

PUBLIC INTEREST DISCLOSURE ACT 2018

***PRESENTATION TO AUSTRALIAN LABOUR
AND EMPLOYMENT RELATIONS
ASSOCIATION OF SA***

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WHISTLEBLOWERS PROTECTION ACT 1993

- Groundbreaking legislation
- First of its kind in an Australian jurisdiction
- One of the first in the world after the United States

WHISTLEBLOWERS PROTECTION ACT 1993

- ‘Whistleblower’ only appears in the title
 - Persons making disclosures
- Target three types of conduct
 - Maladministration and waste in the public sector
 - Criminal conduct generally (ie public or private sector)
 - Substantial risk to public health and safety, or to the environment
- Disclosures of misconduct not protected

WHISTLEBLOWERS PROTECTION ACT 1993

- Protections
 - Immunity from liability where criteria satisfied
 - Victimisation (could take action as a tort / EO Act claim)
 - Confidentiality - Recipient of disclosure must not divulge identity without consent except *'so far as may be necessary to ensure that the matters to which the information relates are properly investigated'*

WHISTLEBLOWERS PROTECTION ACT 1993

- Not reviewed for 20+ years
- Poorly understood
- Best practice?

WHISTLEBLOWERS PROTECTION ACT 1993

- State of mind of person making disclosure – reasonable belief
 - Cf ICAC Act reporting obligations – reasonable suspicion
- No obligation on most recipients to do anything with a disclosure
- No offence of victimisation
- No obligation on a person other than the recipient of disclosure to maintain confidentiality
- No protection for disclosing to journalist or member of Parliament
- No oversight of disclosures

ICAC REVIEW OF THE *WHISTLEBLOWERS PROTECTION ACT 1993*

- Request by then Attorney-General to conduct review of *Whistleblowers Protection Act 1993* (WBP Act)
- Review completed October 2014
- 218 page report (www.icac.sa.gov.au)
- 30 recommendations

ICAC REVIEW OF THE WHISTLEBLOWERS PROTECTION ACT 1993 (WBP ACT)

A new Act to replace the WBP Act. The new Act to address five fundamental issues:

1. The content of a disclosure
2. Who can make the disclosure
3. To whom a disclosure can be made
4. The protections given to a person making a disclosure
5. The action to be taken in respect of the receipt of a disclosure

ICAC PUBLIC INTEGRITY SURVEY: ATTITUDES TO REPORTING WRONGDOING

Conducted in 2018. More than 12,500 respondents:

- 53.2% worried about their job if they report wrongdoing
- 42.8% feel intimidated to report wrongdoing
- 31.5% agreed that reporting causes trouble with colleagues
- 29.2% know of others who have experienced negative consequences from reporting
- 35.7% agreed reporting externally had negative consequences

PUBLIC INTEREST DISCLOSURE ACT 2018 (PID ACT)

- **Commenced 1 July 2019**
- **Incorporates almost all recommendations from WBP Act
review**

PID ACT

- **Whistleblower = informant**
- **Disclosures must relate to ‘public interest information’**
- **Restriction on who can make disclosures and under what circumstances**
- **Must be made to a relevant authority**

PUBLIC INTEREST INFORMATION

- **Either**
 - **Environmental and health information**
 - *Information that raises a potential issue of a substantial risk to the environment or to the health or safety of the public generally or a significant section of the public: s 4*
 - **Public administration information**
 - *Information that raises a potential issue of corruption, misconduct or maladministration in public administration: s 4*

WHO CAN DISCLOSE?

- Environmental and Health Information

- *Anyone*

- *Reasonable Belief*

- Public Administration Information

- *Public Officer*

- *Reasonable Suspicion*

TO WHOM CAN A DISCLOSURE CAN BE MADE?

- Relevant Authority

- Section 5(5)

- *OPI**
- *Minister of the Crown**
- *Responsible officer in a public sector agency or council*
- *Ombudsman*
- *Manager or supervisor of public officer to whom the information relates*
- *Auditor General*
- *Commissioner for Public Sector Employment*
- *Member, officer or employee of a council (where information relates to a location within the council area)*
- *Presiding Officer or House of Parliament*
- *Member of the Police Force*
- *Environment Protection Authority*
- *+ more*

ACTION TO BE TAKEN

- Every appropriate disclosure must be assessed by recipient and:
 - Action taken (or decide to take no further action)
 - Action could be to refer to another person or agency
 - Notify informant of assessment and action taken, or reason for no action
(1st notification)
 - Notify the OPI of the appropriate disclosure and the assessment / action taken (or not taken)

See Guideline 1

ACTION TO BE TAKEN

- Person taking action, or person to whom disclosure is referred, must:
 - Notify informant of outcome of action (2nd notification)
 - Notify the OPI of the outcome of action

See Guideline 2

DISCLOSURE TO JOURNALIST / MEMBER OF PARLIAMENT

- Informant can still be protected under PID Act if:
 - They disclose substantially the same information as already disclosed to a relevant authority, made their identity known and:
 - Have not received notification 1 within 30 days; or
 - Have not received notification 2 within 90 days (or such longer period as specified in written notice).
- Believe on reasonable grounds that the information is true.

PROTECTIONS

- Immunity from liability as a result of making an appropriate disclosure.
 - *Has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person: s5(2).*
- Confidentiality
 - Identity of informant must not be disclosed unless:
 - Consent
 - So far as may be necessary to ensure that the matters to which the information relates are properly investigated.
 - In accordance with guidelines (**see Guideline 3**)

PROTECTIONS

- Victimisation
 - Criminal offence to personally commit an act of victimisation
 - Victimisation can be dealt with as a tort or under EO Act.
- Detriment:
 - (a) *Loss or damage (including damage to reputation)*
 - (b) *Injury or harm (including psychological harm)*
 - (c) *Intimidation or harassment*
 - (d) *Discrimination, disadvantage or adverse treatment in relation to a person's employment*
 - (e) *Threats of reprisal*

ICAC / OPI

- ICAC can prepare guidelines (s 14)
- OPI is a relevant authority
- OPI receives notifications
 - PID Act silent on what OPI is to do with notifications
 - Brief review of each notification
 - If nature of matter or proposed action justifies further consideration, dealt with under the ICAC Act.

TRANSITIONAL PERIOD

- By 30 September 2019:
 - Appointment of responsible officers (public sector agencies and councils)
 - Responsible Officer training (course approved by ICAC – PID regulations)
 - Procedure document (public sector agencies only at this stage)
 - Publicly available on internet

See Guideline 4

THANK YOU