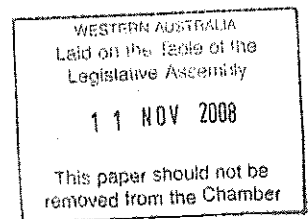
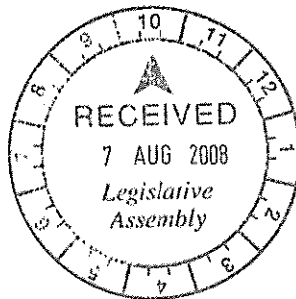


REPORT OF THE REVIEW (  
PUBLIC INTEREST DISCLOSURE

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## Executive Summary

The review commenced in December 2006. A former Deputy State Solicitor, Mr John Lyon, was appointed to assist in the review. The public was invited to make submissions. Letters were sent to 25 public officers and representatives of interested bodies, inviting submissions. Submissions were received from 16 persons.

The (former) Commissioner for Public Sector Standards and her staff, senior officers of the Corruption and Crime Commission, members of the Public Interest Disclosure Co-ordination Committee and Dr AJ Brown of Griffith University were consulted. Dr Brown leads an Australia-wide study entitled the *Whistling While They Work* Project. Particular consideration was given to a November 2006 Issues Paper Dr Brown had written.

The review has found that the Commissioner for Public Sector Standards and her staff have been most diligent in the administration of the *Public Interest Disclosure Act 2003* (the Act). However, as is apparent from her reports, she is concerned about a low level of awareness of the Act. There is a low and diminishing number of disclosures. Administration of the Act has been hampered by a number of its provisions, particularly those relating to confidentiality. Some amendments are required to improve the effectiveness of the Act. However, this is not unexpected. During the course of parliamentary debate it was recognised that experience would, in due course, indicate a need for refinement. It is to be noted that in the November 2006 Issues Paper, Dr Brown ranks the Western Australian Act very highly compared to public interest disclosure legislation elsewhere in Australia.

The main findings of the review are as follows:

- a. A new definition of "misconduct" should be inserted in section 3(1), consistent with the definition of misconduct in the *Corruption and Crime Commission Act 2003*.
- b. The definition of "police officer" should be deleted, and the definition of that term in the *Interpretation Act 1984* be relied upon.
- c. Section 5(3)(a) should be amended to reflect the jurisdiction of the Corruption and Crime Commission, so that disclosures to the Commission under the *Public Interest Disclosure Act* are those relating to "misconduct" under the *Corruption and Crime Commission Act 2003*.
- d. It would seem to be premature to form a view on the question of whether the Act should be amended to restrict disclosure-making capacity to public officers and volunteers performing public functions. This is ultimately a question of policy, does not affect the attainment of the purposes of the Act and is still subject to review in the *Whistling While They Work* Project.
- e. The review is concerned only with the purposes of the Act as it stands, and to allow for disclosures to the media and members of Parliament would be a departure from these purposes, and a marked change from the current policy.
- f. The implications of recent legal advice that the Commissioner for Public Sector Standards is not a proper authority for the disclosure of public interest information in relation to an officer of the Corruption and Crime Commission, should be accommodated in any amendments to the Act.

- g. Section 5(3)(h) should be amended to make it clear that the Act allows disclosures to be made to investigative authorities with responsibility for the type of behaviour which is the subject of the disclosures.
- h. Section 8(1) should be amended to address the difficulty of interpretation where the proper authority is a Public Interest Disclosure (PID) Officer.
- i. Section 8(2) should be amended to encompass investigations other than those pursuant to the Act.
- j. Section 9(2) should be amended to clarify that a proper authority is required to give a person an opportunity to make a submission, which submission may be either oral or written.
- k. Section 10 should be amended to require investigative bodies to provide progress reports to the PID Officer on the outcome of the investigation, or to transfer responsibility for such reports to those bodies.
- l. The word "informant" should be replaced by "discloser" in the headings to sections 10 and 11.
- m. Responsibility for the investigation and prosecution of offences under the Act should lie with the Public Sector Investigations Unit of the WA Police Service.
- n. Sections 16(1) and (3) should be amended to enable offences and complaints to be made, investigated and heard without potentially breaching the confidentiality provisions of section 16.
- o. Any amendments to section 16 should also ease the confidentiality requirements so that "identifying disclosures" may be made to a limited class of third parties, such as workplace grievance officers.
- p. The word "or" at the end of section 16(1) should be removed.
- q. Section 23(1)(a) should be amended so that small public authorities, such as boards and committees, are able to arrange for officers in supporting or associated departments or authorities to perform the role of PID Officer for them.
- r. A new paragraph should be inserted in section 23(1) to require a principal executive officer to promote awareness of the Act within his or her organisations.
- s. Section 23(1)(f) should be amended to allow the Commissioner for Public Sector Standards to request information from principal executive officers at any time about any disclosures and the conduct of subsequent investigations.
- t. The Guidelines should be amended to ensure that public authorities have management procedures in place to assist employees who make a disclosure under the Act. Consideration could also, perhaps, be given to amending the Act to specifically require the provision of welfare services to the discloser, and any subject of the disclosure.

## 1. Introduction

Section 27 of the *Public Interest Disclosure Act 2003* (the Act) provides as follows:

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.*
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.*

The Act was fully proclaimed on 1 July 2003. The Premier is the Minister to whom the administration of the Act is committed.

In November 2006 the Premier determined that the review provided for in section 27 be carried out.

On 13 December 2006 Mr John Lyon, a former Deputy State Solicitor, met with Mr Tim Sharp, the State Solicitor, and accepted instructions to assist with the review. Mr Lyon was requested to have regard to any preliminary findings or other information available from the *Whistling While They Work*<sup>1</sup> national research project being led by Griffith University and to consult with such persons as he considered relevant in the course of the review. The review's terms of reference can be found at **Appendix 1**.

The Department of the Premier and Cabinet provided administrative support to the review in the form of an executive officer. Professional staff of the State Solicitor's Office also provided assistance.

It is helpful to give some consideration to the dictionary meanings of the key words set out in section 27 of the Act. The Australian Concise Oxford Dictionary<sup>2</sup> indicates the following. Amongst the definitions of the word "review" are "a general survey or assessment of a subject or thing" and "a retrospect or survey of the past". Definitions of the word "operation" include "the action or process or method of working or operating" and "the scope or range of effectiveness of a thing's activity". Amongst the meanings of the word "purpose" is "an object to be attained; a thing intended". Definitions of the word "administration" include "the management of public affairs; government".

The purpose or object of the Act is evident from its long title and the second reading speeches. The long title states that it is "to facilitate the disclosure of public interest

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<sup>1</sup> <http://www.griffith.edu.au/centre/slr/whistleblowing/>

<sup>2</sup> Fourth edition, Oxford University Press (Canberra 2003)

information" and "to provide protection for those who make disclosures and for those the subject of disclosures". In his second reading speech the Attorney General, the Hon Jim McGinty MLA, observed as follows:

'Whistleblowers who uncover improper or illegal conduct or substantial mismanagement of public resources in state and local government authorities must be encouraged to make disclosures to proper authorities and must be protected when they do so. To achieve and maintain open and accountable government, there must be a free flow of information. Corrupt, illegal or improper conduct must be exposed and prevented. There will be no improvement so long as potential whistleblowers who are aware of such conduct and want to report it, remain silent. Reluctance of public officers to disclose improper conduct is often due to a fear of reprisal. The purpose of this Bill is to create an environment in which whistleblowers are protected and encouraged....this proposed whistleblowers legislation complements and adds to existing statutes.'<sup>3</sup>

It is also to be observed that the Attorney General made the following observations when the Bill was being considered in detail:

'When we were preparing this legislation I was keen not to create yet another public sector management body to deal with public interest disclosure matters. ... Partly for cost reasons and partly for duplication reasons we did not want to set up an office of whistleblowing or public interest disclosure. Other bodies can fulfil those functions. That is the approach we adopted.'<sup>4</sup>

It is of interest to note the Attorney General's use of the term "whistleblowers". This term has a long history, and is defined, in the context of policy and the social sciences, as 'the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.'<sup>5</sup> It is also to be noted that Wikipedia records as follows:

'The term whistleblower derives from the practice of English bobbies who would blow their whistle when they noticed the commission of a crime. The blowing of the whistle would alert both law enforcement officers and the general public of danger.'<sup>6</sup>

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<sup>3</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 8606 (Hon Jim McGinty MLA, Attorney General)

<sup>4</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 May 2003, 9954 (Hon Jim McGinty MLA, Attorney General)

<sup>5</sup> JP Near & MP Miceli, 'Organisational dissidence: the case of whistleblowing' in *Journal of Business Ethics* 4:1-16, p4 (1985)

<sup>6</sup> <http://en.wikipedia.org/wiki/Whistleblower>

## **2. Review Process**

### **2.1 Invitations for submissions**

On and after 15 December 2006 letters were written to the 25 persons listed in **Appendix 2**, informing them of the review and inviting them to make written submissions by specified dates.

On 20 December 2006 the Department of the Premier and Cabinet created a website<sup>7</sup> publicising the review and inviting submissions to the review by 7 February 2007.

The review was also publicised in *The West Australian* newspaper's Government Noticeboard section on 3, 5, 10 and 12 January 2007, and submissions to the review were invited by 7 February 2007.

Additionally, the review was advertised in routine circulars to government departments and authorities.

Further, the Office of the Public Sector Standards Commissioner (OPSSC) publicised the review in Issue 8 of its publication *The Voice*, which is a regular newsletter containing information about matters of relating to the Act.

### **2.2 Submissions**

Prior to the review, the Hon John Kobelke MLA, Minister for Police and Emergency Services, had written to the Premier, by minute dated 8 December 2006, recommending the repeal of the definition of "police officer" in the Act. His minute has been treated as a submission.

In his letter of 16 January 2007, the Hon Wayne Martin, Chief Justice of Western Australia, advised that there does not appear to be any record of any disclosure having been made under section 5(3)(e) of the Act to him or his predecessor, and that he is unable to shed any light upon the issues to be canvassed in the review.

A total of 16 submissions were received. A list of the submissions can be found at **Appendix 3**.

### **2.3 Consultation**

In the course of the review, a number of relevant agencies and officers with significant roles in the administration of the Act were consulted. A list of consultations can be found at **Appendix 4**.

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<sup>7</sup> <http://www.dpc.wa.gov.au/psmd/pubs/psrd/pjd/pidact2003.html>

All of the submissions, and the information obtained by way of the consultation process, have been taken into account in the preparation of this report.

### 3. Whistling While They Work Project

*Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* is a three year collaborative national research project into the management and protection of internal witnesses, including whistleblowers, in the Australian public sector. The project is being led by Griffith University. In November 2006 an Issues Paper was published.

By identifying and promoting current best practice in workplace responses to public interest whistleblowing, the project will use the experience and perceptions of internal witnesses and first and second level managers to identify more routine strategies for preventing, reducing and addressing reprisals and other whistleblowing-related conflicts.

More detailed information about this project can be found at **Appendix 5**.

### 4. Administration of the Act

The *Public Interest Disclosure Bill* completed its passage through Parliament on 7 May 2003. It was assented to on 22 May 2003. The Act commenced on 1 July 2003. The administration of the Act was assigned to the Premier; Minister for Public Sector Management. The OPSSC was appointed as the agency principally assisting the Minister in the administration of the Act. The Commissioner prepared the necessary Code of Conduct and Integrity, which was gazetted on 27 June 2003. The Commissioner also developed and published the Guidelines. The operation of the Act is the subject of annual reports to Parliament pursuant to section 22(1) of the Act. There are three Compliance Reports from 2003–04, 2004–05 and 2005–06.

In the course of debate in the Legislative Council on the *Public Interest Disclosure Bill*, the Hon Nick Griffiths MLC (the Minister representing the Attorney General in the Legislative Council) observed as follows:

'I anticipate that as the Commissioner for Public Sector Standards makes his reports over time, matters will give rise to the requirement to amend. That is something we as a Parliament will deal with in the light of experience. This is a building block exercise and I suggest to members that this Bill is a good foundation.'<sup>8</sup>

As the Minister predicted, the reports of the Commissioner for Public Sector Standards do point to the need for some amendments, and these are adverted to in Part 5 of this report. The matters which are the subject of the amendments suggested by the Commissioner have been largely the subject of legal opinions from the State Solicitor's Office.

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<sup>8</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 11 March 2003, 5064, (Hon Nick Griffiths MLC, Minister for Racing and Gaming)

The Commissioner's reports reveal that she and her office have been most diligent and very active in her roles of monitoring compliance and assisting public authorities and public officers. The Code was established and Guidelines prepared and public authorities were supplied with copies. A major problem remains the lack of awareness of the Act - despite the considerable efforts of the Commissioner and her staff. The measures taken by the Commissioner include the launching of a website, the issuing of a range of publications and a PID training package. Mr Lyon was very impressed with the standard of the training course for PID officers which he attended.

A prominent aspect of the Commissioner's reports, taken as a whole, is the reference to the low and diminishing number of disclosures.

## **5. Review of the Act**

Before turning to the detail of the Act, the general comment can be made that it emerges from the Issues Paper (referred to in Part 3 above) that the Western Australian Act ranks very highly in relation to the corresponding Acts of other jurisdictions. During discussion with Dr Brown, he revealed that where, in his paper, he refers to the need for a 'second generation of Australian whistleblower laws', he had in mind a model based on the Queensland and Western Australian Acts.

A convenient approach to a discussion of the content and effectiveness of the Act is to consider those provisions requiring consideration sequentially, section by section. The following observations may be made.

### **5.1 Section 3(1) – “Commissioner”**

The Commissioner for Public Sector Standards raised the matter of whether the Act needed to provide for the situation of an Acting Commissioner and for delegation by the Commissioner. It would appear that the definition of “Commissioner” in the Act does not require amendment to embrace an Acting Commissioner. Section 28 of the *Public Sector Management Act 1994* allows for an Acting Commissioner. Section 49 of the *Interpretation Act 1984* provides that where a written law confers a power upon an office holder, the power may be exercised by the person for the time being acting in the office.

Insofar as delegation is concerned, it may be noted that the power of delegation provided in section 23 of the *Public Sector Management Act 1994* is limited to powers and duties under that Act. However, a consideration of the *Public Interest Disclosure Act* indicates that the provisions calling for the personal attention of a Commissioner or Acting Commissioner (Part 4) would be limited. The Commissioner's monitoring role can be largely carried out by staff under her control under a legal principle known as the 'Carltona' doctrine, which is that a power conferred by statute upon an officer can ordinarily be exercised on his or her behalf by another officer, without the need for any formal delegation.<sup>9</sup> The Commissioner

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<sup>9</sup> *Carltona Ltd v Commissioner of Works* [1943] 2 All ER 560

herself, of course, needs to make the annual report to each House of Parliament, as required by section 22(1) of the *Public Interest Disclosure Act*. No amendments are needed.

## **5.2 Section 3(1) – New Definition – “misconduct”**

During the course of the discussion with senior officers of the Corruption and Crime Commission on 22 February 2007, they raised the matter of the inconsistency between section 5(3)(a), which concerns a disclosure "*where the information relates to an act or omission that constitutes an offence under a written law*", and the definition of "misconduct" in the *Corruption and Crime Commission Act 2003*.

This inconsistency, and its resolution, is discussed below in Item 5.12 in relation to section 5(3)(a). Should amendments to section 5(3)(a) be pursued to resolve this inconsistency, section 3(1) will also need to be amended to define "misconduct". It should be defined to mean "misconduct as defined in section 4 of the *Corruption and Crime Commission Act*."

## **5.3 Section 3(1) – “police officer”**

In his submission, the Minister for Police and Emergency Services seeks the removal of the definition of "police officer" from the Act, because it has the unintended effect of imposing the obligations of a proper authority upon special constables and aboriginal aides. Pursuant to the current definition in section 3(1) of the Act, special constables and aboriginal aides are deemed to be proper authorities and have an obligation to accept and act on disclosures. This is inappropriate. In all the circumstances it seems that the definition "police officer" should be deleted, and the definition of that term in the *Interpretation Act 1984* be relied upon.

## **5.4 Section 3(1) – “public authority” – paragraphs (e) and (f)**

Uncertainty has given rise to a number of requests for legal advice from the State Solicitor's Office relating to whether particular bodies fall or do not fall within the embrace of paragraphs (e) and (f) of the definition of "public authority". The wording of these provisions is far from exceptional and has not lead to uncertainty in other contexts. In respect to paragraph (e), the words "public purpose" have an established common law meaning. Some of the difficulty stems from the requirements of section 23(1)(a) of the Act that a body have a structure that includes a principal executive officer and positions that can be specified as PID officers.

The comment contained in the observations made later in this report in relation to section 23(1)(a) and the matter of outsourcing the role of a PID Officer may be noted. While it would perhaps be possible to amend the Act to allow for regulations to provide clarification in difficult cases, this approach is not favoured. The building up of a body of legal opinion concerning the meaning of the term "public authority" should assist over a period of time.

## **5.5 Section 3(1) – “public interest information” – “public function”**

The Commissioner for Public Sector Standards indicates in her submission<sup>10</sup> that the meaning of the term “public function” has not emerged as a significant issue, but still raises the matter of whether a definition of the term is required. It would seem unnecessary, and would probably be counter-productive, to define “public function”. To define this term would risk unnecessarily restricting its meaning, and contradicting the intention to cover as broad a range of public-related functions and activities as possible.

## **5.6 Section 3(1) – “public interest information” – “improper conduct”**

In her submission, the Hon Helen Morton MLC observes that the Commissioner for Public Sector Standards found that “improper conduct” is not defined, “making it difficult for PID officers to ascertain whether the disclosed information constitutes public interest information or not in the circumstances of the case”. Ms Morton observes that this should be rectified so that the Act can be administered properly and with confidence.

In her submission, the Acting Director General, Department of Education and Training, observes that the term “improper conduct” is quite broad and further guidance on this area and the kind of matters that can be examined may be useful. The Commissioner for Public Sector Standards makes the following observations in her submission:

‘The two most common questions that OPSSC is asked are “What is improper conduct?”, and whether particular behaviour constitutes improper conduct. “Improper conduct” is not defined in the PID Act. The OPSSC received legal advice that “improper conduct” has been defined in other contexts as:

“conduct has been seen to be improper where it involves a breach of the standards of conduct that would be expected of a person or body in the position of the public body by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case”.

This means that “improper conduct” is broader than the other categories of conduct in the definition of “public interest information” (except for a “matter of administration”), which are qualified by “substantial”, or a “substantial and specific risk”.

The PID Guidelines distinguish between personal grievances and public interest matters and suggest that the Act would not apply to a grievance. However, as ‘improper conduct’ could include such a wide range of behaviour, PID officers are finding it difficult to decide with any confidence whether particular information tends to show improper conduct. The decision is even

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<sup>10</sup> See page 46 of the 2005-06 Compliance Report.

more difficult when the information concerns an employment related matter, or has a mix of personal issues and public interest issues.

The consequence of not assessing information as "public interest information" is that the discloser does not receive the protections in the PID Act. If the PID officer does not assess the information correctly and the discloser suffers reprisal action, then he or she is not able to access the remedies in the PID Act.

To provide greater certainty, it would be useful if "improper conduct" was defined. However, as legislators are generally reluctant to define "improper conduct", then one option would be to exclude particular matters from the definition of public interest information, such as personal grievances, and employment related matters that can be resolved using another process.

Another matter that could be excluded is disputes about government policy.'

While there are legitimate arguments for both defining "improper conduct" and leaving it undefined, on balance it would be preferable not to attempt to define this term. It is a matter that can and has been addressed in the Guidelines.

With respect, it would seem that there is no basis, as the Act presently stands, for excluding personal grievances and employment-related matters, as such, from the realm of "improper conduct". Conceptually it seems inappropriate, since impropriety can extend to personal matters. The present Guidelines, where they speak of the "differences" between grievances and disclosures (Part 1, pp 5-6), can be viewed as attempting to identify situations which may fall short of involving disclosures. Insofar as the use of other process is concerned, it has to be borne in mind that the Act basically leaves intact all other remedies. The Act should be seen as providing an additional avenue of redress in cases where redress is appropriate, regardless of whether another process has commenced or has been completed (see comments in Item 5.20 regarding grounds for refusal to investigate).

## **5.7 Section 3(1) – New definition – “sphere of responsibility”**

The observations in Item 5.14 later in this report are in point.

## **5.8 Section 5(1) – Eligibility for protection**

This provision allows "(a)ny person" to make a disclosure under the Act irrespective of whether the person has any connection to, or association with, the public authority which is the subject of the disclosure. This was clearly the intention of Parliament. In his second reading speech, the Hon Jim McGinty MLA, the Attorney General, observed as follows:

'This Bill will enable any member of the public, as well as public officers, to make public interest disclosures. This is important because members of the public may be aware of improper conduct, illegal activities or

maladministration within government. When this occurs they should be able to report that to the relevant authorities.<sup>11</sup>

A number of submissions were made as to the appropriateness of this broad eligibility for protection. The question of eligibility was one considered by Dr AJ Brown in his November 2006 Issues Paper for the *Whistling While They Work* project.

In his submission, the Solicitor General refers to Dr Brown's November 2006 Issues Paper and goes on to observe that:

'...I am in general agreement with Dr Brown's view that whistleblower protection should be limited to public officials and others who might properly be classified as 'internal' to the public sector.

There are a number of reasons why this should be so. First, it is because of their position internal to the public sector entity that we recognise whistleblowers may have information worthy of disclosure and for which protection should be afforded. If standing were to be limited in the way suggested by Dr Brown, it would reduce the number of "disclosures" from persons outside the public sector, who may be mere busybodies whose only interest is in creating mischief for the sake of it. Secondly, only internal whistleblowers would seem to require special legal and management protection, and special encouragement to come forward. "Outside" members of the public do not usually need legislative protection to report wrongdoing and they are not normally subject to the same organisational loyalties and pressures or the risk of reprisals that might deter personnel employed within the public sector.'

In her submission, the Commissioner for Public Sector Standards observes as follows:

'Members of the public are not exposed to the same kind of internal reprisal risks as employees. Furthermore, there are existing complaints mechanisms which members of the public can use to raise their concerns and those processes can be examined by external integrity agencies, like the State Ombudsman and the OPSSC. Some members of the public have used the PID Act as a de facto appeal mechanism when all other avenues for raising their concern have failed because the PID Act requires a matter to be investigated, except in certain circumstances. While Parliament intended that members of the public who are not former employees can make disclosures and receive a level of protection, a question for the review is whether it is in the public interest for them to do so.

If the review recommends that members of the public are not to make disclosures, then it will also be necessary to consider who else may need the protections in the PID Act, such as volunteers.<sup>12</sup>

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<sup>11</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 8606 (Hon Jim McGinty MLA, Attorney General)

<sup>12</sup> See p 7 of the 2005-06 Compliance Report.

The Principal Solicitor of the Environmental Defender's Office, in his submission, applauds the fact that the Act refers to "any person" and disagrees with Dr Brown in this respect. It is noteworthy that persons other than public officers will continue to have the benefit of being able to complain to other public authorities, such as the Police and the Corruption and Crime Commission.

It is material that no submission was received which suggested that the broad eligibility for protection under the Act in any way prevented the Act from achieving its purposes.

It would seem to be premature to form a view on this question, which is ultimately one of policy, when it does not affect the attainment of the purposes of the Act and is still subject to review in the *Whistling While They Work* Project.

If, despite the preceding observations, it was thought appropriate to narrow the eligibility for protection, it would probably be necessary to retain the disclosure-making capacity of those classes of people who would not otherwise be captured by the definition of "public officer", such as volunteers who are performing public functions.

## 5.9 Section 5(1) – Meaning of "disclosure"

Section 5(1) allows for the making of a "disclosure". The Australian Concise Oxford Dictionary<sup>13</sup> provides two meanings of the verb "disclose", namely "1. Make known; reveal (*disclosed the truth*). 2. Remove the cover from; expose to view". The 1998 case of *King v SA Psychological Board*<sup>14</sup> is of interest in relation to the meaning of the word "disclosure" in the *Whistleblowers Protection Act 1993* of South Australia. The following extract is taken from page 4 of the reasons for decision of Bleby J:

'On the appellant's own case, the information which he provided to the respondent on 5 April 1995 was a repeat of a complaint he had previously made to the respondent in December 1989. To disclose in this context means "to open up to the knowledge of others; to reveal" (Shorter Oxford Dictionary). A disclosure is therefore the act of disclosing or opening something up to view or revealing it. A necessary implication is the information disclosed has not previously been revealed to the person to whom it is disclosed. This meaning of "disclosure" is entirely consistent with the stated objects of the Act contained in section 3 which provides:

"3. The object of this Act is to facilitate the disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally –

(a) by providing means by which such disclosures may be made; and

<sup>13</sup> Fourth edition, Oxford University Press (Canberra 2003)

<sup>14</sup> [1998] SASC 6621; (1998) EOC 92-929

(b) by providing appropriate protection for those who make such disclosures."

The assumption behind the Act is that the information disclosed has not previously been made known to the authority concerned, and the object is to ensure that persons who make known such information should have adequate protection when they make it known. As the relevant information had already been made known by the appellant to the respondent in 1989, there was nothing new to disclose, and on the appellant's case as particularised by him, there was no relevant disclosure.'

It should be noted that Bleby J's comments are made in the context of the South Australian legislation, and should be applied with care in Western Australia.

#### **5.10 Section 5(1) – Need for disclosure to be conscious and voluntary**

Legal advice from the State Solicitor's Office has been given that, upon its proper construction, the Act requires a disclosure of public interest information under that Act to be a conscious and voluntary disclosure in a manner that enables the disclosure to be identified as one to which the Act applies. In other words, a discloser must choose that the disclosure is to be governed by the Act. This is significant, for the reason that, as well as providing protections to a discloser, the Act also imposes responsibilities (for example, the confidentiality requirements), and it is important that the discloser is aware of these. It would seem appropriate to preserve this position and not make any changes.

#### **5.11 Section 5(1) – Anonymous disclosures**

The Act is silent on whether disclosures can be made anonymously. The Commissioner for Public Sector Standards has taken the position that disclosures can be made anonymously if it is clear that the person wishes to make a disclosure under the Act. The Commissioner suggests in her submission that it may be necessary to expressly provide for this in the Act. On balance, it would seem that, as the Act is silent on this matter, the view that it permits the making of anonymous disclosures is correct. It is preferable that anonymous disclosures are not encouraged, as it is difficult for a proper authority to apply the Act where the identity of the discloser is not known. No amendment appears to be required.

#### **5.12 Section 5(3)(a) – Disclosures to Corruption and Crime Commission**

As noted above, during the course of the discussion with officers of the Corruption and Crime Commission, they raised the matter of the inconsistency in approach between section 5(3)(a) which refers to *"information relat(ing) to an act or omission that constitutes an offence under a written law"* and the definition of "misconduct" in the *Corruption and Crime Commission Act 2003*.

The circumstances where a disclosure of public interest information is made to the Corruption and Crime Commission, as a proper authority, pursuant to section 5(3)(a) would seem to need to be consistent with the provisions of the *Corruption and Crime Commission Act* to resolve this concern. It would seem appropriate to amend section 5(3)(a) so that disclosures to the Corruption and Crime Commission under the *Public Interest Disclosure Act* are those relating to "misconduct" under the *Corruption and Crime Commission Act 2003*. The provision allowing for disclosures to be made to police officers where the information relates to offences under written law should remain.

### **5.13 Section 5(3)(g) – Reference to Schedule 1 to the *Parliamentary Commissioner Act 1971***

Legal opinion has very recently been provided by the State Solicitor's Office that the Commissioner for Public Sector Standards is not a proper authority for the disclosure of public interest information in relation to an officer of the Corruption and Crime Commission. This is because the Corruption and Crime Commission is referred to in Schedule 1 to the *Parliamentary Commissioner Act 1971* and section 13(3) of that Act relevantly provides that, for the purposes of that Act, reference to an authority shall be construed as including references to each of the members, officers and employees thereof. The implications of this advice should be accommodated in any amendments to the Act.

### **5.14 Section 5(3)(h) – Meaning of "sphere of responsibility"**

The Act does not define the meaning of "sphere of responsibility". Legal advice has been given by the State Solicitor's Office that the concept extends to any matter concerning the operations of a public authority; that is, its conduct and that of its staff, including human resources and financial management staff. The expression does not extend to matters which a public authority has power to investigate, for example, a matter relating to an alleged failure of another agency to comply with legislation. The State Solicitor's Office advice is that it would be desirable for an amendment to be made to clarify what constitutes an authority's "sphere of responsibility".

It is clear that the Act does require amendment since section 5(3)(h) does not appear to have achieved its intended effect. It is apparent from the second reading speech of the Hon Jim McGinty MLA, the Attorney General, that the Act was intended to allow disclosures to be made to investigative authorities with responsibility for the type of behaviour which is the subject of the disclosure. The Attorney General observed:

'For the purposes of the Bill, a public interest disclosure cannot be made to a department or agency that does not have responsibility for that matter. This

will allow public interest disclosures to be made to public authorities that have the power to investigate the disclosure and take remedial action.<sup>15</sup>

The Act should be changed by defining the term "sphere of responsibility" or otherwise amending it to make it clear that the Act allows disclosures to be made to investigative authorities with responsibility for the type of behaviour which is the subject of the disclosure.

#### **5.15 Section 5(3) – Possible extension of protection to disclosures to media and members of Parliament**

Ms Thornton, Mr Winzer, Mr Read, the Hon Helen Morton MLC and the Principal Solicitor of the Environmental Defender's Office have all urged that the Act be amended to permit disclosures under the Act to be made to the media and members of Parliament. The Solicitor General, in his submission, observes as follows:

'The Act provides no protection to whistleblowers that make disclosures to non-government actors, such as parliamentarians and journalists. I submit that the Government should be wary about the extent of any amendments it may wish to make here. Clearly, there are circumstances in which disclosure to non-government sources is warranted (for example, Nurse Toni Hoffman's disclosure of information about Dr Jayant Patel's practices at Bundaberg Hospital to her local parliamentarian). However, if the Act does not limit the circumstances in which protection will be afforded, then there is the risk that there will be an increase in public disclosures that may unnecessarily damage the internal workings of the public service and lead to breaches of confidentiality. I would support Dr Brown's suggested criteria designed to protect against these risks; namely:

- Disclosures should only be protected if the official first made the disclosure internally to the agency, and/or to an appropriate independent agency unless neither of these courses is reasonably open to the official;
- Disclosures should only be protected if the official has reasonable grounds for believing that no appropriate action has been or will be taken on their internal disclosures within a reasonable period, by either the agency or the independent agency; and
- For the further disclosure to be protected, the court, tribunal or officer determining the matter must be generally satisfied that it was in the public interest that the matter be further disclosed.'

The Solicitor General's submission that the Government should be wary is understandable. In fact, the Issues Paper does not appear to adopt a position on the merits of allowing disclosure to "non-government actors" (the media and members of Parliament), as such. This review is concerned only with the purposes of the Act as it

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<sup>15</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 May 2002, 10272-10273 (Hon Jim McGinty MLA, Attorney General)

stands, and to allow for disclosures to the media and members of Parliament would be a departure from these purposes, and a marked change from the current policy.

#### **5.16 Section 8(1) – No conferral of power to investigate**

Legal advice has been given by the State Solicitor's Office that the Act does not itself confer any power of investigation on a proper authority. Rather, it imposes an obligation in defined circumstances for a proper authority to undertake an investigation using whatever investigative powers it has derived from its own legislation. It is apparent that there is no need for any amendment since this position is consistent with the philosophy behind the Act to touch as little as possible on existing laws.

#### **5.17 Section 8(1) – Operation where proper authority is a PID Officer**

Each of the entities referred in paragraphs (a) to (i) of section 5(3) is a proper authority. In the case of paragraph (h) this is a PID officer. Section 8(1) does not make sense where the proper authority is a PID officer. The relevant disclosure in any particular case would not relate to the PID officer, a public officer of the PID officer, a public sector contractor of the PID officer or a matter or person that the PID officer has a function or power to investigate. Section 8(1) should be amended to deal with the situation where a PID Officer is the proper authority. By way of illustrating the problem only, it is pointed out that a possible way to amend the Act would be to introduce two new passages in section 8(1). One could be interposed between the words "if" and "the" in line 2. It would read as follows:

" , in the case of a disclosure other than one under section 5(3)(h)."

The second passage could be added after the final word, "investigate". It would read as follows:

"or, in the case of a disclosure under section 5(3)(h), the disclosure relates to  
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- (a) the public authority;
- (b) a public officer and public sector contractor of the authority;
- (c) a matter or a person that the authority has a function or power to investigate".

#### **5.18 Section 8(1) - Inconsistent application of jurisdiction**

In her submission, the Commissioner for Public Sector Standards expresses concern that section 8(1) is applied inconsistently as "some proper authorities are not taking any action if the matter does not fall within their jurisdiction"<sup>16</sup> despite the clear terms

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<sup>16</sup> See p17 of the Commissioner for Public Sector Standard's submission.

of the section which state that the proper authority must "investigate or **cause** to be investigated" (emphasis added).

When read together, sections 8(1) and 9(1)(b) of the Act are reasonably clear as to the role of a proper authority with regard to a disclosure over which it does not have jurisdiction. Amendments to clarify the terms of the Act would not assist in avoiding such a misapplication.

#### **5.19 Section 8(2)(a) and (b) – Trivial matters and vexatious or frivolous disclosures**

On pages 24-25 of the Issues Paper, Dr Brown deals with "(v)exatious complaints" and "(t)rivial disclosures". He concludes that, in relation to vexatious complaints, '(b)est practice would involve reliance on the term "vexatious" alone as a general barrier to other inappropriate complaints, with suitable definition of "vexatious" to make clear that, this means an "abuse of process". He suggests in relation to the word "trivial" that it be defined.

In his submission, the Solicitor General refers to Dr Brown's view concerning deletion of the term "frivolous". The Solicitor General points to the long history of the term "frivolous or vexatious". He observes that "its accepted meaning, at least in relation to legal proceedings, is that the party bringing the proceedings is not acting bona fide and merely wishes to annoy or embarrass his opponent or when it is not calculated to lead to any practical result". The Solicitor General concludes that he is not sure that the deletion of the word "frivolous" will make any material difference to the way in which a disclosure which is said to fall foul of section 8(2) should be viewed. In her submission<sup>17</sup>, the Commissioner for Public Sector Standards suggests that, if the terms "trivial", "vexatious" and "frivolous" are to remain, they should be defined.

It is to be observed that section 8(2)(b), as originally drafted, read "the disclosure is made vexatiously". The Legislative Council deleted the words "made vexatiously" and substituted "vexatious or frivolous". This amendment was accepted by the Legislative Assembly. One of the considerations of the Parliament was the use of the expression "vexatious or frivolous" in the *Anti-Corruption Commission Act 1988* (repealed) and the *Parliamentary Commissioner Act 1971*.<sup>18</sup>

In all the circumstances, and bearing in mind the submission of the Solicitor General, no change to either section 8(2)(a) or 8(2)(b) is suggested.

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<sup>17</sup> See p52 of the 2005-06 Compliance Report.

<sup>18</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 11 March 2003, 5070 and 5072; Legislative Assembly, 19 March 2003, 5573-5575

## **5.20 Section 8(2) – Additional grounds for refusal to investigate**

In her submission,<sup>19</sup> the Commissioner for Public Sector Standards refers indirectly to the provisions of section 8(2)(d) of the Act and goes on to observe that the power to refuse to investigate does not apply where a matter has been properly investigated under a different process and no new information has been raised in the disclosure. Legal advice from the State Solicitor's Office confirms this point.

The Commissioner suggests that the review needs to examine whether it is in the public interest for another investigation to be conducted.

During consultation with interested parties, it became clear that many of the disclosures received, particularly by the (former) Parliamentary Commissioner, the Auditor General and the Commissioner for Public Sector Standards, had already been the subject of previous complaints.

Section 8(2)(d) allows a proper authority to refuse, or discontinue, an investigation where the matter has been, or is being, adequately or properly investigated by another person pursuant to the Act.

A further paragraph should be added to section 8(2) to encompass investigations other than those conducted pursuant to the Act, where:

- the previous investigations are adequate and proper;
- no new information has been disclosed; and
- it is not in the public interest to conduct another investigation under the Act.

## **5.21 Section 9(2) – Ambiguity**

Legal advice has been given by the State Solicitor's Office that, on one reading, this provision requires a proper authority to give a person either an opportunity to make a written submission or an opportunity to make an oral submission, while on another reading it may require a proper authority to give a person an opportunity to make a submission, which may be either oral or written. It would seem appropriate to provide clarity by an amendment which adopts the second mentioned reading, which seems likely to have been what was intended by Parliament.

## **5.22 Section 10 – Transfer of responsibilities**

In her submission, the Commissioner for Public Sector Standards observes as follows:

'When a proper authority refers a matter to another investigative body under section 9(1)(b), he or she only needs to report to the discloser and to the Commissioner that the matter has been referred. As the investigative body has no obligation to report to the discloser or to the Commissioner about the

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<sup>19</sup> See pp52-53 of the 2005-06 Compliance Report.

outcome of the investigation, PID officers can be placed in a very difficult position, particularly where the investigative body takes a long time to complete the investigation, as they still need to manage the situation at the workplace. This is a gap in the accountability framework that could be overcome by amending the PID Act to require investigative bodies to provide progress reports to the PID officer on the outcome on the investigation, which is then reported to the Commissioner annually, or by providing for a central clearinghouse to coordinate the handling of disclosures and the monitoring of investigations.<sup>20</sup>

Leaving aside at this point the matter of a clearinghouse, it is apparent that the above observations have merit. It may be preferable, however, to transfer the responsibility for notification and the other responsibilities under section 10 to the investigative body to whom the disclosure has been referred. The Act should be amended to accomplish one of these results.

### **5.23 Sections 10 and 11 – Removal of word “informant” from heading**

In her submission,<sup>21</sup> the Commissioner for Public Sector Standards criticises the use of the word “informant”. It is used in the headings to sections 10 and 11. In accordance with section 32(2) of the *Interpretation Act 1984*, the headings are not actually part of an Act. It is agreed, however, that use of the expression “discloser” would be more desirable. The word “informant” should be replaced by the word “discloser” in these headings.

### **5.24 Section 12 – Corruption and Crime Commission and Parliamentary Commissioner for Administrative Investigations**

On one view, section 12(1) appears awkward. On its face, section 8(1) imposes an obligation to investigate where disclosures relate to a matter that the Corruption and Crime Commission or the Parliamentary Commissioner for Administrative Investigations has a function to investigate. Section 12(1) then negates this by use of the same wording.

In any event, the submissions of the Corruption and Crime Commission and the Parliamentary Commissioner require consideration.

In her submission, the Parliamentary Commissioner observes as follows:

‘Section 12(1) of the PID Act provides that the Ombudsman is not required to comply with sections 8(1), 9 and 10 (Obligation to carry out investigation; Action by proper authority; Informant to be notified of action taken) if the disclosure relates to a matter that it is a function of the Ombudsman to investigate. This section appears to give the Ombudsman the power, subject to the confidentiality provisions of the PID Act, to investigate and deal with a

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<sup>20</sup> See pp 54-55 of the 2005-06 Compliance Report.

<sup>21</sup> See p 62 of the 2005-06 Compliance Report.

disclosure in the same way as a matter would normally be investigated under the *Parliamentary Commissioner Act*.

However, if I am correct in my view, it seems that the process is different for the Ombudsman if the disclosure purely relates to the improper conduct of a public officer [subject to the exceptions set out in section 5(3)(g)]. In these circumstances, it appears that section 12(1) of the PID Act would not apply. It is not a function of the Ombudsman to investigate allegations about conduct per se. Conduct is looked at in the context of an investigation about maladministration and if the Ombudsman forms the opinion that there is evidence of any breach of duty or misconduct by an officer, then section 19(7) of the *Parliamentary Commissioner Act* requires that the matter be reported to the principal officers of the authority concerned and the relevant Minister.

In my view the process of investigation should not be different for the Ombudsman when a disclosure is made, whether it relates to a matter of administration or improper conduct. The PID Act should simply provide that sections 8(1), 9 and 10 do not apply to disclosures investigated by the Ombudsman.'

While the views of the Parliamentary Commissioner are noted, it does not appear that these issues materially affect the operation of the Act, and it should therefore not be amended in this respect.

In his submission, the (former) Corruption and Crime Commissioner submits that the Corruption and Crime Commission should have jurisdiction under the *Corruption and Crime Commission Act* only. He suggests that only one statute, namely the *Corruption and Crime Commission Act*, should deal with the reporting and investigation of conduct that could amount to misconduct, as defined in the *Corruption and Crime Commission Act*, as well as with disclosure issues and protection for complaints. He says that the *Public Interest Disclosure Act* should be amended to remove any overlap. It is apparent that, while the *Corruption and Crime Commission Act* contains some protection for witnesses, it does not provide a comprehensive protection framework. Moreover, the *Corruption and Crime Commission Act* does not provide a vehicle, or protection, for its own officers who wish to make disclosures concerning improper conduct. The Commission's submission should be further considered during the review of the *Corruption and Crime Commission Act*, shortly to be carried out under section 226 of that Act. In the meantime, section 5(3)(a) of the *Public Interest Disclosure Act* should be amended as suggested above.

## **5.25 Section 13(a) – Defamation action**

Dr Brown, in the Issues Paper, observes that the Act is silent on whether the general statement of protection extends to a defence against defamation action. Section 13(a) states that a person incurs no civil or criminal liability for making an appropriate disclosure of public interest information to a proper authority under section 5 of the Act. It is apparent that this provision could not be wider. A consideration of the

*Defamation Act 2005* and the *Criminal Code* indicates no basis for doubting that section 13(a) protects against defamation action.

## **5.26 Section 14(1) and (2) – Offences – Prosecution**

Sections 14(1) and (2), together with sections 16(1) and (3) and 24(1), create offences. In her submission,<sup>22</sup> the Commissioner for Public Sector Standards points out that the Act is silent on who should prosecute offences. In his submission, the PID Officer of the Department of Agriculture and Food observes that the Act should be amended to provide more clarity to explain how charges can be laid. The omission of a relevant specific provision in this respect is not unusual. The matter is now dealt with by section 20(3)(a) of the *Criminal Procedure Act 2004*. It provides, in essence, that "....a prosecution for an offence may be commenced by -

(a) one of the following acting in the course of his or her duties –

- (i) an authorised person in relation to the offence;
- (ii) a person referred to in section 80(2)(a) to (e),<sup>23</sup> or
- (iii) a police officer ".

In accordance with section 20(1) of that Act, an "authorised person" is basically a "public authority", an employee of a "public authority" or a person authorised by a "public authority". The term "public authority" is defined in section 3(1) of the *Criminal Procedure Act* as meaning –

- (a) a Minister of the State;
- (b) a department of the Public Service;
- (c) a local government or a regional local government; or
- (d) a body, whether incorporated or not, or the holder of an office, being a body or office that is established for a public purpose under a written law and that, under the authority of a written law, performs a statutory function on behalf of the State;"

For all intents and purposes any "public authority" under the *Public Interest Disclosure Act* and any "proper authority" under that Act will each be a "public authority" under the *Criminal Procedure Act*.

In all the circumstances, administrative arrangements should be made so that one body investigates and prosecutes offences under the *Public Interest Disclosure Act*. It would seem that the Public Sector Investigations Unit of the WA Police Service is the most appropriate entity to assume responsibility for these functions.

## **5.27 Section 16(1) – Offences – Prosecution**

Note the immediately preceding observations.

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<sup>22</sup> See p 60 of the 2005-06 Compliance Report.

<sup>23</sup> Sections 80(2)(a) to (e) of the *Criminal Procedure Act* are not relevant.

## 5.28 Section 16(1) and (3) – Confidentiality

Sections 16(1) and (3) of the Act provide that a person must not disclose any information that might identify anyone as someone who has made a public interest disclosure, or as someone about whom a public interest disclosure has been made. There are certain exceptions that apply to these provisions. The confidentiality provisions contained in section 16(1) and (3) have undoubtedly been a major obstacle to its effectiveness. This is evident from all of the three Compliance Reports submitted so far to Parliament under section 22 of the Act. Legal opinions have been provided by the State Solicitor's Office that sections 16(1) and (3) arguably do not apply to the investigation and prosecution of offences under the Act.

In her submission,<sup>24</sup> the Commissioner for Public Sector Standards deals at length with the difficulties relating to sections 16(1) and (3). She refers to the fact that she had sought an amendment to enable offences and complaints to be made, investigated and heard without potentially contravening section 16.

It is also noteworthy that the Acting Parliamentary Commissioner for Administrative Investigations in her submission indicates that she has found the provisions of section 16 to be unduly restrictive. It is readily apparent that the request for amendment should be met. The request of the Public Sector Standards Commissioner embraced a proposal that a proper authority be allowed to refer matters to an appropriate investigative body, in accordance with section 9(1)(b) of the *Public Interest Disclosure Act*, without contravening section 16. It is apparent that amendments should deal with this aspect too. They should, incidentally, also effect the removal of the word "or" at the end of section 16(1).

Any amendments to this section should also ease the confidentiality requirements so that "identifying disclosures" may be made to a limited class of third parties, such as workplace grievance officers. If this is done, however, serious consideration will also need to be given to how to prevent such parties from making further disclosures.

## 5.29 Section 19(1) – Commissioner's monitoring role

Section 19(1) requires the Commissioner for Public Sector Standards to monitor compliance with the Act and the Code established under section 20. One of the definitions of the word "monitor" in the Australian Concise Oxford Dictionary<sup>25</sup> is to "maintain regular surveillance over". The Encyclopaedic Australian Legal Dictionary<sup>26</sup> defines the term "monitor" as "an observation or recording device or procedure".

The provisions of section 19(1) of the Act, with regard to monitoring, are similar to the provisions contained in section 21(1)(a), (b), (c) and (e) of the *Public Sector Management Act 1994*, which set out the Commissioner's role in regard to public sector standards, codes of ethics, codes of conduct, and the principles set out in that Act.

<sup>24</sup> See pp56-60 of the 2005-06 Compliance Report.

<sup>25</sup> Fourth edition, Oxford University Press (Canberra 2003)

<sup>26</sup> Butterworths (Sydney 2002)

Each refers to "monitoring" which, from the dictionary meanings above, does not seem to incorporate an "investigation" function or empower the Monitor beyond observing and recording.

However, section 24 of the *Public Sector Management Act* also empowers the Commissioner to investigate the activities of a "public sector body" for the purposes of performing her functions under that Act. The powers of the Commissioner when investigating under section 24 of the *Public Sector Management Act* are the powers of a "special inquirer" under that Act.

Submissions were received from the Auditor General and the Commissioner that more "quality assurance" was required of investigations under the Act, and responses given pursuant to the Act (see Item 5.34). The purposes of the Act do not, necessarily, require that the investigation of a disclosure by a public authority be subject to "quality assurance" by another authority. However, it is arguable, that such a "quality assurance" procedure may be of assistance in attaining the purposes of the Act, if it increases confidence in the protections provided by the Act.

On balance, it would not appear appropriate or necessary to add an investigatory role as such for the Commissioner for Public Sector Standards. The amendment suggested below in Item 5.34 relation to section 23(1)(f) will provide appropriate and adequate powers.

### **5.30 Section 20(1) – Code**

The Commissioner for Public Sector Standards is required to establish a code setting out minimum standards of conduct and integrity to be complied with by proper authorities. The Commissioner did establish a code. It was gazetted on 27 June 2003. Its contents appear entirely suitable.

### **5.31 Section 21 – Guidelines – Relationship with sections 19(2) and 2(1)**

Section 21 requires the Commissioner for Public Sector Standards to prepare guidelines on internal procedures relating to the functions of a proper authority and ensure that all proper authorities have copies. As noted, section 20(1) also relates to proper authorities. Section 19(2), however, relates to public authorities rather than proper authorities. This seems incongruous. In any event, the Guidelines have been well crafted so as not to create any difficulty. The Guidelines appear to work well. It is understood that they will be reworked in the light of experience to date.

### **5.32 Section 23(1)(a) – Outsourcing role of PID Officer**

The legal opinions concerning the meaning of "public authority" have, as indicated above, been influenced by the need for a body to have a structure that includes a principal executive officer and positions that can be specified as PID Officers. A change to these requirements could lead to a different interpretation. Perhaps, more

significantly, it would be of assistance in the case of committees and other small bodies if they were able to arrange for officers in supporting or associated departments or authorities to perform the role of a PID Officer for them. An amendment to the Act allowing for this would undoubtedly be beneficial. Such an amendment should be made.

### **5.33 Section 23(1) – New paragraph (ea) – Obligation to promote awareness**

The observations made at pages 12 to 13 of the Commissioner for Public Sector Standards' 2005 – 06 Compliance Report have merit. It would be advantageous to insert a provision requiring a principal executive officer to promote awareness of the *Public Interest Disclosure Act* within his or her organisations.

### **5.34 Section 23(1)(f) – Adding enhanced powers of scrutiny**

In her submission, the Commissioner for Public Sector Standards observes as follows:

'The Commissioner does not have jurisdiction to examine administrative decisions made by proper authorities to investigate a disclosure or not, or evaluate the quality of investigations undertaken. While the Commissioner is not advocating for a centralised model where one body receives all disclosures, there is a need for some level of quality assurance by a central clearinghouse. This model would also allow for disclosures that have been made to multiple agencies to be better coordinated as the current arrangements are cumbersome.

The PID Act does not give the Commissioner any additional powers or functions to undertake compliance monitoring activities. If Parliament intended that the Commissioner's monitoring function be fulfilled in a different way, then the reviewer may wish to consider any additional functions and powers that the Commissioner may need.'

The following passage is taken from the submission of the Acting Auditor General:

#### **'Quality Assurance**

Considering the nature of my role, it is understandable that I believe the quality of an investigation to be of critical importance. It is therefore with some concern that I note the PID Act's lack of quality assurance requirements for the investigation of, and actions taken in response to, public interest disclosures.

Within my own Office, I have authorised three of my Assistant Auditor Generals to manage public interest disclosures. All three officers have the skills and experience necessary to effectively conduct and evaluate investigations, and maintain confidentiality. The day to day operations of my

Office also provide ample opportunity for these officers to develop and refine these skills. In addition to the requirements of the PID Act, my Office has a policy and framework for ensuring that our processes are reviewed as part of our internal quality assurance reviews. It is important that other proper authorities are able to provide a high level of assurance about the quality of their public interest disclosure activities. You may wish to consider the potential for broader quality assurance assistance for all public interest disclosure activities under the PID Act.'

It is also to be noted that in her submission, the Acting Parliamentary Commissioner observes as follows:

'However, no provision is made in the PID Act for the review of decisions not to investigate a disclosure. In my view, there is currently no way of determining whether proper authorities are making consistent and appropriate decisions about what amounts to "public interest information", or whether there is appropriate exercise of discretions. To maintain confidence in the system for those making disclosures and for the authorities dealing with them, decisions not to investigate should be referred to a central agency for review.'

In his submission, Mr Read urges the creation of an independent whistleblower agency. Having considered all these submissions, it would appear appropriate to provide some enhanced powers to the Commissioner for Public Sector Standards to assist her in her monitoring role – rather than to provide for a clearinghouse. Section 23(1)(f) should be amended accordingly, to provide for powers for the Commissioner to request information from principal executive officers at any time about any disclosures and the conduct of subsequent investigations.

### **5.35 Section 24(1) – Offences – Prosecution**

Note the above observations relating to section 14(1) and (2).

### **5.36 Other matters – Support for disclosers**

Ms Thornton, Mr Winzer, Mr Read, and the Hon Helen Morton MLC have all urged that the Act be amended to provide support for those who make disclosures. The Commissioner for Public Sector Standards also acknowledges that there are no provisions in the Act which deal with welfare support for the subject, or the maker, of a disclosure and that this may need to be addressed.

On pages 6-7 of the Issues Paper, Dr Brown observes that disclosers are 'always destined to suffer for their experience' and the experience is 'almost always stressful'.

The Act and the Guidelines are indeed silent on the "welfare support" available to those who are, in some way, associated with a public interest disclosure and its investigation.

Dr Brown observes that the responsibility for the "welfare" of all public employees, including those who make disclosures, lies first and foremost with the employer, usually the chief executive officer of the public sector body.<sup>27</sup> This view is consistent with the public sector structures in Western Australia, and with the scheme of the Act.

While most, if not all, public sector bodies have an employee assistance program which provides services such as counseling, these services are not expressly linked to the Act.

The Guidelines should be amended to ensure that public authorities have management procedures in place to assist employees who make a disclosure under the Act. Consideration could also, perhaps, be given to amending the Act to specifically require the provision of welfare services to the discloser, and any subject of the disclosure.

May 2007

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<sup>27</sup> Issues Paper, p52

### Terms of Reference

1. Conduct a review of the operation of the *Public Interest Disclosure Act 2003* (the Act), having regard to:
  - a. The attainment of the purposes of the Act;
  - b. The administration of the Act; and
  - c. Any preliminary findings or other information available from the *Whistling While They Work* national research project being led by Griffith University.
2. Consult with such persons as you consider relevant in the course of the review.
3. Report the findings of your review to me within four months of the date of appointment.

### **Invitations to submit**

The following people were invited by letter to make submissions to the review.

The Hon Nick Griffiths MLC  
President of the Legislative Council

The Hon Fred Riebeling MLA  
Speaker of the Legislative Assembly

The Hon Wayne Martin  
Chief Justice of Western Australia

Mr Robert Meadows QC  
Solicitor General

Mr Karl O'Callaghan APM  
Commissioner of Police

Mr Robert Cock QC  
Director of Public Prosecutions

The Hon Kevin Hammond  
Corruption and Crime Commissioner

Ms Deirdre O'Donnell  
Parliamentary Commissioner for Administrative Investigations

Ms Maxine Murray  
Commissioner for Public Sector Standards

Ms Darryl Wookey  
Acting Information Commissioner

Mr Robert McDonald  
Chief Executive Officer, State Supply Commission

Mr Colin Murphy  
Acting Auditor General

Mr Bob Mitchell  
Director General, Department of Housing and Works

Ms Cheryl Gwilliam  
Director General, Department of Local Government and Regional Development

Mr Bill Mitchell  
President, WA Local Government Association

## APPENDIX 2

Ms Maria Saraceni  
President, Law Society of Western Australia

Mr Ken Martin QC  
President, Western Australian Bar Association

Ms Belinda Lonsdale  
President, Western Australian Criminal Lawyers Association

Ms Sharyn O'Neill  
Acting Director General, Department of Education and Training

Professor Alan Robson  
Vice Chancellor, University of Western Australia

Professor Jeanette Hackett  
Vice Chancellor, Curtin University of Technology

Professor Kerry Cox  
Vice Chancellor, Edith Cowan University

Professor John Yovich  
Vice Chancellor, Murdoch University

The Hon Helen Morton MLC  
Member for East Metropolitan Region

Ms Toni Walkington  
Branch Secretary, Community and Public Sector Union / Civil Service Association

## List of submissions

No.	Submitter	Date
1	Hon John Kobelke MLA, Minister for Police and Emergency Services	8.12.06
2	Mr Bruce Meredith, General Counsel, Government Employees Superannuation Board	02.01.07
3	Mr Robert Meadows QC, Solicitor General	16.01.07
4	Hon Wayne Martin, Chief Justice of Western Australia	16.01.07
5	Ms Jean Thornton	25.01.07
6	Mr Michael Trefusis-Paynter, PID Officer, Department of Agriculture and Food	31.01.07
7	Mr Neil Winzer	06.02.07
8	Mr Chris Read	06.02.07
9	Hon Kevin Hammond, Commissioner, Corruption and Crime Commission	07.02.07
10	Hon Helen Morton MLC	13.02.07
11	Ms Sharyn O'Neill, Acting Director General, Department of Education and Training	19.02.07
12	Mr Cameron Poustie, Principal Solicitor, Environmental Defender's Office	21.02.07
13	Ms Katy Ashforth, Manager of Legislation, Department of Agriculture and Food	22.02.07
14	Mr Colin Murphy, Acting Auditor General	23.02.07
15	Ms Heather Brown, Acting Parliamentary Commissioner for Administrative Investigations	21.03.07
16	Ms Maxine Murray, Commissioner for Public Sector Standards	21.03.07

## **Consultation**

- 9 January 2007: meeting with Public Sector Standards Commissioner and staff of the Office of the Public Sector Standards Commissioner.
- 22 February 2007: meeting with senior officers of the Corruption and Crime Commission.
- 6 March 2007: Mr Lyon attended the first half day of the two day Public Interest Disclosure Officers' Training Course conducted by the Office of the Public Sector Standards Commissioner.
- 4 April 2007: meeting with Dr AJ Brown of Griffith University and Ms Sandy Randall of the Office of the Public Sector Standards Commissioner.
- 17 April 2007: meeting with staff of the Office of the Public Sector Standards Commissioner.
- 8 May 2007: meeting with members of the PID Co-ordination Committee.

### ***Whistling While They Work***

The project is being led by Griffith University, and is jointly funded by:

- The Australian Research Council;
- Six participating universities; and
- 14 industry partners, including some of Australia's most important integrity and public sector management agencies.

The industry partners are:

- Commonwealth Government:
  - Commonwealth Ombudsman
  - Australian Public Service Commission
- New South Wales Government:
  - Independent Commission Against Corruption
  - NSW Ombudsman
- Queensland Government:
  - Crime and Misconduct Commission
  - Ombudsman
  - Office of Public Service Merit and Equity
- Western Australian Government:
  - WA Corruption & Crime Commission
  - Public Sector Standards Commissioner
  - Ombudsman
- Victorian Government:
  - Victorian Ombudsman
- Northern Territory Government:
  - Commissioner for Public Employment
- ACT Government:
  - Chief Minister's Department
- Transparency International Australia

The Project Leader is Dr AJ Brown, Senior Lecturer, Griffith Law School and Visiting Fellow of the Australian National University College of Law. In November 2006 the Commonwealth Ombudsman, the NSW Ombudsman and the Queensland Ombudsman published an Issues Paper by Dr Brown. This paper analyses the current public interest disclosure legislation in South Australia, Queensland, New South Wales, the Australian Capital Territory, the Commonwealth, Victoria, Tasmania and the Northern Territory. This document is most comprehensive and runs to 70 pages. For the purposes of this review, it is taken as embodying the findings and information concerning the project presently available, insofar as the Terms of Reference of the review are concerned.

