for the purpose of giving the Queensland Ombudsman the ability to supervise disclosures of ‘serious maladministration’. This would mirror the CMC’s supervisory powers under the \textit{Crime and Misconduct Act 2001} over disclosures about official misconduct.\(^41\)

In the Ombudsman’s view, ‘serious maladministration’ encompasses financial mismanagement involving public funds and conduct that constitutes a danger to the public health or safety or the environment.\(^42\) The Ombudsman suggested that his Office should be empowered to investigate the disclosures of serious maladministration or to supervise or review the investigation by the agency in the

\begin{footnotesize}
\begin{itemize}
  \item \(^39\) These new provisions will not affect the limited disclosure processes applying to courts, tribunals and judicial officers; GOCs and corporatised corporations.
  \item \(^40\) Hon P Beattie MP, Queensland Premier, Estimates Committee A, p 20.
  \item \(^41\) Queensland Ombudsman, Submission to the Bundaberg Hospital Commission of Inquiry, p 12.
  \item \(^42\) See comments made in the Queensland Ombudsman’s \textit{Annual Report 2004-2005}, p 25.
\end{itemize}
\end{footnotesize}
same way as the CMC can supervise or review agencies’ investigations of official misconduct if it refers the matter back to them.43

The Ombudsman proposed that, under the suggested model, agencies would have to refer all such public interest disclosures involving serious maladministration, that do not amount to official misconduct, to the Ombudsman. The Ombudsman would investigate the matter; or refer the disclosure back to the relevant agency or another appropriate complaints body and supervise, monitor, or review that investigation. If the disclosure did not amount to maladministration, it would be referred back to the relevant agency or to the appropriate investigative body. Thus, two agencies, the CMC and the Ombudsman, would have responsibility for making sure that consistency was achieved in dealing with the full range of possibly serious disclosures.44

It was also submitted that the Ombudsman could also audit investigations of public interest disclosures by agencies on a periodic basis to identify any systemic deficiencies and that the Ombudsman’s Office and the CMC could advise and assist agencies on whistleblowers’ protection and whistleblowers’ rights and obligations.45 The Ombudsman considered that the proposals would strike an appropriate balance between ensuring the agency accepts responsibility for taking the right steps to deal with maladministration within the agency, and providing for independent external oversight of the system.46

The Davies Report adopted the Ombudsman’s recommendations and proposed that the WPA be amended to give the Queensland Ombudsman oversight of all public interest disclosures, apart from those involving misconduct. Under the changes, all such public interest disclosures must be referred to the Ombudsman who can either investigate the disclosure or refer it to the agency for investigation, subject to monitoring by the Ombudsman.47

On the other hand, the Forster Review did not support the proposal for oversight by the Ombudsman. However, the Ombudsman noted that the deadline for Mr Forster’s Report did not allow for consultation with his Office about the Ombudsman’s submissions or for a proper consideration of them. In his Report, Mr Forster said that there would be no great gains for whistleblowers from the

43 Queensland Ombudsman, Submission, pp 6-7.
44 Queensland Ombudsman, Submission, p 12.
45 Queensland Ombudsman, Submission, p 12.
46 Queensland Ombudsman, Submission, p 13.
47 Davies Report, p 472.
change because maladministration was just one of four types of conduct giving rise to a public interest disclosure. He did not consider that ‘maladministration’ would cover danger to public health or safety or the environment or negligent or improper management of public funds.\(^{48}\) However, the Ombudsman has said that this rationale in the Forster Review for not supporting the Ombudsman oversight proposal was “based on a misconception that financial mismanagement affecting public funds is not maladministration. It clearly is. Conduct ... that constitutes a danger to the public health or safety or the environment may also amount to maladministration.”\(^{49}\)

A further reason given by the Forster Review for not supporting the proposal for Ombudsman oversight was the belief that there could be confusion about which external body would have carriage of a disclosure.\(^{50}\) The Ombudsman has since pointed out that there are systems in place for liaison between the CMC and the Ombudsman to deal with matters involving both official misconduct and maladministration.\(^{51}\)

### 3.3.2 Whistleblowers Protection Amendment Bill 2006

A **proposed new s 27A** (see cl 13) of the Bill will require public sector entities receiving public interest disclosures to refer all of these to the Queensland Ombudsman, apart from a disclosure about official misconduct. The Ombudsman must consider the disclosure, make relevant inquiries, and decide to either investigate it or refer it back to the appropriate entity with directions or advice the Ombudsman considers appropriate regarding the investigation of the disclosure. The Ombudsman will also have the power to monitor the investigation by the appropriate entity.

### 3.4 PROTECTIONS AND OTHER MEASURES FOR DISCLOSERS

While there are no suggestions for amendments to any of the protections for disclosers, a discussion of this aspect seeks to provide some appreciation of the significance of whistleblowers protection laws in establishing a scheme within which persons should feel able to make disclosures about misconduct and maladministration without fear of retribution and legal consequences.

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\(^{50}\) *Queensland Health Systems Review Final Report*, p 193.

Research has found that every year, around 2,600 (or 1.8%) of all Queensland government employees come into contact with the internal investigation systems of agencies by either reporting suspected wrongdoings or providing other assistance to internal investigators. However, how these people’s welfare and any internal workplace conflicts are managed is largely unknown.  

The 1997 *Queensland Whistleblower Study (QWS)* examined 369 evaluations by Queensland public sector whistleblowers of the internal reporting procedures they were processed through. The *QWS* found that 71% of the sample stated that they had suffered official reprisals for having made a disclosure while 94% had incurred ‘unofficial reprisals’, such as ostracism or humiliation. There have been few surveys and studies since that time. In one major study, the NSW Independent Commission Against Corruption (ICAC) found that, although more of the 800 government employees it surveyed in 1999 were prepared to report corruption compared with those surveyed in a similar 1993 ICAC study, only around one-third of employees disagreed with the statement “people who report corruption are likely to suffer for it”.  

Indeed, one researcher has observed that whistleblowers protection legislation will do little on its own to remove fear of reprisals without commitment to the creation of an organisational culture conducive to staff speaking up about wrongdoing.  

It has been suggested that the key to creating a positive reporting climate is careful early intervention by managers rather than waiting to see if the problems eventuate before taking action. Management that reinforces respect for the process is important to guarding against potential for conflict and sends the message to staff that if they ever have information that should be disclosed they will not be left out by themselves.

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52 AJ Brown et al, p 3.  
53 CMC and Griffith University Media Release, ‘Whistleblowers being heard … but are they being protected?’ 16 February 2005.  
55 S Dawson, p 5, citing W De Maria & C Jan, pp 45-46.  
57 S Dawson, p 14.  
Whistling While They Work: Enhancing the theory and practice of internal witness management in public sector organisations is a three year national research project funded by a grant from the Australian Research Council, five participating universities and 12 of Australia’s leading public integrity agencies and organisations (such as the Commonwealth, Queensland, the WA Ombudsman, the Queensland CMC and the NSW ICAC). The project is being led by Queensland’s Griffith University. The research will involve extensive surveys into the experience of public sector whistleblowers in participating jurisdictions (Commonwealth, Queensland, NSW, WA, NT, and the ACT), the ways in which managers handle internal disclosures, the institutional supports in place to manage whistleblowing-related conflicts and options for law reform. The project is anticipated to be finalised in late 2007.  

3.4.1 Whistleblowers Protection Act 1994

Under Part 5 of the WPA, disclosers are protected from civil or criminal liability and liability under an administrative process for making a public interest disclosure: s 39. In fact, the discloser has a defence of absolute privilege in a defamation action. Also, if the disclosure would otherwise be in breach of confidentiality, there will be no contravention in these circumstances.

Sections 41-42 make reprisals against any person as a result of a public interest disclosure unlawful. A reprisal is causing, attempting or conspiring to cause, detriment to another person on this basis. That ‘detriment’ includes personal injury or prejudice to safety; property damage or loss; intimidation or harassment; adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; threats of detriment; and financial loss from detriment.

A public officer who takes a reprisal commits an indictable offence and is liable to a fine of up to $12,525 or a 2 year prison term: s 42. A civil action can also be brought against a person who takes a reprisal: s 43. The taking of reprisal action by a public officer constitutes misconduct for which the officer may be dismissed or disciplined: s 57.

59 Griffith University & CMC Media Release.

60 See s 5 of the Penalties and Sentences Act 1992 (Qld).

61 Under Part 5, Division 7, an application for injunction can be made in certain circumstances to the Industrial Commission or the Supreme Court.
One of the best ways of protecting disclosers from reprisals is to keep their identities confidential, as required by s 55 of the *WPA*. 62

Under s 55 of the *WPA*, an officer who receives a public interest disclosure for an appropriate entity must preserve the confidence of the information – apart from those disclosures necessary to carry out his or her obligations, or for a court/tribunal proceeding, or to comply with natural justice requirements. A maximum penalty of $6,300 applies for contravention of this requirement. 63 The type of information protected is identifying information about the discloser and the officer against whom the disclosure is made, as well as the information itself; any personal affairs information about an individual; and information that could cause detriment to a person if disclosed. However, such information will not be protected if it has been publicly disclosed in a public interest disclosure made to a court, tribunal or other entity that may receive evidence, unless further disclosure is prohibited. For example, the CMC may prohibit the publication of evidence given before it on the grounds that it is contrary to the public interest to publish it.

By making unlawful the taking of reprisal action against ‘any person’ as a result of the disclosure, not just the officer making the original disclosure, the *WPA* seeks to protect anyone involved in bringing the issues to light. 64

Under Division 6 of Part 5, public sector entities must have reasonable procedures in place to protect their officers from reprisals. If an officer is appealing or seeking to review disciplinary action; an appointment or transfer; or unfair treatment, the officer can ask for the action to be set aside on the basis that the action was the taking of a reprisal against the officer. When the *WPA* was introduced, the *Explanatory Notes* stated (p 8) that it would be necessary for the officer to show that the reprisal played a ‘substantial part’ in the action. Note also that an officer can ask for a relocation if it is likely that a reprisal will be taken if the officer continues to work in the existing location.

### 3.5 Other Jurisdictions

The Queensland *WPA* is one of the earlier types of whistleblowers protection legislation. The New South Wales *Protected Disclosures Act 1994* and the South Australian *Whistleblowers Protection Act 1993* are similar to the Queensland Act.

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63 See s 5 of the *Penalties and Sentences Act 1992 (Qld)*. If done by a public officer it will also constitute misconduct.

64 AJ Brown et al, p 2.
On the other hand, Victoria’s Whistleblowers Protection Act 2001 and Tasmania’s Public Interest Disclosures Act 2002 are examples of more recent enactments which go beyond the mere mechanics of receiving, recording and reporting disclosures and protecting whistleblowers. The Victorian and Tasmanian Acts are almost identical and, under each, if an entity proposes to accept a public interest disclosure, it has to refer the disclosure to the Ombudsman who may investigate it or refer it back for investigation.\textsuperscript{65} The Western Australian Public Interest Disclosures Act 2003 is similar in that it seeks to ensure consistency in the way public interest disclosures are dealt with but does not have the Ombudsman in the oversight role. Under the Act, the Commissioner for Public Sector Standards must establish a code setting out minimum standards of conduct and integrity that must be complied with by the person receiving a public interest disclosure and prepare guidelines on procedures that entities must follow.

3.5.1 New South Wales

The Protected Disclosures Act 1994 (NSW) has many similarities to the Queensland WPA.\textsuperscript{66}

To receive protection under the Act, the disclosure must be made by a public official and made to –\textsuperscript{67}

- an investigating authority (which includes the Independent Commission Against Corruption (ICAC) and the Ombudsman); or
- the principal officer of a public authority or investigating authority or officer who constitutes a public authority; or
- another officer of the public authority or investigating authority to which the public official belongs or to which the disclosure relates. The disclosure must be made in accordance with the authority’s procedures for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money; or
- in certain circumstances, to a member of Parliament or the media (as explained earlier).

\textsuperscript{65} Queensland Ombudsman, Submission, p 7.


\textsuperscript{67} Protected Disclosures Act 1994 (NSW), s 8.
Sections 10-14 describe the ways in which disclosures by public officers are made.

Disclosures by public officers to the ICAC must be in accordance with the ICAC Act 1988 and be disclosures of information that shows or tends to show that a public authority or official has engaged in corrupt conduct: s 10. Disclosures to the Ombudsman must be made in accordance with the Ombudsman Act 1974 and be a disclosure of information that shows or tends to show that certain conduct of a public authority or official amounts to maladministration (i.e. action or inaction of a serious nature that is contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; or based on improper motives): s 11.

Sections 12 govern protection of disclosures to the Auditor-General concerning serious and substantial waste of public money by an authority or an officer and s 12B concerns disclosures to the Director-General of Local Government concerning serious and substantial waste in Local Government. Section 12A sets out the process for protecting disclosures to the Police Integrity Commission (PIC) concerning police officers or the PIC, and s 12C relates to disclosures to the ICAC Inspector about the ICAC, an officer of the ICAC or an officer of the ICAC Inspector. Section 13 deals with disclosures relating to investigating authorities.

Provision is made under ss 25-27 for referral of disclosures by investigating authorities to a more appropriate authority and by public officials to a more appropriate public official or investigative body.

Various protections are conferred on persons making the above types of disclosures, as set out in Part 3 of the Act. These include making the taking of reprisal action an offence carrying a fine and/or 12 months imprisonment.

In June 2004, the NSW Legislative Council’s General Purpose Standing Committee No 2 published Complaints Handling within NSW Health. The Inquiry arose from media interest in relation to serious allegations about inadequate patient care at Campbelltown and Camden Hospitals that triggered an investigation by the Health Care Complaints Commission (HCCC). In December 2003, the HCCC released its final report which included an examination of certain allegations made by several nurses about patient and management issues and the difficulties they encountered making the relevant disclosures.


An inquiry was then established by the General Purpose Standing Committee No 2 into complaints handling in NSW Health to examine systemic issues relevant to this issue. It was noted that the experience of the informants in the Campbelltown and Camden Hospital matters highlighted the consequences faced by whistleblowers.\(^{70}\) The Committee’s Report concluded that it was necessary to find “ways to ensure that people who raise concerns about patient safety were not vilified but, rather, seen as making a positive contribution to the provision of quality health care.”\(^{71}\) The Committee observed that even if a complaints handling system looked good on paper, it was necessary for officers to feel that they can report incidents and that management acts on their reports. What was needed, it considered, was cultural change and greater openness. An organisation with a ‘culture of learning’ would encourage staff to report incidents and analyse mistakes so that complaints would be seen as a source of information.\(^{72}\) A number of recommendations regarding principles of open disclosure and protection of whistleblowers (including protecting identities) were made by the Committee.

The [NSW Government’s response](#) supported the Committee’s recommendations regarding protection of whistleblowers and better handling of complaints.\(^{73}\)

### 3.5.2 South Australia

The [Whistleblowers Protection Act 1993 (SA)](#) is another example of the older style model of whistleblowers legislation.

Unlike the Queensland and NSW legislation, the range of persons able to make disclosures is broad. A person (which does not appear to be limited to a public officer and seems to include a natural person as well as a corporation) who makes an appropriate disclosure of public interest information incurs no civil or criminal liability in doing so: s 5. ‘Public interest information’ (defined in s 4) is information tending to show that a person, body corporate or government agency is or has been involved in illegal activity, or in an irregular or unauthorised use of public funds, or in conduct causing a substantial risk to public health or safety or to the environment; or that a public officer is guilty of maladministration.

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\(^{70}\) [Complaints Handling within NSW Health](#), p 62.

\(^{71}\) [Complaints Handling within NSW Health](#), p 67.

\(^{72}\) [Complaints Handling within NSW Health](#), pp 2-4.

\(^{73}\) NSW Government Response to the Legislative Council, General Purpose Standing Committee No 2, [Complaints Handling within NSW Health](#), March 2005.
To receive protection under the Act, the disclosure must be made only to certain persons or authorities: s 5(3)(4). The appropriate person or authority to receive the information will depend upon the type of information disclosed or to whom the information relates. For example, if the information relates to a public officer (other than a police officer of judicial officer), the disclosure must be received by the Ombudsman. In addition, the disclosure can be made to a Minister. Further, if the disclosure relates to fraud or corruption, the person to whom the disclosure is made must pass it on to the Police Complaints Authority (if it implicates the police), or to the Anti-Corruption branch of the police force in other cases.

The identity of the whistleblower must be kept confidential (s 7) and reprisals can be dealt with as acts of victimisation as an action in tort or under the Equal Opportunity Act 1984 (s 9). No offence appears to be created for victimisation action.

### 3.5.3 Victoria

A more recent model for the protection of whistleblowers is found in the Whistleblowers Protection Act 2001 (Vic).

Any person can make a disclosure about improper conduct to the Ombudsman or the relevant public body and it is not necessary that the person be a public officer. However, it must be an individual person, not a corporation, that makes the disclosure. ‘Public body’ and ‘public officer’ are broadly defined in s 3 of the Act and are similar to like definitions in the Queensland WPA.

‘Improper conduct’ is defined as ‘corrupt conduct’ (also defined but in a manner which seeks to evoke dishonesty of some type); a substantial mismanagement of public resources; conduct involving substantial risk to public health or safety; and conduct involving a substantial risk to the environment. In each case, it is also required that the conduct would, if proved, be a criminal offence or reasonable grounds for dismissal.

Disclosures can also be made about reprisal action taken against a person for a protected disclosure: ss 5, 18. It is an offence for someone to take reprisal action

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against a person and a fine and/or 2 years imprisonment can be incurred for committing such an offence.

To enable the disclosure to receive protection under Part 3 of the Act, it must be made in accordance with Part 2 of the Act which requires that –

- the disclosure be made to the appropriate person in accordance with the prescribed procedure. As a general rule, unless it concerns a member of Parliament or the police, the disclosure should be made to the public body employing the person about whom the disclosure relates, or to the Ombudsman; and

- certain criteria are met – that the disclosure be made by a natural person; relate to the conduct of a public body or officer acting in their official capacity; relate to improper conduct or reprisal action; and the person making the disclosure has reasonable grounds for believing that the alleged conduct has occurred.

Under s 29, the public body receiving the disclosure must inform the person making it if it determines that it is not a protected disclosure under the Act and of their rights of appeal to the Ombudsman. This must occur within 45 days of receiving the disclosure. If the disclosure is determined to be a protected disclosure, s 28 requires an assessment to be made of whether it is a public interest disclosure (in accordance with the process set out in ss 28-32). To do so, the public body may seek further information or conduct a discrete inquiry to determine if there is sufficient prima facie evidence of the relevant conduct. If it is decided that the disclosure is a public interest disclosure, it must be referred to the Ombudsman within 14 days of the decision. 76 If it turns out that the disclosure is not a public interest disclosure, it will still be a protected disclosure allowing the Part 3 protections – such as protection of confidentiality of the whistleblower, protection from defamation, protection from reprisal action – to apply.

If the Ombudsman decides that a matter is not a public interest disclosure, the person making it can, when advised of this by the Ombudsman, ask the Ombudsman to deal with the matter as a normal complaint. If it is determined to be a public interest disclosure, the Ombudsman will either investigate it or refer it to (as relevant) the Police Commissioner; Auditor-General; Director of Police Integrity; other prescribed bodies; or a public body if it relates to an employee etc. of that body. If the matter is referred to a public body for investigation, it must be done in accordance with Part 6 of the Act, the Ombudsman’s Guidelines and the public body’s procedures. Part 6 of the Act requires the Ombudsman to monitor the public body’s investigation and, if not satisfied with the way in which the

76 If, on the other hand, the public body finds that it is not a public interest disclosure, the person making the disclosure must be advised that the disclosure can be referred to the Ombudsman for a formal determination.
investigation is conducted (or the person making the disclosure is dissatisfied), the Ombudsman may take it over.

Under s 68 of the Act, each public body must have written procedures for handling disclosures under the Act, including procedures for the protection of whistleblowers – both internal and external – from detrimental action taken in reprisal for making a disclosure. Part of this process involves the appointment of a welfare manager to support the whistleblower. Public bodies must also have an established reporting system and a nominated protected disclosure coordinator. The protected disclosure coordinator’s role, among other responsibilities, is to impartially assess each disclosure to determine if it is a public interest disclosure; coordinate the organisation’s reporting system; ensure that the public body carries out its responsibilities; and carry out, or supervise the carrying out of, an investigation referred to the public body by the Ombudsman.77

The Ombudsman has an important role under the Act. The Ombudsman determines whether a disclosure should be investigated; can investigate disclosures; and monitors investigations referred to public bodies and the action taken as a consequence of the findings of the investigation. The Ombudsman also publishes guidelines to help public bodies to comply with the Act and reviews procedures for handling disclosures established by public bodies pursuant to s 68 of the Act. Reports are made to Parliament where public bodies do not implement recommendations made by the Ombudsman at the end of an investigation.

3.5.4 Tasmania

The Tasmanian Public Interest Disclosures Act 2002 is almost identical to the Victorian legislation in its structure and operation.78 Again, the Ombudsman plays a central role in handling disclosures under the Act and has issued Guidelines to assist public bodies in their understanding of, and compliance with, the Act.79

A difference of note is that under s 6 of the Tasmanian Act, the disclosure must be made by a public officer or by a contractor to a public body rather than by ‘any person’. The disclosure may be made about improper conduct by a public body or

a public officer. The types of ‘improper conduct’ are the same as under the Victorian legislation as are the provisions for receipt, handling and investigation of disclosures and the oversight function of the Ombudsman.

3.5.5 Western Australia

The Western Australian Public Interest Disclosure Act 2003 has a number of similarities to the Tasmanian and Victorian models but does not provide for referral of public interest disclosures to the Ombudsman.80 It is the Commissioner for Public Sector Standards who is charged with the oversight function under the Act (under Part 4). The main role of the Commissioner for Public Sector Standards is to develop a code of minimum standards of conduct and integrity; monitor compliance with the Act and code; and publish guidelines on internal procedures of proper authorities. Public authorities have obligations to report to the Commissioner annually regarding the investigation of disclosures and the outcome of such.81

Similarly to the Victorian legislation, any member of the public may make a disclosure of public interest information, not just public officers: s 5. ‘Public interest information’ is defined in s 3 as –

- improper conduct;
- an offence under a written law;
- a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources;
- an act or omission that involves a substantial and specific risk of injury to public health, prejudice to public safety, or harm to the environment; or
- a matter of administration that can be investigated by the Ombudsman.

If the disclosure relates to a public authority or a public officer – other than a member of Parliament, judicial officers, police officers or certain designated officers (where other ‘proper authorities’ must receive the disclosure) – the proper authority responsible for receiving the disclosure is generally the public authority concerned. The Act requires each public authority to establish a person responsible

80 Western Australian State Law Publisher, http://www.slp.wa.gov.au/statutes/swans.nsf/5d62daee56e9e4b348256ebd0012c422/6a1da7c7a740d9c248256d56001b7e22/$FILE/Public%20Interest%20Disclosure%20Act%202003.PDF.

for receiving such disclosures in relation to the public authority concerned – i.e. the public interest disclosure officer. In relation to a matter of administration that can be investigated by the Ombudsman, the proper authority for the disclosure is the public interest disclosure officer or the Ombudsman: s 5.

The Commissioner’s Guidelines note that disclosures to other persons, such as members of the media, will not be protected by the Act as these persons are not ‘proper authorities’. 82

Once the disclosure is made, the proper authority must investigate the information it receives although it may refuse to do so in certain circumstances: s 8. The matter can also be referred to another investigative body (e.g. the police) if relevant to do so. The proper authority is required to take relevant action to prevent the conduct recurring, such as the taking of disciplinary action. The authority must also provide the discloser with a report of the outcome.

Various protections for disclosers are provided for in Part 3 of the Act, including protection from reprisals. The taking of reprisal action is an offence which may attract a fine or 2 years imprisonment.

3.5.6 Australian Capital Territory

On 8 June 2006, the Chief Minister, Mr J Stanhope MP, introduced the Public Interest Disclosures Bill 2006 into the ACT Legislative Assembly consequent upon the review of the Public Interest Disclosure Act 1994 and the release of a Discussion Paper outlining options for a new and better system for making public interest disclosures and for protecting whistleblowers. 83

The Bill provides more direction on what constitutes a ‘public interest disclosure’. Under cl 7, a public interest disclosure must contain information that implicates a government entity or official in conduct that is contrary to the public interest. Clause 8 gives relevant examples of public interest information – a concept that is broader than a matter that affects just an individual interest. Examples are systemic failure, policy failure, fraud, corruption and pattern of non-compliance with a law or policy.


It appears that any person, not just a public official, can make a public interest disclosure. To be a valid public interest disclosure, the disclosure must be made to a ‘contact person’. That contact person includes a person designated by the government entity concerned to be the contact person or, otherwise, the chief executive of the entity, or the Ombudsman. If the disclosure is about financial management, it will be the Auditor-General and if about employment matters, the contact person is the Commissioner for Public Administration: cl 11.

There are clear processes established under Part 4 of the Bill for the investigation of a public interest disclosure, including referral of matters to the police under cl 34. Part 5 deals with action taken on completion of an investigation and the provision of an investigation report containing recommendations for action or otherwise. It is then for the chief executive of the agency concerned to decide what action should be taken, having regard to the report.

Part 6 gives various protections to disclosers and cls 51-52 make it an offence, punishable by a fine or 12 months imprisonment, or both, for taking reprisal action to injure, harass or discriminate against a person in an attempt to deter them from making a public interest disclosure or to punish them for doing so. The person impacted upon can sue for damages and can access remedies under the Human Rights Commission Act 2005.84

To ensure that the confidentiality of disclosures – intended to protect whistleblowers – is not abused by government bodies to prevent the exposure of maladministration, cl 17 of the Bill will require all public interest disclosures to be reported to an independent supervisor. The Ombudsman will be the supervisor for most public interest disclosures. The Commissioner for Public Administration will supervise employment related disclosures. The Auditor-General will supervise those regarding financial mismanagement. While the government entity to whom the disclosure relates will normally investigate the public interest disclosure (through an appointed investigator), the supervisor can step in and take over the investigation in certain circumstances (such as when the disclosure may implicate a chief executive of a government body). The supervisor also has the role of ensuring that chief executives take appropriate action to protect the public interest once the investigation is complete and recommendations have been made.85 The forgoing measures seem to bear some similarity to the general oversight function of the Ombudsman in the Victorian and Tasmanian models.

84 Mr J Stanhope MP, Second Reading Speech, p 1912. See Part 6 of the Public Interest Disclosure Bill 2006 (ACT). See also, cl 50 of the Public Interest Disclosure Bill 2006 (ACT).

85 Mr J Stanhope MP, Second Reading Speech, p 1912.
3.5.7 Northern Territory

In late 2002, the Northern Territory Attorney-General requested the Northern Territory Law Reform Committee to inquire into, and make recommendations for, the best model of legislation operating in other jurisdictions for the Northern Territory to follow.\(^{86}\) The Committee considered that, generally, the Victorian and Tasmanian legislation was the best model for the Northern Territory to adopt. It was noted, particularly, that with these Acts and later whistleblowers legislation, the responsibility for dealing with disclosures falls on the Ombudsman and that the trend appeared to be for locating responsibility for oversight in one independent body. That body has jurisdiction and expertise in the investigation process and is able to develop guidelines and procedures for agencies to follow.\(^{87}\)

The *Report on Whistleblowers Legislation* also commented that the later types of legislation emphasised effective internal mechanisms for handling disclosures, balancing the need for public bodies to deal with disclosures with external oversight. It was also noted that the Victorian and Tasmanian Acts cover all aspects of improper conduct and operate in a context like that in the Northern Territory where there are no specialist bodies that deal with various types of conduct, such as the CMC in Queensland which handles corrupt conduct.\(^{88}\) It was strongly suggested, however, that the Northern Territory legislation should go beyond the approach of the Victorian and Tasmanian Acts to extend the right of making a disclosure to ‘any person’ not just to a public officer (as under the Queensland *WPA*) or to natural persons (as in Victoria).\(^{89}\)

The Northern Territory Department of Justice released a draft *Public Interest Disclosure Bill 2004* for public comment (which closed on 18 March 2005). The draft Bill appeared to accord with the recommendations of the Law Reform Committee in enabling any person to make a disclosure regarding improper conduct to the Ombudsman or to the public body about which the disclosure relates. Protections were provided for persons making the disclosure, including making reprisal action an offence. The process for handling disclosures and determining if they are public interest disclosures was similar to that in the Tasmanian and Victorian legislation, including referral of the matter to the Ombudsman if it is found to meet the relevant criteria for a public interest disclosure.

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disclosure. Further, the Ombudsman had a central role for protected disclosures and was required to either investigate the disclosure or refer it to another body to do so, if appropriate. The final Bill is yet to be introduced into the Northern Territory Parliament.

On 30 March 2006, the Opposition Leader, Ms J Carney MLA, introduced a private member’s Bill into the NT Legislative Assembly stating that, as no Government Bill had been forthcoming during 2005, the Opposition was bringing forward the Whistleblowers Bill 2006. However, at the conclusion of her Second Reading Speech, Ms Carney said that the Opposition looked forward to debating the Government’s whistleblowers legislation before too long and that the Bill she was bringing in might prompt its introduction. Essentially, the Bill enables persons to make disclosures to the chief executive of the relevant agency concerned, the Ombudsman or to the Commissioner for Public Employment. The Ombudsman will oversee all investigations and must be notified of the investigation of a disclosure by the proper authority. The Ombudsman may take over the investigation on his or her own initiative. Similar protections for whistleblowers are provided as in other legislation of this type.

3.5.8 Commonwealth

Unlike the states and territories, there is no general whistleblowers protection legislation at the federal level, despite some unsuccessful attempts via private members’ Bills in the early 1990s. In December 2002, Senator Andrew Murray introduced into the Senate the Public Interest Disclosure (Protection of Whistleblowers) Bill 2002 as a private member’s Bill. The Ombudsman is stated to be an appropriate authority to receive and investigate disclosures and to receive complaints about unlawful reprisals but does not appear to be given a general oversight function. The Bill is yet to be debated.


92 For example, Senator C Chamarette, Whistleblowers Protection Bill 1993 (introduced 5 October 1993). There have also been Senate Inquiries such as the Senate Select Committee on Public Interest Whistleblowing, In the Public Interest, 1994.

Section 16 of the Commonwealth *Public Service Act 1999* provides that a person performing functions in or for an agency must not victimise, or discriminate against, any public service employee because the employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- the Public Service Commissioner or other authorised person; or
- the Merit Protection Commissioner or other authorised person;
- an agency Head or other authorised person.

The provision has been criticised as being limited in scope, applying to only around half of the Commonwealth public sector, i.e. those employed under the *Public Service Act.*

### 3.5.9 Australian Standard AS8004-2003

Australian Standard **AS8004-2003** – Whistleblower Protection Programs for Entities – sets out the way in which entities should establish and implement a whistleblower protection program. It seeks to cover government and non-government entities as well as non-profit bodies engaging in business with other entities in a business-like setting. The Standard is designed to enhance other laws about whistleblowing and draws upon the Victorian *Whistleblowers Protection Act 2001.*

The Standard is designed to encourage entity employees to report matters that may cause financial or non-financial loss to the entity or damage to its reputation; and to enable the entity to effectively handle whistleblower disclosures in a way that will protect both the whistleblower’s identity and the information provided. It also provides a framework for establishing policies for the protection of whistleblowers against internal or external reprisals, for the appointment of a Whistleblower Protection Officer and Whistleblower Investigation Officer and alternative means of reporting.

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The conduct sought to be made reportable is that which is dishonest, fraudulent, corrupt, illegal, in breach of the law, unethical, serious improper conduct, unsafe work practices or any other conduct which may cause financial or non-financial loss. However, this is not an exhaustive list.

The Standard sets out the essential elements of an effective whistleblower program and to meet the Standard, the program must satisfy the following elements:

- a structural element (a commitment by employees, managers and others to effective reporting of improper conduct supported by a whistleblower protection policy);

- an operational element (the establishment of an independent Whistleblower Protection Officer and Whistleblower Investigation Officer and alternative means of reporting, anonymity for whistleblowers where appropriate, feedback, conduct of the investigation, internal reporting arrangements);

- a maintenance element (education, training, visibility and communication, regular review and accountability so that every employee is made aware on induction and through ongoing training of the importance of reporting corrupt and illegal conduct).\(^98\)

The Standard also deals with a very essential component of an effective whistleblower program – protection of the whistleblower from reprisal action and from legal liability.

One commentator has observed:

*Rather than fearing the possible results of a whistleblower program, organisations should embrace a program as part of good corporate governance... It is only when senior managers and their boards are made aware of deficiencies within their organisations that they can act, ensuring that the interests of shareholders and the public alike are properly protected.*\(^99\)

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\(^99\) A Trimmer, p 603.
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