
A review of the
Whistleblowers Protection Act 1993 (SA)

The Hon. Bruce Lander QC

September 2014

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Introduction

On 1 September 2013 the *Whistleblowers Protection Act 1993* (the WBP Act) was amended by the *Independent Commissioner Against Corruption Act 2012* (the ICAC Act). Section 13 was included in the WBP Act. It provides:

13-Review of the operation of Act

- (1) The Attorney-General must, as soon as practicable after the first appointment of an Independent Commissioner Against Corruption under the *Independent Commissioner Against Corruption Act 2012*, conduct a review of the operation and effectiveness of this Act.
- (2) The Attorney-General, or a person conducting the review on behalf of the Attorney-General, must consult the Independent Commissioner Against Corruption in relation to the review and have regard to any recommendations of the Commissioner for the amendment or repeal of the Act (unless the Commissioner is the person conducting the review).
- (3) The Attorney-General must, within 12 months of the first appointment of an Independent Commissioner Against Corruption, prepare a report based on the review and must, within 12 sitting days after the report is prepared, cause copies of the report to be laid before each House of Parliament.

The Attorney-General has requested me to conduct that review and report to him. By requesting me to conduct the review the Attorney-General satisfied

s13(2), which envisages that the Attorney-General might ask me to conduct the review. If someone else had been requested to conduct the review, that person would have needed to have regard to any recommendations made by me. On 4 October 2013 the Attorney-General wrote:

As indicated in my letter to you dated 11 March 2013, I wish to appoint you to conduct the review required by section 13. This letter serves as confirmation of this appointment.

Section 7(3) of the ICAC Act provides:

The Attorney-General may request the Commissioner to review a legislative scheme related to public administration and make recommendation to the Attorney-General for the amendment or repeal of the scheme.

That subsection is consistent with s13 of the WBP Act.

This review is my response to the Attorney-General's request.

Submissions Sought

On Tuesday 29 October 2013 I made a public call for submissions to this review.

A print advertisement was placed in *The Advertiser* newspaper on Tuesday 29 October 2013 and Saturday 2 November 2013. The public call for submissions was also advertised on ICAC's website from 29 October through to the closing date for submissions. The advertisement requested that interested persons provide a submission to me by close of business on 6 December 2013.

In addition, the Chief Executive Officer extended written invitations to 10 South Australian Government departments, agencies and administrative units, 6 representative bodies and not-for-profit organisations, and to 7 academic or research institutions to make a submission to this review.

Extensions of time to provide submissions were granted to those who requested an extension, so that I would receive as much assistance as possible.

Terms

In this review:

ICAC is the Independent Commissioner Against Corruption

ICAC Act is the *Independent Commissioner Against Corruption Act 2012*

Inquiry agency is the Ombudsman, or the Police Ombudsman, or the Commissioner for Public Sector Employment

OPI is the Office for Public Integrity

Public administration includes the whole of the public sector and local government

Public authority (which includes a local council) is as defined in the ICAC Act

Public officer is as defined in the ICAC Act

WBP Act is the *Whistleblowers Protection Act 1993*.

WPL is Whistleblowers Protection Legislation

List of Recommendations

Recommendation 1: The WBP Act be repealed and a new Act be substituted that clearly addresses the four fundamental issues relevant to whistleblowing and the further recommendations mentioned in this review.

Recommendation 2: That the reporting of criminal conduct other than in public administration not be addressed by WBL.

Recommendation 3: That WBL recognise disclosures of conduct that creates a substantial risk to the environment or to public health and safety wrongdoing, whether the conduct has occurred in the public sector or private sector.

Recommendation 4: That maladministration as it is presently defined, and its use in the definition of public interest information, not be included in WBL.

Recommendation 5: That the definition of public interest information in WBL in public administration be consistent with the definitions of corruption, misconduct and maladministration in public administration in the ICAC Act.

Recommendation 6: That WBL protect public officers (as those public officers are defined in the ICAC Act) in relation to disclosures about unacceptable conduct in public administration.

Recommendation 7: That WBL no longer cover public interest information disclosures made by members of the public in relation to public sector wrongdoing, because the ICAC Act provides a sufficient specialist channel for such disclosures, and the office of the Ombudsman provides an additional

channel for persons directly affected by public sector decisions and other administrative acts.

Recommendation 8: That WBL provide protection for any person who makes a public interest disclosure about conduct that causes a substantial risk to public health or safety or to the environment.

Recommendation 9: That WBL provide an obligation, subject to appropriate exceptions, to investigate disclosures.

Recommendation 10: That the OPI be the primary recipient for public interest disclosures by public officers concerning unacceptable conduct in public administration.

Recommendation 11: That a Minister continues to be a person to whom a public interest disclosure may be made under WBL.

Recommendation 12: That a person in authority who supervises or manages the public officer, directly or indirectly, be included as an appropriate recipient of a protected public interest disclosure. Further, that the ICAC be empowered to provide guidelines to a public authority as to the person within an agency who could be considered a person in authority under WBL.

Recommendation 13: That WBL require that the head of each public sector entity designate a person as a “responsible officer” and that the responsible officer within a public sector entity be a recipient of a public interest disclosure under WBL.

Recommendation 14: That WBL permit a public officer to re-disclose a public interest disclosure to the media or to a Member of Parliament where there has been a previous public interest disclosure in accordance with WBL, but there has been a failure to investigate or a failure to keep the public officer informed and, where the re-disclosure covers substantially the same information as the initial disclosure and, provided that the information is substantially true, or that the discloser believes on reasonable grounds that the information is true.

Recommendation 15: That WBL make clear that the making of a public interest disclosure does not of itself amount to a breach of confidence, a breach of professional etiquette or ethics, or breach of a rule of professional conduct, or if in relation to a parliamentarian, a contempt of the Parliament.

Recommendation 16: That WBL include an offence for disclosing the identity of a person who has made a public interest disclosure, with exceptions that permit disclosure within referrals for investigation and for other proper purposes clearly set out.

Recommendation 17: That WBL permit a person to make an anonymous public interest disclosure to the OPI and obtain the status of whistleblower.

Recommendation 18: That WBL provide for civil remedies which are low cost and that the South Australian Civil and Administrative Tribunal and the District Court be considered as jurisdictions where such actions can be heard.

Recommendation 19: That an injunctive remedy be available to a whistleblower who can demonstrate a risk of victimisation to prevent anyone from engaging in such victimisation.

Recommendation 20: That WBL provide that a whistleblower taking action for victimisation or breach of a statutory duty not be liable for costs unless the relevant court or tribunal rules that the whistleblower has conducted his or her litigation unreasonably or vexatiously or have brought the proceedings without reasonable cause.

Recommendation 21: That WBL provide for a duty on agencies of the Crown to take reasonable steps to prevent victimisation of whistleblowers, and provide for the agencies' vicarious liability for victimisation of employees at the hands of other employees if the agencies fail to do so.

Recommendation 22: That WBL include an offence of victimisation.

Recommendation 23: That the provision for the making of a false disclosure be in similar terms to s22 of the ICAC Act, without making recklessness as to falsity of the disclosure an offence.

Recommendation 24: That in relation to allegations made against public officers or entities by public officers or entities, the necessary knowledge threshold to make a protected disclosure be the same as that contained in s20 of the ICAC Act and in the ICAC's Directions and Guidelines.

Recommendation 25: That an obligation to assist with an investigation, with loss of protection resulting from failure to co-operate, not be included in WBL.

Recommendation 26: That South Australia not adopt a US-style bounty scheme for public sector whistleblowing.

Recommendation 27: That WBL empower ICAC to act as the oversight body for WBL.

Recommendation 28: That WBL require each public sector agency to devise and publish a public interest disclosure procedure. That WBL specify minimum requirements for that procedure similar to those found in the Australian Capital Territory's legislation.

Recommendation 29: That WBL deal with the handling of public interest disclosures about unacceptable conduct in public administration in a manner which is complementary with the ICAC Act, according to the process set out in this review.

Recommendation 30: That WBL provide for a process to allow a Minister to refer a public interest disclosure concerning environmental and public health and safety risks to a public authority for investigation.

The History of the WBP Act

The WBP Bill was introduced into the House of Assembly on 23 March 1993. It was described by the then Minister of Primary Industries the Hon Terry Groom in his second reading speech as an integral part of the Government's comprehensive public sector anti-corruption programme, which included:

- The establishment of the Police Complaints Authority
- The development of codes of ethics and conduct for police officers and public sector employees
- The enactment of the *Statutes Amendment and Repeal (Public Offences) Act 1992*
- The launching of a Public Sector Fraud Policy and the establishment of the Public Sector Fraud Co-ordinating Committee
- The establishment of the Anti-Corruption Branch of the South Australia Police Force.

He said ¹

The Government is of the opinion that action must be taken in order to provide protection for those who disclose public interest information in the public interest. Such legislation is not only about freedom of speech, it is also a useful weapon against corruption for personal gain, incompetence and danger to the public interest.

and²

The Bill sets two kinds of balances. The first is the substantive policy balance. If the Bill makes it too hard for whistleblowers to get the protection which it offers, then it will be ignored and whistleblowers will risk reprisals as they do at the moment. This would be counterproductive and wasteful. If the Bill makes it too easy for whistleblowers, it will undermine the integrity of Government and the

¹ South Australia, House of Assembly, *Parliamentary Debates (Hansard)*, 23 March 1993, at 2521.

private sector, and risk justifiable Governmental or commercial and industrial confidentiality.

The second kind of balance is the style balance. One of the objects of the Bill is to inform all who read it of their rights and duties, and to channel disclosures if at all possible to responsible investigating authorities. Therefore the Bill should be as clear and comprehensible as possible.

He also said³

The Government does not believe that this State needs more investigating authorities and more bureaucratic structures for dealing with these disclosures... That is why the Bill seeks to leave the investigation of disclosures and the administrative protection of whistleblowers to such bodies as the Police Complaints Authority, the Auditor General, the Police and the Anti-Corruption Branch and the Equal Opportunity Commissioner.

He described the intent of the legislation:⁴

This Bill does not require a whistleblower to go to an appropriate authority, but it encourages them to do so. It protects the confidentiality of their identity, but it requires them to co-operate with any official investigating authority. The protections involve immunity from criminal and civil action, and the right to seek redress for victimisation.

When the WBP Act was enacted in 1993 it was ground breaking legislation. It was the first Australian jurisdiction and one of the first in the world after the United States to pass a comprehensive whistleblower protection law⁵.

Much however has changed since that time, and South Australia's model can no longer be described as best practice.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ A J Brown, *South Australian Whistleblower Protection: A new Opportunity* (Don Dunstan Foundation, 2013) 7.

The WBP Act has not been reviewed by the Government since its introduction.

It is appropriate that the WBP Act now be reviewed, not only because some 21 years has passed since it was enacted, but because the ICAC Act has been enacted and the ICAC Act evinces a legislative intention that is not entirely consistent with the remarks made in the second reading speech in 1993. There are also tensions between the WBP Act and the ICAC Act that need to be resolved.

There are a number of issues to address in the course of this review, but four of the principal issues are who should be given legislative protection for making public interest disclosures; what should be the content of such a disclosure; to whom should the person make the disclosure to obtain statutory protection; and what should be the extent of that protection.

These questions must be addressed by first considering the current integrity landscape in South Australia.

The answers to these questions are informed in part by the ICAC Act.

It is necessary therefore to have an understanding of the ICAC Act and its recent impact on the integrity landscape to understand how the WBP Act should be reviewed.

The ICAC Act and the WBP Act

The ICAC Act

The ICAC Act has as its primary objectives:

3—Primary objects

- (1) The primary objects of this Act are—
 - (a) to establish the Independent Commissioner Against Corruption with functions designed to further—
 - (i) the identification and investigation of corruption in public administration; and
 - (ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and
 - (b) to establish the Office for Public Integrity to manage complaints about public administration with a view to—
 - (i) the identification of corruption, misconduct and maladministration in public administration; and
 - (ii) ensuring that complaints about public administration are dealt with by the most appropriate person or body; and
 - (c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).
- (2) While the Commissioner may perform functions under this Act in relation to any potential issue of corruption, misconduct or maladministration in public administration, it is intended that the primary object of the Commissioner be—
 - (a) to investigate serious or systemic corruption in public administration; and

- (b) to refer serious or systemic misconduct or maladministration in public administration to the relevant body, giving directions or guidance to the body or exercising the powers of the body as the Commissioner considers appropriate.

The ICAC Act has created two offices; OPI has the function of receiving and assessing complaints and reports of corruption, misconduct and maladministration in public administration and to make recommendations to ICAC as to how they should be addressed: and the ICAC has the responsibility of investigating corruption and overseeing the investigation of misconduct and maladministration in public administration.

The functions to which I have referred show that the ICAC Act is concerned with three types of conduct: corruption, misconduct and maladministration in public administration. In this review I refer from time to time to these types of conduct generally as unacceptable conduct.

The ICAC Act is only concerned with unacceptable conduct in public administration. It is not concerned with conduct in the private sector but it does extend to conduct of a person employed in the private sector whilst engaged in or with public administration.

Any member of the public can, and any inquiry agency, public authority and public officer *must* report conduct that the member of the public, inquiry agency, public authority or public officer reasonably suspects involves corruption, or serious or systemic misconduct or maladministration in public administration *to the OPI*.

The inquiry agencies referred to in the ICAC Act are the Ombudsman, Police Ombudsman and the Commissioner for Public Sector Employment

(Commissioner for PSE). They will be collectively referred to as inquiry agencies throughout this review.

Public authorities and public officers are defined in Schedule 1 of the ICAC Act. It is not necessary to analyse in detail who or what are public authorities and who is a public officer.

Public authorities include all agencies, instrumentalities and statutory offices across the public sector. Importantly all local government bodies are public authorities.

Public officers include anyone employed by a public authority and some persons who are engaged in the public sector but not employed, e.g. the Governor and a Member of Parliament. A member of a local council or an employee of a local council is a public officer.

The definition of a public officer also includes “a person performing contract work for a public authority or the Crown”, which means that the ICAC Act applies to some people in the private sector who are engaged in public administration because they are contracted to public authorities.

The legislative intention is to catch all people engaged in public administration in South Australia.

A member of the public can choose or elect to make a complaint of corruption, misconduct and maladministration in public administration to the OPI. There is no compulsion to do so but on the other hand there is nothing to prevent a member of the public making a complaint of that kind.

The OPI's experience is that fifty percent (50%) of reports received are complaints by members of the public.

An inquiry agency, public authority and public officer all have an obligation which is imposed by the ICAC Act to report unacceptable conduct.

Section 20(1) – (3) of the ICAC Act provides:

20—Reporting system

- (1) The Commissioner must prepare directions and guidelines governing reporting to the Office of matters that an inquiry agency, public authority or public officer reasonably suspects involves corruption, misconduct or maladministration in public administration.
- (2) The directions and guidelines—
 - (a) must include provisions specifying the matters required to be reported and guidance as to how they should be reported; and
 - (b) may require matters to be reported even if the matter has been referred to the inquiry agency, public authority or public officer under another Act; and
 - (c) must be made available free of charge on the Internet, and at premises established for the receipt of complaints or reports by the Office, for inspection by members of the public.
- (3) An inquiry agency, public authority or public officer—
 - (a) must make reports to the Office in accordance with the directions; and
 - (b) may report to the Office any matter that the agency, authority or officer reasonably suspects involves corruption, misconduct or maladministration in public administration.

In accordance with the statutory obligation in s20(1) of the ICAC Act I prepared and published Directions and Guidelines governing reporting obligations to OPI.

The Directions and Guidelines should be studied for their precise terms, but broadly speaking an inquiry agency, a public authority and public officer must report any conduct that they reasonably suspect raises a potential issue of corruption or serious or systemic misconduct or maladministration in public administration.

It is necessary to understand how the ICAC Act defines what I have called unacceptable conduct.

Corruption is defined in s 5(1) of the ICAC Act:

- 5(1) Corruption in public administration means conduct that constitutes—
- (a) an offence against Part 7 Division 4 (Offences relating to public officers) of the Criminal Law Consolidation Act 1935, which includes the following offences:
 - (i) bribery or corruption of public officers;
 - (ii) threats or reprisals against public officers;
 - (iii) abuse of public office;
 - (iv) demanding or requiring benefit on basis of public office;
 - (v) offences relating to appointment to public office; or
 - (b) an offence against the Public Sector (Honesty and Accountability) Act 1995 or the Public Corporations Act 1993, or an attempt to commit such an offence; or
 - (c) any other offence (including an offence against Part 5 (Offences of dishonesty) of the Criminal Law Consolidation Act 1935) committed by a public officer while acting in his or her capacity as a public officer or by a former public officer and related to his or her former capacity as a public officer, or by a person before becoming a public officer and related to his or her capacity as a public officer, or an attempt to commit such an offence; or

- (d) any of the following in relation to an offence referred to in a preceding paragraph:
 - (i) aiding, abetting, counselling or procuring the commission of the offence;
 - (ii) inducing, whether by threats or promises or otherwise, the commission of the offence;
 - (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, the commission of the offence;
 - (iv) conspiring with others to effect the commission of the offence.

The definition of corruption in one sense is very narrow and in another sense very wide.

It is narrow because corruption is limited to conduct that constitutes a criminal offence. Anything less than a criminal offence is not corruption for the purposes of the ICAC Act. A person cannot be corrupt unless that person commits a criminal offence. A person who is not a public officer can be guilty of corruption if that person commits an offence of the kind in paragraphs (a) or (b) or is guilty of the conduct in paragraph (d) of the definition of corruption.

However the definition is very wide in that while it includes the offences in para (a) and (b) of the definition and includes offences against Part 5 of the *Criminal Law Consolidation Act 1935*, it includes in (c) of the definition any offence “committed by a public officer whilst acting in his or her capacity as a public officer”.

The definition therefore picks up the least serious offences that might be committed by a public officer if that offence is committed whilst the public officer is acting in his or her capacity as a public officer.

The ICAC Act limits the kind of corruption that ought to be addressed by describing the corruption that can be assessed by OPI and investigated by ICAC as corruption in public administration that could be the subject of a prosecution: s23(1)(2); s24(1).

That means that conduct that could raise a potential criminal offence but which is unlikely to be prosecuted, is not the type of corruption that should be investigated by ICAC.

Misconduct is defined in s5:

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

There are two types of misconduct for the purpose of the ICAC Act, but both types require that the public officer's conduct be while acting in the public officer's capacity as a public officer.

The type of conduct that is envisaged in (a) is a contravention of the Code of Ethics that applies to all public sector employees (public officers) by reason of the *Public Sector Act 2009*; a contravention of the Codes of Conduct that apply to Council members and employees by reason of the *Local Government Act 1999*; or a breach of Part 5 of the *Police Regulations 1999* made under the *Police Act 1998* that apply to all police officers; or any other code of conduct that applies to public officers engaged in public administration.

The second type of conduct is “other misconduct” that is not further defined in the ICAC Act. The Code of Ethics for public sector employees does not require those employees to comply with the Directions and Guidelines published under the ICAC Act. However, the ICAC Act does require public officers (which includes all public sector employees) to make reports to the OPI in accordance with the directions: s20(3)(a).

A failure by a public officer to comply with the directions would be “other misconduct” for the purposes of the ICAC Act.

Maladministration is defined in s5:

- (a) means—
 - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
 - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

Maladministration includes not only the conduct of a public officer but also the practice, policy or procedure of a public authority. Of the three types of conduct with which the ICAC Act is concerned, maladministration is the only one that applies to a public authority.

Because of the effect of s20, an inquiry agency, public authority or public officer must report to the OPI any conduct that it, he or she reasonably suspects raises a potential issue of corruption in public administration. Because corruption includes any criminal offence committed by a public officer acting in his or her capacity as a public officer, the OPI should receive all reports of criminal conduct committed by public officers while the public officers are acting in their capacity as public officers in public administration.

The Directions and Guidelines require that misconduct or maladministration must be reported to the OPI by a public officer but only if the misconduct or maladministration is serious or systemic.

It follows that if a public officer reasonably suspects that another public officer has engaged in corruption, or serious or systemic misconduct, or that a public authority or public officer has engaged in conduct that results in serious or systemic maladministration, then the public officer must report the conduct to OPI.

Therefore public officers who are whistleblowers *must* now report any corrupt conduct or serious or systemic misconduct or maladministration in public administration caught by the ICAC Act to the OPI, regardless of whether these public officers report the conduct to any other person, authority or institution.

For the reasons I have given, if they fail to make that report they may be guilty of misconduct: s20.

If that public officer has blown the whistle in accordance with the WBP Act, and the person to whom the disclosure has been made is also a public

officer, the public officer to whom the disclosure is made also has a duty under the Directions and Guidelines published under s20 of the ICAC Act to report the matter to OPI.

That separate duty will arise when the public officer to whom the disclosure has been made suspects on reasonable grounds that the conduct which the whistleblower has disclosed raises a potential issue of corruption or serious or systemic misconduct or maladministration in public administration.

Thus, OPI must be made aware of the conduct of which the whistleblower is aware and which the whistleblower has reported to another public officer.

Any future WBL should recognise that all whistleblowers who are also public officers are already under a statutory obligation to report any conduct that raises a potential issue of corruption or serious or systemic misconduct and maladministration in public administration to the OPI. Moreover, if the whistleblower also reports to another public officer the public officer to whom the whistleblower has reported must also report that conduct to OPI.

A member of the public or a public officer has the protections given by ss56(b)(d) and (e) and s54 if he or she makes a complaint or report of unacceptable conduct to OPI.

Section 56(b)(d) and (e) provide:

A person must not, except as authorised by the Commissioner or a court hearing proceedings for an offence against this Act, publish, or cause to be published—

- (b) information that might enable a person who has made a complaint or report under this Act to be identified or located; or

- (d) information that might enable a person who has given or may be about to give information or other evidence under this Act to be identified or located; or
- (e) the fact that a person has given or may be about to give information or other evidence under this Act; or

Section 54 provides:

- (1) A person must not, directly or indirectly, disclose information obtained in the course of the administration of this Act in connection with a matter that forms or is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act except—
 - (a) for the purposes of the administration or enforcement of this Act; or
 - (b) for the purposes of a criminal proceeding or a proceeding for the imposition of a penalty; or
 - (c) for the performance of the functions of the Commissioner under another Act; or
 - (d) as otherwise required or authorised by this Act.

Maximum penalty: \$10 000 or imprisonment for 2 years.

- (2) The Commissioner may, as the Commissioner considers appropriate, provide, or authorise the provision of, information connected with a matter that is the subject of a complaint, report, assessment, investigation, referral or evaluation under this Act to—
 - (a) a person who makes a complaint or report to the Office; or
 - (b) a person who is the subject of a complaint, report or investigation; or
 - (c) a person who is required by the Commissioner or an investigator to answer a question, produce a document or other thing or provide a copy of a document or a statement of information; or
 - (d) an inquiry agency, public authority or public officer; or
 - (e) a law enforcement agency; or
 - (f) a Minister; or
 - (g) the Auditor-General; or

- (h) a legal or technical expert from whom advice is sought in the course of an investigation; or
- (i) a person conducting a review under Part 5; or
- (j) any other person of a class prescribed by the regulations.

The complainant's or the reporter's identity should not become known unless the complainant or reporter gives his or her authority.

OPI's practice is not to provide information relating to a person's identity to anyone unless the person has consented to his or her identity being released.

Therefore a complainant's or reporter's identity should not be revealed by reporting to OPI.

A member of the public or public officer who complains or reports to OPI does not acquire the status of a whistleblower that is given by the WBP Act or the benefits provided for by the WBP Act. He or she does not obtain immunity from civil or criminal liability as a whistleblower does under the WBP Act.

Future WBL has to be considered in the light of the mandatory reporting obligations imposed upon public officers by the ICAC Act.

The WBP Act

It is also necessary to understand the current WBP Act in order to review the operation and effectiveness of the WBP Act.

Although the Act is called the “Whistleblowers Protection Act”, the Act does not refer to whistleblowers except in its title. Rather it talks of persons making disclosures.

The WBP Act has as its sole object “to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector, and corrupt and illegal conduct generally by providing means by which such disclosures may be made; and by providing appropriate protections for those who make such disclosures.”⁶

The object of the WBP Act is said to be to target two types of conduct: maladministration and waste in the public sector; and corrupt or illegal conduct generally.

Maladministration is defined in s4 of the WBP Act to include “impropriety or negligence”. Corrupt or illegal conduct is not defined.

The two types of conduct are quite different.

The first limb of the bifurcated object may involve the disclosure of conduct that is neither corrupt nor illegal, but merely conduct that amounts to maladministration or is wasteful, but only in the public sector. It has no application to the private sector.

The second limb of the bifurcated object relates to the disclosure of corrupt or illegal conduct generally, which may include of course conduct of that kind in the private sector.

⁶ Section 3 of the WBP Act.

A person therefore may make a disclosure of public interest information that is maladministration and waste in the public sector, or corrupt or illegal conduct in either the public or private sector.

If, as I assume, illegal activity must be criminal conduct, a person who makes a disclosure of serious misconduct committed by public officer in public administration, would not obtain the protections given by the WBP Act.

Disclosure of misconduct is not protected by the WBP Act.

The scheme of the Act is to provide immunity where a person makes an appropriate disclosure of “public interest information” by protecting that person against any civil or criminal liability for doing so. Section 5(1) provides:

- (1) A person who makes an appropriate disclosure of public interest information incurs no civil or criminal liability by doing so.

It is important to note that the scheme of the WBP Act does not provide for a process by which a person can claim to be a whistleblower or claim the benefits of a whistleblower.

As I have said the WBP Act does not speak of whistleblowers. What it does is give a person who makes an appropriate disclosure of public interest information immunity from civil and criminal liability in making the disclosure.

A person obtains that immunity if the person satisfies the criteria in s5. The satisfaction of the criteria provides the immunity.

Some people therefore will not know if they have the immunity given in s5(1) ie. that they have not incurred civil or criminal liability in making the disclosure. A person cannot seek the immunity, and indeed some persons will not even

know about the immunity, but they will become entitled to the immunity because they satisfy the s5 criteria.

Equally as important, the person to whom the person has made the disclosure may not know that the person who has made the disclosure is entitled to the immunity, because the recipient of the disclosure will not know if the criteria in s5 have been satisfied.

The result is most unsatisfactory because the person to whom the disclosure is made has obligations that the WBP Act imposes on him or her by a disclosure that satisfies s5.

The disclosure must be of public interest information.

Public interest information is defined in s4 of the WBP Act:

public interest information means information that tends to show—

- (a) that an adult person (whether or not a public officer), body corporate or government agency is or has been involved (either before or after the commencement of this Act)—
 - (i) in an illegal activity; or
 - (ii) in an irregular and unauthorised use of public money; or
 - (iii) in substantial mismanagement of public resources; or
 - (iv) in conduct that causes a substantial risk to public health or safety, or to the environment; or
- (b) that a public officer is guilty of maladministration in or in relation to the performance (either before or after the commencement of this Act) of official functions;

That definition must be considered against the object of the WBP Act to which I have already referred. The information in paragraph (a) may be about persons who need not be public officers but the information in (b) must be about public officers. Public officer is defined in s4 of the WBP Act to mean:

- (a) a person appointed to public office by the Governor; or
- (b) a member of Parliament; or
- (c) a person employed in the Public Service of the State;
or
- (d) a member of the police force; or
- (e) any other officer or employee of the Crown; or
- (f) a member, officer or employee of—
 - (i) an agency or instrumentality of the Crown; or
 - (ii) a body that is subject to control or direction by a Minister, agency or instrumentality of the Crown;
or
 - (iii) a body whose members, or a majority of whose members, are appointed by the Governor or a Minister, agency or instrumentality of the Crown;
or
- (g) a member of a local government body or an officer or employee of a local government body.

The definition is very wide but similar in effect to the definition of public officer in Schedule 1 of the ICAC Act.

The information can be about a public officer (provided the public officer is an adult), a body corporate or government agency provided he or she or it has been involved in illegal activity, maladministration (placita (ii) and (iii)), or conduct that causes substantial risk to public health or safety to the environment.

The types of conduct that are identified in paragraph (a) of the definition of public interest information are wider than those predicated in the object in s3 of the WBP Act.

The object of the Act has the two elements to which I have referred of maladministration and waste in the public sector and illegal activity generally. Paragraph (b) deals with maladministration and I suppose so do placita (ii) and (iii) of paragraph (a).

Because placita (ii) and (iii) of paragraph (a) refer to “public money” and “public monies”, these placita must be referring conduct in the public sector but not necessarily by a public officer.

Placitum (i) deals with illegal activity and because the definition is not limited to public officers includes any illegal activity by anyone in both the public and private sector.

Placitum (iv) is not envisaged in the object of the WBP Act. It is also not confined to conduct of that kind in the public sector but may be conduct in either the public or private sector.

The information may be about maladministration in the public sector that might have been caused by impropriety or negligence by a public officer: para (b). It may also be about conduct not engaged in necessarily by a public officer of the kind in para (a) but it is likely that placita (ii) and (iii) are confined to the public sector.

The information may be about illegal activity or conduct that causes a substantial risk to public health or safety in the environment, whether that activity or conduct occurred within or outside the public sector.

The person who makes the disclosure must make an appropriate disclosure.

Section 5(2) describes how an appropriate disclosure is made:

- 5(2) A person makes an appropriate disclosure of public interest information for the purposes of this Act if, and only if—
- (a) the person—
 - (i) believes on reasonable grounds that the information is true; or
 - (ii) is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated; and
 - (b) the disclosure is made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.

Section 5(2) is important. A person who is seeking the benefits of the WBP Act who discloses public interest information will only obtain that status if the person has a subjective belief that is objectively reasonable that the information is true, or if not able to reach that state of belief, has a subjective belief that is objectively reasonable that the information may be true *and* is of sufficient significance to justify the disclosure so that the truth may be investigated. Because of the words “if, and only if” there must be strict compliance with s5(2).

The threshold for satisfying the criteria in s 5 is higher than the mandatory reporting obligations made under the ICAC Act.

Under the ICAC Act the state of mind that enlivens the reporting obligation is suspicion, albeit reasonable suspicion. Under the WBP Act the state of mind

is belief that the information is true or belief on reasonable grounds that the information may be true.

The two different standards of states of mind create a tension between the two Acts. Any future WBL must address that tension.

The disclosure must also be made to a person to whom in the circumstance of the case it is reasonable and appropriate to make the disclosure: s5(2)(b).

That is further explained in s5(3) which provides:

- 5(3) A disclosure is taken to have been made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure if it is made to an appropriate authority (but this is not intended to suggest that an appropriate authority is the only person to whom a disclosure of public interest information may be reasonably and appropriately made).

The effect of s5(3) is to make a disclosure to an appropriate authority satisfaction of s5(2)(b) and any person who can also satisfy s5(2)(a) will thereby satisfy s5(1).

Section 5(4) identifies who or what is an “appropriate authority”. It provides:

- 5(4) For the purposes of subsection (3), a disclosure of public interest information is made to an appropriate authority if it is made to a Minister of the Crown or—
 - (a) where the information relates to an illegal activity—to a member of the police force;
 - (b) where the information relates to a member of the police force—to the Police Ombudsman;
 - (c) where the information relates to the irregular or unauthorised use of public money—to the Auditor-General;

- (d) where the information relates to a public sector employee—to the Commissioner for Public Sector Employment;
- (e) where the information relates to a member of the judiciary—to the Chief Justice;
- (f) where the information relates to a member of Parliament—to the Presiding Officer of the House of Parliament to which the member belongs;
- (g) where the information relates to a public officer (other than a member of the police force or a member of the judiciary)—to the Ombudsman;
- (h) where the information relates to a matter falling within the sphere of responsibility of an instrumentality, agency, department or administrative unit of government—to a responsible officer of that instrumentality, agency, department or administrative unit;
- (i) where the information relates to a matter falling within the sphere of responsibility of a local Government body—to a responsible officer of that body;
- (j) where the information relates to a person or a matter of a prescribed class—to an authority declared by the regulations to be an appropriate authority in relation to such information.

Section 5(4) is a non-exhaustive list of persons or office holders to whom a person may make a disclosure and provided the other criteria in s5 is satisfied obtain the benefits of the WBP Act.

Section 5(4) allows for so many different people to be an appropriate authority that no one can know who qualifies as a whistleblower except each appropriate authority. However the WBP Act does not provide any structure for any central authority knowing who is entitled to the benefits of the WBP Act.

Each of the persons or office holders in s5(4) might receive disclosures but will not know of any persons who made a related disclosure to any other person or office holder.

There is no obligation on any of the persons or office holders to report to anybody or any authority when a person has made a disclosure to that person or officeholder except for the obligation in s5(5) which I will mention shortly.

Any disclosure to any Minister of the Crown will satisfy s5(3) and therefore s5(2)(b). On the other hand a complaint or report to OPI will not be a disclosure to an appropriate authority for the purposes of s5(4) although OPI could still be an appropriate authority because of the provisions of s5(3) and in particular the words in parentheses in that subsection.

Any disclosure of the kind of information mentioned in each of the paragraphs (a) to (g) can be made to a Minister or the officer holder mentioned in those paragraphs, which will also satisfy s5(3) and therefore s5(2)(b).

The only appropriate authority for the purpose of disclosure of illegal activity is a Minister or a member of the police force.

The other appropriate authorities are those public authorities that have responsibility for the types of conduct mentioned.

Paragraphs (h) and (i) of s5(4) introduce the notion of a responsible officer. A responsible officer is not defined in the WBP Act. However paragraphs (h) and (i) assume that instrumentalities, agencies, departments or administrative units of government and local government bodies will have a “responsible officer”

to whom a person who seeks the benefits of the WBP Act can disclose public interest information that satisfies s5(2).

The first thing to notice is that it is only the public sector (including local government) which is to have responsible officers. The WBP Act does not contemplate that the private sector will have responsible officers.

Therefore if the public interest information relates to the private sector then the disclosure must be made to a Minister or the relevant person in s5(4) (a) to (h) in order for the person who has made the disclosure to be assured that the disclosure is made to an appropriate person unless the person disclosing that information can satisfy s5(2)(b).

Secondly the WBP Act does not identify who is a responsible officer. It assumes that the relevant instrumentality, agency, department of administrative unit of government will have a “responsible officer”. However the WBP Act itself does not require any of those bodies to have a responsible officer.

The requirement to appoint a responsible officer is found in s7 of the *Public Sector Act 2009* and, for local government, in s302B of the *Local Government Act 1999*. That reinforces the earlier comment that the notion of a responsible officer is confined to the public sector.

If no responsible officer is appointed, the person must make his or her disclosure to a Minister or one of the persons in s5(4)(a) to (h) to be assured of protection.

Thirdly, the responsible officer must be the responsible officer of the instrumentality agency, department or administration unit of government or the local Government body that is the subject of the disclosure.

In other words if a person who is a public officer wishes to make a disclosure of public interest information other than to a Minister or the authorities mentioned in s5(4)(a)-(g) and be certain of protection under the WBP Act, that person must make the disclosure internally.

The object of the WBP Act and the definition of “public interest information” contemplate that a person may make a disclosure of illegal activity in the private sector. The person will only obtain the benefits under the WBP Act if that person satisfies the criteria in s5.

Because s5(4) does not contemplate that there will be responsible officers in the private sector the person making the disclosure must make the disclosure to a Minister of the Crown or a member of the police force. It is possible that a disclosure to someone else might satisfy s5(2)(b), but the person could not be sure of that at the time he or she made the disclosure.

No regulations have been made under s5(4)(j) of the WBP Act so there has been no broadening of the list of “appropriate authorities” to whom disclosure can be made.

It is important to say again that public officers who make a report to the OPI in accordance with their obligations under the Directions and Guidelines that is a report of conduct of the kind that is also public interest information under the WBP Act will not thereby have made a report to an appropriate authority and will not satisfy s5(1) unless they can rely upon 5(2)(b).

That is unsatisfactory.

Lastly section 5 imposes an obligation on the person to whom the disclosure is made. Section 5(5) provides:

- 5(5) If a disclosure of information relating to fraud or corruption is made, the person to whom the disclosure is made must pass the information on as soon as practicable to—
 - (a) in the case of information implicating a member of the police force in fraud or corruption—the Police Ombudsman;
 - (b) in any other case—the Anti-Corruption Branch of the police force.

The obligation in s5(5) is vague because the WBP Act does not provide a definition of fraud or corruption. It is not clear whether fraud or corruption extends to conduct that is not criminal conduct, because the Police Ombudsman’s powers are not limited to illegal conduct. However s5(5) rather assumes that fraud or corruption is criminal or illegal conduct because that is the only jurisdiction exercised by the Anti-Corruption Branch of South Australia Police.

It also does not identify who “the person” is in the subsection. It may be assumed that fraud and corruption is illegal activity. The only appropriate authority for the disclosure of illegal activity is a Minister or a member of the police force or a responsible officer where the information relates to a matter falling within the sphere of responsibility of an instrumentality, agency, department or administrative unit of Government.

This means for the private sector, illegal activity must be disclosed to a Minister or a member of the police force. Why a Minister might be interested in private sector illegal activity is not obviously apparent.

If the disclosure is made to a person who is not an appropriate authority, that person may have the obligation imposed in s5(5) even if that person is not aware that he or she has received public interest information.

If the disclosure is of illegal activity in the private sector that does not concern a police officer, the Police Ombudsman would have no jurisdiction to deal with the matter. The Anti-Corruption Branch would not entertain such a referral because it would not be within the Ministerial Direction for the Anti-Corruption Branch. This subsection is simply inappropriate for illegal activity in the private sector.

Section 5(5) imposes upon a person not defined an obligation to pass on information that is also not defined conduct relating to fraud or corruption in the private sector to the Police Ombudsman or to the Anti-Corruption Branch of South Australia Police, both of which have no jurisdiction to deal with any private sector conduct contained in the information.

If the public interest information concerns fraud or corruption in public administration the person to whom the disclosure is made would have to comply with s5(5). The Police Ombudsman is an inquiry agency and the Anti-Corruption Branch is part of South Australia Police which is a public authority. If the information is about the conduct of a public officer in public administration, the Police Ombudsman and the Anti-Corruption Branch would then have to report that conduct to OPI in accordance with the Directions and

Guidelines. There is a real risk of proliferation of reports relating to the same subject matter, with resultant inefficiency.

Section 5 imposes upon a person to whom a disclosure of public interest information has been made only the duty to pass on information relating to “fraud or corruption.”

The WBP Act does not impose any obligation on any of the persons mentioned in s5(4) to do anything with the information disclosed to these persons, unless the information amounts to “fraud or corruption”. That could mean that a disclosure of illegal activity that is not fraud or corruption is never reported to anyone with power to investigate that activity because the person to whom the disclosure is made did not have an obligation to report the conduct to anyone.

I have mentioned before if the person to whom the disclosure is made is an inquiry agency, public authority or public officer they would have a duty under the Directions and Guidelines to report that conduct to the OPI, if the conduct is of a kind that raises a potential issue of corruption, or serious or systemic misconduct or maladministration in public administration.

The object of the WBP Act is to deal inter alia with “corrupt or illegal conduct”. The definition of “public interest information” in s4 of the WBP Act speaks of illegal activity. Section 5(5) speaks of “fraud and corruption”. The WBP Act in 3 separate sections uses different terms for what might be the same conduct and does not define any of those terms.

The language of the WBP Act is unnecessarily confusing.

The thrust of the WBP Act is to provide an immunity from civil or criminal liability for a person who discloses public interest information and who satisfies s5(2); s5(1).

The person who made the disclosure is obliged to assist with any investigation into the matters to which the information relates “by the police or any official investigation authority”: s6(1) WBP Act.

The obligation is to assist the Police, not specifically the Anti-Corruption Branch, which is the branch of the Police recognised in s5(5)(a). The obligation is also to assist any official investigating authority, which is not defined, but which must be a body other than the Police.

It is difficult to know what would have comprised “an official investigating authority” when the WBP Act was enacted. So far as public administration is concerned, it would include the Ombudsman and Police Ombudsman (then the Police Complaints Authority) and probably the Commissioner for Public Sector Employment, all of which are inquiry agencies for purposes of the ICAC Act.

If a person fails to assist without reasonable cause, that person “forfeits the protection of (the WBP Act).” That protection is of course the immunity from civil or criminal liability given by s5(1).

The obligation to assist with any investigation is unqualified. It may mean that the person would have to disclose his or her identity to the person who is the subject of the investigation. That would appear to be likely having regard to s7(1).

Another benefit that a person who makes an appropriate disclosure of public information accrues arises because the WBP Act imposes a further obligation on a person to whom the disclosure is made. That person must not reveal the identity of the person who has made the disclosure “except in so far as may be necessary to ensure that the matters to which the information relates are properly investigated”. Section 7 (1) of the WBP Act provides:

- (1) A person to whom another makes an appropriate disclosure of public interest information must not, without the consent of that person, divulge the identity of that other person except so far as may be necessary to ensure that the matters to which the information relates are properly investigated.
- (2) The obligation to maintain confidentiality imposed by this section applies despite any other statutory provision, or a common law rule, to the contrary.

The prohibition against divulging the identity of a person who has made a disclosure is subject to the exception when it is necessary to ensure that the matters are properly investigated. That subsection reinforces the construction of s6 which I have mentioned.

The obligation in s7 is only imposed upon the person to whom the disclosure is made. Any other person who becomes aware of the identity of the person who made the disclosure is not prohibited from revealing the identity of that person, unless to do so would amount to an act of victimisation contrary to s9 of the WBP Act. That is unsatisfactory from the point of view of the person who made the disclosure.

Section 9 addresses victimisation.

The party who has disclosed the public interest information obtains the statutory protection given in s9 of the WBP Act which provides:

- (1) A person who causes detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure of public interest information commits an act of victimisation.
- (2) An act of victimisation under this Act may be dealt with—
 - (a) as a tort; or
 - (b) as if it were an act of victimisation under the Equal Opportunity Act 1984,but, if the victim commences proceedings in a court seeking a remedy in tort, he or she cannot subsequently lodge a complaint under the *Equal Opportunity Act 1984* and, conversely, if the victim lodges a complaint under that Act, he or she cannot subsequently commence proceedings in a court seeking a remedy in tort.
- (3) Where a complaint alleging an act of victimisation under this Act has been lodged with the Commissioner for Equal Opportunity and the Commissioner is of the opinion that the subject matter of the complaint has already been adequately dealt with by a competent authority, the Commissioner may decline to act on the complaint or to proceed further with action on the complaint.
- (4) In this section—

detriment includes—

 - (a) injury, damage or loss; or
 - (b) intimidation or harassment; or
 - (c) discrimination, disadvantage or adverse treatment in relation to a person's employment; or
 - (d) threats of reprisal.

It is not necessary here to address s9 in detail except to note three things.

First, an act of victimisation only occurs if the person who causes the detriment to the person who made the disclosure does so because that

person has made or intends to make an appropriate disclosure of public interest information.

Secondly, an act of victimisation is both a tort and deemed to be an act of victimisation under the *Equal Opportunity Act 1984* (EO Act) but a person is entitled to only one of the two remedies.

Thirdly, an act of victimisation is not made an offence.

Indeed the only offence provided in the WBP Act is for making a disclosure of “false public interest information” knowing it to be false or being reckless about whether it is false: s10(1). Section 10(2) provides that someone who makes a disclosure of public interest information in contravention of the sections is not protected by the WBP Act. It makes recklessness a criminal offence.

Section 10(1) creates a curious offence. An element of the offence is that there is a disclosure of “false public interest information”. It may be arguable that the provision requires the prosecution to prove that the information was public interest information. Section 10(2) certainly contemplates that to be that case.

In summary, the WBP Act provides certain legal protections to a person if he or she discloses “public interest information” to an “appropriate person”.

The key features of the WBP Act are:

- The WBP Act assumes that persons who will or may make disclosures of public interest information are not only those employed in the public sector.

- The subject matter of protected disclosures is also broad. A protected disclosure may be about any adult person who engages in any “illegal activity” or conduct by anyone that causes a substantial risk to public health and safety, or to the environment, as well as various kinds of wrongful or inappropriate conduct in public administration.
- The persons to whom a public interest disclosure may be made that will attract the protection of the WBP Act are defined, but in a non-exhaustive manner. A disclosure is protected if made to any person, provided it is “reasonable and appropriate in the circumstances of the case” to have made the disclosure to that recipient.
- By making a disclosure that meets the criteria of the Act, the whistleblower incurs no civil or criminal liability.
- There is some limited protection for the confidentiality of the whistleblower’s identity.
- If a person causes a detriment to a whistleblower substantially because of a relevant disclosure, then the whistleblower may take action for victimisation in tort or under the *Equal Opportunity Act 1984* (SA), but not both. Victimisation is not an offence.
- The only criminal offence provided for in the WBP Act is that of making a false public interest information disclosure or being reckless about whether the information is true. Where that offence is committed, the whistleblower does not attract the protection of the Act.
- The protection of the Act may also be lost if a whistleblower unreasonably fails to assist external authorities in an investigation arising out of the complaint.

The WBP Act in the Context of South Australia's Integrity Framework

The criticisms of the WBP Act have to be understood in the light of its novelty when it was introduced. It was a brave attempt to provide protection for persons who wished to bring to light maladministration and illegal activity but feared retribution or victimisation.

The ICAC Act and the WBP Act do not recognise each other's place or purpose in the integrity landscape.

The two Acts are designed to obtain information about unacceptable conduct. The ICAC Act only seeks information of unacceptable conduct in public administration, but the WBP Act encourages the provision of some of that information in both the public and private sectors.

The ICAC Act compels inquiry agencies, public authorities and public officers to make reports of unacceptable conduct. The WBP Act permits reports of some kind of unacceptable conduct.

The purpose of receiving that information is to investigate the conduct that is described in the information and deal with that conduct according to law.

The two Acts have different thresholds where under the ICAC Act a matter must or may be reported to OPI and where under the WBP Act a public interest information disclosure may be made.

Under the ICAC Act the threshold is reasonable suspicion and under the WBP Act the threshold is belief on reasonable grounds that the information is true or belief on reasonable grounds that the information may be true and is of

sufficient significance to justify its disclosure so that its truth may be investigated.

Both Acts provide for a regime of confidentiality for the person making the complaint, report or disclosure.

The ICAC Act offers no protections apart from confidentiality whilst the WBP provides for immunity from civil or criminal liability.

The ICAC Act requires all complaints and reports of unacceptable conduct in public administration to be made to the OPI. The WBP Act provides for a number of different recipients depending upon the type of information disclosed.

The ICAC Act requires OPI and the Commissioner to take action in respect of any complaint or report that raises a potential issue of unacceptable conduct.

The WBP Act does not compel anyone to do anything except when the disclosure of information concerns fraud or corruption then the recipient of the information, who would be a Minister or a police officer (because the conduct would be illegal activity), must pass the information to the Police Ombudsman or the Anti-Corruption Branch of the police force. Otherwise there is no obligation on anyone to act on the information.

The ICAC Act does not oblige the reporter to cooperate in the investigation but the WBP Act requires a reporter to cooperate or face losing protection under that Act.

Both Acts have similar provisions for civil remedies for victimisation but the ICAC Act, unlike the WBP Act, makes victimisation an offence.

The WBP Act preceded the ICAC Act by twenty years. The ICAC Act recognised the tension that its enactment would cause and therefore ensured that the WBP Act would be reviewed by amending the WBP Act with the insertion of s13.

Legislation in Australia

Appendix 1 to this review is a comparison of the WBL of the other Australian States and the Commonwealth.

The legislation is arranged by reference to the latest Act (Cth) descending to the earliest Act (SA).

I do not intend here to refer to the legislation in detail but I will refer to the legislation as it becomes relevant.

Recent Evidence on Whistleblowers

Whistling While They Work⁷

The Whistling While They Work (WWTW) research has provided some evidence when public sector employees blow the whistle; their reasons for doing so; and the consequences of reporting. The research has also provided some evidence for the reasons that deter potential whistleblowers from making reports about serious wrongdoing. The employee survey obtained evidence from 7663 public officers in 118 public sector agencies.

⁷ A J Brown(ed), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU E Press, 2008).

The WWTW did not address the South Australian experience, but there is no reason to think that the findings would not be relevant to this State.

I will make an attempt to summarise the findings without I hope oversimplifying the research.

The study found that reporting wrongdoing was a relatively common activity. It was estimated that twenty percent (20%) of respondents reported the most serious wrongdoing that they observed in a two year period, and twelve percent (12%) of all employee respondents had reported wrongdoing that involved conduct such as corruption, defective public administration or waste in their public sector organisation.

The importance of whistleblowing was commonly recognised by the surveyed public sector agencies. In the fifteen case studies of agencies, a survey of case-handlers and managers revealed that respondents considered whistleblowing to be the most important or equally the most important manner in which wrongdoing was revealed in their organisations.

The study also uncovered variability in reporting and inaction rates between agencies. On average, twenty nine percent (29%) of employee respondents who had observed wrongdoing that they considered to be “very” or “extremely” serious did not report that wrongdoing. Some agencies had an inaction rate of less than ten percent (10%), whereas in a few agencies, the inaction rate was more than fifty percent (50%). Individual organisational practices and cultures played a significant role in determining whether employees felt confident to report wrongdoing. The agencies with very high inaction rates were spread across Australian jurisdictions.

Contrary to some views, the study found that there was little evidence that those who reported wrongdoing were driven to report by perverse personal characteristics. There is no profile for a person who may be a whistleblower.

Those who decided to report wrongdoing appeared to be influenced by the seriousness of the wrongdoing, and whether they thought that making the report would achieve any good purpose.

When asked to nominate their reasons for reporting, respondents to the employee survey indicated that the following factors were, on average, “very important”:

- “I saw it as my ethical responsibility”
- “the wrongdoing was serious enough”
- “I believed my report would correct the problem”
- “I had evidence to support my report”.

Almost as significant were to following factors:

- “I knew who to report to”
- “I trusted the person I should report to”.

Surprisingly perhaps, confidence that the reporter would be supported and receive legal protections were less significant factors.

The public sector employees who had direct knowledge of wrongdoing but chose not to report it were asked to identify reasons for not reporting. The three most common reasons given, in order, were:

- “I didn’t think anything would be done about it”
- “I didn’t have enough evidence to report it”

- “I was afraid the wrongdoer would take action against me”.

Ninety seven percent (97%) of all public sector whistleblowing disclosures studied were initiated within the agency. A significant proportion of the internal whistleblowers eighty four percent (84%) made their disclosure to superiors through their own management chain rather than through specialist units or processes (less than ten percent (10%)). Only two percent (2%) of whistleblowers made their first report to an external agency or body. Less than one percent (1%) of whistleblowers reported to the media. There was a strong correlation between high levels of trust in management and internal reporting.

The research also revealed that although whistleblowing was associated with personal risks, it was by no means inevitable that whistleblowers would be poorly treated or subject to reprisals as a result of making a report. Seventy eight percent (78%) of public interest whistleblowers surveyed said that they were treated the same or treated as well by management and co-workers following disclosure. Twenty two percent (22%) of the whistleblowers reported adverse treatment at the hands of management and/or co-workers following disclosure with that adverse treatment emanating from managers more often than from co-workers. The rate of adverse treatment varied significantly from agency to agency.

World Online Whistleblowing Survey – SA Results

In May 2012, Newspoll in association with Griffith University and the University of Melbourne surveyed a random sample of Australians aged 18-64 in relation to their attitudes to whistleblowing⁸. The South Australian sample consisted of 132 adults, fifty three point seven percent (53.7%) of whom reported that they were employees, managers, self-employed/contractors or otherwise employed. They may be described internal as to an organisation.

Those respondents who identified as internal to an organisation were asked to indicate whether they disagreed, agreed or neither/could not say in response to the three following statements:

- A. **If I observed wrongdoing, I would feel personally obliged to report it to someone in my organisation.** Seventy three percent (73%) of SA respondents agreed, compared to eighty point one percent (80.1%) of respondents nationally.
- B. **If I reported wrongdoing to someone in my organisation, I am confident something appropriate would be done about it.** Forty two point four percent (42.4%) of SA respondents agreed, compared to fifty four point five percent (54.5%) of respondents nationally.
- C. **Management in my organisation is serious about protecting people who report wrongdoing.** Forty two point three percent (42.3%) of SA respondents agreed, compared to forty eight point eight percent (48.8%) respondents nationally.

⁸ Professor AJ Brown was kind enough to provide the raw unpublished data from this survey

Compared to the national response, South Australian respondents provided the lowest percentage of “agreeing” answers and the highest percentage of “neither”/ “cannot say” answers to each of those three statements.

It would be concerning if South Australia’s employees were generally less likely to report wrongdoing and less confident the organisation with which they were associated would do something about the report, and believed that their organisation was less serious about protecting people who report wrongdoing than their Australian colleagues.

The results however should be treated cautiously. The sample is very small. The three questions were only addressed to a subset of all respondents. There was a large proportion of South Australian respondents who were external to any organisation, (that is, unemployed, retired, home duties etc) and so the sample size for those three questions for South Australia was relatively small compared to the sample size for the other States.

Nevertheless, that research is some evidence that the culture for reporting wrongdoing is less robust in this State than the other Australian States.

Institute of Public Administration Australia Survey: ‘ICAC - Integrity in Public Administration’

In late 2013 and early 2014, the South Australian Chapter of the Institute of Public Administration conducted an online survey directed towards public officers in South Australia designed to capture early awareness levels amongst public officers of the ICAC and the OPI and the procedures under

the ICAC Act.⁹ The survey attracted 2,262 participants, mostly in the public sector, together with a small percentage of contractors and council employees.

The key findings were:

- Seventy four percent (74%) of survey respondents stated that they had never reported corruption, misconduct or maladministration; against twenty six percent (26%) who stated that they had;
- Thirty eight percent (38%) stated that it was somewhat likely that they would report corruption, misconduct or maladministration; and fifty percent (50%) stated that it was very likely that they would report that conduct;
- When asked what might prevent them from reporting corruption misconduct or maladministration in their organisation, twelve percent (12%) of survey respondents stated that they did not know to whom they would report; thirty two percent (32%) stated that they did not think that a report would lead to action being taken; and fifty six percent (56%) were concerned about negative repercussions for their career;
- When asked to whom they would make a report, most respondents nominated the holder of a management position; only 0.1 percent (.1%) of survey respondents said they would report to the person who was the “responsible officer” in their organisation under whistleblowing legislation;

⁹ Institute for Public Administration, *ICAC – Integrity in Public Administration Report*, (IPAA South Australian Division Inc, 2013).

- Only a small proportion of respondents nominated a body or person external to their organisation to which they would complain. External bodies or persons nominated were ICAC (3.6%), the OPI (1.3%), an un-named “external body” (0.5%), Police (0.5%), Union (0.2%), a Minister (0.2%), the media (0.1%), the Ombudsman (0.1%), and the Commissioner for PSE (0.1%).

The results broadly confirm the relevance of the WWTW research to South Australia, particularly in that both surveys showed that:

- Reporting corruption, maladministration and misconduct in the public sector is not unusual or exceptional behaviour for public sector employees;
- The vast majority of public sector employees consider that reporting wrongdoing is something that could or should be done;
- The tendency is to report internally and to management rather than to responsible officers;
- Only a very small proportion of respondents would make a disclosure to the media;
- Fear about reprisals, lack of clear reporting channels, and lack of faith that any action would result from the disclosure are disincentives to potential public interest disclosers.

University of Adelaide Survey on Attitudes to Corruption, Misconduct and Maladministration in the Local Government Context.

Recently the Local Government Association of South Australia commissioned a study in order to better understand attitudes of people engaged in South Australian local government and the South Australian general public in relation to corruption, misconduct and maladministration in the sector.

The study was conducted by Dr Gabrielle Appleby et al and the results were released in May 2014¹⁰.

Responses were sought from two separate groups of respondents: those engaged in local government and from members of the general public.

A majority of both local government respondents and members of the public agreed with the statement that councillors and council employees have an obligation to report corruption.

A similar majority in each group disagreed with the statement that people who report corruption are just trouble makers.

A majority but not as large in each group agreed with the statement that people who report corruption are likely to suffer for it.

Only local government respondents were asked whether they agreed with the statement that they would not know where to report corruption. More than seventy four percent (74%) of respondents disagreed with that statement.

¹⁰ Gabrielle Appleby et al, *Survey on Attitudes to Corruption, Misconduct and Maladministration in the Local Government Context* (University of Adelaide, 2014) 74.

The study had both quantitative and qualitative components. Analysis of the qualitative component of the study revealed that:¹¹

There was at times a sense of helplessness in respondents' discussions. This was seen in negative perceptions of the effectiveness of reporting behaviour. Some respondents felt that in many cases reporting had been ineffective in the past or would be ineffective and nothing can be done. ... Some respondents were also very fearful of personal repercussions should they take action on behaviour they deem to be corruption, maladministration or misconduct.

Public Sector Agency Annual Reports

The annual reports of public sector entities provide some further evidence relevant to whistleblowing.

Regulation 7 of the *Public Sector Regulations 2010* requires a public sector agency to include certain information in its annual report, including the number of instances that public interest information has been disclosed to a responsible officer of the agency under the WBP Act.

Sub regulation 7(k) provides:

A public sector agency's annual report to the agency's Minister must contain information (including relevant statistics) with respect to the following:

(a) ...

(k) the number of occasions on which public interest information has been disclosed to a responsible officer of the agency under the *Whistleblowers Protection Act 1993*;

The Regulation provides the only means by which anyone can be aware of the prevalence of whistleblowing in this State and then only in the public sector.

¹¹ Ibid, 74

A review of a selection of annual reports indicates a very low number of disclosures to responsible officers for the majority of agencies – less than four disclosures per year for most agencies, and most commonly one or no disclosures.

If the South Australian experience were the same as the other States, which is that less than 10 percent (10%) of public sector whistleblower reports are made to a specialist internal unit,¹² it may be expected that this State's agencies' annual reports pick up only those few whistleblowers who utilise the formal internal units.

That would seem to follow, because if a disclosure of public interest information were made to someone else in the agency, that person who received that disclosure would have been unlikely to report it to the internal unit, particularly because of the provisions of s7 of the WBP Act.

Submissions

Submissions from with the Public Sector

The Department of Planning, Transport and Infrastructure, by its **Local Government Legislation** section (the LGL), expressed the view that the WBP Act in its current form was not able to achieve its stated objects of facilitating, in the public interest, the disclosure of maladministration and waste in the public sector, and corrupt or illegal conduct generally, and the protection of those who make such disclosures.

¹² Marika Donkin et al, 'How Do Officials Report? Internal and External Whistleblowing' in A J Brown (ed) *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU E Press, 2008) 83, 88.

It was submitted that the WBP Act fails to deal in a practical manner with the confidentiality of disclosures and the identity of a discloser.

The LGL section asked that consideration be given to either prescribing the means for keeping such matters confidential, or alternatively that the legislation require that such means be contained in a Whistleblower Protection Policy and Procedure, perhaps based on a model Procedure promulgated by a person or body such as the ICAC.

The LGL section referred to s302B of the *Local Government Act 1999*, which as I have mentioned requires that each council must ensure that a member of the staff of the council, (with qualifications prescribed by the regulations) is designated as a responsible officer for the council for the purposes of the WBP Act. There are no such regulations and the LGL Unit suggested that the necessary qualifications and training for such an officer should be considered, as should the need for each council to have a Policy and Procedure in relation to the handling of whistleblower complaints.

Finally, the LGL Unit said that there was a need to harmonise competing mandatory reporting obligations, particularly between the ICAC Act and s5(5) of the WBP Act.

The **Auditor-General, Mr Simon O'Neill**, said that that because he was obliged to be impartial he should not make a formal submission to the review. He did however note that the categories of persons to whom a public interest disclosure may be made under ss 5(4) and 5(5) is ripe for review, given the mandatory reporting requirements imposed by the ICAC Directions and Guidelines.

The then **Ombudsman, Mr Richard Bingham**, made a number of specific recommendations.

First, he noted inconsistencies between the definitions in WBP Act, the ICAC Act, and the *Ombudsman Act 1972* (the Ombudsman Act), and recommended that these three pieces of legislation contain complementary, hierarchical definitions as an aid to comprehensibility and consistent application.

He expressed the view that the present definition of “public interest information” in the WBP Act is unnecessarily complex and too wide. In particular, the inclusive definition of “maladministration” would upon one reading make every person who approaches the Ombudsman a whistleblower for the purposes of the WBP Act.

He said that neither the relatively narrow definition of maladministration in the ICAC Act, nor the broader understanding of maladministration which includes an administrative error which is commonly employed in Ombudsman’s jurisdictions, were well suited to identifying the subject matter of public interest disclosures for the purposes of a WBL.

He said that providing protection in relation to every disclosure of minor misconduct is not desirable either.

He recommended that the Commonwealth legislation be considered for the purpose of drafting the limits of the subject matter of public interest disclosures, having regard to the need for complementary definitions in the relevant South Australian Acts.

Mr Bingham recommended that consideration be given to the inclusion of a provision similar to s18 of the *Public Interest Disclosures Act 1994* (NSW) which removes protection in relation to disclosures made with the intention of avoiding disciplinary action.

He recommended that the mandatory reporting provision found in s5(5) WBP Act be removed, having regard to the jurisdiction of the ICAC and the obligations under the ICAC Directions and Guidelines.

He recommended that any new South Australian WBL not include specific additional investigative powers.

He recommended that there be an exception to the requirement that the identity of a person making a disclosure be kept confidential, for an inquiry agency to be permitted to disclose that identity to another inquiry agency if the first inquiry agency considers the disclosure to be in the public interest.

He recommended that an offence of victimisation be included in the WBL to further support and protect persons making disclosures, noting the existence of victimisation offences in other Australian offences and under the ICAC Act.

He said that further protections akin to those found in NSW legislation ought to be considered, being protections including the ability to apply for an injunction to prevent reprisals, and a clearer delineation of the scope of protections against civil action.

He recommended that, consistent with Commonwealth provisions, the Ombudsman SA be designated by legislation as responsible for assisting agencies to comply with their legislative responsibilities to encourage, support

and protect whistleblowers, and be appropriately resourced to fulfil that function.

He said the Commonwealth legislative model provided a well-accepted and up-to-date model for whistleblower legislation, including in relation to oversight arrangements. He said a potential difficulty for the Ombudsman office being responsible for oversight of public interest disclosures was in relation to disclosures about Police.

He expressed the view that if it were decided to include wrongdoing within the private sector, the WBL ought to take account of the different issues which arise in the two sectors.

Mr Gary Burns, the Commissioner of Police, said that the WBP Act was adequate for the purposes for which it was introduced.

He said that there had been no reports of breaches of the WBP Act (I take this to be a reference to the offence of knowingly or recklessly providing false public interest information.) He recommended that consideration be given to the apparent duplication of reporting requirements since the commencement of the ICAC Act, and that definitions, offence provisions and reporting responsibilities be reconsidered in the light of the roles of the OPI and the ICAC.

Ms Anne Gale, the Commissioner for Equal Opportunity (the EOC) focussed on practical and policy considerations relating to her statutory role in relation to victimisation under the WBP Act.

She outlined her agency's mechanisms for handling whistleblower victimisation complaints. She said that upon receiving a complaint from a

person that he or she has been victimised as a consequence of making a disclosure of public interest information, the EOC makes an assessment whether, on the face of the complaint, victimisation appears to have occurred. If the jurisdictional requirements are met, the complaints are “accepted” and the EOC attempts to facilitate a resolution of the complaint.

Four outcomes are possible: the complainant may withdraw the complaint; the EOC may refuse to entertain a complaint that lacks substance or is misconceived, or is frivolous or vexatious; conciliation may be achieved; or, if the conciliation process does not succeed, the matter may be referred to the Equal Opportunity Tribunal (EOT) for hearing, and potentially for the imposition of remedies.

The EOC reported that whistleblower complaints make up only a small proportion of the complaints received by the EOC overall. Relatively small numbers of complaints under the WBP Act are “taken up” by the EOC: 4 or less complaints per year were taken up in the reporting periods leading up to 2011 – 2012. In 2012 – 2013 there was a jump in the number of complaints taken up by the EOC when a total of 11 complaints were taken up in that period.

She reported that there have been only two successful conciliations of victimisation complaints in the period 2010 – 2013. She thought that high levels of emotional investment and the irreparable breakdown of the relationship between the parties were possible reasons for the conciliation process being unsuccessful.

She said that the World Online Whistleblowing Survey revealed a great deal of uncertainty and a lack of understanding by South Australians participants about protections for whistleblowers. She said it also emerged from that survey that South Australian participants were least likely of all Australian participants to “blow the whistle” on wrongdoing in their workplace.

She said that the WBP Act “lacks the prescriptive elements found in other jurisdictions to allow for practical implementation.” She advocated reforms to the WBP Act “to include more specific legislative guidance to public sector agencies, in particular, about what is involved in putting into place effective reporting systems, and what are the obligations on agencies to provide systems to protect and support their workers.”

She said that callers to the Equal Opportunity Commission (EO Commission) often inquire as to what protections are available to them, and are disappointed to discover that there is nothing available in the nature of an injunction to protect them from future harassment or discrimination.

She called for practical remedies to assist whistleblowers, including a penalty for unlawful disclosure of the identity of a whistleblower.

She asked for consideration of harmonisation of ICAC’s and the EO Commission’s processes, with provision for information sharing where appropriate.

She said in summary that “the EOC sees a need for greater clarity and guidance as to the practical application of the Act” and recommends “the inclusion of a set of more robust safeguards to protect those who make the decision to blow the whistle.”

The EOC recommended a simplification of the whistleblowing process, supported by broader education and training to make the WBP Act more comprehensible to employees.

Submissions from Academics

Dr Gabrielle Appleby, Dr Judith Bannister and Ms Anna Olijnyk, of the University of Adelaide, confined their submission to matters relating to public interest disclosures in the public sector, which they said reflected their expertise and research interests.

They said that they preferred the brief and accessible approach of the current WBP Act to the technical and legalistic approach recently adopted by the Commonwealth. They said that “Long, difficult-to-navigate legislation that requires legal advice to determine whether protection is available acts as a major deterrent to bona fide whistleblowers coming forward.”

They addressed the necessary standard of suspicion, knowledge and belief for making a public interest disclosure. They recommended the replacement of the present objective tests with a test based upon “reasonable belief.”

They also recommended that the disclosure be able to be made to a person whom the would-be whistleblower believes on reasonable grounds to be an appropriate recipient of the disclosure.

They observed that a distribution of obligations imposed under the WBP Act was inconsistent with the WBP Act’s stated object of encouraging disclosures in the public interest. In particular, the obligation to assist with an investigation found in s 6 of the WBP Act was said to be largely unnecessary, as most

whistleblowers act out of a sense of altruism. In the absence of any obligation to investigate, and given the lack of any offence provisions designed to protect disclosers, s6 was said to send “the message that a disclosure of public interest information will not necessarily lead to further action on the part of government; on the contrary, a person who blows the whistle brings upon themselves additional legal and practical responsibilities.”

They recommended an introduction of an obligation to investigate, and pointed to the emerging consensus that this is part of an effective modern regime. They pointed to Part 3 Division 2 of the *Public Interest Disclosure Act 2013* (Cth) as a model for amendment.

They said that the presence of an offence targeted at would-be whistleblowers and the absence of any offences that penalised a breach of the provisions designed to protect whistleblowers was a further discouragement to persons who make disclosures. They recommended the creation of offences designed to protect the confidentiality of the discloser’s identity and to prevent victimisation.

They recommended that where a whistleblower has an action for loss or damage as a consequence of a breach of the WBP Act, that government-funded legal aid be made available to the whistleblower to ensure that potential whistleblowers are not deterred by the prospect of litigation and its associated costs.

They recommended a number of minor revisions aimed at reducing ambiguity and improving clarity in the legislation.

Dr Vivienne Brand of Finders University recommended that the WBP Act be amended to improve protections for whistleblowers, including by making it an offence to release a whistleblower's identity in certain circumstances and cited the Commonwealth provisions as a possible model.

She also recommended that improved awareness on the efficacy of the WBP Act would be obtained through annual reporting.

She recommended that persons who have made public interest disclosures be informed about the outcomes of investigations or actions in a timely manner, once again citing the Commonwealth legislation as an example of such provisions.

She also recommended the statutory imposition of minimum requirements and structural supports for the management of whistleblower reports within agencies, including the requirement that the agency take "reasonable steps" to protect disclosers from detriment or threats of detriment.

She considered whether a US-style bounty system ought to be adopted in future legislation, noting the dramatic impact that such a regime has had in the US. She concluded however that sufficient reason to introduce such a bounty system does not yet seem to exist.

Professor AJ Brown of Griffith University, writing on behalf of the Don Dunstan Foundation, said that there was a need for South Australia to replace its current legislation, because in the light of experience since the enactment of the WBP Act the Act could be seen "to represent more of a framework, or statement of principles for how the disclosure of wrongdoing should be

recognised and protected by South Australian society – rather than a clearly actionable set of rights and obligations for achieving that purpose.”

He said that the changes to the legislation are now necessary in order to ensure that the legislation facilitated the timely disclosure and rectification of wrongdoing and prevented or limited adverse consequences for whistleblowers; to ensure that whistleblowers received just compensation or other remedies when they suffered adverse consequences; and to make it clear when whistleblowers have an entitlement to make disclosures to the media or third parties.

He submitted that there was a need for “a more comprehensive definition of the scope of wrongdoing that should be disclosed; more specific requirements on organisations to respond appropriately to disclosure; more specific requirements on organisations to protect and support whistleblowers, proactively or preventively; and clear identification of one or more oversight agencies with power and responsibility to ensure these requirements are met.”

In relation to the issue of definition, Professor Brown recommended that precise definitions of the targeted improper conduct be introduced to make clear the relationship between these reports and the jurisdictions of the ICAC and the Ombudsman. In addition, in his view the requirement that a person making a disclosure believes on reasonable grounds that the disclosure is true introduces an unnecessary and extraneous element to the regime. He pointed to the test contained in the ACT legislation as a more useful formulation.

Professor Brown recommended a strengthening of remedial measures to assist whistleblowers by compensating whistleblowers for all adverse consequences that flow to them as a consequence of blowing the whistle, not just for deliberate or clearly wrongful conduct. He recommended that public sector whistleblowers who suffer adverse consequences through their workplace have access to industrial remedies, by amendment to the *Fair Work Act 1994* (SA). Such remedies should include remedies in the nature of an injunction to prevent victimisation.

He also recommended that in line with current practice, there should be an offence for intentional reprisals.

He further recommended that whistleblower protection no longer be available to “any person” who is entitled to make a public interest disclosure entitled to protection. On this topic he said:

Some early Australian legislation such as the present Act made a well-intentioned mistake in extending ‘whistleblower’ protection to any type of informant or complainant, irrespective of organisational status or position. The difficulty this now creates is that an effective, comprehensive approach to whistleblower protection relies on disclosure facilitation and reprisal prevention approaches which are designed to meet the organisational institutional challenges confronted by whistleblower i.e. organisational ‘insiders’ – not necessarily other types of informant or complainant.

He questioned whether the SA legislation ought to apply to the private sector at all, whilst noting that to remove the protection would result in a loss of some rights to private sector employees.

As to the question of reporting channels, he notes that they need to be updated so as to take account of the roles of the OPI and ICAC, and that it would be desirable that reporting channels required by WBL be given some

specificity to enable disclosers and agencies to readily understand when a disclosure is made in accordance with the regime's requirement, as has been done by the ACT.

Professor Brown said that WBL should make explicit when whistleblowers can take their disclosure to the media or other third parties which he said was a "major objective" of modern whistleblowing law. He noted that early legislation was silent on this topic in the hope that official disclosure avenues would prevent the need for public disclosure. He observed that it has since been established that managerial and organisational culture, where deficient, can be changed if there is a prospect that poor disclosure handling in the first instance may result in public disclosure. Professor Brown pointed to the Commonwealth and ACT examples as representing good practice in this policy area.

He recommended that an obligation to investigate be included in the WBP Act, to ensure that the public policy objectives are met, and to encourage proper disclosures.

In addition, he called for more specific requirements for organisations to protect and support whistleblowers, proactively and preventatively. He said that the prospect of having to pay damages only when victimisation had taken place was unlikely to motivate appropriately protective organisational behaviour. His preference was that each agency or organisation develop its own approach, led by a suitable management commitment, and underpinned by minimum requirements mandated by legislation. The key components of those minimum requirements would be to:

- proactively guard against reprisals through risk assessment and planned action: see sub-ss 33(2) and 59(1) of the ACT and Commonwealth legislation respectively;
- maximise confidentiality;
- keep the discloser up to date at regular intervals;
- keep records of disclosures made and action taken, so that the effectiveness of the regime may be assessed.

He indicated that an oversight agency is now considered a necessary part of an effective whistleblower protection regime, and indicated that the most appropriate repository for such a role for South Australia might, with appropriate resourcing, be the State Ombudsman.

He considered that there was no reason why South Australia ought not to introduce a reward or “bounty” system to encourage whistleblowing.

Professor Andrew Goldsmith of Flinders University provided a submission on behalf of the Centre for Crime Policy and Research at the Flinders Law School in which he highlighted the fact that employees within an organisation are frequently best-placed to identify shortcomings in administration within an organisation, and are therefore an essential resource in improving integrity. He also observed the difficulty with assessing the effectiveness of South Australia’s WBP Act in the absence of reported case law or any requirement for detailed reporting, and recommended that better data be collected.

He said that the present WBP Act was not known to protect whistleblowers and that there had been little effort as a matter of public policy to encourage whistleblowers.

He recommended implementation of effective agency oversight for public interest disclosures as a necessary first step for improving the system overall and ensuring that sector-wide learnings are drawn from the data collected. In addition an oversight agency would have a more direct role which was seen as “crucial especially where the risk of reprisal was deemed to be significant or there are concerns about the ability of the agency involved to deal with the disclosure impartially and effectively.”

He further recommended that clear enforceable responsibilities be imposed on everyone from the leadership of an organisation to the level of manager, to support and protect whistleblowers with clear outcomes flowing from any failures to protect.

Finally, Professor Goldsmith invited consideration of incentives designed to encourage whistleblowers. Such incentives might be financial or professional, and might include symbolic recognition by leaders of service provided to an organisation by whistleblowers.

Submissions from Representative Bodies and Not-for-profit Bodies

The Local Government Association provided a submission after consultation with its member councils. It indicated that the introduction of the ICAC Act had imposed overlapping and sometimes contradictory reporting obligations on public officers.

It submitted that the definitions for such terms as “public officer” and “maladministration” should be rendered consistent between the WBP Act and the ICAC Act without limiting the broad scope of the definitions.

It recommended that the list of “appropriate authorities” to whom an appropriate disclosure of public interest information may be made be updated, and the mandatory reporting requirements be aligned with those published under the ICAC Act.

It recommended that the WBP Act provide more assistance and guidance as to how a disclosure of public interest information should be managed within an organisation, including when a referral to an external agency is appropriate.

It further recommended that the confidentiality requirements of the WBP Act be extended to “all matters pertaining to the disclosure of public interest information, including the investigatory process”.

Blueprint for Free Speech provided a submission which recommended updating the protections available to whistleblowers and it gave the Commonwealth and ACT legislation as examples of the trend towards modern statutory protections. It pointed to the widespread community acceptance of the worth of whistleblowers and whistleblowing to society in general, and indicated that there was community support for robust protections for those who make public interest disclosures.

It recommended replacing the current criminal offence of knowingly or recklessly making a false disclosure with a civil penalty offence, rather than a criminal offence, that consists of knowingly making a statement which is false or misleading.

It recommended that the remedies available to whistleblowers under the WBP Act, should permit a suit for detrimental action against a whistleblower that

falls short of victimisation, and that remedies be permitted to be pursued in low cost jurisdictions, such as the industrial jurisdiction.

Rewards and bounties were posited as a possible answer to the problem of remedies and a means to encourage whistleblowing. A division of seized monies between the whistleblower and a general fund which could then make distributions to whistleblowers whose disclosures did not concern monetary wrongs was advocated.

Clearer provisions about when a whistleblower can make an external disclosure were called for, particularly in cases where the organisation to which the disclosure relates is endemically corrupt, or where there is a lack of capacity to internally investigate or manage the allegation, or where the gravity or immediacy of the subject material necessitates urgent and immediate action.

Blueprint for Free Speech recommended the imposition of an investigation obligation, with supervision of the investigations by a central oversight body.

Mr Morry Bailes, President of the Law Society of South Australia provided a submission on behalf of the Law Society.

It was said that in the 20 years since the WBP Act's enactment, there has been little recourse to its protection, and certainly very few such cases before the Courts. Accordingly, he observed, "many of its provisions still remain uncertain in their operation."

The Society said that in particular the reach of the legislation into the private sector, and in relation to the expenditure of Commonwealth "public monies" is somewhat uncertain.

It recommended that the definition of “maladministration” be reviewed with a view to exploring whether the definition should be amended for consistency with the ICAC Act.

It considered that information about how many people had claimed the civil immunity provided for under the WBP Act would be useful in the review of the WBP Act, if such information were available.

It recommended that the protection under the WBP Act be extended to disclosures to members of Parliament, in addition to protection that exists for disclosures to Ministers. He noted the concern, predominant at the time when the WBP Act was framed, that such a protection would facilitate politically motivated leaks, and threaten the functioning of Government. He said that issue can be addressed by providing for an offence prohibiting the making of false and misleading statements, which would be a sufficient safeguard.

The Society recommended that the list of “appropriate authorities” be amended and updated to provide further assistance to potential whistleblowers. If the WBP Act were to maintain private sector coverage, the Society he considered that “appropriate authorities” relevant to this sector should be extended to include the Chief Executive Officer or Board Chairperson of organisations.

It recommended that the WBP Act include an offence of victimisation to deter such conduct, because there were difficulties in treating whistleblower victimisation as conduct prohibited by the EO Act.

It recommended that consideration be given to providing for enforcement of the remedies provisions through the new Civil and Administrative Tribunal.

Submissions by Whistleblowers

I received submissions from persons who identified themselves as whistleblowers.

Because they did not give express consent for their identities to be revealed I shall not identify them nor will I include details which may tend to identify them.

The **writers of confidential submissions one and two** are colleagues of each other.

At the relevant time, they both worked in a sector which involved the care of vulnerable people. They reported that there had been wrongdoing involving some of these vulnerable people. It appears that the allegations were investigated and found to have substance and as a consequence some persons were dismissed. After making their report of wrongdoing the writers of confidential submissions one and two claimed that they were subjected to adverse treatment including bullying and exclusion.

They reported that their identity as whistleblowers was made known publically, and that as a consequence they were blamed for the sacking of those responsible for the wrongful conduct by colleagues loyal to those sacked.

They complained to management and to government, but remained unsatisfied. When they took their complaints to an external party, they were subjected to disciplinary action which resulted in a written warning.

They were unable to take legal action to vindicate their position because of the cost involved.

Their work, health and family lives suffered.

Both writers said that they felt utterly let down by a system that held out a promise to protect them but failed them.

The writer of **confidential submission three** made submissions about the writer's circumstances when the writer became aware of wrongful conduct in public administration. The writer made numerous complaints about the conduct through numerous formal channels. The writer was not satisfied that the conduct was investigated adequately.

The writer questioned the use of reporting the conduct in the absence of an obligation to properly investigate the allegation. The writer reported that he had been named as the whistleblower in breach of the requirements of the WBP Act.

The writer was concerned about a Member of Parliament relying upon parliamentary privilege to circumvent the confidentiality requirements in the WBP Act.

The writer claimed that the writer and others who spoke out about the conduct were routinely subjected to bullying and abuse.

The writer questioned the comprehensibility and usefulness of concepts like "belief on reasonable grounds", "that the information is true" and "sufficient significance to justify its disclosure". The writer indicated that "far greater

certainty needs to be defined within the Act as to what constitutes appropriate disclosure and the terms in which that disclosure can be made.”

The writer contended that it would be appropriate to provide greater clarity about a person to whom a disclosure may be made, including clarification of the relationship between this provision and the role of the OPI and ICAC.

The writer indicated that more needed to be done to make sure that organisations were obliged to protect and support whistleblowers.

The writer found the remedial mechanisms available through the WBP Act to be unclear and likely to be an impediment to future whistleblowers. In particular the relationship between the WBP Act and the EO Act remedies was said to be difficult for a lay person to understand.

Recommended Changes

Policy for a WBL Act

The Macquarie Dictionary defines a whistleblower as “a person, usually an employee or member of an organisation, who alerts the public to some scandalous practice or evidence of corruption of that organisation.”¹³

The purposes for whistleblower protection legislation have been expressed:¹⁴

- to support public interest whistleblowing by facilitating disclosure of wrongdoing

¹³ *Macquarie Dictionary* (online edition, - 2014).

¹⁴ AJ Brown et al, ‘Best-Practice Whistleblowing Legislation for the Public Sector: The Key Principles’ in AJ Brown (ed) *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, (ANU E-Press, 2008) 261, 263.

- to ensure that public interest disclosures are properly assessed and, where necessary, investigated and actioned
- to ensure that a person making a public interest disclosure is protected against detriment and reprisal

The policy principles that tend to constrain legislative action in relation to whistleblower protection include:

- The desire to properly keep some matters confidential, in the interest of maintaining trust between government and an impartial public service, or in the interest of protecting commercially sensitive information;
- The risk that the legislation may be used by whistleblowers for malicious reasons or to cause reputational harm;
- Ensuring that a person against whom whistleblower allegations are made should be treated fairly.

It is not easy to balance the competing factors and to settle upon an acceptable formulation that will address all possible cases. The more serious the conduct which is the subject of the disclosure the greater the public interest in bringing it to light. The closer the relationship or the greater the power imbalance between the person making the disclosure and the person or body responsible for the wrongdoing, the greater is the risk of reprisal arising from speaking out.

The argument for WBL has been made out and that is evidenced by the universal acceptance of the concept throughout Australia.

Government has become increasingly bigger and more complex and there is a reason to think that will continue.

The reasons that were identified in 1993 by the then Minister and the reasons mentioned above, lead to the conclusion that government can not only tolerate WBL, but it cannot do without it.

It is in the government's interests that it is made aware of unacceptable conduct in public administration.

WBP Act – Amendment or Repeal and Re-enactment?

Since the WBP Act was enacted discussions about whistleblower protection have reached a level of maturity where “best practice” for legislative models has been talked about.

The majority of Australian states have legislated for second generation models, and the Commonwealth has, after long deliberation, recently enacted its own legislation.

There has been relatively little litigation in relation to the WBP Act over the last 20 years, which gives rise to two possible explanations, one positive, the other negative. The positive explanation is that the legislation is working well and creates an appropriate framework in which whistleblowers make disclosures without fear of adverse consequences, and the disclosures are appropriately acted upon, without any consequential adverse impacts to the whistleblower. The negative explanation is that whistleblowers lack confidence in the legislation and its processes and therefore do not make

disclosures, or having made a disclosure do not seek a remedy when they suffer victimisation as a result of the disclosure.

Of course, the reality in South Australia may lie somewhere between those two extremes.

Because the Act is an “orphan” in the sense that no single person or body is publically responsible for monitoring its effectiveness or ensuring its implementation, there is no empirical evidence to establish which of these two possibilities best represents the way in which the WPB Act is working.

Except for the Australian Research Council funded WWTW project, there has not been in-depth or empirical evaluation of the experience of public officers and contractors making public interest disclosures, or the impact of those disclosures on public administration, or the effectiveness of the various Australian legislative regimes that have provided a legal framework for those disclosures.

Even less information is available in relation to private sector whistleblowing. However this lack of information has not kept the issue out of Australia’s boardrooms, as evidenced by the development of an Australian Standard for *Whistleblowing protection programs for entities*¹⁵ and with the emergence of for-profit external whistleblower management services.

¹⁵ Australian Standard 8004 - 2003.

The submissions to which I have referred drew attention to the following inadequacies of the WBP Act in the current integrity setting:

- The mandatory reporting provisions of the ICAC Act and provisions of the WBP Act are inconsistent, and there is a need for consistency between the two Acts.
- It is not always clear to whom a whistleblower should make a disclosure.
- It is not always clear to public sector agencies who is a whistleblower and who attracts the protection of the WBP Act.
- There is no present obligation to investigate a disclosure.
- It is difficult to deal with the practical implications of the limited confidentiality that the WBP Act accords whistleblowers.
- WBL should include a framework for supporting and protecting persons who make public interest disclosures by providing better civil remedies for victimisation and making an act of victimisation an offence.
- There should be for an oversight agency/clearing house to promote awareness, consistency and accountability.
- Persons who make disclosures should not be obliged to assist in the investigation and should not be at risk of losing their status and their protections.
- Some whistleblowers are dissatisfied with the way in which they have been treated, and with the operation of the WBP Act. Their expectations of confidentiality have not been met, and they said that it has been difficult to them to determine, sometimes even with

professional advice, whether or not the WBP Act would be likely to protect them or provide redress for victimisation.

- Bounties should be payable to whistleblowers.

As I have said, the enactment of the ICAC Act resulted in a fundamental change to the public sector integrity framework in South Australia. To the extent that the WBP Act and the ICAC Act share policy objectives and operate in the same area, they should operate in a complementary fashion to enhance integrity in public administration.

The OPI acts as a clearing-house for complaints and reports about conduct that raises a potential issue of corruption, misconduct or maladministration in public administration. The OPI was intended to be the repository for complaints or reports about the conduct of public authorities and public officers, with a “no wrong number, no wrong door” approach.¹⁶

The ICAC will obtain a picture of the extent of unacceptable conduct in public administration and be able to identify and address the serious risks of unacceptable conduct in public administration.

All complaints and reports to OPI that are assessed as raising a potential issue of corruption or serious or systemic misconduct or maladministration in public administration must be dealt with in accordance with the ICAC Act.

A potential issue of corruption must be investigated by ICAC or at the direction of ICAC, South Australia Police or the Police Ombudsman. The ICAC Act empowers the appropriate authorities to investigate corruption which as I have said, must be a criminal offence.

¹⁶ Attorney General’s Department (SA), *An Integrated Model – A review of the Public Integrity Institutions in South Australia and an integrated model for the future*, (2011)

A potential issue of misconduct or maladministration in public administration must be dealt with by an inquiry agency or the public authority concerned but under the oversight of ICAC.

A complainant or reporter to OPI who makes their complaint or report of unacceptable conduct in public administration will do so with the certain knowledge that the complaint or report will be addressed by the appropriate public authority.

The ICAC has issued Directions and Guidelines governing reporting to the OPI of matters which an inquiry agency, public authority or public officer reasonably suspect raises a potential issue of corruption or serious or systemic misconduct or maladministration in public administration.¹⁷ A public officer is required under Part 11 of the ICAC Directions and Guidelines to report to OPI any matter that the public officer reasonably suspects involves corruption in public administration, which is defined to include all criminal offences committed whilst acting in a public officer's capacity as a public officer, as well as any serious and systemic misconduct or maladministration in public administration.

The WBP Act allows but does not require persons including public officers to make public interest information disclosures to an appropriate authority, by providing public interest information that the person believes to be true or has reasonable grounds to believe may be true.

If the person is a public officer, that public officer's disclosure in relation to wrongdoing is addressed by two legislative frameworks, one mandatory and

¹⁷ S 20 ICAC Act.

one facultative. Whilst the two frameworks have some common areas, there are many different provisions which will be discussed in some detail. These differences are likely to lead to confusion and there is a real risk that the differences will contribute to uncertainty on the part of persons considering making disclosures about wrongdoing, and may discourage them from doing so.

There is a pressing need to bring consistency to the whistleblowing protection regime as it relates to public officers who report wrongdoing, so that they can report unacceptable conduct, confident that it will be investigated and with the added confidence that there will be protections available to them for having made the disclosure.

I think there is a strong case for the repeal of the WBP Act. I think in its present form it cannot perform a useful function in the integrity system. I do not think it is fulfilling its primary objective of facilitating disclosure and providing protections for those who make disclosures.

But its fundamental weakness, which has been the subject of some of the submissions is that it offers no guarantees to a whistleblower who takes the risk of making a disclosure of public interest information that anyone will do anything to address the disclosure (except if the disclosure relates to fraud and corruption and then the obligation is only to report that conduct to either the Police Ombudsman or the Anti-Corruption Branch of the Police force).

Persons who have information about unacceptable conduct need to be encouraged to report wrongdoing. As the studies show a significant group of people in society need to know that the body to whom they report will receive

and address the report and the process by which they report will protect them from reprisals or victimisation.

Honesty and integrity must be encouraged and the legislation should reflect that objective.

The other fundamental flaw in the existing legislation is the failure to make an act of victimisation an offence.

A whistleblower needs to know:

- 1) what type of information can be the subject of a disclosure;
- 2) to whom the disclosure should be made;
- 3) that the disclosure will be appropriately and adequately investigated by an integrity agency that has that responsibility as part of its core functions; and
- 4) that he or she will be protected so far as is possible from any act of victimisation from any person whether that person is the subject of the disclosure or not.

Professor AJ Brown described the WBP Act as no more than a framework or a set of principles.

I think that criticism is valid. The WBP Act should be repealed.

I have considered whether the WBP Act should be repealed and the ICAC Act be amended to address whistleblowers. However, I do not favour that approach. I think there would be a risk that the primary objective in the ICAC Act might be diminished and the primary objectives in the WBL not be achieved.

I think a new Act should be considered.

Recommendation 1: The WBP Act be repealed and a new Act be substituted that clearly addresses the four fundamental issues relevant to whistleblowing and the further recommendations mentioned in this review.

Who Needs Protection and for what Disclosure?

The disclosures which need to be facilitated in the public interest

The persons who ought to be considered to be whistleblowers and therefore to qualify for statutory protection are identified in part by the content of the disclosures that it is in the public interest to encourage.

I have already addressed the definition of public interest information in the WBP Act and that it has the effect of allowing for disclosures in both the private and public sector.

The definition addresses in effect three types of conduct: illegal activity in the private and public sector; conduct that causes a substantial risk to public health or safety, or to the environment in both the private and public sector; and maladministration in the public sector although a person who is not a public officer could have been a party to the conduct: (ii) and (iii) of the definition of public interest information.

The information which WBL needs to encourage in the public interest is information about unacceptable conduct that has two features: first, the unacceptable conduct must be of a level of seriousness, that it needs to be brought to the attention of someone in a position to investigate the conduct; secondly, the information ought to be information that is not widely known

outside the organisation in which it is kept and there is a risk that it may remain unknown due to organisational pressure exerted upon the person who is in possession of the information.

For reasons that follow, I think that the WBP Act attempts to do too much by addressing all illegal conduct in both the public and private sectors.

[Is all criminal conduct wrongdoing of the kind where disclosure should be facilitated and protected by WBL?](#)

I will deal with the question of illegal activity first and upon the assumption that illegal activity means criminal offending.

I have said that under the WBP Act any member of the public can make an appropriate disclosure about an “illegal activity” committed by anyone, and thereby attract the protections of the WBP Act. This is a very broad scope for whistleblower protection, particularly where a police officer is listed as an “appropriate authority” for a disclosure about any illegal activity.¹⁸ Read literally, every person who makes a complaint to Police about illegal conduct attracts whistleblower protection.

Reporting a crime is a common occurrence.

People report crime for two different reasons: first because they are the victims of crime; secondly, if they are not victims because they see it as their responsibility as citizens. The first group needs no encouragement, they act out of a legitimate self-interest. The second group needs no protection, they are motivated by their duties as citizens.

¹⁸ Section 5 of the Act.

The reports are invariably made to the Police. The reporters expect that the Police will act upon their reports and investigate the circumstances, obtain the necessary evidence and cause the offender to be prosecuted.

They have that expectation because in this country the Police has a reputation as an organisation that discharges its duty as a law enforcement agency. That expectation is warranted.

There are some people who report crime to the Police who request that their identity not be revealed. Usually that request is made for the reason that the reporter does not wish the offender to know that the reporter was responsible for the report. That may be because the reporter fears reprisals at the offender's hands or by persons associated with the offender. It may be because the reporter and offender are well known to each other or related to each other and the reporter has personal reasons for his or her identity not being known.

Under the existing WBP Act if a person believes on reasonable grounds that an adult person has been involved in illegal activity and discloses that information to a member of the police force that person will have satisfied the criteria in s5 and be entitled to the benefits of the WBP Act which includes an immunity from civil or criminal liability.

The police officer to whom the disclosure was made could not without the reporting person's consent divulge the identity of that person except for investigation purposes.

Therefore a member of the public who reports illegal activity of another member of the public to Police is entitled under the WBP Act to be a whistleblower and become entitled to whistleblower status.

There is no need for WBL where a person discloses criminal conduct by another person to the Police.

Ordinarily a person reporting an offence under the general law would not be thought to be a whistleblower. These people are not usually at risk of victimisation for reasons of the making of the report.

That I think demonstrates that the WBP Act is too wide. It catches all disclosures made by persons who would not consider themselves whistleblowers but simply victims or citizens discharging their duties as citizens.

I am not addressing Police informants who provide information and intelligence to the Police on a strictly confidential basis. Those people are not whistleblowers as the term is understood. Their circumstances are managed by Police to keep their identities secret. Those persons would be at serious risk if their identities were revealed.

It is part of a citizen's duty as a citizen to report criminal conduct to the Police. Whilst this State enjoys a police force in which its citizens have confidence there is no need for protection of the kind envisaged in the WBP Act.

Where a person is at risk by reporting a criminal offence to the Police the Police will have the responsibility for managing that risk.

Witnesses and complainants do receive some protection outside of whistleblower protection legislation, in that interference with witnesses and attempts to pervert the course of justice are prohibited by the criminal law of South Australia,¹⁹ and the relevant offences carry significant maximum periods of imprisonment.

That does not mean that WBL should not recognise the need to encourage the reporting of some illegal activity. What the WBL should do is identify more precisely the kind of illegal activity that the WBL encourages be reported and it can do so by limiting the application of WBL to reporting criminal activity in public administration.

I am of the view that South Australia's WBL ought not to provide general protection for whistleblowing in relation to criminal conduct in the private sector but only provide protection for a disclosure of that kind in the public sector.

In any event, criminal conduct in the private sector is being increasingly regulated by Commonwealth legislation.

Certain categories of private sector whistleblowers receive the protection of Commonwealth laws when they make particular disclosures. For example, the *Corporations Act 2001* protects a corporate whistleblower when he or she discloses illegal conduct to ASIC and other authorities.²⁰ Other areas of employment where a private sector employee who is a whistleblower will

¹⁹ Section 244 and 256 *Criminal Law Consolidation Act 1935* (SA).

²⁰ Part 9.4AAA *Corporations Act 2001* (Cth).

enjoy Commonwealth legal protection include the education, health care and banking industries.²¹

The type of conduct that a private sector employee is likely to report is conduct of a kind that is addressed and being increasingly addressed by Commonwealth legislation.

Recommendation 2: That the reporting of criminal conduct other than in public administration not be addressed by WBL.

Is conduct which creates a substantial risk to the environment or to public health and safety wrongdoing of the kind where disclosure should be facilitated and protected by WBL?

The third element of the present definition of public interest information in the WBP Act is conduct that causes substantial risk to public health or safety or the environment which could include conduct in both the public and private sector.

It would be difficult to argue with the proposition that if a person discloses information to an appropriate recipient about a substantial risk to public health or safety and the environment, that person should not face civil action or criminal charges, or suffer victimisation, for doing so.

The wellbeing of the South Australian community depends on the preservation of the environment and the protection of public health, so there is a public interest in protecting disclosures about serious threats to the environment and public health.

²¹ Senate Select Committee on Public Interest Whistleblowing, *In the public Interest*, (Australian Government, 1994) 152-153.

It is not known whether there have been disclosures of public health and environmental whistleblowing in South Australia outside of a public sector context. This of course is one of the present weaknesses of the WBP Act which does not allow for anyone to know the extent to which the WBP Act is utilised and for what type of conduct.

Theoretically, an occasion for speaking out in reliance on such a protection could arise in a variety of circumstances: a private sector employee, contractor or client might speak out about an unsafe use or dumping of harmful chemicals, or about dangerous medical waste disposal, or about fatigue inducing trucking schedules, or about a person who interacts closely with the public failing to take necessary anti-infection precautions.

Wrongdoing that gives rise to grave risks to the environment and public health will not necessarily be restricted to conduct in the public sector.

For that reason this type of conduct should attract WBL protections whether committed in the public sector or private sector.

The WBP Act does not provide clear disclosure channels or processes for a person who wishes to make a health or environmental disclosure.

Apart from a Minister, there are no “appropriate authorities” listed in s 5(4) of the Act that appear well placed to receive a disclosure about conduct causing a risk to the environment. It was suggested that the then newly created South Australian Environment Protection Authority might be declared by regulation to be an “appropriate authority” for the purposes of the WBP Act, to allow members of the public an appropriate and identifiable authority for

complaining about environmental matters.²² However, this has not been done.

Similarly there are currently no obvious appropriate authorities in the WBP Act for making a protected disclosure about conduct which causes a risk to public health. The enactment of the *Health and Community Services Complaints Act 2004* (SA) (HCSC Act) evinces a legislative intention to create a specialist complaints regime, for complaints about the provision of a health or community service. Of course a defective health or community service is not the only context in which conduct which causes a substantial risk to public health may arise.

Whichever agency is to become the agency to which disclosures of this kind might be made will need to ensure that the disclosure that is made is properly investigated.

I think the approach is consistent with the approach taken by Queensland. Queensland legislation divides public interest disclosures up into two types: the first type of disclosure can be made by anyone; the second type of disclosure can be made by a public officer. The Queensland legislation protects a public interest disclosure by “any person” if that person has information about certain matters, including about a:

- Substantial and specific danger to the health or safety of a person with a disability;

²² M R Goode, above n 14, 39.

- Substantial and specific danger to the environment arising from the commission of one of a number of nominated environmental offences or breaches; and
- Conduct amounting to a reprisal against a public interest discloser.²³

Recommendation 3: That WBL recognise disclosures of conduct that creates a substantial risk to the environment or to public health and safety wrongdoing, whether the conduct has occurred in the public sector or private sector.

Should disclosure of maladministration as presently defined in the WBP Act be the subject of protection in future WBL?

Paragraph (b) of the definition of public interest information in the WBP Act directly addresses maladministration.

Maladministration is unhelpfully defined in the WBP Act to include impropriety or negligence.

The definition of public interest information means information that tends to show that a public officer is guilty of maladministration in or in relation to the public officer's performance of his or her official functions.

That conduct must be something different from an adult person being involved in an irregular use of public money or substantial mismanagement of public resources: see (a)(ii) and (iii) of the WBP Act.

The understanding of what is meant by maladministration must be informed by the definition of public interest information and in particular by (a) of the definition.

²³ Section 12 *Public Interest Disclosure Act 2010* (QLD).

That part of the definition that relates to maladministration, the definition of which I have mentioned, came as a result of consultation and was not part of the first draft of the Bill.²⁴

Because maladministration takes its colour from the whole of the definition, “maladministration” can be understood to include the making of decisions that are wrong, contrary to law, unreasonable or unjust, or where a public officer fails to provide reasons for a decision where reasons ought to have been provided. That is the kind of administrative act that is usually within the jurisdiction of an Ombudsman and is the case in South Australia.²⁵

As I have mentioned, the former Ombudsman Mr Bingham was of the view that “maladministration” for the purposes of the WBP Act was too wide.

If maladministration may be understood that way, and I think that is likely to have to be the way in which it should be understood in the WBP Act, a person might reasonably think that he or she would be entitled to disclose something that involved an administration decision that was adverse to that person and obtain the benefits of the WBP Act. If that expectation is not realised, it is likely to add to that person’s sense of grievance.

As a matter of public policy, it is difficult to see that there is a public interest in extending protection in relation to complaints about administrative acts that involve error. For that reason the protection of the WBP Act ought not to extend that far.

²⁴ M R Goode, ‘Policy Considerations in the Formulation of Whistleblowers Protection Legislation: The South Australian *Whistleblowers Protection Act 1993*’ (2000) 22 *Adelaide Law Review* 27, 35.

²⁵ Section 25, *Ombudsman Act 1972* (SA).

The ICAC Act has its own more prescriptive definition of “maladministration in public administration”.

The definition contained in the ICAC Act captures conduct of a public authority or a public officer that needs to be disclosed in the public interest because of the seriousness of the conduct. The required threshold of seriousness is “*substantial* mismanagement”, which is used in both placita (i) and (ii) of (a) in the ICAC Act. Administrative actions that are regarded as maladministration simply because they are in error or are administration acts that are unreasonable will be excluded unless they reach that threshold.

The phrases “irregular and unauthorised use of public money” and “substantial mismanagement of public resources” in the definition in the ICAC Act are also used in the WBP’s definition of public interest information: see (a)(ii) and (iii). That part of the WBP Act definition captures the more serious maladministration without having to resort to a broad concept of maladministration in (b).

The present WBP Act does not address maladministration in the private sector nor should it. The management or mismanagement of the private sector is for the private sector and there is no reason for government to interfere unless the mismanagement results in a regulatory or criminal breach.

For these reasons I think that the definition of maladministration in the WBP Act is too wide and captures conduct that is not the type of conduct that should, if disclosed, lead to whistleblower status or protection.

Recommendation 4: That maladministration as it is presently defined, and its use in the definition of public interest information, not be included in WBL.

For future WBL public interest information should pick up the conduct that is defined separately in the ICAC Act as corruption, misconduct and maladministration in public administration.

I have mentioned the definitions of the other types of unacceptable conduct in public administration in the ICAC Act. For the reasons that follow I think these definitions are better suited to serve the purposes of WBL for this State than concepts of illegal activity and maladministration in the WBP Act.

The first type of conduct which the ICAC Act is concerned is the most serious conduct: “corruption” which must be, as I have already said, a criminal offence and is for the reasons already mentioned any criminal offence by a public officer while the public officer is acting in his or her capacity as a public officer. That definition would pick up the concept of illegal activity in the WBP Act, at least as it applies to the public sector. For the reasons already mentioned I think that WBL should be limited to reporting illegal activity in the public sector.

The ICAC Act also deals with the misconduct of a public officer and treats as misconduct any contravention of a Code of Conduct that could result in disciplinary action. That it seems to me is also conduct that should reported to an appropriate authority to be investigated and to be dealt with if made out in accordance with the relevant Code of Conduct.

The third type of conduct with which the ICAC Act is concerned is maladministration, the definition of which I mentioned earlier.

It is in the public interest that that these types of unacceptable conduct in public administration are exposed, investigated, and addressed.

There are three powerful arguments for providing that a public interest information disclosure be in the same terms of the definitions of corruption, misconduct and maladministration in the ICAC Act.

First, those definitions capture the kind of conduct that is sufficiently serious that it should be reported. That is the underlying assumption in the ICAC Act.

Secondly, and crucially, it is conduct that if reported must be investigated. The conduct will be investigated and dealt with in accordance with the ICAC Act. That, as the research makes clear, is a very important factor in motivating people to report unacceptable conduct i.e. confidence that it will be dealt with by an appropriate body.

Thirdly, if the definitions in the WBL and the ICAC Act were the same the risk of confusion for public officers in reporting conduct that should be investigated would be avoided.

The definitions of public interest disclosure in WBL should be consistent with the definitions of unacceptable conduct in the ICAC Act

Recommendation 5: That the definition of public interest information in WBL in public administration be consistent with the definitions of corruption, misconduct and maladministration in public administration in the ICAC Act.

Who will need protection in order to facilitate these disclosures in the public interest?

Facilitating disclosures about unacceptable conduct in public administration: protection for whom?

The broad sweep of the present WBP Act captures many kinds of “whistleblowers”.

Some of those WBP Act “whistleblowers” are not whistleblowers in the sense in which the word is usually understood. A member of the public who reports a criminal offence committed against him or herself to Police is not a person who has inside information, and he or she is not at risk of victimisation in an organisational context.

As I have said, anyone can be a whistleblower for some purposes of the WBP Act. This means that the Act covers *private sector* employees who blow the whistle in relation to illegal activity, or in relation to substantial public health or safety or environmental risks created by the whistleblower’s employer.

The argument that whistleblower protection should be available for the broad range of complainants was made as early as 1991 by the Queensland Electoral and Administrative Review Commission reporting in the wake of the Fitzgerald Commission.²⁶ South Australia adopted this approach in 1993 when it enacted the WBP Act, but Queensland did so only in part.

²⁶ Electoral and Administrative Review Commissioner, *Report on Protection of Whistleblowers* (Queensland Government, 1991).

A number of Australian jurisdictions have chosen not to adopt such a broad based approach, but instead have concentrated on regulating public interest disclosures made by persons directly connected with the public sector.²⁷

Some argue that public sector employees should not have special protections available that are unavailable to the general public. At first sight this argument has superficial appeal.

However, the better argument favours a regime for the public sector. Government has a duty to ensure that all of its agencies of whatever kind provide good governance. Shaping a whistleblower protection regime which contributes to the discharge of duties should be the underlying rationale for WBL, whatever else the legislation manages to achieve.

It might be argued that the ICAC Act and the protection which it offers a public officer who reports unacceptable conduct to the OPI now makes the protections of a WBL unnecessary. That is not the case.

Although the ICAC Act does provide some protections to public officer whistleblowers when those public officers disclose unacceptable conduct to OPI, those protections need to be augmented by WBL for three reasons: first, because unacceptable conduct may first be reported to someone other than the OPI and thus whistleblower protection is required for that report; secondly, because a public officer may disclose unacceptable conduct internally within his or her agency, in addition to any report to OPI, and whistleblower protection should apply to that internal report; and thirdly because a public officer may be ignorant or mistaken about the extent of his

²⁷ The Commonwealth, New South Wales and Tasmania have taken this approach.

or her obligation to report to OPI, but should nevertheless enjoy whistleblower protection.

Recommendation 6: That WBL protect public officers (as those public officers are defined in the ICAC Act) in relation to disclosures about unacceptable conduct in public administration.

The next question to be determined is whether South Australia's legislation should continue to provide protections, and the same protections, to *any person* who makes disclosures of public interest information in relation to conduct in the public sector?

There are three reasons why it is said that WBL is not needed to protect members of the public who may wish to make a disclosure in relation to unacceptable conduct in public administration.

First, a member of the public does not need special encouragement to make a disclosure about unacceptable conduct in public administration because he or she is unlikely to be subject to organisational pressure to refrain from reporting the unacceptable conduct.

Secondly, a public officer is more vulnerable than a member of the public to the kind of victimisation that WPL seeks to prevent. A member of the public is unlikely to lose his or her job, suffer demotion, or face disciplinary action as a consequence of making a disclosure about unacceptable conduct in public administration.

Thirdly, members of the public who wish to make a complaint about unacceptable conduct in public administration already have means by which they can do so whilst enjoying an appropriate level of protection. Members of

the public do not make complaints to persons or agencies that make the members of the public vulnerable to victimisation.

The OPI and Ombudsman both provide a means for persons who are members of the general public to make complaints about public sector wrongdoing.

Under the ICAC Act, any person, including a member of the public, may make a report in relation to unacceptable conduct in public administration. The identity of a person who does so is protected under the ICAC Act, and the ICAC Act complainant is protected by stronger protections against victimisation than are available to a whistleblower under the WBP Act.²⁸

A member of the general public who is directly affected by an administrative act may make a complaint to the Ombudsman in order to have that complaint investigated and resolved. Although a person making a complaint to the Ombudsman does not have a right to have his or her identity kept secret under the Ombudsman Act the Ombudsman can control the dissemination of information obtained in the course of the administration of the Ombudsman Act.²⁹

Both the Ombudsman Act and the ICAC Act contain provisions concerning a duty to inform a complainant about an outcome of a complaint.³⁰

The protections afforded by the ICAC Act are generally sufficient and sufficiently well adapted to protect members of the public who wish to make public interest disclosures about public sector wrongdoing, subject to some

²⁸ The difference between these two victimisation provisions will be discussed in detail below.

²⁹ Section 26 *Ombudsman Act 1972 (SA)*.

³⁰ Sections 17(3) and 27 *Ombudsman Act 1972 (SA)* and s24(8) ICAC Act.

recommendations for improvement made below. In my opinion, there is no longer a need for South Australia's whistleblowers regime to protect this kind of disclosure.

Accordingly, WBL need not protect a disclosure made by a member of the public in relation to unacceptable conduct in public administration.

Recommendation 7: That WBL no longer cover public interest information disclosures made by members of the public in relation to public sector wrongdoing, because the ICAC Act provides a sufficient specialist channel for such disclosures, and the office of the Ombudsman provides an additional channel for persons directly affected by public sector decisions and other administrative acts.

[Facilitating public interest disclosures about conduct causing a substantial risk to public health or safety or to the environment: protection for whom?](#)

As I have said, conduct causing a substantial risk to the environment and public health may take place in the public sector or outside the public sector. A person who has knowledge of such conduct may or may not be a public officer.

There is a strong argument that in order to encourage and facilitate disclosures of this kind, legislation should offer whistleblower protection for "any person" who makes a whistleblower disclosure in relation to conduct which creates a substantial risk to public health or safety, or to the environment whether in the public or private sector.

Recommendation 8: That WBL provide protection for any person who makes a public interest disclosure about conduct that causes a substantial risk to public health or safety or to the environment.

The Process for Disclosures

The need to investigate

The WWTW study has provided useful information about public officers' motivation to make public interest disclosures and what might discourage them from doing so. It is appropriate that WBL in South Australia use that knowledge to design a public interest disclosure system that is best adapted to meeting its stated goals.

As I have said, the WWTW study found that confidence that appropriate action would be taken was a "very important" reason for disclosing serious wrongdoing. Also, when those who knew of wrongdoing were asked why they did not make a disclosure, the most common reason given was that they believed no action would be taken.

Accordingly, one of the best ways that WBL can facilitate disclosures in the public interest is to create confidence that disclosures will be appropriately investigated, and action taken. A statutory obligation to investigate public interest disclosures will encourage further public interest disclosures.

The WBP Act presently provides that if an appropriate disclosure of public interest information is made to a public official, that official must, wherever practicable and in accordance with the law, notify the informant of the

outcome of any investigation into the matter to which the disclosure relates.³¹

The WBP Act falls short of creating an obligation to investigate, although it silently acknowledges that an investigation may take place.

An obligation to investigate will also ensure that public interest disclosures actually achieve the public benefit for which they are encouraged to be made, that is, the exposure of wrongdoing with the benefit that the quality, accountability and integrity of public administration will be maintained and improved. Individual public officers rarely have investigation skills, but in any event do not have the powers to carry out an investigation. Accordingly, it is unrealistic to expect a whistleblower to report fully investigated cases of corruption, misconduct or maladministration.

An obligation to investigate is now included in most Australian public interest disclosure legislation and therefore represents current best practice. The Commonwealth legislation has particularly clear requirements for imposing an obligation on the recipient agency to allocate the handling of the disclosure to the appropriate agency to deal with the matter. When an authorised officer of an agency receives an internal disclosure about suspected disclosable conduct, either directly from the person making the disclosure or via a supervisor of that person, the authorised officer must allocate the disclosure for investigation, to the agency itself, or to the Ombudsman, or to a specialist investigative agency. The authorised officer must inform the agency head, the person who made the disclosure and an oversight agency (the Ombudsman or the IGIS) about the allocation. The principal officer of an agency must investigate or refer for investigation an allegation if it is allocated to them,

³¹ Section 8 of the WBP Act.

although the principal officer may decline to investigate or halt an investigation if any of a number of specified circumstances applies, for example, where the person who made the disclosure is not and has never been, a public official. The person who made a disclosure must be informed about decisions made at this stage too, and decisions not to investigate must be notified to the oversight agency. The Commonwealth Act also sets out detailed requirements for what must go into the report of the investigation that the agency head is required to produce.

Recommendation 9: That WBL provide an obligation, subject to appropriate exceptions, to investigate disclosures.

To whom should the disclosure be made?

Disclosure to the OPI

The WPB Act provides immunity for public interest disclosures that are made “to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.”³²

I have already observed that the WBP Act identifies non-exclusively the persons to whom disclosure of types of conduct should be made.

The separate bodies or institutions that are listed in s5(4) of the WBP Act may not be inappropriate recipients for the type of conduct to which reference is made but the better question is whether they are the most appropriate.

A list of appropriate authorities is not the preferred way to proceed. First it is unlikely that a whistleblower will know of the list and therefore to whom the

³² S 5(2)(b) WBP Act.

whistleblower may make his or her disclosure. Moreover, the appropriate authority depends upon the nature of the information to be disclosed.

Secondly the list is not and cannot be exhaustive. It is not exhaustive in the sense that it provides for responsible officers in addition to the officers in paragraphs (a) to (g). But even after providing for those officers and responsible officers the WBP Act still provides that the appropriate authorities in s5(4) may not be the only appropriate authorities available: s5(3).

The further difficulty with a list of the kind is that the appropriate authorities may not have the power to investigate the matter reported. For example, the authority may need, if the matter relates to criminal conduct, to refer the matter to the Police.

If the person making the disclosure is a public officer he or she must report the matter to the OPI in addition to reporting it to the 'appropriate authority'.

The Directions and Guidelines made under the ICAC Act, which are mandatory for all public officers, require that corruption and serious and systemic maladministration and misconduct in public administration must be reported to the OPI. So in all cases public officers, public authorities and public officers must report unacceptable conduct to the OPI.

All of the persons or the office holders in s5(4)(a) to (g) are inquiry agencies, public authorities or public officers.

All of them on receiving a disclosure that they reasonably suspect raises a potential issue of corruption, misconduct or maladministration in public administration would be obliged to report that conduct to the OPI.

Any disclosure to them in those circumstances is an indirect report to OPI.

For those reasons the appropriate authority for the disclosure of public interest information of conduct in public administration should be the OPI.

The OPI has been established to receive complaints and reports of unacceptable conduct in public administration. It has a statutory duty to deal with the complaints and reports by assessing them and making recommendations to ICAC. ICAC in turn has an obligation to deal with matters that are assessed as corruption, misconduct or maladministration in public administration.

There is therefore an existing statutory body that could receive disclosures from whistleblowers.

The next question is whether the OPI should be the only appropriate authority for a person to make a public interest disclosure.

Recommendation 10: That the OPI be the primary recipient for public interest disclosures by public officers concerning unacceptable conduct in public administration.

[Disclosure to a Minister](#)

The WBP provides that a Minister of the Crown is an appropriate authority for disclosures.

I suggest that a Minister continue to be a person to whom a public interest information disclosure can be made.

A Minister has a vital interest in being aware of unacceptable conduct within any department or agency for which the Minister has responsibility.

A Minister is a public authority and may be a public officer. The Minister would, if a disclosure was made to the Minister, be obliged to report the conduct if it were unacceptable conduct, to the OPI.

A Minister should be the only recipient under WBL of a disclosure of public interest information relating to conduct outside of public administration which creates a substantial risk to public health or safety or to the environment.

Recommendation 11: That a Minister continues to be a person to whom a public interest disclosure may be made under WBL.

[Disclosure to a Manager](#)

More is now known about the circumstances that encourage whistleblowers to make disclosures. The results of the WWTW project findings show that a majority of public sector employees who report wrongdoing will do so to someone above them in their management chain. It is only relatively rare for them to use formal internal processes in the first instance, and very unusual for them to disclose to the media at any stage.

It would be appropriate to provide a public officer with alternative authorities to whom to make a disclosure especially where as I have said the person to whom the disclosure was made would have to report the disclosure to OPI. However, it is difficult to identify a person in a position of that kind.

A public officer who wishes to disclose wrongdoing within his or her own agency should be able to report to his or her choice of a number of sufficiently senior managers within the agency.

Agencies vary greatly in their size and structure, and some managers and supervisors routinely carry heavy responsibilities, and others are relatively junior in terms of their pay, responsibilities and qualifications.

WBL should recognise that if a public officer makes a disclosure to a manager senior to him or her that disclosure will attract whistleblower protection. Because of the ICAC Act that manager (and indeed the person making the disclosure) must report the disclosure to the OPI.

Recommendation 12: That a person in authority who supervises or manages the public officer, directly or indirectly, be included as an appropriate recipient of a protected public interest disclosure. Further, that the ICAC be empowered to provide guidelines to a public authority as to the person within an agency who could be considered a person in authority under WBL.

Disclosure to a “Responsible Officer”

An agency is presently required to designate a responsible officer for the purposes of the Act,³³ to ensure that the responsible officer has the qualifications specified by the Commissioner for PSE and to report each year in its annual report the number of instances when public interest information

³³ Section 7 *Public Sector Act 2009*. It is worth noting that this section was not part of the Bill first put to the house of Assembly, and is not referred to in the second reading speeches in either the House of Assembly or the Legislative Council.

has been disclosed to a responsible officer of the agency under the Act.³⁴ The qualifications specified by the Commissioner for PSE are set out in the Commissioner for PSE's *Determination 4 – Qualifications for Designated Whistleblower Contact Officers (February 2010)* which specifies that responsible officers for the purpose of the Act will at least possess the following attributes and qualities:³⁵

- Knowledge of the content and operation of the *Whistleblowers Protection Act 1993* and other relevant legislation and policies;
- Appropriate seniority and standing within the agency and with recognised status and reputation; and
- Tact, discretion and sophisticated communication skills.

Only a very small percentage of whistleblower reports can be expected to go through formal internal processes. The reality is that many whistleblowers do not regard themselves as whistleblowers or do not initially characterise their reporting of wrongdoing as whistleblowing. They may simply regard themselves as employees trying to do what is right. If they do not self-identify as whistleblowers then there is little chance that they will make their disclosure of public interest information to a person who is a responsible officer for the purposes of the WBP Act.

If managers who receive the initial disclosures do not immediately recognise that what they are being told is in fact a disclosure which entitles the person reporting to the protection of the WBL, the risk is that the person's confidentiality will be jeopardised and that breach of confidentiality may result

³⁴ Regulation 7(k) *Public Sector Regulations 2010*.

in a risk of victimisation will be heightened. These risks can in part be addressed by training, but WBL also has a role to play in making it clear that disclosures are protected even when they are made to a manager, and that the agency's obligations to a whistleblower should commence from the very first moment that a report is made to a manager about suspected wrongdoing, whether the whistleblower "claims" protection or not.

However, there is a benefit in retaining the responsible officer within the whistleblower protection scheme. The responsible officer can act as an initial resource point for the manager who is likely to be the first recipient of the disclosure. He or she can facilitate confidential on-notification to the head of the agency or administrative unit who is ultimately responsible for both integrity within the agency and for ensuring that a whistleblower is treated lawfully. The responsible officer can also provide an alternative channel for disclosures which a whistleblower can choose to utilise.

Each agency should continue to have a responsible officer who can receive public interest information disclosures from public officers.

Recommendation 13: That WBL require that the head of each public sector entity designate a person as a "responsible officer" and that the responsible officer within a public sector entity be a recipient of a public interest disclosure under WBL.

External disclosures including a Member of Parliament and to the media

When the enactment of WBL was under consideration in 1993, there was some pressure to make a Member of Parliament an “appropriate authority” to receive public interest disclosures.³⁶ That pressure was resisted, for reasons later elaborated by Mr Matthew Goode, an architect of the WBP Act:³⁷

The Act is very powerful. Once a disclosure falls within its scope, it provides very complete protection against all legal action. It follows that it potentially protects the leakage of confidential information from all levels of the State public service. If a Parliamentarian was, as such, an ‘appropriate authority’, then any member of the public service could with impunity leak information to any Member of Parliament and could seriously compromise the integrity of Government.

The end result was that Parliamentarians were not included in the list of “appropriate authorities” found in s 5(4) of the WBP Act.

A disclosure to a Parliamentarian would nevertheless be protected by the WBP Act if he or she is a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.³⁸

From the perspective of a potential whistleblower, this is problematic. He or she may be passionate about the necessity for the disclosure, but may lack confidence that a manager or a judge would find the choice of disclosure channel reasonable and appropriate. Potential whistleblowers are entitled to expect from a WBL greater certainty in relation to whether or not a particular disclosure to a particular person attracts the protection of WBL.

³⁶ Matthew Goode, ‘Policy Considerations in the formulation of the Whistleblowers Protection Legislation: The South Australian Whistleblowers Protection Act 1993’ (2000) 22 Adelaide Law Review 27, 38.

³⁷ Ibid.

³⁸ Section 5(2)(b) of the WBP Act.

In the same manner, the WBP Act allows for a disclosure of public interest information to a journalist in the media, but only if the journalist is a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure.³⁹

It is unlikely that it would be considered reasonable or appropriate for a person to make a disclosure in the first instance to a journalist.

Undoubtedly public officers make disclosures to the media. Whether they are matters that could be described as public interest information may be problematic. Sometimes the disclosures are made for the wrong reasons, being a sense of grievance or to do political damage to the Government.

As I have said, research indicates that public sector employees rarely choose to make a disclosure to the media, and almost never do so as a first resort. Nevertheless, it must be noted that the media has, on occasion, played an important role in ventilating serious public interest concerns that emanate from whistleblowers.

The World Online Whistleblower Survey, mentioned above, asked their participants *“If someone in an organisation has inside information about serious wrongdoing, when do you think they should be able to use a journalist, the media, or the internet to draw attention to it?”* Eighty seven per cent (87%) of Australian participants responded positively to either *“as a first option”*, *“when there become specific reasons to do so”*, or *“as a last resort, if all else fails”*.

³⁹ Section 5(3) of the WBP Act.

The Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs received submissions prior to the enactment of the *Public Interest Disclosures Act 2013* (Cth), and observed that the issue of disclosures to the media was “one of the more contentious aspects of the inquiry.”⁴⁰ Also contentious was the question of disclosures to other third parties – such as members of Parliament, unions, and external legal advisors.

The media’s part in a democratic society cannot be underestimated. It has a significant and important role to play in ensuring government accountability.

To a large extent, having functional and clear internal and formal external channels for whistleblowing, and obligations on recipients of disclosures to investigate; to maintain confidentiality; to keep whistleblowers safe; and to keep whistleblowers informed obviates the need for making complaints outside of those channels.

Nevertheless, it is possible that even with an optimal disclosure regime there may be instances where a whistleblower may decide that he or she needs to disclose public interest information to the media in order to ensure appropriate action or at least timely action. In such a circumstance the community may regard it as unjustified for that whistleblower to suffer any loss as a consequence of the whistleblower’s choice of reporting to the media.

Until recently, only NSW had a specific provision for whistleblowers to make protected public interest disclosures to the media. Under the *Public Interest*

⁴⁰ Standing Committee on Legal and Constitutional Affairs, House of Representatives, Parliament of Australia *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* (2009) p 146.

Disclosures Act 1994 (NSW), a public official may make a disclosure to a journalist or a member of Parliament if there has been a prior disclosure in accordance with the Act, followed by a failure to investigate and inform.⁴¹ Additionally, the person making the disclosure must have reasonable grounds to believe the disclosure is substantially true, and it must be substantially true.

In 2012 Western Australia amended its *Public Interest Disclosure Act 2003* to include a similar provision.⁴²

The *Public Interest Disclosure Act 2012* (ACT) allows protected public interest disclosures to be made to a journalist or member of the Legislative Assembly⁴³ (MLA) in circumstances where there has been a failure to investigate, or a failure to keep the discloser informed about progress in the investigation. A protected public interest disclosure may be made to a journalist or a MLA where the person making the disclosure honestly believes on reasonable grounds that he or she has information that tends to show disclosable conduct; that he or she faces a significant risk of detrimental action if the report is made through the officially mandated channels; and that it would be unreasonable in all the circumstances for the person making the disclosure to report through the officially mandated channels. That person “must disclose sufficient information to show that the conduct is disclosable conduct, but no more than is reasonably necessary to show that the conduct is disclosable conduct”.⁴⁴

⁴¹ Section 19 *Public Interest Disclosures Act 1994* (NSW).

⁴² Section 7A *Public Interest Disclosure Act 2003* (WA).

⁴³ Part 5 *Public Interest Disclosures Act 2012* (ACT).

⁴⁴ Section 27(4) *Public Interest Disclosure Act 2012* (ACT).

This last requirement would be likely to discourage all but the most determined persons who wish to make a disclosure from approaching the media. It requires a whistleblower to make a judgement with some precision as to what is sufficient information to provide to the external recipient, and to hope that judgement might be the same as a court's assessment, if a proceeding is taken claiming the whistleblower has released more information than was reasonably necessary, and seeking to discipline him or her for it.

The Queensland *Public Interest Disclosure Act 2010* permits a person wishing to disclose public interest information to make a public interest disclosure to a member of the Legislative Assembly, even in the first instance, unless it relates to a judicial officer.⁴⁵ If a person has made an internal public interest disclosure that is followed by a failure to investigate and inform, the discloser may also take the same information to a journalist.⁴⁶

Most recently, in *Public Interest Disclosure Act 2013* (Cth) Division 2 of Part 2 addresses circumstances when a person may make a disclosure to "anyone". Disclosures may be made in the first instance to an authorised internal recipient, or a supervisor of the whistleblower. Should there be a failure to investigate properly, and if certain additional criteria are met, the person who made the disclosure may repeat the disclosure to anyone other than a foreign government official. There is also a provision for an emergency external disclosure at first instance where "the information concerns a substantial and

⁴⁵ Section 14 *Public Interest Disclosure Act 2010* (Qld).

⁴⁶ Section 20, *Public Interest Disclosure Act 2010* (Qld). The Queensland Ombudsman is now the oversight agency for the Queensland Act, and he or she reports annually on public interest disclosures received by public sector entities. The 2012-2013 report captured data in relation to 1,140 such disclosures, however it did not appear to capture data in relation to disclosures made to parliamentarians or journalists.

immediate danger to the health and safety of one or more persons or to the environment” and other criteria are satisfied. Disclosure to an Australian legal practitioner is also permitted for the purpose of the person making the disclosure obtaining legal advice about making a disclosure. Not all disclosures are permitted under this section, for example, the disclosure of intelligence information is expressly excluded. No more information than is reasonably necessary to identify the wrongful conduct or notify of the risk may be released.

Recommendation 14: That WBL permit a public officer to re-disclose a public interest disclosure to the media or to a Member of Parliament where there has been a previous public interest disclosure in accordance with WBL, but there has been a failure to investigate or a failure to keep the public officer informed and, where the re-disclosure covers substantially the same information as the initial disclosure and, provided that the information is substantially true, or that the discloser believes on reasonable grounds that the information is true.

Scope of legal protection

Protection against civil and criminal liability

The WBP Act provides whistleblowers with immunity from civil or criminal liability. Without this protection, a whistleblower might be at risk of civil proceedings in an action such as defamation or a breach of confidence. A whistleblower might also be at risk of being prosecuted for breaching a statutory regime which provides for information to be kept confidential as a consequence of the public interest disclosure.

There is a trend in more recent legislation to more specifically identify the areas of protection offered by such legislation. For example, the *Public Interest Disclosure Act 2012 (ACT)* specifies that the making of a public interest disclosure (as defined) is not:⁴⁷

- (i) *A breach of confidence*
- (ii) *A breach of professional etiquette or ethics; or*
- (iii) *A breach of a rule of professional conduct; or*
- (iv) *If the disclosure is made in relation to a member of the Legislative Assembly – a contempt of the Assembly.*

The ACT legislation also contains a provision that provides for a defence of absolute privilege against defamation,⁴⁸ and a defence against civil and criminal liability,⁴⁹ and, in the case of a public official who has made the disclosure, protection against administrative action including disciplinary action or dismissal.⁵⁰

There are competing arguments for prescriptive legislation. The argument for the legislation is that it makes clear to a whistleblower what protections her or she will acquire when making a disclosure. The argument against is that as a matter of statutory construction there are no other protections available other than those identified. In other words the legislation creates a code.

I do not think the contrary argument to be of much force. As a matter of construction WBL can only offer the protections precisely identified by the

⁴⁷ Section 35(a) *Public Interest Disclosure Act 2012 (ACT)*.

⁴⁸ Section 36 *Public Interest Disclosure Act 2012 (ACT)*.

⁴⁹ Section 36(b) *Public Interest Disclosure Act 2012 (ACT)*.

⁵⁰ Section 36(c) *Public Interest Disclosure Act 2012 (ACT)*.

legislation itself. It could not be argued I would have thought that a whistleblower is entitled to any protection not expressly mentioned in the WBL.

As far as the WBP Act is concerned, it is not clear whether section 5(1) protects a whistleblower person against a disciplinary or other administrative action for disclosing public interest information which was otherwise confidential, or whether the WBP Act assists the whistleblower against an allegation that the whistleblower has breached a professional code of ethics. It would be consistent with the purpose of the WBP Act if the protection extended to that kind of protection.

There is a real need to protect whistleblowers from retribution under the guise of disciplinary action. In the WWTW study it was found about thirteen percent (13%) of internal witnesses surveyed had experienced adverse treatment as a consequence of whistleblowing. About fifteen percent (15%) of all agency case managers who witnessed adverse treatment as a consequence of whistleblowing indicated that the adverse treatment took the form of disciplinary action or prosecution.

In the end I think that a whistleblower is entitled to know exactly what protections the WBL is providing at the time the whistleblower makes a disclosure.

The WBL should precisely identify the protections that will be acquired, so whistleblowers can know exactly what benefits accrue. Whistleblowers could not expect any further benefits.

Recommendation 15: That WBL make clear that the making of a public interest disclosure does not of itself amount to a breach of confidence, a breach of professional etiquette or ethics, or breach of a rule of professional conduct, or if in relation to a parliamentarian, a contempt of the Parliament.

Protection of a whistleblower's confidentiality

Section 7 of the WBP Act imposes an obligation on the person who has received an appropriate disclosure not to divulge the identity of the person who made the disclosure unless necessary for an investigation.

As I have said, this section does not provide that if a whistleblower's identity has to be disclosed for an investigation, that person to whom the identity is revealed is subject to the same confidentiality obligation as the person to whom the first disclosure of the information was made.

In practice, the confidentiality of a whistleblower's identity is often illusory, or at best, short-lived. The Local Government Legislation section submission, to which I have referred, stated:

A written disclosure is usually seen by a variety of staff, ranging from the administrative to executive level, before a person of authority (for the purposes of the Act) sees the disclosure.

That submission pointed to a lack of practical information as to how the identity of an informant is to be kept confidential, and how the person who made the disclosure should be protected.

That is consistent with a finding of the WWTW study, that a person within Government who is officially responsible for receiving whistleblower reports,

such as a “responsible officer” for the purposes of the WBP Act, is not likely to be the first recipient of a public interest disclosure by a person within the public sector.

In the WBP Act it is assumed that the responsible officer of a public sector workplace will know about whistleblower protection legislation. The current South Australian regime relies upon on the ability of responsible officers who receive whistleblower disclosures to manage the whistleblower protection; to manage the whistleblower’s confidentiality; and to make appropriate referrals for investigation. However the regime does not provide any obligations of that kind. If the disclosure is made to an appropriate authority that is not a responsible officer there may be no-one to perform that important function. Because a whistleblower will not necessarily identify himself or herself as a whistleblower, and because a whistleblower is not likely to report public interest information to a “responsible officer” in the first instance, reliance on a responsible officer may be misguided. Unless every manager has a good working understanding of whistleblower protection processes and obligations, the fact that there is a responsible officer in an organisation will not ensure that a whistleblower remains anonymous or free of victimisation, or that appropriate action will be taken in relation to the information.

The Parliaments of the other States and the Commonwealth have made it an offence to disclose the identity of a person who has made a public interest disclosure, subject to some clear exceptions.⁵¹ For example, the Commonwealth legislation makes it an offence for a person who has obtained

⁵¹ For example, s 44(2) *Public Interest Disclosure Act 2012* (ACT) and s 65(1) *Public Interest Disclosure Act 2010* (QLD).

information about a public interest disclosure in that person's capacity as a public official to release identifying information unless:

- The disclosure or use is for the purposes of the Act;
- The disclosure or use is in connection with the performance of a function conferred on an oversight body – the Ombudsman or the Inspector General of Intelligence and Security;
- The disclosure is for the purposes of a law of the Commonwealth or a prescribed law of a State or Territory;
- The person who made the disclosure has consented to its release; or
- The identifying information has already been lawfully published.⁵²

Within the South Australian integrity framework, there would seem to be good reason to permit identity of disclosers to be divulged in the course of communications between public authorities and inquiry agencies and law enforcement agencies, for example, between the Police Ombudsman and ICAC, or between the Auditor General and the head of the Anti-Corruption Branch of SA Police, where the communication is for the purposes of the WBL or for the exercise of a function under another law.

This approach has the advantage of providing extra protection and realistic expectations for the whistleblower, as well as administrative and regulatory certainty for those who may receive or otherwise deal with a public interest disclosure.

If this were made clear in WBL it would assist public sector agencies to avoid breaching their statutory duty of confidentiality⁵³.

⁵² Section 20 *Public Interest Disclosure Act* (Cth).

The ICAC Act makes it an offence to publish, or cause to be published, information that might enable a person who has made a complaint or report under the ICAC Act to be identified or located, unless there is authorisation by the Commissioner or a Court which is hearing proceedings for an offence against the ICAC Act. The offence carries maximum penalties of \$150, 000 for bodies corporate, and \$30, 000 for natural persons.

The risk of reprisals for a person who has made a disclosure will be increased if his or her identity is disclosed, depending upon to whom the person's identity is disclosed. Most reprisals occur within the workplace at the hands of managers and colleagues, WBL's confidentiality regime ought to be focussed on protecting confidentiality within the workplace, and towards preventing the identity of the whistleblower becoming publically known. It is not suggested that the confidential disclosure of a whistleblower's identity between investigating agencies in accordance with the exercise of statutory functions creates a risk of reprisals.

There are limitations to the proper reach of any confidentiality regime. In some but not all cases, investigation in accordance with the principles of natural justice will necessitate telling the alleged wrongdoer enough of the allegations contained in the public interest disclosure that the alleged wrongdoer may be able to identify who the person was who made the disclosure. In such instances, the whistleblower must rely on other aspects of the WBP Act for

⁵³ In *Morgan v Workcover Corporation* [2013] SAFC 139, the Full Court of the Supreme Court found that if a whistleblower suffers loss as a consequence of a disclosure of identity that is in breach of the Act, the whistleblower has available a cause of action for breach of statutory duty to recover that loss which is a separate cause of action to the cause of action for victimisation found in s9(2) of the WBP Act.

protection, such as the victimisation provisions, and must also rely on the whistleblower's employer's ability and willingness to mitigate any risk of victimisation.

Recommendation 16: That WBL include an offence for disclosing the identity of a person who has made a public interest disclosure, with exceptions that permit disclosure within referrals for investigation and for other proper purposes clearly set out.

Anonymous disclosures?

Nearly all other Australian jurisdictions permit anonymous public interest disclosures.⁵⁴

An argument made against protecting anonymous disclosures is that anonymous reports can be difficult to investigate. It is also said that there is an increased risk that if anonymous reports were accepted the person making the disclosure might be less likely to be truthful because that person will not be accountable for what he or she has said.

A third and perhaps more cogent argument permitting anonymous disclosures within the WBL is that the person making a disclosure anonymously does not need protection. If the identity of the person making the disclosure is not known there would appear to be little risk of reprisals. However, the content of a disclosure and any ensuing investigation may make

⁵⁴ Section 8 *Public Interest Disclosure Act* (Cth); s 17(1) *Public Interest Disclosure Act* (Qld); s 16 (1)(b) *Public Interest Disclosure Act* (ACT) s 12(2)(b) *Protected Disclosure Act 2012* (Vic); s 8 *PID Public Interest Disclosure Act 2002* (Tas),s 5(6A) *Public Interest Disclosure Act* (WA), s 11(3) *Public Interest Disclosure Act* (NT).

it possible to identify the person who made the disclosure and if that be the case that person will then need the protections offered by the WBL.

The jurisdictions that permit anonymous disclosures do so for the reason that if there is serious wrongdoing, it is better that it be reported even anonymously rather than not at all.

A person who wishes to make an anonymous disclosure cannot of course make it to his or her manager or easily make it to the responsible officer so these reporting channels are not available. It is difficult for internal reporting to be made anonymously.

The approach that I recommend is to permit public officers and members of the public to make anonymous reports to the OPI. For reasons already given a report of that kind will mean that the report is addressed within the limits of any anonymous complaint or report. The OPI has confidentiality provisions that will allow an anonymous disclosure to be properly investigated without any unfairness to the person against whom the allegations of wrongdoing are made.

Recommendation 17: That WBL permit a person to make an anonymous public interest disclosure to the OPI and obtain the status of whistleblower.

Protection against victimisation

Remedies where victimisation occurs or is apprehended

It is accepted that a whistleblower is at risk of adverse consequences as a result of making a disclosure, particularly in his or her work place, and one of

the purposes of the WBL must be to protect a whistleblower from those adverse consequences.

The WBP Act does so by making that conduct, victimisation, which can be utilised by a whistleblower to seek a remedy for a wrong done to the whistleblower as a consequence of a public interest disclosure by him or her. A person is said to commit an act of victimisation against a person if the first person causes detriment to the second person on the basis that the second person or a third person has made or intends to make an appropriate disclosure of public interest information.

Detriment is defined in the WBP Act as including:

- a) Injury, damage or loss; or
- b) Intimidation or harassment; or
- c) Discrimination, disadvantage or adverse treatment in relation to a person's employment; or
- d) Threats of reprisal.⁵⁵

Two remedies are given by the WBP Act.

First, it creates a statutory cause of action as a tort: s9(2)(a). Secondly, it deems an act of victimisation to be an act of victimisation under the EO Act.

If a whistleblower under the WBP Act has suffered detriment as a result of an act of victimisation, the aggrieved whistleblower may seek damages either by taking an action for the statutory tort in the civil jurisdiction of the general courts, or by making a complaint under the EO Act.

⁵⁵ Section 9(4) of the WBP Act.

The remedies are alternative which requires a whistleblower to elect to either approach the courts or the Commissioner for Equal Opportunity (CEO).

A number of submissions criticise the remedies that are available under the WBP Act. It has been suggested that it is unrealistic to expect a whistleblower who has already suffered detriment as a consequence of making a public interest disclosure to resort to litigation or for a remedy under the EO Act, both which might incur the risk of costs.

I know of no litigation which has gone to judgement where a whistleblower in South Australia has successfully sued for damages relying upon the statutory tort. The best that can be said of this remedy is that it does not assist whistleblowers in respect of any victimisation that a whistleblower has suffered.

Given that the use of the remedial provisions of the Act is infrequent, it is difficult to get a sense of the scale of loss suffered by whistleblowers in South Australia. However Professor AJ Brown has made an educated guess: ⁵⁶

If South Australia is similar to the four jurisdictions studied in detail (NSW, Queensland, WA and the Commonwealth) then notionally, perhaps 7,320 individuals may have reported public interest-related wrongdoing within the State public sector in any recent 1-year period. If the treatment of these individuals is similar to the other jurisdictions, then if surveyed, between 25 and 30 per cent might report mistreatment by management or colleagues. Even if only 5 per cent of this reporting population, or a quarter or less of those alleging mistreatment, in fact suffered mistreatment that was sufficiently clear and serious to approach a compensable standard, this would equate to 366 individuals – for the public sector alone. Unless most or all of such individuals are receiving satisfactory alternative remedies within their agencies without reference to the courts or EOC, which is unlikely, then on any analysis, the gap between the likely potential

⁵⁶ A J Brown, *South Australian Whistleblower Protection: A New Opportunity* (Don Dunstan Foundation, 2013).

remedial need and the current level of victimisation complaints is extreme.

If that assessment is correct, some whistleblowers are suffering uncompensated loss as a result of victimisation consequential upon a disclosure, but are judging it better to cope with their loss than to subject themselves to a lengthy and possibly expensive remedy process.

Professor AJ Brown argued that the loss suffered by a whistleblower as a consequence of making a disclosure should include not only damages arising from deliberate acts of victimisation, but also from failure in management to properly manage the whistleblowing process and to protect the whistleblower. He argues “many of the serious adverse consequences that may befall whistleblowers, such as career impacts arising from diminished performance due to poorly managed stress, arise not from deliberate intentions to harm a whistleblower, but from simple mismanagement of their circumstances.”

For reasons that I will discuss below, the link between management’s failure to manage risk of victimisation and compensable loss suffered by a whistleblower is not clearly made under the legislation as it stands.

Whilst the WBP Act’s tortious remedy mechanism has not been utilised, some whistleblowers have sought redress for victimisation pursuant to the EO Act.

The object of the EO Act is to promote equality of opportunity in South Australia. The EO Act prohibits discrimination in certain spheres of activity on the bases of sex, race, disability, age, and other grounds. The EO Act provides a conciliation and enforcement mechanism to respond to prohibited

discriminatory conduct. It contains its own prohibition of victimisation provisions to protect EO Act complainants.⁵⁷ A written complaint alleging breach of the EO Act, including a complaint of victimisation, may be made by an aggrieved person to the EOC within 12 months of the breaching conduct. Upon receipt of the complaint, the EOC may conduct an investigation, and has a power to call for written records to assist with that.⁵⁸ If the EOC forms the view that the matter may be resolved by conciliation, she or he is obliged to “make all reasonable endeavours to resolve the matter by conciliation.”⁵⁹ The policy of the EO Act is that dispute resolution should be based on consensus.

The EOC may withdraw the Equal Opportunity Commission (EO Commission) from the process and decline to take action if the complaint lacks substance, is misconceived, frivolous, or vexatious.⁶⁰

If conciliation fails, or if the EOC forms the view that conciliation cannot resolve the matter, or if the EOC declines to take action in relation to the complaint and the complainant nevertheless requires that the complaint be resolved, the EOC must then refer the complaint to the EOT.

Quite some time may pass between receipt of a WBP Act complaint of victimisation and any hearing by the EOT. This is not intended as a criticism of either the EO Commissioner or the Tribunal.

The EOC made a submission to this review, focussing on victimisation. She provided statistics based on her office’s records of formal victimisation

⁵⁷ Section 86 *Equal Opportunity (EO) Act 1984*.

⁵⁸ Section 94 EO Act.

⁵⁹ Section 95(1) EO Act.

⁶⁰ Section 95A EO Act.

complaints. Whistleblower victimisation complaints have been relatively small in number, usually between one percent (1%) and 3 percent (3%) of the total complaints received in a year, with a long term average of 7 complaints per year.

Over the last 9 years, on average, 40 percent (40%) of WBP Act victimisation complaints each year are taken up by the EOC for conciliation or other action. This low level of take-up points perhaps to a lack of knowledge or understanding of the WBP Act by complainants. It may be that some of the persons who perceive that they have been victimised as whistleblowers are not assessed to be whistleblowers or to have suffered victimisation in the terms of the WBP Act by the EOC.

The EOC said that it is rare for whistleblower victimisation complaints to be successfully conciliated, in part due to the high levels of personal and emotional investment in the disputes and the often irreparable breakdown of the relationship between the parties.

The two-phased EO Act procedure, designed to maximise the number of disputes that resolve at the conciliation phase, means that the EO Act mechanism can only assist whistleblowers once they have already suffered harm. If there had been a large percentage of whistleblower victimisation complaints that settled through conciliation, then this two-phase process would have served its purpose. However, as mentioned above, conciliation is often not successful.

In her submission to this review, the EOC said:

Individuals who telephone the EOC through its enquiry line who are potential whistleblowers want to know what protections are available to them once they blow the whistle. There is a belief among many that they will be entitled to something similar to an injunction to stop them losing their job or being harassed, and as a result they are often disheartened when they hear that the EOC can only act once they have suffered a detriment.

It would appear that some potential whistleblowers consider protections and risks to themselves, and engage in a risk-weighting process before reporting wrongdoing. It must be assumed that some potential persons who take the trouble to investigate the protections which are available to whistleblowers, and find them wanting, do not report serious wrongdoing.

That is contrary to the interests of the public.

The EOT does have powers to make orders requiring a respondent to refrain from further contraventions, or to make interim orders to prevent prejudice to a person affected by the proceedings,⁶¹ but again this jurisdiction is only accessible once the detriment has been suffered, and once the EOC's investigative and conciliatory processes have been exhausted.

It therefore seems unlikely that the EO Act's injunctive remedy will be available to protect a whistleblower who has received information that the whistleblower is likely to be dismissed for making a protected disclosure. The lack of injunctive remedies for whistleblowers facing victimisation is a weakness in the current WBP Act that WBL should address.

⁶¹ Section 96 EO Act.

Other Australian jurisdictions have provided an injunctive remedy to a whistleblower who apprehends a risk of detrimental action being taken against him or her.⁶²

Given that the power for a Court to make an injunction protecting a whistleblower against apprehended detrimental action is now a commonly accepted part of WBL, the WBL for South Australia should include such a provision. The District Court has a power to make injunctions within its civil jurisdiction. It may be the best placed Court for that purpose.

In their submission, Dr Gabrielle Appleby, Dr Judith Bannister and Ms Anna Olijnik, all of the University of Adelaide, argued that leaving enforcement of the WBP Act's protections completely in the hands of victims of victimisation does not do enough to acknowledge the public good that whistleblowers perform, and the public benefit in the protection's consistent enforcement. They are of the view that the legal costs and time involved in bringing a proceeding alleging victimisation acts as a deterrent to whistleblowers enforcing their rights. They are of the view that government funded legal aid should be available to whistleblower litigants but subject to conditions.

There is presently a form of legal aid available to whistleblower litigants The EOC may fund or partially fund legal costs of a victimisation complaint referred to the EOT.⁶³ The most recent annual report of the EO Commission

⁶² See for e.g. s 15 *Public Interest Disclosure Act 2013* (Cth); s 42 *Public Interest Disclosure Act 2012* (ACT); s 49 *Protected Disclosures Act 2010* (Vic); s 48 *Public Interest Disclosure Act 2010* (Qld).

⁶³ Section 95C EO Act.

states that a whistleblower victimisation complaint was referred to the EOT with full or partial legal funding in 2013.⁶⁴

Any person contemplating litigation must take into account the vagaries of litigation and the risk that costs will be ordered against him or her if he or she is unsuccessful. Moreover, they must have regard to the possibility that they will be asked to provide security for costs during the course of the litigation. If there is a mismatch between the power, vulnerabilities and resources of parties to litigation it is unlikely the disempowered, vulnerable and under resourced litigant will proceed. This risk can be a serious barrier to justice. In employee versus employer litigation such a mismatch often occurs. Professor AJ Brown, in his submission on this review, stated that “in practice, costs impediments and risks have likely been the single most significant barrier to civil remedies to date.”⁶⁵

The Commonwealth has responded to this barrier to access to justice by including a “public interests” costs provision for compensation actions taken in the Federal Court. Under this provision, a whistleblower cannot be held liable to pay a respondent’s costs, even if the whistleblower ultimately does not succeed in the proceedings, as long as the whistleblower conducts the proceedings reasonably and his or her claim is not vexatious or brought without reasonable cause.⁶⁶ This kind of provision goes some way towards alleviating the risk for a whistleblower who by making the public interest disclosure has performed an act in the public interest.

⁶⁴ Equal Opportunity Commissioner, *Annual Report 2012 – 2013*, SA Government, p 37. (The case name is *Rice v National Centre for Vocational Education Research Ltd.*)

⁶⁵ A J Brown, *South Australian Whistleblower Protection: A New Opportunity* (Don Dunstan Foundation, 2013) 19.

⁶⁶ S 18 *Public Interest Disclosure Act 2013* (Cth).

The Law Society of South Australia has suggested that the absence of litigation in relation to whistleblower protections means that there is considerable uncertainty about the operation of the WBP Act's provisions, which "may suggest that, despite the best intent of the legislators, there is still a prevailing fear on the part of persons, in particular employees, of an adverse impact upon them if they should make a whistleblower complaint."

The Law Society has suggested that the WBL provide for enforcement through the proposed new South Australian Civil and Administrative Tribunal. It is possible that that jurisdiction may enhance access to justice for a whistleblower by improving the cost effectiveness and ease of access for a person who has suffered victimisation after making a public interest disclosure.

Recommendation 18: That the WBL provide for civil remedies which are low cost and that the South Australian Civil and Administrative Tribunal and the District Court be considered as jurisdictions where such actions can be heard.

Recommendation 19: That an injunctive remedy be available to a whistleblower who can demonstrate a risk of victimisation to prevent anyone from engaging in such victimisation.

Recommendation 20: That WBL provide that a whistleblower taking action for victimisation or breach of a statutory duty not be liable for costs unless the relevant court or tribunal rules that the whistleblower has conducted his or her litigation unreasonably or vexatiously or have brought the proceedings without reasonable cause.

Another area of uncertainty is the extent to which employers can be held vicariously liable for an intentional tort of victimisation committed by their employees.⁶⁷ Vicarious liability for intentional torts is a complex area of the common law, and that lack of certainty may well discourage whistleblowers who suffer as a result of acts of victimisation from seeking any redress.

Some jurisdictions have legislated for vicarious liability for employee-to - employee victimisation unless the employer takes steps to prevent it. For example, the anti-reprisal provisions in the *Public Interest Disclosure Act 2010* (Qld) provide that a public sector entity will be liable for damage arising out of a reprisal inflicted by an employee unless the entity proves that it took reasonable steps to prevent such conduct.⁶⁸ The WWTW found that some public sector entities had inaction rates that were very much worse than others. For that reason it is appropriate to legislate to require the agencies of the Crown with the responsibility of protecting whistleblowers from victimisation and imposing a statutory liability upon the agencies for acts of victimisation by their employees when those agencies have failed in their duty.

Recommendation 21: That WBL provide for a duty on agencies of the Crown to take reasonable steps to prevent victimisation of whistleblowers, and provide for the agencies' vicarious liability for victimisation of employees at the hands of other employees if the agencies fail to do so.

⁶⁷ For e.g. see *Howard v State of Queensland* [2000] QCA).

⁶⁸ Section 43 *Public Interest Disclosure Act 2010* (Qld).

A criminal offence of victimisation?

The WBP Act does not seek to deter victimisation by making an act of victimisation against a whistleblower a criminal offence. This option was considered but rejected because:⁶⁹

The criminal offence was contrary to the general principle of parsimony in the criminal process; that is, the blunt weapon of the criminal law should only be employed where the need is clear and the offence will go at least some way to meeting it.

There are reasons to be cautious about the extent to which a criminal offence of reprisal can protect a whistleblower. Many of the forms of victimisation reported in the WWTW study by case managers and whistleblowers, such as ostracism, increased scrutiny of work, and alteration of tasks allocated to less desired tasks are relatively subtle and hard to distinguish from other normal workplace behaviour, and so would likely fall short of the provable discrete acts that are necessary to found criminal liability.

Therefore a victimisation offence, without more, would not be sufficient to provide protection to whistleblowers against workplace reprisals that were conducted in that subtle way.

However this is the only State that does not make victimisation of whistleblowers an offence. Every other Australian jurisdiction makes it a criminal offence to commit an act of reprisal against a person because that person has made a public interest disclosure. The recent Commonwealth legislation provides that taking a reprisal against another person is a criminal

⁶⁹ Mathew Goode, 'Policy Considerations in the formulation of the Whistleblowers Protection Legislation: The South Australian *Whistleblowers Protection Act 1993*' (2000) 22 *Adelaide Law Review* 27, 32.

offence carrying a maximum penalty of up to two years imprisonment and or a fine.⁷⁰ The penalty in the Act is greater than that in the original Bill and was increased following consultation because it was accepted that there was a need to make a strong statement that the victimisation of persons making disclosures would not be condoned.

Like the WBP Act, the ICAC Act contains within it a prohibition of victimisation. It makes a person who causes detriment to another on the ground or substantially on the ground that the other person or a third person intends to make a complaint or report under the ICAC Act or has provided or intends to provide information or other assistance to the Commissioner in connection with an investigation under the ICAC Act an act of victimisation: s 57(1).

Detriment is defined in s57(8) as the same terms as detriment is defined in s9(4) of the WBP Act. The ICAC Act mirrors the provisions of the WBP Act so far as the availability of civil remedies by providing an action in tort and deeming the conduct an act of victimisation under the EO Act.

Causing detriment in response to false allegations or allegations not made in good faith are excluded from the scope of victimisation for the purpose of the ICAC Act.⁷¹ Neither the ICAC “false or not in good faith” exception nor the similar provision in s10 of the WBP Act are entirely consistent with a legislative goal of directing the focus of the recipient organisation towards ensuring that the disclosure is investigated and the person who made the disclosure protected from victimisation.

⁷⁰ Section 19, *Public Interest Disclosure Act* 2013 (Cth).

⁷¹ Section 57(2) ICAC Act

However, as I have mentioned earlier, the ICAC Act also contains a criminal offence of victimisation. Section 57(6) provides that:

A person who personally commits an act of victimisation under this Act is guilty of an offence.

The maximum penalty for the offence is a \$10,000 fine.

In the Second Reading Speech where the ICAC Bill was introduced, clause 57 was referred to as a “standard provision relating to victimisation”.⁷²

A person cannot initiate a private prosecution.⁷³ A prosecution can only be brought by a police officer or a person approved by either the Commissioner of Police or the Director of Public Prosecutions. That is a necessary protection against the criminal law being used other than for an appropriate purpose.

A similar criminal provision is contained in the *Health and Community Services Complaints Act 2004 (SA)* which prohibits unfavourable treatment on the basis that a person has made a complaint under that act, or assisted the Health Commissioner or another person performing a function under that act. A breach carries a fine of up to \$10, 000.⁷⁴

A whistleblower should be given the added protection of a criminal sanction for an act of victimisation. I appreciate that subtle discrimination of the kind that I have mentioned may not be enough for a prosecution.

Moreover, causing detriment of the kind mentioned in s57(8) must be proved as an element of the offence.

⁷² South Australia, House of Assembly, *Parliamentary Debates (Hansard)*, 2 May 2012, at 1373.

⁷³ S57(7) ICAC Act.

⁷⁴ Section 79, *Health and Community Services Complaints Act 2004 (SA)*.

However, the existence of the criminal remedy will pick up more blatant acts and in any event will act as a detriment to those otherwise minded to commit acts of victimisation.

An offence of the kind in s57(7) of the ICAC Act for an act of victimisation causing detriment would be appropriate.

The only criminal offence in the WBP Act at present is an offence of making a false disclosure.⁷⁵ Providing criminal sanctions only for the purpose of restraining a potential whistleblower and not for the purpose of protecting the whistleblower sends a message that is at odds with the stated objects of the WBP Act.

It is necessary to consider, if the proposals already mentioned are adopted, whether the WBL should specify defences to a civil suit of victimisation or an offence of victimisation. It is necessary to consider whether a defence to a proceeding for victimisation (either civil or criminal) should be available if the person accused of the act of victimisation can show that the disclosure was not true or that the disclosure was not made in good faith?⁷⁶

Section 57(2) of the ICAC Act excludes conduct causing detriment in those circumstances from the definition of detriment.

I think a definition of that kind should be provided. If it were otherwise a manager could not discipline or deal adversely with a public officer who has made a false allegation or not acted in good faith.

⁷⁵ Section 10, WBP Act.

⁷⁶ This is the approach taken in other South Australian legislation that contains an offence of victimisation: see ICAC Act and EO Act.

For an offence of victimisation, it should be made clear that it ought not to be necessary to prove that the person who suffered the victimisation made or intended to make a public interest information disclosure.⁷⁷

Whether the disclosure qualifies as a public interest information disclosure is not to the point. It would be odd if in a prosecution for victimisation the prosecution needed to prove that the person made a disclosure of conduct that raised a potential issue or corruption, misconduct or maladministration.

The most likely reason why the person who made the disclosure has been victimised is not because of the actual content of the disclosure but because of the disclosure itself. It should be enough for the prosecution to prove the disclosure and the detriment and that the reason for the detriment was that the person had or intended to make a disclosure.

Recommendation 22: That WBL include an offence of victimisation.

In considering possible protections for whistleblowers, it is worth considering what whistleblowers themselves want, and what will work to protect them. In the course of making submissions to the Parliamentary Inquiry into whistleblowing protection within the Australian Government public sector, Whistleblowing Australia's witness to the Committee stated that most whistleblowers did not seek compensation. He said:

All they want to do is to go back to the position they were in without a loss and accept a really nice, genuine apology.⁷⁸

⁷⁷ C.f. s 19(2) *Public Interest Disclosure Act 2013* (Cth).

⁷⁸ Peter Bennett, quoted in Commonwealth Parliament, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, [6.55].

The public sector should be under a duty to take active steps to prevent a person who has made a disclosure and who is employed in the public sector from suffering victimisation as a result of that disclosure. That will require senior management developing active management plans to obviate the risk of victimisation to the person who might suffer an act of victimisation.

It is important not to overemphasise anti –victimisation protections at the expense of proactive risk management and reasonable steps that can be taken to prevent harm.

When the protection should be lost

Disclosure for wrong motives?

A perhaps unresolved debate is whether the motives of the whistleblower should determine whether the protection should be given by the WBL. The position taken in this State since 1993 was that there was a public interest in having wrongdoing reported regardless of the motives of the person making the disclosure, and this is reflected in the WBP Act.

One submission argued that the WBL protection should not be available where a person makes a purported public interest disclosure with the intention of avoiding disciplinary action. The New South Wales Act contains such a provision, by removing protection for disclosures motivated with the object of avoiding disciplinary action, unless the disciplinary action itself was taken as a reprisal for a public interest disclosure.⁷⁹

⁷⁹ Section 18 *Public Interest Disclosures Act 1994* (NSW).

I am not persuaded that there needs to be a limit of that kind on the provision of a protection for a disclosure. The reason for WBL is to encourage and facilitate the disclosure of public interest information in order that the conduct which is the subject of the disclosure can be addressed. If the person made a disclosure of that kind it is unimportant what motivated the disclosure.

It would be counterproductive to provide in WBL for a regime that enquires into the motivation for the disclosure. What is important is the content of the disclosure.

Disclosure not accompanied by the requisite standard of truth or belief?

Only an appropriate disclosure under the WBP Act qualifies the person who made it for protection under the Act. Section 5(2) provides that to qualify for the protection of the WBP Act, a disclosure is only an appropriate disclosure if and only if:

- (a) the person:
 - (i) Believes on reasonable grounds that the information is true; or
 - (ii) Is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated.

If the disclosure ultimately proves to be false, that person will be liable to lose the protection of the WBP Act if he or she knew the disclosure to be false or was reckless about whether it was false and the whistleblower is liable to be prosecuted for the offence of making a false disclosure.

Section 10 of the WBP Act provides:

- (1) A person who makes a disclosure of false public interest information knowing it to be false or being reckless about whether it is false is guilty of an offence.
Penalty: Division 5 fine or division 5 imprisonment.
- (2) A person who makes a disclosure of public interest information in contravention of this section is not protected by this Act.

South Australia and NSW are the only Australian jurisdictions to make recklessness as to the falsity of a public interest disclosure an offence.⁸⁰

Making recklessness an offence is inconsistent with removing as many barriers as possible to public interest disclosures. It would be desirable to further refine the balance between the need to encourage disclosures and the need to avoid the reputational and other costs of false disclosures by disclosing recklessness as an offence.

The false statement offence in the ICAC Act provides a useful point of comparison. Section 22 of the ICAC Act provides that:

A person must not –

- (a) Make a statement knowing that it is false or misleading in a material particular (whether by reason of inclusion or commission of a particular) in information provide in a complaint or report; or
- (b) Make a complaint or report knowing that there are no grounds for the making or the complaint or report.

Maximum penalty: \$10, 000 or imprisonment for 2 years.

It was apparently not considered necessary to include recklessness in the formulation of the ICAC offence.

⁸⁰ S 24(1) *Public Interest Disclosure Act 2003* (WA)

The criminal offence of making a false public interest disclosure under WBL should be framed in similar terms to the ICAC offence of making a false or misleading statement in a complaint or report.⁸¹ Actual knowledge that the information is false or misleading, or the making of the disclosure knowing there are no grounds for the disclosure, should be required to establish the offence.

Recommendation 23: That the provision for the making of a false disclosure be in similar terms to s22 of the ICAC Act, without making recklessness as to falsity of the disclosure an offence.

For public sector whistleblowers who are also “public officers” in terms of the ICAC Act, there is an additional complication. Under the ICAC’s Directions and Guidelines, public officers are obliged to report unacceptable conduct to the OPI. The obligation arises when the public officer reasonably suspects that the conduct raises a potential issue of corruption⁸² in public administration or serious or systemic misconduct or maladministration in public administration.

The threshold “reasonably suspects” found in the Directions and Guidelines is found in the ICAC Act itself, in s20. The selection of a standard of suspicion, and not some higher standard such as knowledge or belief upon reasonable grounds, indicates deliberate policy choice by Parliament to ensure that public officers (and inquiry agencies and public authorities) report any unacceptable conduct that is reasonably suspected to have occurred.

⁸¹ See section 22 ICAC Act.

⁸² Corruption in public administration is defined by the ICAC Act *inter alia* as including any other offence committed by a public officer while acting in his or her capacity as a public officer: S 5(1)(c) ICAC Act.

Because of the different provisions in the ICAC Act and the WBP Act, public officers are obliged to report *suspected* corruption or serious or systemic misconduct or maladministration as defined in the ICAC Act to OPI, but are not protected by *whistleblower* legislation in making a report until that reasonable suspicion develops to a belief on reasonable grounds that the information tending to show wrongdoing is true or belief on reasonable grounds that it may be true and is of sufficient significance to justify the disclosure so that its truth may be investigated.

Public sector employees who are acquainted with information about apparent unacceptable conduct would have to have in mind two separate thresholds relating to reports about wrongdoing. In a sense, the level of the two thresholds are counter-intuitive.

Many people believe, incorrectly, that they are obliged to initially report wrongdoing internally, and only report externally to an investigatory body such as OPI if they are “really sure” or have acquired evidence of wrongdoing. A person may well reach the reasonable suspicion threshold for making a mandatory disclosure to OPI at a point prior to when he or she acquires protection to facilitate an internal disclosure under the WBP Act. This inconsistency can only be confusing for potential disclosers.

A better course for public officers who already have obligations to report their reasonable suspicions of corruption or serious or systemic maladministration and misconduct in public administration under the ICAC’s Directions and Guidelines, is to make the threshold for a public officer’s protected disclosure under WBL for any type of public interest information disclosure the same as the ICAC threshold. For the reasons mentioned earlier, the definitions of

corruption, misconduct and maladministration in public administration should be the same.

A more stringent knowledge requirement than “reasonably suspects” or “suspects on reasonable grounds” should be required for any disclosure to a Member of Parliament or a journalist. Given that the media is not bound by rules of procedural fairness and may not have investigative capacity, this is a reasonable safeguard.

Recommendation 24: That in relation to allegations made against public officers or entities by public officers or entities, the necessary knowledge threshold to make a protected disclosure be the same as that contained in s20 of the ICAC Act and in the ICAC’s Directions and Guidelines.

Failure to assist in the investigation?

Section 6 of the WBP Act imposes an obligation on a person who discloses public interest information to assist with any investigation of the matters to which the information relates by Police or another investigating authority (other than an investigation by the authority to whom the information relates.) Failure to comply with that obligation without reasonable excuse results in forfeiture of the WBP Act’s protections.

This provision has been considered counter-productive in submissions to this review. Dr Gabrielle Appleby and her colleague’s state:⁸³

Together with other features of the Act, section 6 sends the message that a disclosure of public interest information will not necessarily lead to further action on the part of government; on the contrary, a person who blows the whistle brings upon themselves additional legal and

⁸³ Dr Appleby et al, submission, 3.

practical responsibilities. We believe that from both a practical and normative point of view, s6 acts as a deterrent to blowing the whistle, and is out of place in an Act which is intended to facilitate the disclosure of information in the public interest.

That is a persuasive argument. The WWTW study shows that most public servants who disclose wrongdoing make their decision based on a consideration of whether or not the report is likely to serve some good purpose.

It should not be a condition of disclosing that the person who makes the disclosure will cooperate in the investigation.

Persons who make disclosures are likely to be motivated to co-operate with an impartial inquiry irrespective of any obligation imposed by the Act. Where they choose to report anonymously or to give minimal information, that choice is likely to be based on their own perception of the risks of reprisal which they themselves are best placed to assess.

A provision such as s6 is likely to deter persons from making a disclosure because those persons could not be sure when they make the disclosure what assistance will be necessary and how, if they give assistance, that might impact upon them.

If it is justifiable and necessary to do so for the purposes of an investigation into corruption ICAC can use its coercive powers to obtain information from the person who made the disclosure confidentially.

Recommendation 25: That an obligation to assist with an investigation, with loss of protection resulting from failure to co-operate, not be included in WBL.

Bounties, rewards or other incentives?

So far no Australian jurisdiction has legislated to create a system for whistleblowers to receive a bounty or reward for making a public interest disclosure that leads to a substantial fine being imposed on a corporation or a recovery by the Government of dishonestly obtained money. Bounty schemes are of interest to commentators and academics because these schemes have been very successful in the United States of America (US) in bringing fraud against the Government, foreign corrupt practices and other serious corporate wrongdoing to light. More will be said below about the US experience.

Some contributors to this review process have recommended that such a scheme be introduced or considered in South Australia. For example, non-government organisation Blueprint for Free Speech has recommended the establishment of a bounty scheme to “incentivise” whistleblowing in relation to large frauds on the Government, and the establishment of a public interest disclosure fund to assist public sector whistleblowers whose disclosures do not result in large monetary recoveries. Professor AJ Brown has argued that there is no reason why South Australia ought not to introduce a reward or “bounty” system to oversee whistleblowing.

In the US, there are a number of legislative schemes that provide payouts to whistleblowers. The *False Claims Act* (US) had its origins in the civil war era, and was substantially strengthened in 1986 in response to experts suggestions that the US was losing many billions of dollars per year through false claims under Government contracts. That Act permits citizens who have knowledge of fraud on the Government to take action on the Government’s

behalf. They can recover monies obtained as a consequence of fraudulent claims on government contracts, and receive a proportion of the total recovery. Reportedly, billions of US taxpayer dollars have been returned to the Government through this mechanism.

The collapse of US financial markets in 2008 led to the enactment of the *Dodd-Frank Act* (US) in order to deter and prevent fraud and other illegal activity in US corporations. The *Dodd-Frank Act* (US) contained whistleblower provisions, including potentially large payouts for individuals who voluntarily provide original information to the US Securities Exchange Commission (SEC) that lead to a successful enforcement action against a corporation.

Interestingly, the SEC has received 39 whistleblower disclosures from Australia since late 2011,⁸⁴ which reflects not only the extent of the extra-jurisdictional reach of US laws such as the *Foreign Corrupt Practices Act* (US), but also the untapped availability of this kind of information in corporate Australia to expose corporate wrongdoing that would potentially amount to Commonwealth offences.

The Dodd-Frank model for exposing wrongdoing in the corporate sector can only provide incentives for the exposure of corporate wrongdoing because of the large fines that can be imposed on corporate offenders. There is no similar financial pool from which public sector rewards could be drawn, except perhaps if there is recovery of the proceeds of large state procurements or land development decisions conducted corruptly. The

⁸⁴ Ruth Williams, 'Australian Whistleblowers provide tip-offs for US scheme amid criticism of laws at home,' *Sydney Morning Herald*, 21 January 2014.

majority of whistleblowing disclosures from the South Australian public sector would not be of that type, if reports to the OPI to date are a guide.

Another important consideration in relation to rewards to public officers for reporting wrongdoing in public administration is the potential effect of such a scheme on public sector values. People who work in the public sector are expected to have, as their ultimate goal, serving the public good according to the will of the Government of the day. A bounty scheme could have the unintended effect of providing a financial incentive for workers to move into areas where there is a greater prospect of obtaining a bounty. It is not known how this could affect the ethos of the public service.

In my view there would need to be evidence of a very serious corruption in public administration in South Australian before it would be appropriate to introduce incentives in the public sector in such a radical way. The evidence indicates that a majority of public officers already feel obliged to speak out about serious public sector wrongdoing of which they are aware.

A case in favour of bounties to public sector insiders to expose public sector wrongdoing has not been established. It would not be appropriate to reward public officers for performing a duty which they already bound to perform.

In 1989, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered whether an US-style bounty scheme ought to be introduced as part of legislative means to curb insider trading in the Australian securities market. The Committee rejected the suggestion, saying “such a system is incompatible with current attitudes in relation to the

credibility of evidence. It is also incompatible with accepted principles and practice within Australian society”.⁸⁵

I agree with that conclusion.

Recommendation 26: That South Australia not adopt a US-style bounty scheme for public sector whistleblowing.

Minimum Standards and Oversight

Apart from an agency’s obligation to protect whistleblower confidentiality and to refrain from acts of victimisation, an agency’s obligations with respect to whistleblower protection are minimal. The WBP Act itself does not create an obligation to investigate reports, or express an obligation to assess the risk of victimisation and form a strategy to mitigate any risk. An agency is not obliged to have a whistleblower protection policy or procedure, or to inform its employees what they should do if they wish to make a disclosure of wrongdoing. An agency is not obliged to keep statistics on the total number of whistleblower reports received within the agency, or to report on the consequences of those reports.

The WBL should require an agency to have a public interest disclosure handling procedure and to make it freely available and accessible to those to whom it might apply. The minimum content of that procedure could be specified by legislation or specified by an oversight body, but other than that, the agency should be at liberty to formulate the detail of the procedure as

⁸⁵ House of Representatives Legal and Constitutional Affairs Committee (1989) *Fair shares for all: insider trading in Australia*, 45.

best suits its size, structure and operations, driven, one would hope, by a high level management commitment to integrity.

An example of such a requirement may be found in the *Public Interest Disclosure Act (ACT)*. It requires that the head of a public sector entity make procedures for the entity for dealing with public interest disclosures. Those procedures have to be approved by the oversight officer, the Commissioner for Public Administration, and must include⁸⁶

- (a) Clear obligations on the entity and its public officials to take action to protect disclosers; and
- (b) Risk management steps for assessing and minimising –
 - (i) Detrimental action against people because of public interest disclosures; and
 - (ii) Detriment to people against whom allegations of disclosable conduct are made in a disclosure.

In the context of talking about the scant evidence available in relation to the implementation and effectiveness of this WBP Act, reference has been made to the Act's "orphan" status. The fact that the WBP Act is largely symbolic in nature, and not designed so as to enable any review of its effectiveness, is largely a product of the state of knowledge in the 1990s. There was simply not enough known about whistleblowing, or what would be effective in assisting whistleblowers, to enable the framer of the WBP Act to build an effective and more prescriptive scheme.

Because of the academic and Government work done in this field in the last decade, knowledge has moved to permit the design of a legislative model which is effective and which is capable of being monitored and improved. As

⁸⁶ Section 33, *Public Interest Disclosure Act 2012 (ACT)*.

a result, it is standard and accepted practice for modern public interest disclosure legislation in Australia to give powers and responsibility of oversight to an existing or new agency.

For example, under Commonwealth legislation, oversight responsibility is now shared between the Commonwealth Ombudsman and the Inspector General Intelligence and Security. In the Australian Capital Territory, the Commissioner for Public Administration holds that role. In Victoria, the Independent Broad-based Anti-corruption Commission is required by legislation to issue guidelines for the handling of disclosures,⁸⁷ and for managing discloser welfare,⁸⁸ and related powers to review procedures⁸⁹ and provide advice.⁹⁰ In Queensland, the Office of the Ombudsman acts as the oversight agency for public interest disclosures,⁹¹ and is responsible for setting and monitoring standards, collecting statistics and monitoring compliance with the Act. In New South Wales, it is the Ombudsman who has that oversight role with respect to the *Public Interest Disclosure Act 1994* (NSW).⁹² In Western Australia, and Tasmania, the role is played by the Public Sector Commissioner,⁹³ and the Ombudsman respectively.⁹⁴

⁸⁷ Section 57(1) *Protected Disclosure Act 2012* (Vic).

⁸⁸ Section 57(2) *Protected Disclosure Act 2012* (Vic).

⁸⁹ Section 60 *Protected Disclosure Act 2012* (Vic).

⁹⁰ Section 66 *Protected Disclosure Act 2012* (Vic)

⁹¹ Section 58 *Public Interest Disclosure Act 2010* (Qld)

⁹² Section 6B *Public Interest Disclosure Act 1994* (NSW).

⁹³ Section 19 *Public Interest Disclosure Act 2003* (WA).

⁹⁴ *Public Interest Disclosure Act 2002* (Tas). I note that in the Northern Territory, only the Commissioner for Public Interest Disclosures (who is also the Information Commissioner) and agency heads are permissible recipients for public interest disclosures, (see section 11, *Public Interest Disclosure Act* (NT)), so although that Commissioner has control over the administration of disclosures, it is not entirely accurate to talk about this in terms of oversight.

Oversight responsibilities can include:

- Monitoring public sector entities' management of public interest disclosures including conduct of investigations and protection from victimisation
- Reviewing such management
- Setting standards and issuing guidelines and or directions relevant to such management
- Ensuring just outcomes for people who make public interest disclosures, including ensuring that investigations are carried out appropriately
- Undertaking or co-ordinating the undertaking of education and training programs about public interest disclosures
- Approving public sector entities procedures and policies for dealing with public interest disclosures.

A number of submissions recommended that there be an oversight agency for South Australia. It is my view that this is now appropriate and necessary for South Australia.

Accepting that there should be an oversight agency in South Australia, the question arises – who should it be, a new body, or one of the existing bodies that has responsibility for integrity in the public sector in this State? For reasons of economy and reduced complexity, the oversight role should be placed with an existing body if that is possible. As can be seen from the variety of oversight structures chosen by other Australian jurisdictions, there is no consensus in relation to which office this role should rest with, although the office of the Ombudsman is most often chosen. Whatever the choice of

oversight agency for South Australia, it should fit as neatly as possible within the existing integrity architecture of this State.

I am of the view that the role is most appropriately undertaken by the ICAC. There is significant overlap between the content of public interest disclosures and the complaints and reports already received by the OPI. Additionally, the jurisdiction established by the ICAC Act is the broadest of all jurisdictions for investigating and monitoring investigations of unacceptable conduct in public administration.

I am conscious, of course, that the ICAC is closely connected with the OPI and that I have recommended that the OPI be the primary recipient of whistleblower disclosures.

If this recommendation is accepted ICAC will have to oversee the operations of the OPI. However, that is already ICAC's role in regard to OPI's functions under the ICAC Act.

To empower any other agency such as the Ombudsman, as suggested by the former Ombudsman, would lead to confusion.

Recommendation 27: That WBL empower ICAC to act as the oversight body for WBL.

Recommendation 28: That WBL require each public sector agency to devise and publish a public interest disclosure procedure. That WBL specify minimum requirements for that procedure similar to those found in the Australian Capital Territory's legislation.

An integrated process for public interest disclosures

In keeping with the Legislature's strategy of providing an integrated model for the preservation and promotion of integrity in this State, the following process is suggested for public interest disclosures made in relation to unacceptable conduct in public administration:

- That a public interest disclosure by a public officer (defined as per the ICAC Act) is protected where it is made in the first instance to any of the following:
 - the OPI;
 - a Minister;
 - a person who supervises or manages the public officer, directly or indirectly; or
 - a public sector authority's responsible officer.
- That if the first recipient of a public interest information disclosure is not OPI that person must report the disclosure to OPI in accordance with the Directions and Guidelines under the ICAC Act.
- That if the initial disclosure is made to one of the persons mentioned that person must carry out an assessment to determine whether the person who made the disclosure has suffered victimisation as a consequence of making the disclosure; or, whether the person who made the disclosure is at risk of victimisation as a consequence of making the disclosure; and what steps if any have been taken or are proposed to be taken to mitigate the risk of victimisation.

- Upon OPI receiving the disclosure, the disclosure is deemed to be a complaint or report to the OPI under the ICAC Act, and the process of assessment and recommendation under the ICAC Act will apply.
- That the ICAC's power to give directions and guidance to a public authority in respect of referral arising out of a public interest disclosure include a power to give directions and guidance with respect to preventing acts of victimisation to the discloser.
- That the person who made the disclosure is informed of the outcome of the disclosure investigation, as if that person was a complainant or reporter referred to in s24(8) ICAC Act.

Recommendation 29: That WBL deal with the handling of public interest disclosures about unacceptable conduct in public administration in a manner which is complementary with the ICAC Act, according to the process set out in this review.

In the case of public interest disclosures about conduct creating a substantial risk to public health or safety or to the environment where that conduct is outside public administration, a simpler process is called for. The legislation should require that a Minister refer the disclosure to an authority for investigation and any appropriate action, and require that the authority to which the disclosure is referred advise the Minister and the person making the disclosure of the outcome or the investigation.

Recommendation 30: That WBL provide for a process to allow a Minister to refer a public interest disclosure concerning environmental and public health and safety risks to a public authority for investigation.

APPENDIX 1: COMPARISON OF AUSTRALIAN JURISDICTIONS' WHISTLEBLOWER PROTECTION LEGISLATION

TABLE ONE

	Title	Year passed (major revision)	Objects (or long title)
Commonwealth	<i>Public Interest Disclosure Act</i>	2013	6 Objects The objects of this Act are: (a) to promote the integrity and accountability of the Commonwealth public sector; and (b) to encourage and facilitate the making of public interest disclosures by public officials; and (c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and (d) to ensure that disclosures by public officials are properly investigated and dealt with.
ACT	<i>Public Interest Disclosure Act</i>	2012	6 Object of Act The object of this Act is to promote the public interest by— (a) providing a way for people to make public interest disclosures; and

				<ul style="list-style-type: none"> (b) ensuring people who make public interest disclosures are protected and treated respectfully; and (c) ensuring public interest disclosures are properly investigated and dealt with; and (d) ensuring that appropriate consideration is given to the interests of people who make public interest disclosures and the people who are the subject of the disclosures.
Victoria	<i>Protected Disclosures Act</i>	2012	1	<p>Purposes</p> <p>The purposes of this Act are—</p> <ul style="list-style-type: none"> (a) to encourage and facilitate disclosures of— <ul style="list-style-type: none"> (i) improper conduct by public officers, public bodies and other persons; and (ii) detrimental action taken in reprisal for a person making a disclosure under this Act; and (b) to provide protection for— <ul style="list-style-type: none"> (i) persons who make those disclosures; and (ii) persons who may suffer detrimental action in reprisal for those disclosures; and (c) to provide for the confidentiality of the content of those disclosures and the identity of persons who make those disclosures.

<p>Queensland</p>	<p><i>Public Interest Disclosure Act</i> 2010</p>	<p>3 Main objects of Act</p> <p>The main objects of this Act are—</p> <ul style="list-style-type: none"> (a) to promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector; and (b) to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with; and (c) to ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and (d) to afford protection from reprisals to persons making public interest disclosures.
<p>NSW</p>	<p><i>Public Interest Disclosures Act</i> 2010</p>	<p>3 Object of Act</p> <p>(1) The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention in the public sector by:</p> <ul style="list-style-type: none"> (a) enhancing and augmenting established procedures for making disclosures concerning such matters, and (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and (c) providing for those disclosures to be

			properly investigated and dealt with.
Western Australia	<i>Public Interest Disclosure Act</i>	2003 (2012)	Long title: An Act to facilitate the disclosure of public interest information, to provide protection for those who make disclosures and for those the subject of disclosures, and, in consequence, to amend various Acts, and for related purposes.
Northern Territory	<i>Public Interest Disclosure Act</i>	2008	3 Objects of Act The objects of this Act are: (a) to provide for disclosure of improper conduct on the part of public officers and public bodies; and (b) to protect the persons who make public interest disclosures and others from acts of reprisal; and (c) to ensure that: (i) public interest information disclosed is properly investigated; and (ii) any impropriety revealed by the investigation is properly dealt with.
Tasmania	<i>Public Interest Disclosures Act</i>	2002	Long title: An Act to encourage and facilitate disclosures of improper conduct by public officers and public bodies, to protect persons making those disclosures and others from reprisals, to provide for the matters disclosed to be properly investigated and dealt with to provide all parties involved in those disclosures with natural justice and for other purposes.
South Australia	<i>Whistleblower Protection Act</i>	1993	3—Object of Act The object of this Act is to facilitate the

	<p>disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally—</p> <ul style="list-style-type: none">(a) by providing means by which such disclosures may be made; and(b) by providing appropriate protections for those who make such disclosures.
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TABLE 2

Who may make such a disclosure Standard of knowledge, suspicion or belief for making a disclosure

Commonwealth	Public officials and former public officials: s 26.	The information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct: s 26
ACT	Any person: s 14.	A disclosure of information by a person about disclosable conduct that the person honestly believes on reasonable grounds tends to show disclosable conduct; or tend to show disclosable conduct regardless of whether the person honestly believes on reasonable grounds the information tends to show disclosable conduct; and includes any assistance given by the discloser during an investigation of the information: s 7.
Victoria	A natural person: s 9.	<p>(1) Subject to subsection (3), a natural person may disclose in accordance with this Part—</p> <p>(a) information that shows or tends to show—</p> <p>(i) a person, public officer or public body has engaged, is engaging or proposes to engage in improper conduct; or</p> <p>(ii) a public officer or public body has taken, is taking or proposes to take</p>

		<p>detrimental action against a person in contravention of section 45; or</p> <p>(b) information that the person believes on reasonable grounds shows, or tends to show—</p> <p>(i) a person, public officer or public body has engaged, is engaging or proposes to engage in improper conduct; or</p> <p>(ii) a public officer or public body has taken, is taking or proposes to take detrimental action against a person in contravention of section 45: s 9.</p>
Queensland	Any person (re limited subject matter) or a public officer: Ss 12 & 13.	<p>A person has information about the conduct of another person or another matter if—</p> <p>(a) the person honestly believes on reasonable grounds that the information tends to show the conduct or other matter; or</p> <p>(b) the information tends to show the conduct or other matter, regardless of whether the person honestly believes the information tends to show the conduct or other matter: ss 12 & 13.</p>
NSW	Public official or former public official: s 8.	<p>Honest belief on reasonable ground that the information shows or tends to show the conduct: Part 2.</p> <p>Evidentiary presumption re honesty of belief: s 9A.</p>
Western Australia	Any person: s 5(1).	A person makes an appropriate disclosure of

		<p>public interest information if, and only if, the person who makes the disclosure —</p> <ul style="list-style-type: none"> (a) believes on reasonable grounds that the information is true; or (b) has no reasonable grounds on which to form a belief about the truth of the information but believes on reasonable grounds that the information may be true: s 5(2).
Northern Territory	An individual: s 10(1).	(None)
Tasmania	<p>A public officer, and a contract who contracts with a public body: s 6.</p> <p>Discretion on recipient to treat discloser as a public officer: s7A.</p>	Belief: s 6.
South Australia	A person: s 5.	<p>A person makes an appropriate disclosure of public interest information for the purposes of this Act if, and only if—</p> <ul style="list-style-type: none"> (a) the person— <ul style="list-style-type: none"> (i) believes on reasonable grounds that the information is true; or (ii) is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated: s 5(2).

TABLE 3

	Disclosure to whom?	Anonymous disclosure?
Commonwealth	To a supervisor of the public official or to authorised officer of the agency to which the disclosure relates, or of the agency to which the discloser belongs, or in certain circumstances, of the Ombudsman or the IGIS: s 34.	Permitted: 28(2).
ACT	To a disclosure officer, a Minister, and if the discloser is a public official, their direct or indirect manager, a governing board member, or a public official of the entity with the function of receiving or acting upon such information: s15.	Permitted: 16(1).
Victoria	Provisions detailing which disclosures must or may be made to whom to attract protection. Recipients which may or must receive disclosures in specified circumstances include the IBAC, the Victorian Inspectorate and the Ombudsman: s 13	Permitted: s 12(2)(b).
Queensland	To a Member of the Legislative Assembly unless the disclosure relates to a judicial officer: s14. To a public sector entity if there is a particular connection as defined, between the entity and the disclosure: s 15. A disclosure is made to the public sector entity if made to CEO, the responsible Minister, a manager of the discloser, & c.: s 17. To the Chief Justice if concerning a judicial officer: s 16.	Permitted: s 17.

NSW	To an investigating authority, to a relevant principal officer, to another public officer in accordance with policy, and to certain parliamentary authorities: s 8. Disclosures in relation to certain persons or topics must be made as specified to attract protection (Part 2), with some residual protection for misdirected disclosures: s 15.	No specific provision.
Western Australia	To specified “proper authorities”, the selection of which depends on the subject matter of the disclosure: s 5(3).	Permitted: s 5(6A).
Northern Territory	To the Speaker (if concerning an MLA); or to the Public Interest Disclosure Commissioner, or to the responsible chief executive.	Permitted: s 11(3).
Tasmania	To specified persons or bodies, depending on the subject matter of the disclosure: s 7.	Permitted: s 8.
South Australia	To a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure: s 5(2) (b). Disclosures to certain persons or bodies re certain subjects are deemed to have satisfied that criteria: s 5(3) & (4).	

TABLE 4

External disclosure? In what circumstances?

Commonwealth	Permitted to anyone except a foreign public official: s 26.	<p>Failure to investigate, as defined, and subject to some further tests: s 26, item 2.</p> <p>Belief on reasonable grounds the information concerns a substantial or imminent danger to the health or safety of one or more persons or to the environment, exceptional circumstances why a previous internal disclosure has not been made, and subject to some further tests: s 26 item 3.</p> <p>To an Australian legal practitioner, for the purposes of obtaining advice: s 26 item 4.</p>
ACT	To a member of the Legislative Assembly or a journalist: 27(3).	<p>Failure to investigate or inform, as defined: s 27(1).</p> <p>To avoid a significant risk or detrimental action if it would be unreasonable in all of the circumstances to make an internal disclosure: s 27(2).</p>
Victoria	Not protected.	
Queensland	<p>To a Member of the Legislative Assembly, as above.</p> <p>To a journalist: s20.</p>	<p>See above.</p> <p>For a failure to investigate, take action or inform,</p>

	as defined: s 20.	
NSW	To a Member of Parliament or a journalist: s 19.	For a failure to investigate, take action, or inform, as defined: s 19(3). Additional requirement: the public official must have reasonable grounds for believing that the disclosure is substantially true AND the disclosure must be substantially true: s19(4) – (5).
Western Australia	To a journalist: s 7A.	For a failure to investigate or inform, as defined: s &A(2). Note – this section was inserted in 2012.
Northern Territory	Not protected.	
Tasmania	Not protected.	
South Australia	May be protected, if s5(2)(b) is satisfied: see above.	

TABLE 5

Disclosure about what wrongdoing/situations?

Wrongdoing by whom?

<p>Commonwealth</p>	<p>Many kinds of wrongful conduct as defined, including conduct that breaches an Australian law, certain conduct in a foreign country, maladministration of defined types, scientific dishonesty, wastage of public money & c.: s 29.</p>	<p>By an agency, by a public official in connection with his or her position as a public official; or by a contracted Commonwealth service provider in connection with the contract: s 29(1).</p>
<p>ACT</p>	<p>Conduct which could if proved be an ACT criminal offence, or give grounds for disciplinary action: s8(1)(a).</p> <p>Action which amounts to maladministration adversely affecting a person’s interests in a substantial and specific way;</p> <p>Substantial misuse of public funds;</p> <p>Substantial and specific danger to public health or safety;</p> <p>Substantial and specific danger to the environment: s 8(1)(b).</p>	<p>By anyone? Except that “conduct” is limited to conduct of a public official, or entity or conduct that adversely effects the proper exercise of public sector functions in particular ways: s 8(2).</p> <p>By a public sector official or public sector entity.</p>
<p>Victoria</p>	<p>S9: Improper conduct, defined as</p> <p>(a) corrupt conduct; (see IBAC Act) or</p> <p>(b) conduct as specified below that is not corrupt conduct but that, if proved, would constitute—</p> <p>(i) a criminal offence; or</p>	<p>By a person, public officer or public body.</p>

	<p>(ii) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of the officer who was, or is, engaged in that conduct.</p> <p>Specified conduct:</p> <ul style="list-style-type: none">(a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or(b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or(c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or(d) of a public officer or public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or(e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d); or
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	<p>(f) of a public officer or public body in his or her capacity as a public officer or its capacity as a public body that—</p> <ul style="list-style-type: none"> (i) involves substantial mismanagement of public resources; or (ii) involves substantial risk to public health or safety; or (iii) involves substantial risk to the environment. <p>Also “detrimental action” i.e. reprisal against a discloser.</p>
Queensland	<p>By any person: information about—</p> <ul style="list-style-type: none"> (a) a substantial and specific danger to the health or safety of a person with a disability; or (b) the commission of specific environmental offences, if the commission of the offence is or would be a substantial and specific danger to the environment; or (c) a contravention of a specific licence conditions if the contravention is or would be a substantial and specific danger to the environment; or (d) the conduct of another person that could, if proved, be a reprisal. <p>By a public officer:</p> <ul style="list-style-type: none"> (a) corrupt conduct; or

	<p>(b) maladministration that adversely affects a person's interests in a substantial and specific way; or</p> <p>(c) a substantial misuse of public resources (other than an alleged misuse based on mere disagreement over policy that may properly be adopted about amounts, purposes or priorities of expenditure); or</p> <p>(d) a substantial and specific danger to public health or safety; or</p> <p>(e) a substantial and specific danger to the environment.</p>	
NSW	<p>Corrupt conduct, maladministration, serious and substantial waste of public money or government information contravention: s 14(1).</p> <p>Specified other conduct falling under the jurisdiction of specified investigating authorities: s 8(1)(a) and ss 10 – 13.</p>	<p>By a public authority or by an officer of a public authority.</p> <p>By specified persons under the jurisdiction of the nominated investigating authority.</p>
Western Australia	<p>Improper conduct (not further defined);</p> <p>An act or omission constituting an offence under a written law;</p> <p>Substantial unauthorised or irregular use of, or substantial mismanagement of, public resources; or</p> <p>An act done or omission that involves a substantial and specific risk of injury to health or prejudice to public safety or harm to the environment; or</p>	<p>By a public authority, public officer, or a public sector contractor: s 3.</p>

	<p>A matter that may be investigated under s 14 of the <i>Parliamentary Commissioner Act 1971</i>: s 3.</p>	
<p>Northern Territory</p>	<p>Conduct which is defined as improper conduct as follows:</p> <ul style="list-style-type: none"> (a) the conduct involves 1 or more of the following and constitutes a criminal offence or, if engaged in by a public officer, reasonable grounds for terminating the services of the public officer: <ul style="list-style-type: none"> (i) seeking or accepting a bribe or other improper inducement; (ii) any other form of dishonesty; (iii) inappropriate bias; (iv) a breach of public trust; (v) misuse of confidential information; or (b) the conduct involves 1 or more of the following (whether or not the conduct constitutes a criminal offence or, if engaged in by a public officer, reasonable grounds for terminating the services of the public officer): <ul style="list-style-type: none"> (i) substantial misuse or mismanagement of public resources; (ii) substantial risk to public health or safety; (iii) substantial risk to the environment; (iv) substantial maladministration 	<p>By a public body or public officer in, or related to, the performance of official functions: s 5(1)</p>

	<p>that specifically, substantially and adversely affects someone's interests: s 5(1).</p> <p>Maladministration here means conduct that includes action or inaction of a serious nature that is any of the following:</p> <ul style="list-style-type: none"> (a) contrary to law; (b) unreasonable, unjust, oppressive, or improperly discriminatory; (c) based wholly or partly on improper motives. <p>Also improper conduct:</p> <ul style="list-style-type: none"> (a) an act of reprisal; (b) a conspiracy or attempt to engage in improper conduct that constitutes a criminal offence. By anyone.
Tasmania	<p>Improper conduct, defined to mean – Public officer or public body: s 6.</p> <ul style="list-style-type: none"> (a) conduct that constitutes an illegal or unlawful activity; or (b) corrupt conduct; or (c) conduct that constitutes maladministration; or (d) conduct that constitutes professional misconduct; or (e) conduct that constitutes a waste of public resources; or (f) conduct that constitutes a danger to public health or safety or to both public health and safety; or (g) conduct that constitutes a danger to the environment; or (h) misconduct, including breaches of applicable codes of conduct; or (i) conduct that constitutes detrimental

	<p>action against a person who makes a public interest disclosure under this Act – that is serious or significant as determined in accordance with guidelines issued by the Ombudsman;</p> <p>Corrupt conduct is further defined to mean–</p> <ul style="list-style-type: none">(a) conduct of a 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(b) 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; or(c) conduct of a public officer, a former public officer or a public body that amounts to a breach of public trust; or(d) conduct of a public officer, a former public officer or a public body that amounts to the 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(e) a conspiracy or attempt to engage in conduct referred to in paragraph
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	(a), (b), (c) or (d): s 3.	
South Australia	<p>Involvement</p> <ul style="list-style-type: none"> (i) in an illegal activity; or (ii) in an irregular and unauthorised use of public money; or (iii) in substantial mismanagement of public resources; or (iv) in conduct that causes a substantial risk to public health or safety, or to the environment; or <p>(b) that a public officer is guilty of maladministration in or in relation to the performance (either before or after the commencement of this Act) of official functions:</p> <p>The question whether a public officer—</p> <ul style="list-style-type: none"> (a) is or has been involved in— <ul style="list-style-type: none"> (i) an irregular and unauthorised use of public money; or (ii) substantial mismanagement of public resources; or (b) is guilty of maladministration in or in relation to the performance of official functions, <p>is to be determined with due regard to relevant statutory provisions and administrative instructions and directions.</p>	An adult person, (whether or not a public officer) body corporate, or public agency: s 4.

TABLE 6

Offence provisions re false disclosures **Other protections against misuse**

Commonwealth	Liability for making a false or misleading statements is unaffected, including for disciplinary action, and for certain <i>Criminal Code</i> offences: s11.	Purely policy decisions about Commonwealth expenditure priorities are excluded from the definition of disclosable conduct: s 31. Judicial conduct of Commonwealth judicial officers and Court and tribunal staff is also excluded: s 32.
ACT	None.	Loss of protection if Court is satisfied that the discloser gave information that the discloser knew was false or misleading , or the disclosure was vexatious: s 37.
Victoria	<p>s. 72</p> <p>(1) A person must not provide information under this Act that the person knows is false or misleading in a material particular, intending that the information be acted on as a protected disclosure.</p> <p>Penalty: 120 penalty units or 12 months imprisonment or both.</p> <p>(2) A person must not provide further information, relating to a protected disclosure made by the person, that the person knows is false or misleading</p>	

	<p>in a material particular. Penalty: 120 penalty units or 12 months imprisonment or both.</p>
<p>Queensland</p>	<p>A person must not—</p> <p>(a) make a statement to a proper authority intending that it be acted on as a public interest disclosure; and</p> <p>(b) in the statement, or in the course of inquiries into the statement, intentionally give information that is false or misleading in a material particular.</p> <p>Maximum penalty— 167 penalty units or 2 years imprisonment.</p> <p>S 66.</p> <p>45 Reasonable management action not prevented</p> <p>(1) Nothing in this part is intended to prevent a manager from taking reasonable management action in relation to an employee who has made a public interest disclosure.</p> <p>(2) However, a manager may take reasonable management action in relation to an employee who has made a public interest disclosure only if the manager’s reasons for taking the action do not include the fact that the person has made the public interest disclosure.</p> <p>(3) In this section—</p> <p>manager, of an employee, means a person to whom the employee reports or a person who directly or indirectly supervises the employee in the performance of the employee’s functions as an employee. Reasonable management action, taken by a manager in relation to an employee, includes any of the following taken by the manager—</p> <p>(a) a reasonable appraisal of the employee’s work performance;</p> <p>(b) a reasonable requirement that the employee undertake counselling;</p> <p>(c) a reasonable suspension of the employee from the employment workplace;</p>

		<ul style="list-style-type: none"> (d) a reasonable disciplinary action; (e) a reasonable action to transfer or deploy the employee; (f) a reasonable action to end the employee's employment by way of redundancy or retrenchment; (g) a reasonable action in relation to an action mentioned in paragraphs (a) to (f); (h) a reasonable action in relation to the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in relation to the employee's employment.
NSW	<p>False or misleading disclosures</p> <p>A public official must not, in making a disclosure to an investigating authority, public authority or public official, wilfully make any false statement to, or mislead or attempt to mislead, the investigating authority, public authority or public official.</p> <p>Maximum penalty: 50 penalty units or imprisonment for 12 months, or both: s 28.</p>	<p>Disclosures made by a public official that principally involves questioning the merits of government policy are not protected by this Act: s 17.</p> <p>Disclosures made solely or substantially with the motive of avoiding dismissal or other disciplinary action, not being disciplinary action taken in reprisal for the making of a public interest disclosure, are not public interest disclosures: s 18.</p>
Western Australia	<p>A person who makes a statement to a proper authority purporting to be a</p>	<p>17. Protection of s. 13 forfeited in some cases etc.</p> <p>(1) A person who has made an appropriate</p>

	<p>disclosure of public interest information —</p> <p>(a) knowing it to be false in a material particular or being reckless about whether it is false in a material particular; or</p> <p>(b) knowing it to be misleading in a material particular or being reckless about whether it is misleading in a material particular, commits an offence.</p> <p>Penalty: \$12 000 or imprisonment for one year: s 24(1).</p> <p>A person who makes a statement in contravention of this section is not protected by this Act in respect of that statement, whether or not it is truly a disclosure of public interest information: s24(2).</p>	<p>disclosure of public interest information under this Act and who —</p> <p>(a) fails, without reasonable excuse, to assist a person investigating a matter to which the disclosure relates by supplying the person with any information requested, whether orally or in writing, by the person in such manner, and within such period, as is specified by the person making the request; or</p> <p>(b) discloses information contained in a disclosure of public interest information otherwise than under this Act, forfeits the protection given by section 13.</p> <p>(2A) Subsection (1)(a) does not apply in respect of a person who made an anonymous disclosure.</p> <p>(2) Where a court is considering whether a person has pursuant to subsection (1) forfeited the protection of section 13 and forms the view that the failure or disclosure —</p> <p>(a) has not materially prejudiced the public interest served by the appropriate disclosure; and</p> <p>(b) is of a minor nature, it may make an order relieving the person in whole or part from the forfeiture and may also make such consequential orders necessary to give effect to the order for relief.</p>
Northern Territory	A person must not knowingly give misleading information to another	No protection from civil or other action in the case of (a) a public interest disclosure that is an

	<p>person acting in an official capacity.</p> <p>Maximum penalty: 400 penalty units or imprisonment for 2 years: s 51(1).</p> <p>A person must not knowingly give a document containing misleading information to another person acting in an official capacity. The prohibition does not apply if the provider of the document draws the misleading information to the receiver's attention, and corrects it.</p> <p>Maximum penalty: 400 penalty units or imprisonment for 2 years: s 51(2).</p>	<p>abuse of process; or</p> <p>(b) a public interest disclosure if the discloser knows the information disclosed is misleading: 14(4)</p>
Tasmania	<p>A person must not knowingly provide false information under this Act, intending that it be acted on as a disclosed matter, to –</p> <p>(a) the President of the Legislative Council;</p> <p>or</p> <p>(b) the Speaker of the House of Assembly;</p>	<p>Loss of protection if convicted of an offence against s 87: s 13(2).</p>

	<p>or</p> <p>(c) the Ombudsman; or</p> <p>(d) the State Service Commissioner; or</p> <p>(e) the Commissioner of Police; or</p> <p>(f) a public body; or</p> <p>(g) the chairman of the Public Accounts Committee; or</p> <p>(h) the Joint Committee.</p> <p>Penalty: Fine not exceeding 240 penalty units or imprisonment for a term of 2 years, or both: s 87(1).</p> <p>A person must not knowingly provide false information to a person conducting an investigation under this Act.</p> <p>Penalty: Fine not exceeding 240 penalty units or imprisonment for a term of 2 years, or both: s 87(2).</p>
South Australia	<p>10—Offence to make false disclosure</p> <p>(1) A person who</p>

	<p>makes a disclosure of false public interest information knowing it to be false or being reckless about whether it is false is guilty of an offence.</p> <p>Penalty: Division 5 fine or division 5 imprisonment.</p> <p>(2) A person who makes a disclosure of public interest information in contravention of this section is not protected by this Act.</p>
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TABLE 7

Shield against criminal and civil action

<p>Commonwealth</p>	<p>10 Protection of disclosers</p> <p>(1) If an individual makes a public interest disclosure:</p> <ul style="list-style-type: none"> (a) the individual is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure; and (b) no contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the individual on the basis of the public interest disclosure. <p>(2) Without limiting subsection (1):</p> <ul style="list-style-type: none"> (a) the individual has absolute privilege in proceedings for defamation in respect of the public interest disclosure; and (b) a contract to which the individual is a party must not be terminated on the basis that the public interest disclosure constitutes a breach of the contract.
<p>ACT</p>	<p>35 Immunity from liability</p> <p>If a person makes a public interest disclosure—</p> <ul style="list-style-type: none"> (a) the making of the public interest disclosure is not— <ul style="list-style-type: none"> (i) a breach of confidence; or (ii) a breach of professional etiquette or ethics; or (iii) a breach of a rule of professional conduct; or (iv) if the disclosure is made in relation to a member of the Legislative Assembly—a contempt of the Assembly; and (b) the discloser does not incur civil or criminal liability only because of the making of the public interest disclosure; and (c) for a discloser who is a public official—the discloser is not liable to administrative action (including disciplinary action or dismissal) only because of the making of the public interest

	<p>disclosure.</p> <p>36 Protection from defamation action</p> <p>Without limiting section 35, in a proceeding for defamation, a discloser has a defence of absolute privilege for publishing the information disclosed.</p>
Victoria	<p>39 Immunity from liability</p> <p>(1) A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the disclosure.</p> <p>(2) Subsection (1) does not apply to a person who, in making the protected disclosure, has contravened section 72(1) or (2) in relation to the information disclosed.</p> <p>40 Confidentiality provisions do not apply</p> <p>s. 40</p> <p>(1) Without limiting section 39, a person who makes a protected disclosure does not by doing so—</p> <p>(a) commit an offence under section 95 of the Constitution Act 1975 or a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information; or</p> <p>(b) breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter.</p> <p>(2) Subsection (1) does not apply to a person who, in making the protected disclosure, has contravened section 72(1) or (2) in relation to the information disclosed.</p> <p>41 Protection from defamation action</p> <p>(1) Without limiting section 39, in any proceeding for defamation there is a defence of absolute privilege in respect of the making of a protected disclosure.</p> <p>(2) Subsection (1) does not apply to a person who, in making the protected disclosure, has contravened section 72(1) or (2) in</p>

	relation to the information disclosed.
Queensland	<p>Immunity from liability</p> <p>S 36 A person who makes a public interest disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, for making the disclosure.</p> <p>S 37 Confidentiality provisions do not apply Without limiting section 36, a person who makes a public interest disclosure does not by doing so—</p> <ul style="list-style-type: none"> (a) commit an offence under any Act that imposes a duty to maintain confidentiality in relation to a matter or any other restriction on the disclosure of information; or (b) breach an obligation by way of oath or rule of law or practice or under an agreement requiring the person to maintain confidentiality or otherwise restricting the disclosure of information in relation to a matter. <p>S 38 Protection from defamation action Without limiting section 36, in a proceeding for defamation, a person who makes a public interest disclosure has a defence of absolute privilege for publishing the information disclosed.</p>
NSW	<p>21 Protection against actions etc</p> <p>(1) A person is not subject to any liability for making a public interest disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure.</p> <p>(2) This section 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.</p> <p>(3) The following are examples of the ways in which this section protects persons who make public interest disclosures. A person who has made a public interest disclosure:</p> <ul style="list-style-type: none"> - has a defence of absolute privilege in respect of the publication to the

	<p>relevant investigating authority, public authority, public official, member of Parliament or journalist of the disclosure in proceedings for defamation</p> <ul style="list-style-type: none"> - on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act - who is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law relevant to the oath, rule or practice - is not liable to disciplinary action because of the disclosure.
Western Australia	<p>13. Immunity for person making appropriate disclosure of public interest information</p> <p>A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 —</p> <ul style="list-style-type: none"> (a) incurs no civil or criminal liability for doing so; and (b) is not, for doing so, liable — <ul style="list-style-type: none"> (i) to any disciplinary action under a written law; or (ii) to be dismissed; or (iii) to have his or her services dispensed with or otherwise terminated; or (iv) for any breach of a duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by a written law) applicable to the person.
Northern Territory	<p>14 Protection from liability for making public interest disclosure</p> <p>(1) A person who makes a public interest disclosure:</p> <ul style="list-style-type: none"> (a) incurs no civil or criminal liability by doing so; and (b) does not become liable to disciplinary action, or other adverse administrative action, for doing so. <p>(2) In an action for defamation, a public interest disclosure will be treated as absolutely privileged.</p>

	(3) Subsections (1) and (2) apply even though the public interest disclosure is made in breach of an obligation of confidentiality.
Tasmania	<p>16. Immunity from liability</p> <p>A person who makes a protected disclosure is not subject to any civil or criminal liability or any liability arising by way of administrative process (including disciplinary action) for making the protected disclosure.</p> <p>17. Confidentiality provisions do not apply</p> <p>(1) Without limiting section 16, a person who makes a protected disclosure does not by doing so –</p> <p>(a) commit an offence under a provision of any other Act that imposes a duty to maintain confidentiality with respect to a matter or any other restriction on the disclosure of information; or</p> <p>(b) breach an obligation by way of oath or rule of law or practice or under an agreement requiring him or her to maintain confidentiality or otherwise restricting the disclosure of information with respect to a matter.</p> <p>(2) Subsection (1) does not apply to a person who makes a disclosure of information to which a protected disclosure relates to a person other than the person to whom the disclosure was originally made, except where the further disclosure of information is made in accordance with this Act.</p>
South Australia	S 5(1) A person who makes an appropriate disclosure of public interest information incurs no civil or criminal liability by doing so.

TABLE 8

Obligation to investigate

Obligation to inform

	Obligation to investigate	Obligation to inform
ACT	<p>The head of the public sector entity to which the disclosure relates must investigate the disclosure (unless the</p>	<p>Both the referring public sector entity (if applicable) and the discloser must be kept informed at specified points in the process: ss 22 & 23.</p>
Commonwealth	<p>The principal officer of an agency has an obligation to investigate disclosures: s47.</p> <p>A discretion not to investigate is enlivened when certain jurisdictional criteria are not met, or the disclosure is frivolous or vexatious, or the disclosure is the same or substantially the same as an existing or previous disclosure investigation or an investigation under another Commonwealth law, and for other enumerated reasons.</p> <p>Investigations are to be completed within 90 days, but the Ombudsman can extend the time for completing the report and must notify the discloser of any extension: s 52.</p>	<p>The principal officer of an agency must inform the discloser of the principal officer’s obligation to investigate the disclosure, or that the principal officer has exercised a discretion not to investigate: s 50(1).</p> <p>On completion of the investigation, the principal officer must prepare a report of the investigation, setting out particular matters: s 51.</p> <p>A copy of the report must be given to the discloser within a reasonable time after its completion. The report may be given in redacted form if certain criteria apply: s51(5).</p>

	<p>disclosure relates to that person): s 18.</p> <p>Alternately the disclosure may be referred to another public sector entity for investigation: s 19.</p> <p>An investigating entity may decide not to investigate in certain circumstances: s 20.</p> <p>There is an obligation on the public sector entity to take action to prevent further disclosable conduct, and to discipline any person found to be responsible for the disclosable conduct: s 24.</p>
Victoria	<p>The majority of disclosures must be notified to IBAC, which will then assess them.</p> <p>If the IBAC determines that a disclosure is a protected disclosure complaint, the IBAC must deal with the disclosure in accordance with the Independent Broad-based Anti-corruption Commission Act 2011: s 32</p>

Queensland	<p>The chief executive officer of a public sector entity must establish reasonable procedures that ensure that disclosures are, when appropriate, investigated and dealt with: s28(1)(b).</p> <p>In certain enumerated circumstances, for example the age of the disclosure making it impractical to investigate, no action need be taken: s 30.</p>	<p>The discloser must be informed of a decision not to investigate, and may request a review of the decision: s30(2) - (3).</p> <p>The discloser must be informed of a decision to refer the disclosure to another entity: s 31.</p>
NSW		<p>The relevant investigating authority, public authority or officer must notify the person who made the disclosure, within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure: s 27.</p>
Western Australia	<p>A proper authority must investigate or cause to be investigated the information disclosed to it under this Act if the disclosure relates to —</p> <ul style="list-style-type: none"> (a) the authority; or (b) a public officer or public sector contractor of the authority; or (c) a matter or person that the authority has a function or power to 	<p>Proper authority has an obligation to advise discloser not more than 3 months after the disclosure is made, notify the person who made the disclosure of the action taken or proposed to be taken in relation to the disclosures: 10(1).</p> <p>At the conclusion of the investigation, the proper authority must provide the discloser with a final report setting out certain matters: s 10(4).</p>

	<p>investigate: s 8(1).</p> <p>A proper authority may refuse to investigate, or may discontinue the investigation of a matter arising from a disclosure in certain enumerated. Circumstances: s 8(2).</p>	
Northern Territory	<p>The Commissioner must investigate all public interest disclosures made or referred to the Commissioner: s 20.</p> <p>Under certain enumerated circumstances, such as the disclosure being too trivial to warrant investigation, or having already been investigated, the Commissioner may decline to investigate: s 21.</p>	<p>The discloser is to be informed of the results of any investigation, including any finding, any recommendations, and any steps taken to give effect to the recommendations: s 34.</p>
Tasmania	<p>The Ombudsman must investigate every disclosure it has determined to be a public interest disclosure: s39.</p> <p>A public body must investigate every disclosure received by it and determined by it to be a public interest disclosure, and</p>	<p>A discloser is to be informed of the outcome of the investigation and any steps taken as a consequence of the investigation. A time limit for completion of the investigation is given, which may be extended by the Ombudsman: S 75 – 77A.</p>

	<p>every public interest disclosure referred to it by the Ombudsman: s 63.</p>	
<p>South Australia</p>	<p>No statutory obligation to investigate.</p>	<p>If an appropriate disclosure of public interest information is made to a public official, that official must, wherever practicable and in accordance with the law, notify the informant of the outcome of any investigation into the matters to which the disclosure relates: s8.</p>

TABLE 9

Obligation to guard against reprisals

Prohibition of victimisation

<p>Commonwealth</p>	<p>The principal officer of an agency must establish procedures for facilitating and dealing with public interest disclosures relating to the agency. The procedures must include:</p> <ul style="list-style-type: none"> (a) assessing risks that reprisals may be taken against the persons who make those disclosures; and (b) providing for confidentiality of investigative processes: s 59(1). <p>The principal officer of an agency must take reasonable steps, <i>inter alia</i>, to protect public officials who belong to the agency from detriment, or threats of detriment, relating to public interest disclosures by those public officials: s 59(3).</p>	<p>A person commits an offence if the person takes a reprisal against another person.</p> <p>Penalty: Imprisonment for 2 years or 120 penalty units, or both: s 19(1).</p> <p>A person (the first person) commits an offence if:</p> <ul style="list-style-type: none"> (a) the first person makes a threat to another person (the second person) to take a reprisal against the second person or a third person; and (b) the first person: <ul style="list-style-type: none"> (i) intends the second person to fear that the threat will be carried out; or (ii) is reckless as to the second person fearing that the threat will be carried out. <p>Penalty: Imprisonment for 2 years or 120 penalty units, or both: s 19(3).</p>
<p>ACT</p>	<p>The head of a public sector entity must make procedures for the entity</p>	<p>A person commits an offence if the person (the retaliator) takes detrimental</p>

	<p>for dealing with public interest disclosures: s33(1).</p> <p>A public sector entity's procedures must include—</p> <ul style="list-style-type: none"> (a) clear obligations on the entity and its public officials to take (b) action to protect disclosers; and risk management steps for assessing and minimising— <ul style="list-style-type: none"> (i) detrimental action against people because of public interest disclosures; and (ii) detriment to people against whom allegations of disclosable conduct are made in a disclosure: s 33(2). 	<p>action because of a public interest disclosure.</p> <p>Maximum penalty: 100 penalty units, imprisonment for 1 year or both: s 40(1).</p>
Victoria	<p>The IBAC must issues guidelines for procedures for a number of purposes, including for the handling of disclosures and for the protection of persons from detrimental action in contravention of section 45: s 57(1).</p> <p>The IBAC must issue guidelines consistent with this Act and the regulations made under this Act for the management of the welfare of—</p> <ul style="list-style-type: none"> (a) any person who makes a protected disclosure; and (b) any person affected by a protected disclosure whether 	<p>A person must not take detrimental action against another person in reprisal for a protected disclosure.</p> <p>Penalty: 240 penalty units or 2 years imprisonment or both: s 45(1).</p>

	<p>as a witness in the investigation of the disclosure or as a person who is a subject of that investigation: s 57(2).</p> <p>48 Vicarious liability of public body</p> <p>(1) If a person in the course of employment with, or while acting as an agent of, a public body takes detrimental action against another person in reprisal for a protected disclosure—</p> <p>(a) the public body and the employee or agent (as the case may be) are jointly and severally civilly liable for the detrimental action; and</p> <p>(b) a proceeding under section 47 may be taken against either or both.</p> <p>(2) It is a defence to a proceeding against a public body under section 47 if the public body proves, on the balance of probabilities, that it took reasonable precautions to prevent the employee or agent from taking detrimental action against the other person in reprisal for the protected disclosure.</p>
Queensland	<p>The chief executive officer of a public sector entity must establish reasonable procedures to ensure, inter alia, that public officers</p> <p>40 Reprisal and grounds for reprisal</p> <p>(1) A person must not cause, or attempt or conspire to cause, detriment to another person because,</p>

	<p>of the entity who make public interest disclosures are given appropriate support and properly assessed and, when public officers of the entity are offered protection from reprisals by the entity or other public officers of the entity: s 28(1).</p> <p>43 Vicarious liability of public sector entity</p> <p>(1) If any of a public sector entity's employees contravenes section 40 in the course of employment, both the public sector entity and the employee, as the case may be, are jointly and severally civilly liable for the contravention, and a proceeding under section 42 may be taken against either or both.</p> <p>(2) It is a defence to a proceeding against a public sector entity under section 42 if the public sector entity proves, on the balance of probabilities, that the public sector entity took reasonable steps to prevent the employee contravening section 40.</p>	<p>or in the belief that—</p> <p>(a) the other person or someone else has made, or intends to make, a public interest disclosure; or</p> <p>(b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.</p> <p>(2) An attempt to cause detriment includes an attempt to induce a person to cause detriment.</p> <p>(3) A contravention of subsection (1) is a reprisal or the taking of a reprisal.</p> <p>(4) A ground mentioned in subsection (1) as the ground for a reprisal is the unlawful ground for the reprisal.</p> <p>(5) For the contravention mentioned in subsection (3) to happen, it is sufficient if the unlawful ground is a substantial ground for the act or omission that is the reprisal, even if there is another ground for the act or omission.</p> <p>41 Offence of taking reprisal</p> <p>(1) A person must not take a reprisal. Maximum penalty—167 penalty units or 2 years imprisonment.</p>
NSW	A person who takes detrimental action against another person that is substantially in reprisal for the other	

	<p>person making a public interest disclosure is guilty of an offence.</p> <p>Maximum penalty: 100 penalty units or imprisonment for 2 years, or both: s 20(1).</p> <p>The taking of detrimental action by a public official constitutes misconduct: S 20(1B).</p> <p>Detrimental action is defined as action causing, comprising or involving any of the following:</p> <ul style="list-style-type: none"> (a) injury, damage or loss, (b) intimidation or harassment, (c) discrimination, disadvantage or adverse treatment in relation to employment, (d) dismissal from, or prejudice in, employment, (e) disciplinary proceeding: s 20(2).
<p>Western Australia</p>	<p>In proceedings against the employer of the perpetrator of an act of victimisation, it is a defence for the employer to prove that the employer —</p> <ul style="list-style-type: none"> (a) was not knowingly involved in the act of victimisation; and (b) did not know and could not reasonably be expected to have known about the act of victimisation; and <p>A person must not take or threaten to take detrimental action against another because anyone has made, or intends to make, a disclosure of public interest information under this Act.</p> <p>Penalty: \$24 000 or imprisonment for 2 years: s 14(1).</p> <p>15. Act of victimisation defined; remedies for</p>

	<p>(c) could not, by the exercise of reasonable care, have prevented the act of victimisation: s 15(3).</p>	<p>(1) A person who takes or threatens to take detrimental action against another because or substantially because anyone has made, or intends to make, a disclosure of public interest information under this Act commits an act of victimisation which may be dealt with as a tort.</p> <p>(2) Proceedings in tort under subsection (1) may be taken against the perpetrator of an act of victimisation or any employer of the perpetrator.</p> <p>(4) An act of victimisation under this Act may be dealt with under</p>
<p>Northern Territory</p>		<p>15 Offence to commit act of reprisal</p> <p>(1) A person commits an act of reprisal against another if the person causes, or threatens to cause, harm to another for a prohibited reason, that is because:</p> <p>(a) the other person or a third person:</p> <ul style="list-style-type: none"> (i) has made or intends to make a public interest disclosure; or (ii) has complied with, or intends to comply with, a requirement imposed by a person acting in an official capacity; or (iii) has cooperated or intends to cooperate with a person acting in an official capacity; and <p>(b) the person wants to obtain retribution for the disclosure,</p>

	<p>compliance or cooperation or, in the case of intended disclosure, compliance or cooperation, to discourage it.</p> <p>Examples of cooperation</p> <p>Voluntarily answering questions, producing documents and providing information in any other form.</p> <p>(2) A person must not commit an act of reprisal against another.</p> <p>Fault elements:</p> <p>The person:</p> <p>(a) knows or believes a person has acted, or intends to act, as described in subsection (1)(a); and</p> <p>(b) intends to discourage, or obtain retribution for, that act or intended act.</p> <p>Maximum penalty: 400 penalty units or imprisonment for 2 years.</p>
Tasmania	<p>19. Protection from reprisal</p> <p>(1) A person must not take detrimental action against a person in reprisal for a protected disclosure.</p> <p>Penalty:</p> <p>Fine not exceeding 240 penalty units or imprisonment for a term not exceeding 2 years, or both.</p>
South Australia	(none) (none)

TABLE 10

	Confidentiality of identity protection and exceptions	Offence provision
Commonwealth	<p>20 (1) A person (the first person) commits an offence if:</p> <ul style="list-style-type: none"> (a) another person (the second person) has made a public interest disclosure; and (b) the first person discloses information (identifying information) that: <ul style="list-style-type: none"> (i) was obtained by any person in that person’s capacity as a public official; and (ii) is likely to enable the identification of the second person as a person who has made a public interest disclosure; and (c) the disclosure is to a person other than the second person. <p>S 20(2) A person (the first person) commits an offence if the person uses identifying information.</p> <p>Penalty: Imprisonment for 6 months or 30 penalty units, or both.</p> <p>Exceptions</p> <p>S 20(3) Subsections (1) and (2) do not apply if one or more of the following applies:</p> <ul style="list-style-type: none"> (a) the disclosure or use of the 	<p>Disclosure of identifying information in a breach of the Act is a criminal offence, as is Use of identifying information.</p>

	<p>identifying information is for the purposes of this Act;</p> <p>(b) the disclosure or use of the identifying information is in connection with the performance of a function conferred on the Ombudsman by section 5A of the Ombudsman Act 1976;</p> <p>(c) the disclosure or use of the identifying information is in connection with the performance of a function conferred on the IGIS by section 8A of the Inspector-General of Intelligence and Security Act 1986;</p> <p>(d) the disclosure or use of the identifying information is for the purposes of:</p> <ul style="list-style-type: none"> (i) a law of the Commonwealth; or (ii) a prescribed law of a State or a Territory; <p>(e) the person who is the second person in relation to the identifying information has consented to the disclosure or use of the identifying information;</p> <p>(f) the identifying information has previously been lawfully published.</p>
ACT	<p>There is a general prohibition of using or divulging protected information by certain persons, with exceptions: s 44.</p> <p>Breach of this section constitutes a criminal offence.</p>

Victoria	<p>The content of an assessable disclosure must not be disclosed: s 52.</p> <p>The identity of a person who made an assessable disclosure must not be disclosed: s 53.</p> <p>The Act provides for exceptions: s 54.</p>	Breaches of these provisions constitute criminal offences.
Queensland	<p>If a person gains confidential information in the administration of the Act, it must not be disclosed to anyone, unless an exception applies: s 65.</p>	Breach of this provision attracts a pecuniary penalty.
NSW	<p>22 Confidentiality guideline</p> <p>(1) An investigating authority or public authority (or officer of an investigating authority or public authority) or public official to whom a public interest disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the public interest disclosure unless:</p> <p>(a) the person consents in writing to the disclosure of that information, or it is generally known that the person has made the public interest disclosure as a result of the person having voluntarily identified themselves (otherwise than by making the public interest disclosure) as the person who made the public interest disclosure, or</p>	(none)

	<p>(b) it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern, or</p> <p>(c) the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.</p> <p>(2) As part of its procedures for receiving, assessing and dealing with public interest disclosures, a public authority must establish procedures for ensuring that a public official who belongs to the public authority maintains confidentiality in connection with a public interest disclosure made by the public official.</p>	
Western Australia	A person may not make a disclosure of information that identifies a discloser unless certain circumstances apply: S 16(1).	Breach of this provision constitutes a criminal offence.
Northern Territory	Except as in accordance with the Act, a person must not disclose confidential information acquired when acting in an official capacity under the Act: s 53(1).	Breaches of these provisions constitute criminal offences.

	Improper use of such information is also prohibited: s 53(4).	
Tasmania	A person must not disclose information obtained as a result of a protected disclosure or obtained in the course of an investigation, unless in certain circumstances: s 23.	Breach constitutes a criminal offence.
South Australia	The original recipient of an appropriate disclosure of public information must not divulge the identity of the discloser without the discloser's consent, except as far as may be necessary to properly investigate the information to which the disclosure relates: s7.	(none)

TABLE 11

	Remedies - damages	Remedies – Injunctions and other orders.	Cost protections and other procedural protections?
Commonwealth	<p>The Federal Court of Federal Circuit Court can award compensation for loss arising out of a reprisal or threat of reprisal. The award may be made either against the respondent, or the respondent’s employer: s 14(1)</p> <p><i>Fair Work Act 2009</i> remedies are alternately available: s 22 – 22A.</p>	<p>The Federal Court or Federal Circuit Court may order an injunction restraining a respondent from engaging in a reprisal: s 15.</p> <p>The Federal Court or Federal Circuit Court may order reinstatement if a reprisal taken consists of a termination of employment: s 16.</p>	<p>Costs are only to be awarded against an applicant if the proceedings were brought vexatiously or without reasonable cause: s 18.</p>
ACT	<p>A Court may award damages for loss occasioned by detrimental action: s 41</p>	<p>The Supreme court may order an injunction restraining detrimental action, on the application of the Commissioner, a discloser, or a person who faces detrimental action: s 42.</p>	
Victoria	<p>A Court may award damages against a</p>	<p>The Supreme Court may order an injunction</p>	

	<p>person who has caused loss etc to another by taking a reprisal: s 47.</p>	<p>to prevent a reprisal, and may also make a remedial order: s 49.</p>
Queensland	<p>A Court may order damages for the tort of reprisal: s 42.</p> <p>A complaint of reprisal may alternately be dealt with under the <i>Anti-Discrimination Act 1991</i>.</p>	<p>The Industrial Court has jurisdiction to order an injunction to prevent a reprisal on application of the employee, a union, or if the employee consents, the Crime and Misconduct Commission: s 48.</p> <p>Persons who do not have standing to apply for an injunction to the Industrial Court may apply to the Supreme Court for an injunction: s 49.</p>
NSW	<p>Compensation is payable for loss suffered as a result of a reprisal: s 20A.</p>	<p>The Supreme Court has jurisdiction to order an injunction restraining a person from engaging in reprisals.</p> <p>An application may be brought by an investigating authority, or by another public authority with the approval of the</p>

		Attorney-General: s 20B(1).
Western Australia	<p>A tort of victimisation is defined, and may be actioned against the tortfeasor or the tortfeasor's employer: s15.</p> <p>Victimisation may alternately be dealt with under the <i>Equal Opportunity Act 1984</i>.</p>	<p>A person who apprehends detrimental action may apply to the Supreme Court for an injunction to restrain a person from engaging in such action: s 15A.</p>
Northern Territory	<p>An act of reprisal by one person against another person amounts to a tort, and the tortfeasor is liable for damages: s 16.</p>	<p>The Supreme Court may grant injunctive remedies for an act of reprisal or an apprehended act of reprisal.</p> <p>An application for an injunction may be made by the Commissioner or by a person against whom the act is committed or is about to be committed: s 17.</p>
Tasmania	<p>A person who takes detrimental action against another for making a disclosure is</p>	<p>A person who apprehends detrimental action may apply to the Supreme Court for an</p>

	liable in damages: s 20. injunction: s 21.
South Australia	<p>An act of victimisation may be dealt with as a tort: s 9.</p> <p>Alternately, an act of victimisation may be dealt with under the Equal Opportunity Act 1984 as an act of victimisation under that Act: s 9.</p>

TABLE 12

	Oversight of procedures	Oversight of investigations
Commonwealth	<p>The Ombudsman may, by legislative instrument determine standards relating to internal disclosure handling procedures, the conduct of investigations, report preparation and record keeping: s 74.</p>	<p>Any decision not to investigate must be advised to the Ombudsman or IGIS: s 50A.</p> <p>The Ombudsman or IGIS are responsible for approving any investigation time extensions under the Act: s 52.</p> <p>The Ombudsman is advised every time a disclosure that does not relate to national security is allocated for investigation: s44(1A).</p>
ACT	<p>The commissioner has functions which include reviewing the way public sector entities deal with public interest disclosures: s 28.</p> <p>The Commissioner may make a report to the Minister about a public sector entity's procedures: s 30.</p> <p>The Commissioner must make guidelines about the way in which a public sector entity deals with a disclosure: s 32.</p> <p>The Commissioner must</p>	<p>The Commissioner may review decisions made by investigating entities to not investigate or cease investigating a disclosure, and may review decisions made by public sector entities: s 29.</p> <p>The Commissioner may make a report to the Minister about how a particular disclosure was dealt with: s 30.</p>

	<p>approve the procedures for disclosure handling etc that must be made by a public sector entity head: s 33.</p>	
Victoria	<p>The IBAC must issue guidelines for certain public entities re disclosure facilitation and handling and discloser and witness welfare management: s 57.</p> <p>Certain entities must devise and public procedures of the kind referred to above: s 58.</p> <p>Those procedures, and their implementation may be reviewed by IBAC at any time: s 59.</p>	<p>Protected disclosure complaints are “taken up” and dealt with as if they were IBAC complaints: s32.</p>
Queensland	<p>The Ombudsman has functions under the Act which include monitoring compliance with the Act: s 59.</p> <p>The Ombudsman may make standards re how public sector entities are to deal with and facilitate public interest disclosures: s 60.</p>	<p>The Ombudsman may make a standard that required a copy of the disclosure information to be given to the Ombudsman: s 33.</p>

NSW	<p>The Ombudsman has functions under the Act which include issuing guidelines for public authorities and investigating authorities, and to provide audit reports and monitoring reports to Parliament in relation to the compliance with the Act: s 6B.</p> <p>The Ombudsman may require the principal officer of or who constitutes a public authority to give the Ombudsman a statement of information or a document for the purposes of an audit: 6C(1).</p> <p>Public authorities must provide the Ombudsman with periodic reports in accordance with any regulations: s6CA.</p> <p>The Ombudsman may make a special report to Parliament, which may include recommendations for statutory change: s 31A.</p>	<p>The regulations may provide for conferring functions on the Ombudsman to resolve a dispute arising out of a public official making a public interest disclosure: s 26B.</p>
Western Australia	<p>The Public Sector Commissioner is to monitor compliance with the Act: s 19.</p> <p>The Commissioner must establish a Code setting out</p>	

	<p>minimum standards of conduct and integrity to be complied with by a person to whom a disclosure may be made: s 20.</p>	
Northern Territory	<p>The Act establishes a Commissioner for Public Interest Disclosures: s 39(1).</p> <p>The Commissioner must prepare and publish guidelines about dealing with public interest disclosures and preventing reprisals.</p>	<p>The Act gives the Commissioner for Public Interest Disclosures investigative powers: Part 3 Division 4.</p>
Tasmania	<p>The Ombudsman's functions under this Act include preparing and publishing guidelines and standards for the procedures to be followed by public bodies in relation to –</p> <ul style="list-style-type: none"> (i) disclosures under Part 2; and (ii) investigations under Part 7; and (iii) the protection of persons from reprisals by public bodies or members, officers or employees of public bodies because of protected disclosures; and (iv) the application of natural 	<p>In relation to particular investigations the Ombudsman is to receive notification of all public interest disclosures made internally to public bodies, and to monitor the progress of investigations by public bodies: 38(1).</p> <p>The Ombudsman may assume conduct of an investigation conducted by a public body if dissatisfied with that investigation: s 69.</p> <p>The Ombudsman is to receive reports in relation to investigations conducted by public bodies: s 76.</p>

	<p>justice to all parties involved in an investigation of a public interest disclosure; and</p> <p>(d) to approve procedures developed by public bodies in accordance with the guidelines and standards, and review those procedures at least once in each 3-year period; and</p> <p>(f) to prepare and publish guidelines and standards for the purpose of determining whether improper conduct is serious or significant:</p> <p>S 38(1).</p>
South Australia	(none) (none)