

Public Interest Disclosure Bill 2002

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Defined Terms

Western Australia

LEGISLATIVE ASSEMBLY

(As amended during consideration in detail)

Public Interest Disclosure Bill 2002

A Bill for

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.

The Parliament of Western Australia enacts as follows:

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Public Interest Disclosure Act 2002*.

2. Commencement

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days may be fixed under subsection (1) for different provisions.

3. Interpretation

- (1) In this Act, unless the contrary intention appears —

“Anti-Corruption Commission” means the Anti-Corruption Commission established under the *Anti-Corruption Commission Act 1988*;

“Auditor General” means the officer of that title appointed or deemed to have been appointed under section 71 of the *Financial Administration and Audit Act 1985*;

“Commissioner” means the person for the time being holding the office of Commissioner for Public Sector Standards created by section 16(1) of the *Public Sector Management Act 1994*;

“Commissioner of Police” means the person holding the office of Commissioner of Police under the *Police Act 1892*;

“detrimental action” includes action causing, comprising, or involving —

- (a) injury, damage, or loss;
- (b) intimidation or harassment;

- (c) adverse discrimination, disadvantage, or adverse treatment in relation to a person's career, profession, employment, trade, or business; or

- (d) a reprisal;

5 **“environment”** has the same meaning as in the *Environmental Protection Act 1986*;

10 **“Parliamentary Commissioner”** means a person for the time being holding the office of the Parliamentary Commissioner for Administrative Investigations under the *Parliamentary Commissioner Act 1971*;

“police officer” means a person —

- (a) appointed under Part I of the *Police Act 1892* to be a member of the Police Force of Western Australia;
- 15 (b) appointed under Part III of the *Police Act 1892* to be a special constable; or
- (c) appointed under Part IIIA of the *Police Act 1892* to be an aboriginal aide;

“public authority” means —

- 20 (a) a department of the Public Service established under section 35 of the *Public Sector Management Act 1994*;
- (b) an organisation specified in column 2 of Schedule 2 to the *Public Sector Management Act 1994*;
- 25 (c) a non-SES organisation within the meaning of that term in section 3(1) of the *Public Sector Management Act 1994*;
- (d) a local government or a regional local government;
- (e) a body that is established or continued for a public purpose under a written law;

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- (f) a body that is established by the Governor or a Minister;
- (g) any other body or the holder of an office referred to in subsection (2) that is declared by the regulations to be a public authority;

“public interest information” means information that tends to show that, in relation to its performance of a public function (either before or after the commencement of this Act), a public authority, a public officer, or a public sector contractor is, has been, or proposes to be, involved in —

- (a) improper conduct;
- (b) an act or omission that constitutes an offence under a written law;
- (c) a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources;
- (d) an act done or omission that involves a substantial and specific risk of —
- (i) injury to public health;
- (ii) prejudice to public safety; or
- (iii) harm to the environment;

or

- (e) a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act 1971*;

“public officer” means —

- (a) a Minister of the Crown;
- (b) a Parliamentary Secretary appointed under section 44A of the *Constitution Acts Amendment Act 1899*;
- (c) a member of either House of Parliament;

- 5 (d) a judicial officer;
(e) a police officer;
(f) a person authorised under a written law to execute or
serve any process of a court or tribunal for
remuneration;
(g) a public service officer within the meaning of the
Public Sector Management Act 1994;
(h) a member, officer, or employee of a public authority;
(i) the holder of —
10 (i) an office that is established for a public
purpose under a written law; or
(ii) an office that is established by the Governor
or a Minister;
(j) an officer of the Commonwealth who exercises or
15 discharges on behalf of this State a function under a
written law; or
(k) any other person holding office under the State of
Western Australia;
- “public sector contractor”** means —
20 (a) a person who, other than as an employee, contracts
with a public authority or the State of Western
Australia to supply goods or services to or on behalf
of the authority or the State or as directed in
accordance with the contract;
25 (b) a person who, other than as an employee, contracts
with a public authority or the State of Western
Australia to perform a public function; or
(c) a subcontractor or employee of a person referred to in
30 paragraph (a) or (b) and each person who contracts
with another person for the execution of the whole or

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part of the requirements of a contract referred to in those paragraphs.

- 5 (2) The regulations made for the purpose of paragraph (g) of the definition of “public authority” in subsection (1) can only declare a body or holder of an office to be a public authority if —
- (a) the body or office is established or continued under a written law; or
 - 10 (b) it is a corporation or association over which control can be exercised by —
 - (i) the State;
 - (ii) a body referred to in paragraph (b), (c), (e) or (f) of that definition; or
 - 15 (iii) a body or the holder of an office declared by the regulations to be a public authority.

4. Application to the Crown

This Act binds the Crown in right of the State.

Part 2 — Public interest disclosures

Division 1 — Disclosures

5. Public interest disclosure

- 5 (1) Any person may make an appropriate disclosure of public interest information to a proper authority.
- (2) A person makes an appropriate disclosure of public interest information if, and only if, the person who makes the disclosure —
- 10 (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.
- 15 (3) A disclosure of public interest information is made to a proper authority if —
- (a) where the information relates to an act or omission that constitutes an offence under a written law — it is made to a police officer or to the Anti-Corruption Commission;
- 20 (b) where the information relates to a substantial unauthorised or irregular use of, or substantial mismanagement of, public resources — it is made to the Auditor General;
- 25 (c) where the information relates to a matter of administration that can be investigated under section 14 of the *Parliamentary Commissioner Act 1971* — it is made to the Parliamentary Commissioner or to a person who occupies a position specified under section 23(1)(a) in relation to the public authority concerned;

- 5 (d) where the information relates to a police officer — it is made to the Commissioner of Police or to the Parliamentary Commissioner;
- (e) where the information relates to a judicial officer — it is made to the Chief Justice;
- (f) where the information relates to a member of either House of Parliament — it is made to the Presiding Officer of the House of Parliament to which the member belongs;
- 10 (g) where the information relates to a public officer (other than a member of Parliament, a Minister of the Crown, a judicial officer or an officer referred to in Schedule 1 to the *Parliamentary Commissioner Act 1971*) — it is made to the Commissioner or the Parliamentary Commissioner;
- 15 (h) where the information relates to a matter falling within the sphere of responsibility of a public authority — it is made to a person who occupies a position specified under section 23(1)(a) in relation to that authority; or
- 20 (i) where the information relates to a person or a matter of a prescribed class — it is made to a person declared by the regulations to be a proper authority for the purposes of subsection (1) in relation to such information.
- 25 (4) A disclosure of public interest information may be made under this Act —
- (a) even though anything to which the disclosure relates occurred before the commencement of this Act; and
- (b) whether or not the person making the disclosure is able to identify any person whom the information concerns.
- 30 (5) Nothing in this Act entitles a person to disclose information that would otherwise be the subject of legal professional privilege.

6. Liability of person disclosing unaffected

A disclosure of public interest information under this Act by a person does not affect that person's liability for anything to which the information relates.

5 **Division 2 — Obligations of a person to whom a disclosure is made**

7. Interpretation

In sections 8, 9 and 10 —

10 **“proper authority”** means a person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3), except that it does not include the Chief Justice or the Presiding Officer of a House of Parliament.

8. Obligation to carry out investigation

15 (1) A proper authority must investigate or cause to be investigated the information disclosed to it under this Act if the disclosure relates to —

- 20 (a) the authority;
- (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 investigate.

25 (2) A proper authority may refuse to investigate, or may discontinue the investigation of, a matter raised by the disclosure if it considers that —

- (a) the matter is trivial or frivolous;
- (b) the disclosure is made vexatiously;

- 5
- (c) there is no reasonable prospect of obtaining sufficient evidence due to the time that has elapsed since the occurrence of the matter; or
- (d) the matter is being or has been adequately or properly investigated by another person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3).
- 10
- (3) A proper authority that refuses to investigate, or discontinues the investigation of, a matter raised by a disclosure must give the person who made the disclosure the reason for its refusal.

9. Action by proper authority

- 15
- (1) If a proper authority forms the opinion that a person may be, may have been, or may in the future be, involved in a matter that may be the subject of a disclosure of public interest information, the proper authority must take such action as is necessary, reasonable, and within its functions and powers, to —
- 20
- (a) prevent the matter to which the disclosure relates from continuing or occurring in future;
- (b) refer the matter to the Commissioner of Police or another person, body, or organisation having power to investigate the matter; or
- 25
- (c) take disciplinary action or commence or enable disciplinary proceedings to be commenced against a person responsible for the matter.
- (2) Before taking action under subsection (1)(a) or (c) the proper authority is to afford any person against whom, or in respect of whom, the action is to be taken the opportunity to make a submission, either orally or in writing, in relation to the matter.

10. Informant to be notified of action taken

- 5 (1) If an appropriate disclosure of public interest information is made to a person referred to in section 5(3), that person must, subject to section 11, 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 disclosure.
- 10 (2) A person who has made an appropriate disclosure of public interest information under this Act may request the person to whom the disclosure was made to provide a report on progress on dealing with the matter in relation to which the disclosure was made.
- 15 (3) If an investigation into a matter in relation to which the disclosure was made is not complete, the person to whom the disclosure was made may provide a progress report to the person who requested a report on the current status of the investigation.
- 20 (4) If an investigation into a matter in relation to which the disclosure was made is complete, the person who carried out the investigation must provide a final report to the person who requested a report stating —
- 25 (a) the outcome of the investigation and any action the person has taken or proposes to take as a result of the investigation; and
- (b) the reason for taking the action that has been taken or that is proposed to be taken.

11. Limitation on notification of informant

- 30 (1) A person must not, in a notification or report under section 10, give information that, in that person's opinion, would be likely to affect adversely —
- (a) any person's safety;

- (b) the investigation of an offence or possible offence; or
- (c) necessary confidentiality about the existence or identity of a person who has made a disclosure of public interest information other than the person being given the information.

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- (2) To avoid doubt, it is declared that information that section 54 of the *Anti-Corruption Commission Act 1988* prevents a person from publishing is not to be given or disclosed under section 10.

12. Obligations under this Act of certain persons limited

- (1) The Anti-Corruption Commission and the Parliamentary Commissioner are not required to comply with sections 8(1), 9 and 10 if the disclosure relates to a matter that it is a function of the Anti-Corruption Commission or the Parliamentary Commissioner to investigate, inquire into, deal with, or take any other step with respect to, under another written law, whether on the complaint of a person or on its or his or her own motion.

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- (2) If a person makes a disclosure of public interest information under this Act —

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- (a) to the Anti-Corruption Commission, section 25 of the *Anti-Corruption Commission Act 1988* applies as if the disclosure were the making of an allegation under that Act; or

25

- (b) to the Parliamentary Commissioner, section 26 of the *Parliamentary Commissioner Act 1971* applies as if the disclosure were the making of a complaint under that Act.

- (3) If a disclosure of public interest information is made —

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- (a) to a declared person; and
- (b) the information relates to a matter which it is a function of the person to investigate, inquire into, deal with, or

take any other step with respect to, under another written law, whether on the complaint of a person or on that person's own motion,

5 sections 8(1) and 9 do not apply to that declared person in relation to that disclosure.

(4) If a declared person has a duty under a written law other than this Act to make a progress report to a person who has made a complaint to it —

- 10 (a) section 10 does not apply to the declared person; and
(b) a progress report is to be made to any person who disclosed public interest information to that declared person under this Act as if the disclosure were the making of a complaint under that written law.

(5) In this section —

15 **“complaint”** includes an allegation, application, charge, motion, objection, petition, report, request or summons;

“declared person” means a person declared in regulations made for the purposes of paragraph (g) of the definition of “public authority” to be a public authority.

Part 3 — Protection

13. Immunity for appropriate disclosure of public interest information

5 A person who makes an appropriate disclosure of public interest information to a proper authority under section 5 —

- (a) incurs no civil or criminal liability for doing so; and
- (b) is not, for doing so, liable —
 - (i) to any disciplinary action under a written law;
 - (ii) to be dismissed;
 - 10 (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.
 - 15

14. Reprisal an offence

- (1) 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.

20 Penalty: \$24 000 or imprisonment for 2 years.

- (2) A person who —

- (a) attempts to commit an offence created by subsection (1); or

- (b) intending that an offence created by subsection (1) be committed, incites another person to commit that offence,

commits an offence.

5 Penalty: \$24 000 or imprisonment for 2 years.

15. Remedies for acts of victimisation

- (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.
- 10
- (2) Proceedings in tort under subsection (1) may be taken against the perpetrator of an act of victimisation or any employer of the perpetrator.
- (3) 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 —
- 15
- (a) was not knowingly involved in the act of victimisation;
- (b) did not know and could not reasonably be expected to have known about the act of victimisation; and
- 20
- (c) could not, by the exercise of reasonable care, have prevented the act of victimisation.
- (4) An act of victimisation under this Act may be dealt with under the *Equal Opportunity Act 1984* as if it were an act that was unlawful under section 67 of that Act but, if the victim commences proceedings in a court under subsection (1), he or she cannot subsequently lodge a complaint under the *Equal Opportunity Act 1984* because of the act and, conversely, if the victim lodges a complaint under that Act because of the act, he
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or she cannot subsequently commence proceedings under subsection (1) because of the act.

- 5 (5) If 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.
- 10 (6) Despite any other provision of this Act, this section has no retrospective operation and no proceeding may be taken under this section in relation to an act of victimisation that occurred before the commencement of this Act.

16. Confidentiality

- 15 (1) A person must not make a disclosure (an “**identifying disclosure**”) of information that might identify or tend to identify anyone as a person who has made an appropriate disclosure of public interest information under this Act unless —
- 20 (a) the person who made the disclosure of public interest information consents to the disclosure of information that might identify or tend to identify him or her;
- (b) it is necessary to do so having regard to the rules of natural justice;
- 25 (c) it is necessary to do so to enable the matter to be investigated effectively;
- (d) the identifying disclosure is made under section 12 or 22 of the *Anti-Corruption Commission Act 1988*, or Part II Division 6 of that Act; or

- (e) to do so is required under section 14 or 15 of the
Anti-Corruption Commission Act 1988.

Penalty: \$24 000 or imprisonment for 2 years.

- 5 (2) A reasonable time before making a disclosure in the
circumstances described in subsection (1)(b) or (c), the person
making the identifying disclosure must take all reasonable steps
to advise the person whose identity is to be disclosed —

- (a) that the disclosure is to be made; and
(b) the reason for the disclosure being made.

- 10 (3) A person must not make a disclosure of information that might
identify or tend to identify anyone as a person in respect of
whom a disclosure of public interest information has been made
under this Act (“**identifying information**”) unless —

- 15 (a) the person in respect of whom the disclosure of public
interest information has been made consents to the
disclosure of information that might identify or tend to
identify him or her;
- (b) it is necessary to do so to enable the matter to be
investigated effectively;
- 20 (c) it is necessary to do so in the course of taking action
under section 9(1)(a) to (c);
- (d) there are reasonable grounds to believe that the
disclosure of identifying information is necessary to
prevent or minimise the risk of injury to any person or
25 damage to any property;
- (e) the disclosure is made under section 12 or 22 of the
Anti-Corruption Commission Act 1988, or Part II
Division 6 of that Act; or
- 30 (f) to do so is required under section 14 or 15 of the
Anti-Corruption Commission Act 1988.

Penalty: \$24 000 or imprisonment for 2 years.

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17. Loss of protection of the Act

A person who has made an appropriate disclosure of public interest information under this Act and who —

- 5 (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
- 10 (b) discloses information contained in a disclosure of public interest information otherwise than under this Act,

forfeits the protection given by section 13.

Part 4 — Role of Commissioner for Public Sector Standards

18. Interpretation

In this Part —

5 **“proper authority”** means a person to whom an appropriate disclosure of public interest information has been made in accordance with section 5(3), except that it does not include the Chief Justice or the Presiding Officer of a House of Parliament.

10 **19. Promoting compliance with this Act**

- (1) The Commissioner is to monitor compliance with —
- (a) this Act; and
 - (b) the code established under section 20.
- (2) The Commissioner is to assist public authorities and public
15 officers to comply with this Act and the code established under section 20.

20. Code

- (1) The Commissioner must establish a code setting out minimum
20 standards of conduct and integrity to be complied with by a person to whom a disclosure of public interest information may be made under section 5(3).
- (2) In establishing, amending, or repealing and replacing the code, the Commissioner is to take into account the independence that any particular proper authority has under a written law.
- 25 (3) The Commissioner may amend, or repeal and replace, the code.

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- (4) The Commissioner must, before establishing, amending, or repealing and replacing the code, consult such persons as he or she considers it desirable and practicable to consult.
- (5) The code must be published in the *Gazette*.
- 5 (6) The code comes into operation at the beginning of the day on which it is published in the *Gazette* or of such later day as is specified in the code.
- (7) Section 42 of the *Interpretation Act 1984* applies to and in relation to the code as if the code were regulations within the meaning of that section.
- 10 (8) Subsections (5) to (7) also apply to an amendment, or repeal and replacement, of the code.

21. Guidelines

The Commissioner must —

- 15 (a) prepare guidelines on internal procedures relating to the functions of a proper authority under this Act; and
- (b) ensure that all proper authorities have copies of the guidelines.

22. Annual report and other reports to Parliament

- 20 (1) The Commissioner must report annually to each House of Parliament on —
- (a) the performance of the Commissioner's obligations under this Act;
- (b) compliance or non-compliance with the Act; and
- 25 (c) compliance or non-compliance with the code established under section 20.

- (2) Despite subsection (1), the Commissioner may at any time, if he or she thinks fit, lay before each House of Parliament a report on any matter arising in connection with the exercise of his or her functions under this Act.
- 5 (3) If either House of Parliament is not sitting at the time when the Commissioner wishes to lay a report under subsection (2) then the Commissioner may —
- (a) send copies of the report to the Clerk of that House; and
 - (b) make the report available to the public.

Part 5 — Miscellaneous

23. Obligations of principal executive officers of public authorities

- (1) The principal executive officer of a public authority must —
- 5 (a) designate the occupant of a specified position with the authority as the person responsible for receiving disclosures of public interest information;
- 10 (b) provide protection from detrimental action or the threat of detrimental action for any employee of the public authority who makes an appropriate disclosure of public interest information;
- (c) ensure that his or her public authority complies with this Act;
- 15 (d) ensure that his or her public authority complies with the code established by the Commissioner under section 20;
- (e) prepare and publish internal procedures relating to the authority's obligations under this Act; and
- (f) provide information annually to the Commissioner on —
- 20 (i) the number of public interest disclosures received by a responsible officer of the authority over the report period;
- (ii) the results of any investigations conducted as a result of the disclosures and the action, if any, taken as a result of each investigation; and
- 25 (iii) such other matters as are prescribed.
- (2) Internal procedures prepared under subsection (1)(e) must be consistent with guidelines prepared by the Commissioner under section 21.

- (3) Subsection (1) does not apply to the Chief Justice or to the Presiding Officer of a House of Parliament.

24. Offence to make false or misleading disclosure

- 5 (1) A person who makes a statement purporting to be a disclosure of public interest information —
- (a) knowing it to be false in a material particular or being reckless about whether it is false in a material particular; or
- 10 (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.

Penalty: \$12 000 or imprisonment for one year.

- 15 (2) 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.

25. Other laws not excluded

20 The protection given by this Act is in addition to, and does not derogate from, any privilege, protection, or immunity existing apart from this Act.

26. Regulations

25 The Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

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27. Review of this Act

- 5 (1) The Minister shall carry out a review of the operation of this Act three years after the Act and all of its provisions have been fully proclaimed, and in the course of such review the Minister shall consider and have regard to —
- (a) the attainment of the purposes of this Act;
- (b) the administration of this Act; and
- (c) such other matters as appear to him to be relevant.
- 10 (2) The Minister shall prepare a report based on the review made under subsection (1) and shall as soon as practicable after its preparation, cause the report to be laid before each House of Parliament.

28. Consequential and miscellaneous amendments

- 15 The Acts specified in Schedule 1 are amended as specified in that Schedule.

Schedule 1 — Consequential and miscellaneous amendments

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1. *Freedom of Information Act 1992* amended

5 After Schedule 1 clause 14(4) to the *Freedom of Information Act 1992** the following subclause is inserted —

“

(5) Matter is exempt matter if its disclosure would reveal or tend to reveal the identity of anyone as —

- 10 (a) a person who has made an appropriate disclosure of public interest information under the *Whistleblowers Protection Act 2002*; or
- (b) a person in respect of whom a disclosure of public interest information has been made under the
- 15 *Whistleblowers Protection Act 2002*.

”.

[*Reprinted as at 3 March 2000.

For subsequent amendments see 2000 Index to Legislation of Western Australia, Table 1, p. 171 and Act No. 53 of 2000.]

20 2. *Prisons Act 1981* amended

Section 98(1) of the *Prisons Act 1981** is amended as follows:

- (a) after paragraph (c) by deleting “or”;
- (b) after paragraph (d) by deleting the comma and inserting instead —

25

“

; or

- (e) commits an act of victimisation within the meaning of section 15 of the *Whistleblowers Protection Act 2002*,

30

”.

[* Reprinted as at 22 December 2000.]

Schedule 1 Consequential and miscellaneous amendments

3. Public Sector Management Act 1994 amended

Section 80 of the *Public Sector Management Act 1994** is amended as follows:

- (a) after paragraph (c) by deleting “or”;
- 5 (b) after paragraph (d) by deleting the comma and inserting instead —
“
- 10 (e) ; or
commits an act of victimisation within the
meaning of section 15 of the *Whistleblowers
Protection Act 2002*,
- ”.

[* *Reprinted as at 9 February 2001.*

15 *For subsequent amendments see Acts Nos. 43 and 53 of
2000.]*

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Defined Terms

[This is a list of terms defined and the provisions where they are defined.

The list is not part of the law.]

Defined Term	Provision(s)
Anti-Corruption Commission	3(1)
Auditor General	3(1)
Commissioner	3(1)
Commissioner of Police.....	3(1)
complaint	12(5)
declared person	12(5)
detrimental action.....	3(1)
environment	3(1)
identifying disclosure	16(1)
identifying information.....	16(3)
Parliamentary Commissioner	3(1)
police officer	3(1)
proper authority.....	7, 18
public authority	3(1)
public interest information.....	3(1)
public officer.....	3(1)
public sector contractor	3(1)