Strengthening trust in Government

...the spotlight on improper conduct

Review of the Public Interest Disclosures Act 2002 Directions Paper

Department of Justice

Tasmania
Explore the possibilities

purpose of the paper

The purpose of this paper is to:

- *promote discussion in the community about public interest disclosures and an extension of the current legislation to a broader range of improper conduct; and*
- *seek the views and obtain written submissions from interested persons or organisations.*

The paper has been developed following a period of consultation and therefore proposes one model for consideration, however it is hoped that responses to the paper will comment on the appropriateness of the model, or suggest alternative models.

The Department will carefully consider all submissions in developing new legislation.

how to respond to the paper

The Paper may be accessed on the Department of Justice website at: http://www.justice.tas.gov.au

If you require copies of the paper in alternative formats, please contact the Project Manager on 6233 6315.

Please ensure that your submission reaches the address below by the close of business on the 26th June 2009.

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ISBN: 978-0-9806330-2-3: Strengthening trust in Government - the spotlight on improper conduct – hard copy

iSBN: 978-0-9806330-3-0: Strengthening trust in Government - the spotlight on improper conduct – e book (PDF)

FOREWORD

In August 2008 the Premier announced a Ten Point Plan to strengthen trust in democracy. A key element of the Ten Point Plan is a review of the protections that are available to people who need to 'blow the whistle' on wrongdoing in the public sector.

Every day thousands of Tasmanians access services and support from the Tasmanian Government. These services support the development of our community, economy and culture. Over $4 billion is spent each year to develop infrastructure, build communities or support individuals and their families. While we would hope that everything is done appropriately – we know that there is opportunity for people to do wrong.

Tasmanians need to be assured that if they know of wrongdoing or inappropriate behaviour in the public sector they can report this behaviour for investigation without risk, penalty or distress. It is central to our system of government that if allegations are made they will be appropriately and fairly investigated - unfortunately this has not always been the case.

In recent years I have had the opportunity to meet with and hear from people who have brought to the community's attention poor behaviour that occurred in the delivery of services to vulnerable Tasmanians. From these conversations I understand the need to ensure those who witness wrongdoing in the public sector can report that behaviour safely – protected from retribution and that there are proper clear processes for them to follow when making a complaint.

As a result of the reference from the Premier there is opportunity to strengthen protections for those who expose wrongdoing in the public sector.

This Directions Paper proposes a broader approach to public interest disclosure than currently exists – making it easier to report and protect witnesses. The Premier has asked the Joint Select Committee on Ethical Conduct to report on the need for an Ethics Commission or similar oversight body to be established in Tasmania. This paper envisages that any such body will oversight the operation of future PIDA. We look forward to receiving the recommendations of this Committee.

In proposing a new approach to public interest disclosures in Tasmania the Bartlett Government wants to strengthen the protections available to whistleblowers. This directions paper is an important step in this process and I encourage you to provide feedback.

Lara Giddings MP
Attorney General

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1 THOSE INVOLVED

1.1 Acknowledgement

In excess of 40 individuals have given time to this project through working groups, via written submissions, and by making themselves available for individual consultation.

The review team would like to thank this range of contributors who have pushed us forward in the preparation of the concepts in this paper. All contributors have been extremely generous in the giving of their time and energy and this paper is an amalgam of their contributions and reflects a high degree of consensus on a need to expand the use of public interest disclosure in Tasmania.

1.2 Project Leadership

The project forms part of the Tasmanian Government's commitment to strengthening trust in democracy and political processes in Tasmania. The Government has indicated its firm commitment to preventing improper conduct in the public sector. This project was initiated and given direction by the Attorney-General and Deputy Premier, Lara Giddings MP.

The strategic decisions have been sponsored by the Secretary of the Department of Justice, Lisa Hutton.

The project manager for this review is Dale Webster, who is based in the Office of the Secretary of the Department of Justice.

1.3 Review Team

In respect of this paper, the project manager is greatly assisted by the substantive work undertaken by Legislative Policy Officer, Sonia Weidenbach. The project is also aided by access to a Graduate Research Officer, Nicola Norton, from the Office of Legislative Development and Review in the Department of Justice. Project quality assurance is provided by Katherine Drake who is the Manager, Policy in the Monetary Penalties Enforcement Service.

1.4 Working Group

The review team was assisted in developing the ideas in this paper by the input of a working group and by testing its ideas with that group. The working group had representation from the core State Service Agencies and from the Office of the Ombudsman.

This paper should not be read as reflecting the views or opinions of any one contributor, including members of the working group, and is the work of the review team on behalf of the Department of Justice.

2 EXECUTIVE SUMMARY

This Review has been hampered by the extremely rare use of the current *Public Interest Disclosures Act 2002* in Tasmania and cannot, therefore, draw upon a body of knowledge about how the Act is applied in this State. Our legislation is broadly similar to that in Victoria and some lessons can be drawn from Victoria and also by comparison to other Australian jurisdictions.

> "Evidence from public employees who have reported wrongdoing, public employees in general and agency statistics [around Australia] indicates that whistleblowing is widely recognised across the public sector as being important to achieving and maintaining public integrity." [1]

After considering the operation of public interest disclosure legislation in other jurisdictions, the review team concluded that the framework provided by the current legislation was sound, but that there is a case for providing for a greater level of disclosures, for improving the way those disclosures are investigated and for improving the supports for witnesses within the framework. The main thrust of the rework should include:

- establishing principles to be applied in the operations of the *Public Interest Disclosures Act 2002* within the Act;
- clarifying the language to make it clear that the person making a protected disclosure is a witness, not a complainant;
- a broadening of the types of disclosures which would fall within the scope of the Act;
- refining the definitions of a public body and a public officer, including an extension to Parliamentary and Ministerial Staff;
- extending the protections beyond the initial witness/es to all witnesses;
- redefining the scope of the protections, including reviewing the remedies available;
- expansion of the functions of the oversight agency, including an educative role and providing for procedures and other information developed by public bodies to be approved by the oversight agency; and
- providing for the appointment of accredited responsible officers to receive public interest disclosures.

1 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations / editor, A J Brown, Canberra: ANU EPress, 2008, pxxiii

2.1 Summary of Recommendations

Number	Recommendation
INTRODUCTION	
1	The *Public Interest Disclosures Act 2002* be amended to: • define the principles to be applied in the operation of the Act; • broaden the scope of the Act to encompass a greater range of public interest disclosures; • provide for approval of internal disclosure procedures;
PRINCIPLES IN THE ACT	
2	The *Public Interest Disclosures Act 2002* be amended to include a section which outlines the principles to be observed when applying the legislation in the following terms - A function or power conferred, or duty imposed, by this Act is to be performed so as to: • encourage and facilitate internal disclosures of improper conduct by public officers and public bodies; • protect persons making those disclosures and others from reprisals; • provide for improper conduct disclosed to be properly investigated and dealt with; and • provide all parties with natural justice.
ENCOURAGE AND FACILITATE DISCLOSURES OF IMPROPER CONDUCT	
3	The *Public Interest Disclosures Act 2002* be amended to: • include ministerial staff as public officers; • remove the exclusion for parliamentary staff from the definition of public officer; • limit the exclusion for tribunals and the Tasmanian Industrial Commission from the definition of public body to their deliberative function; and • remove the exclusion of non judicial officers from the definition of public officer.
4	The *Public Interest Disclosures Act 2002* be amended to specifically include council owned companies in the definition of a public body.
5	The *Public Interest Disclosures Act 2002* be amended to: • include employees and subcontractors in the definition of contractor; and • include a provision to enable those receiving a public interest disclosure in accordance with section 7 to deem certain other persons to be 'contractors' for the purposes of making a disclosure.

6	The *Public Interest Disclosures Act 2002* be amended to:
	• remove the current threshold for public interest disclosures;
	• provide for a new threshold of public interest disclosures, namely, improper conduct which is either serious or significant; and
	• define improper conduct as including:
	  • illegal or unlawful activity;
	  • corrupt conduct;
	  • maladministration;
	  • breach of public trust;
	  • professional misconduct;
	  • wastage of public resources;
	  • dangers to public health and/or safety;
	  • dangers to the environment;
	  • official misconduct (including breaches of applicable codes of conduct); and
	  • detrimental action against a person who makes a public interest disclosure under the legislation.

7	The *Public Interest Disclosures Act 2002* be amended to provide for the key oversight agency to also have the power to: • publish standards and approve procedures to be adopted by public bodies, such approval to be reviewed at least every three years; • publish guidelines on the application of natural justice to all parties involved in an investigation of a public interest disclosure; • provide advice on the operation of the Act; and • proactively monitor the progress of the PID investigators undertaken by public bodies.
INVESTIGATION AND HANDLING OF DISCLOSURES	
8	That section 7 of the *Public Interest Disclosures Act 2002* be amended to provide that disclosures of improper conduct relating to: • persons employed under the provisions of the *Parliamentary Privilege Act 1898* be made to the Speaker of the House or the President of the Council or the oversight agency; • the Auditor-General be made to the oversight agency; • the State Service Commissioner be made to the oversight agency; • the Director of Public Prosecutions be made to the oversight agency; • the Ombudsman be made to the Speaker of the House of Assembly or the President of the Legislative Council or the oversight agency if other than the Ombudsman.
9	The *Public Interest Disclosures Act 2002* be amended to provide for a public interest disclosure officer(s) to be appointed in each public body by the principal officer of that public body for a renewable three year period and that prior to appointment/reappointment the principal officer of the public body is to ensure that the officer s/he is appointing has the skills and knowledge to fulfil the role of PID officer.
10	The *Public Interest Disclosures Act 2002* be amended to provide that the principal officer is responsible for: preparing procedures for approval by the oversight agency; • receiving public interest disclosures and ensuring they are dealt with in accordance with the legislation and the approved procedures; • ensuring the protection of witnesses; • ensuring the application of the principles of natural justice in the agency's processes; • ensuring the promotion of the importance of public interest disclosures, including ensuring easy access to information about the legislation and the public body's procedures; • providing access for witnesses, and others involved in the process of investigation, to confidential employee assistance programs; and • providing access for witnesses, and others involved in the process of investigation, to appropriate trained internal support staff. • And also amended to provide for the principal officer to delegate any of these functions to a public interest disclosure officer.
11	Section 8 of the *Public Interest Disclosures Act 2002* be amended to allow for anonymous disclosure where the person to whom a disclosure is made is satisfied that the disclosure is being made by a public officer or contractor.
12	The *Public Interest Disclosures Act 2002* be amended to provide for a single test to be applied to all disclosures in the first instance, which combines the current tests for a protected disclosure and a public interest disclosure, such that a public interest disclosure is either – • one that the person making the disclosure believes on reasonable grounds that improper conduct or detrimental action has occurred, is occurring or will occur; or • one which does show that the improper conduct or detrimental action has occurred, is occurring or will occur.
13	The *Public Interest Disclosures Act 2002* be amended to provide for review on the papers or otherwise by the oversight agency of all determinations by a public body where the public body determines that a disclosure is not a public interest disclosure or should not be investigated.

14	The *Public Interest Disclosures Act 2002* be amended to provide for additional grounds for the oversight agency or a public body to decline to investigate a public interest disclosure, namely where: • the disclosure relates solely to the personal interests of the person making the disclosure; and • the disclosure is based on false or misleading information.
PROTECTION OF PERSONS MAKING DISCLOSURES	
15	The *Public Interest Disclosures Act 2002* be amended to provide that any disclosure made to a person to whom a disclosure may be made and purporting to be a public interest disclosure is a protected disclosure.
16	The *Public Interest Disclosures Act 2002* be amended to provide that further information provided to a person to whom a disclosure may be made, or through an investigatory process in accordance with the Act, and relating to a matter already determined to be a public interest disclosure may be deemed to be a further protected disclosure.
17	The *Public Interest Disclosures Act 2002* be amended to: • delete section 24; • include in section 40 and 64 an additional ground for refusing to investigate a public interest disclosure, namely "that the matter which is the subject of the disclosure has already been determined and the additional disclosure does not provide significant or substantial new information".
18	The *Public Interest Disclosures Act 2002* be amended to provide that a person found guilty of an offence under Section 87 should no longer be a person to whom Part 3 applies.
19	The *Public Interest Disclosures Act 2002* be amended to provide for public body procedures to include procedures for the protection of the welfare of a person making a protected disclosure.

2.2 Summary of suggested amendments

The table below does not taken into account amendments which would be necessary should the ultimate decision be to move the role of oversight agency from the Ombudsman to a future Ethics Commission.

PUBLIC INTEREST DISCLOSURES ACT 2002		
Section:	Suggested amendment:	Referred to in:
New	principles to apply to decisions in Act	recommendation 2
3. Interpretation	define council owned company include council owned company in definition of public body	recommendation 4
3. Interpretation	redefine contractor	recommendation 5
3. Interpretation	redefine improper conduct	recommendation 6
3. Interpretation	define principal officer	recommendation 9
3. Interpretation	define ministerial staff include ministerial staff in definition of public officer	recommendation 3
4. Exclusion of certain persons and bodies	remove exclusions other than courts and judicial officers	recommendation 3
6. Disclosures about improper conduct or detrimental action	delete reasonable ground test	recommendation 12 and 15
7. Persons to whom disclosures may be made	expand to take account of changes to section 4	recommendation 8
New	further disclosure by a witness may be a disclosure under Part 2	recommendation 16

New	disclosure by a person who is not a public officer or contractor may be deemed to be a disclosure by a contractor in certain circumstances	recommendation 5
8. Anonymous disclosure	include test that the person is a public officer or contractor	recommendation 11
15. Certain further information also protected	delete reference to section 24	recommendation 17
17. Confidentiality provisions do not apply	expand to take account of changes to section 4	recommendation 3
23. Offence to reveal confidential information	expand to take account of changes to section 4	recommendation 3
24. Certain further disclosures and further information related to disclosures are not protected disclosures	delete section	recommendation 17
35. Procedure where public body determines disclosure not to be public interest disclosure	amend to provide for automatic review	recommendation 13
36. Request for referral to Ombudsman	delete – not required due to changes to Section 35	recommendation 13
38. Functions of Ombudsman under this Act	expand to include additional functions	recommendation 7
40. Matters that do not have to be investigated	expand to include additional reasons	recommendation 14 and 17
56. Report on investigation	expand to take into account changes to section 4	recommendation 3
New	59A? - specifying that certain persons are a public body for purposes of this part	recommendation 8
60. Public body to establish procedures that comply with guidelines	procedures to be approved by the oversight agency	recommendation 7
New	principal officer to appoint PID officer(s)	recommendation 9
New	role of principal officer	recommendation 10
New	delegation of functions by principal officer	recommendation 10
62. Review of procedures	procedures reviewed by the oversight agency every 3 years	recommendation 7
62. Review of procedures	procedures to include procedures for protection of welfare of witnesses	recommendation 19
64. Matters that do not have to be investigated	expand to include additional reasons	recommendation 14 and 17
New	87A? – remove protection if guilty of offence	recommendation 18

3 INTRODUCTION

The term whistleblower most likely derives from the United Kingdom and the practice which existed prior to the proliferation of modern communication devices where English police constables, specifically those in towns or cities, would blow their whistles when they observed the presence of a suspect or the commission of a crime. The whistle would alert fellow officers of the need for assistance and the public of potential danger.

> "Unless organisations foster a culture that declares and demonstrates that it is safe and accepted to raise a genuine concern about wrongdoing, employees will assume that they face victimisation, losing their job or damaging their career. The consequence is that most employees will stay silent where there is a threat – even a grave one - to the interests of others, be they consumers, passengers, patients, communities, taxpayers or shareholders. This silence can mean that those in charge of organisations place their trust on the systems they oversee rather than on the people who operate them. This means they deny themselves what can be the fail-safe opportunity to deal with a serious problem before it causes real damage."[2]

Whistleblowers Australia took up this theme in their submission and suggested that the legislation should apply to any person making a disclosure about the public sector, and so allow the protection provisions to apply to appropriate disclosures made by a much broader group.[3] However, the review team, after examination of the evidence available, concluded that the internal connection to the public body/officer is generally what gives rise to the need for protection.

The internal witnesses are the people that have the insight into the body's operation and access to the information that should be disclosed, and it is rare that a member of the public outside the organisation would have that same insight. Further it is because the internal witness has a connection to the organisation that they require special protection and support to make a disclosure, as the connection can provide the organisation with the power and means to effect a reprisal.

Public interest disclosure laws in Australia, have in the main concentrated on the encouragement of witnesses who are internal to the public sector and this is the direction of both the current Act in Tasmania and the suggestions in this paper.

This conclusion is arrived at in the context of the other schemes available for disclosure for people who are not the so-called 'internal witnesses'. These schemes include complaint procedures of public bodies, Freedom of Information, a number of Ombudsman schemes, the Health Complaints Commissioner, the Anti Discrimination Commissioner, the Auditor-General, Parliamentary accountability and the like.

3.1 Background to the present Review

Strengthening trust in democracy is a key agenda for Premier David Bartlett and the Government. This Agenda was announced by the Premier in August 2008. A comprehensive plan to strengthen trust in democracy and political processes in Tasmania has

2 "Whistleblowing Around the World; Law, Culture and Practice", Public Concern at Work and Open Democracy Advice Centre.

3 Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Whistleblowing in the Australian Public Service, Whistleblowers Australia, August 2008, p9

been submitted to the Joint Select Committee of Parliament on ethical conduct.

Included in the Government's Ten Point Plan are:

1. A review of the Freedom of Information Act.
2. **A review of the legislation which currently protects whistleblowers.**
3. Approved Protocols and Rules for Judicial appointment.
4. Improvements in Governance and Accountability in Government Business Enterprise's and Financial Management Frameworks.
5. A register of Lobbyists – those seeking to register will be required to adhere to a lobbyist's code of conduct.
6. Codes of conduct for members and ministers – a new code of conduct for all members of the Parliament and a strengthened code of conduct for ministers.
7. A code of conduct for ministerial and parliamentary staff.
8. Training, advice and induction for all members, ministers and staff to ensure a very high ethical standard is maintained.
9. The offices of the Auditor-General, the Ombudsman and Director of Public Prosecution will be subject to a review of resources. This is to ensure they have adequate resources to carry out duties with diligence and the appropriate level of accountability.
10. A recommendation to clarify the Police Act and create a separate investigation power – there needs to be clarification on the relationship between the Commissioner of Police, the Premier and Minister of Police, as well as the ability of ministers to direct, or not direct, the Commissioner in relation to investigations.

The Government plans to implement all of the initiatives and to respond to the various reviews by the end of 2009.

3.2 Joint Select Committee of Tasmanian Parliament

This paper should be read in conjunction with the Tasmanian Government submission to the inquiry of the Joint Select Committee of the Tasmanian Parliament into ethical conduct, standards and integrity of elected Parliamentary representatives and servants of the State.

The Submission is available on the Parliament of Tasmania website:

http://www.parliament.tas.gov.au/ctee/ethical.htm

The review team, having had the benefit of reading the Government's submission to the Joint Select Committee, concluded that it is important to acknowledge that it is likely that an Ethics Commission may be established, as envisaged in the Government submission, and if it is established it could take on the role of the body which accepts external public interest disclosures and oversees the processes for disclosure within public bodies. We have not made a specific recommendation on this as we concluded that it is prudent to await the outcome of the Joint Select Committee's deliberation which is currently due to report on 9 July 2009.

However it is important to note that should this role be moved from the Ombudsman to an Ethics Committee it will result in a series of minor changes to the legislation which are not canvassed in this report.

3.3 Why do we have Whistleblower laws?

The Committee on Standards in Public Life was established in the United Kingdom in 1994. The Committee's work initially was to define a framework for those serving the public, and the framework is essentially defined in seven principles: selflessness; integrity; objectivity; accountability; openness; honesty; and leadership.

In order to support these principles the Committee then recommended the development of processes and law which facilitated disclosure of "wrongdoing" within the structure of the organisation, that is internally, but which also allowed for a level of external disclosure where these internal systems break down. These principles should drive the work of public officials, but there needs to be recognition of the human condition which can see individuals, or indeed a collective of individuals, compromising

these principles for their own advantage, advancement or, indeed, in pursuit of a skewed view of the public interest or public good.

3.4 What is the purpose of PID legislation?

A firm indication of the purpose can be drawn from the long title of the *Public Interest Disclosures Act 2002*:

> "An Act to encourage and facilitate disclosures of improper conduct by public officers and public bodies, to protect persons making those disclosures and others from reprisals, to provide for the matters disclosed to be properly investigated and dealt with and for other purposes."

The work of the UK Committee on Standards in Public Life sums up the purpose thus:

"We observed in our First Report that it was far better for systems to be put in place which encouraged staff to raise worries within the organisation, yet allowed recourse to the parent department where necessary. An effective internal system for the raising of concerns should include:

- A clear statement that wrongdoing is taken seriously in the organisation and an indication of the sorts of matters regarded as wrongdoing;
- Respect for the confidentiality of staff raising concerns if they wish, and an opportunity to raise concerns outside the line management structure;
- Access to independent advice;
- Penalties for making false and malicious allegations;
- An indication of the proper way in which concerns may be raised outside the organisation if necessary."[4]

3.5 Use of Public Interest Disclosures legislation in Tasmania

The *Public Interest Disclosures Act 2002* has been rarely used as a means of reporting improper conduct and the review team cannot, therefore, draw upon a body of knowledge about how the Act is applied in this State. This rare use may be the product of a lack of "improper conduct" in our public bodies, a lack of understanding of the Act, a lack of awareness of the Act or indeed a product of the high benchmark set for what constitutes "improper conduct". Most likely it is a product of a combination of these and other factors.

4 UK Committee on Standards in Public Life, Second Report, May 1996, page 22 and Third Report, July 1997, p49

Table 1 - Receipt and Handling of Disclosures by the Ombudsman

REPORTING	2003/2004	2004/2005	2005/2006	2006/2007	2007/2008
1	4 (improper conduct)	6 (improper conduct) 2 (detrimental action)	1 (improper conduct)	Nil	3
2	1 (protected disclosure status but not PID)	6 (not protected disclosure status) 2 (PID)	Nil	Nil	1
2(a)	3	3	3	Nil	Nil
3	N/A	1 (detrimental action carried over)	Nil	Nil	1 (not yet complete)
4(a)	N/A	1 (improper conduct) referred to Auditor General	1 (improper conduct) referred to Commissioner of Police	Nil	2 referred to Auditor-General
4(b)	N/A	Nil	Nil	Nil	Nil
5(a)	N/A	1	3	Nil	Nil
5(b)	Nil	Nil	Nil	Nil	Nil
6	Nil	Nil	Nil	Nil	Nil
7	Nil	Nil	Nil	Nil	Nil
8	N/A	Nil	Nil	Nil	Nil
9	N/A	Nil	Nil	Nil	Nil
10	No formal reviews	No formal reviews	No formal reviews	No formal reviews	No formal reviews
11	N/A	N/A	N/A	N/A	N/A
12	Nil	1	1	Nil	Nil

Note Requirements are:

1. *The number and types of disclosures made to the Ombudsman.*
2. *The number and types of determinations made by the Ombudsman as to whether disclosures are public interest disclosures.*
   a) The number of disclosures carried over for determination.
3. *The number and types of disclosed matters the Ombudsman has investigated.*
4. *The number and types of disclosed matters the Ombudsman has referred to:*
   a) the Commissioner of Police, the Auditor-General, a prescribed public body or the holder of a prescribed office to investigate;
   b) a public body to investigate.
5. *The number and types of disclosed matters that:*
   a) the Ombudsman has declined to investigate.
   b) were referred by a public body to the Ombudsman to investigate.
6. *The number and types of disclosures referred to the Ombudsman by the President of the Legislative Council or the Speaker of the House of Assembly.*
7. *The number and types of investigations of disclosed matters taken over by the Ombudsman.*
8. *The number and types of investigations of disclosed matters for which the Ombudsman has made a recommendation.*
9. *The recommendations made by the Ombudsman in relation to each type of disclosed matter.*
10. *The recommendations made by the Ombudsman re the procedures established by a public body.*
11. *The action taken on each recommendation of the Ombudsman.*
12. *Notifications by a public body of public interest disclosures determinations.*

The Ombudsman reported in his Annual Report for 2007/2008 that of the three disclosures received for that reporting year, an investigation was commenced into only one disclosure – the other two disclosures were referred to the Auditor-General. "This investigation, into human resources practices in a local council in Tasmania, … is the first investigation of a public interest disclosure that the Ombudsman has conducted since the commencement of the Act."[5]

3.6 This Review

The process followed by the review team to develop this directions paper included:

- literature searches;
- detailed examination of the work undertaken by the 'Whistling While They Work' project and the recently released House of Representatives Report;
- formation of Working Groups, tasked with detailed examination of issues identified at forums;
- individual discussion with stakeholders about issues; and
- examination of submissions received (call for submissions opened in November 2008 for 12 weeks).

In the absence of specific research in Tasmania and the limited use of the present legislation resulting in a difficulty in drawing conclusions on the actual operation of the Tasmanian Act, the review team have relied on research conducted as part of an Australian Research Council funded Linkage Project:

> 'Whistling While They Work: Enhancing the theory and practice of internal witness management in public sector organisations', led by Griffith University. The project involves four other Australian universities and 14 partner organisations, including the public integrity and management agencies. A steering committee representing the partner organisations oversaw the project. The project team comprised the lead researchers from each participating university plus three partner investigators from the NSW, Queensland and Western Australian governments.
>
> … the four main objectives, or 'terms of reference', for the research were:
>
> 1. to describe and assess the effects of whistleblower legislative reforms on the Australian public sector in the past decade, including effects on workplace education, willingness to report and reprisal deterrence
>
> 2. to study comparatively what is working well and what is not in public sector internal witness management, to inform best-practice models for the development of formal IDPs and workplace-based strategies for whistleblower management
>
> 3. to identify opportunities for better integration of internal witness responsibilities into values-based governance at organisational levels, including improved coordination between the roles of internal and external agencies, and strategies for embedding internal witness responsibilities in good management
>
> 4. to inform implementation strategies for best-practice procedures in case study agencies, including cost-efficient options for institutionalising and servicing such procedures in a range of organisational, cultural and geographical settings, as well as legislative and regulatory reform where needed."[6]

The recommendations in this paper, taken as a whole, produce a framework for managing disclosures

5 Ombudsman Annual Report 2008, p25

6 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations / editor, A J Brown, 2008, pp4-5

which is largely consistent with the dimensions of a new system for managing internal witnesses highlighted in an appendix to the 'Whistle While They Work' project. This appendix is reproduced as appendix two of this paper.

3.7 The Case for Change

It is hard to argue that the current Public Interest Disclosures Act in Tasmania has not worked or does not work. The statistics do not show that a large number of persons are attempting to use the Act or indeed that there have been constant reports of improper conduct. The Tasmanian Government wants to strengthen trust in democracy and in doing so has looked at the Act and concluded that the Tasmanian Community expect that improper conduct must be reported, investigated and stopped.

What became increasingly obvious during the process of this review is that what the community would see as improper conduct and the type of improper conduct which met the threshold in the current Act were some distance apart and it is this which, in part, drives that need for change.

Changing the current Act to reflect a broader range of improper conduct may or may not result in a greater number of reports. However, what it does do is send a clear message that this is conduct which must not exist in the public sector and public bodies will investigate and stop it where it exists.

3.8 A Way Forward

The considerable work done in the 'Whistling While They Work' project provides a prism through which to judge the effectiveness of the Tasmanian Act. The *Public Interest Disclosures Act 2002* (PID Act) is progressive in some areas, such as the investigatory powers given to the Ombudsman, but in the main is too narrow in its scope.

The review team concluded that a best practice model of legislation as suggested by AJ Brown[7] in the recent report of his work provided us with the way forward. Further, it was concluded after discussion with the working group assembled to assist in the preparation of the paper, that the model was achievable by amending our current legislation.

The review team concluded that legislative amendment was needed in five main areas:

- defining the principles to be applied;
- broadening the Scope of the legislation, by lowering the threshold for use of the Act, better defining improper conduct and including a broader range of people and bodies within the definition of public officer and public body;
- improving the standard of internal disclosure procedures, by allowing for external scrutiny and by requiring public bodies to better educate their staff about the legislation;
- improving the skills base for dealing with disclosures, by allowing for appointment processes and increased education;
- improving the protections available, by clarifying the role of the person making the disclosure, extending the protections to other witnesses in certain circumstances and reducing the risk of reprisal.

Recommendation 1

The *Public Interest Disclosures Act 2002* be amended to:

- define the principles to be applied in the operation of the Act;
- broaden the scope of the Act to encompass a greater range of public interest disclosures;
- provide for approval of internal disclosure procedures;
- provide for a process of appointing officers to deal with disclosures; and
- improve access to the protections available to witnesses.

7 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations / editor, A J Brown, 2008, Chapter 11

4 PRINCIPLES IN THE ACT

The Tasmanian *Public Interest Disclosures Act 2002* does not include an Object section or a statement of purposes. Similar legislation in New South Wales, Queensland, Northern Territory (to commence soon), and South Australia contain Object clauses, while Victoria's *Whistleblowers Protection Act 2001* commences with a statement of purposes in section 1.

Defining the principles to be applied when implementing or using the legislation has been a feature of legislation, particularly those dealing with rights, for many years. It makes a clear statement about how it is intended that the legislation be applied. If there is doubt created by the wording of a subsequent section, that uncertainty can often be resolved through reference back to the purpose of the legislation. While these principles can be discovered through reference to other documents such as the second reading speech, it is more direct and of greater practical use to have the statement made up front and in direct connection with the legislation.

Outlining principles in this way and with clear language can also create a framework for the culture in organisations covered by the legislation. It sets a clear standard for the thinking, behaviour and practices that should be adopted and promoted in such organisations in relation to public interest disclosures and the people who make disclosures. This is an important outcome for any organisation wishing to aspire to and maintain high levels of ethical conduct.

4.1 What is whistleblowing and what should be the principles?

whistleblowing // wɪsəlbloʊɪŋ *(say 'wisuhlblohing)*
noun the activity of blowing the whistle on or exposing the corrupt practices of others.[8]

Whistleblowing - [a] Bringing an activity to a sharp conclusion as if by the blast of a whistle (Oxford English Dictionary); [b] Raising a concern about wrongdoing within an organisation or through an independent structure associated with it (UK Committee on Standards in Public Life); [c] Giving information (usually to the authorities) about illegal or underhand practices (Chambers Dictionary); [d] Exposing to the press a wrongdoing or cover-up in a business or government office (US, Brewers Dictionary); [e] (origins) Police officer summoning public help to apprehend a criminal; referee stopping play after a foul in football.[9]

"… the word is now used to describe the options available to an employee to raise concerns about workplace wrongdoing. It refers to the disclosure of wrongdoing that threatens others, rather than a complaint about one's own treatment. Whistleblowing covers the spectrum of that communication, from raising the concern with managers, with those in charge of the organisation, with regulators or with the public (be it through the media or otherwise). And the purpose of whistleblowing is not the pursuit of some private vendetta but that the risk can be assessed and, where appropriate, reduced or removed."

"It is also important to remember that people do not have to be victimised to be a whistleblower. Many people all over the world raise concerns about dangers and wrongdoing in the workplace and the issue is dealt with properly and their lives and careers progress unaffected. They too are whistleblowers, though they remain – no doubt to their personal satisfaction - largely unknown."[10]

8 The Macquarie Dictionary Online
9 Whistleblowing: The State of the Art, Dehn, G and Calland, R, Public Concern at Work and Open Democracy Advice Centre, p1
10 Ibid, p6

From definitions such as those above one sees that the primary focus of whistleblowing is the 'disclosure of wrongdoing' and legislation addressing whistleblowing needs to be focussed on the disclosure itself rather than the person making the disclosure. Furthermore, if we see "the willingness of public officials to voice concerns on matters of public interest … as fundamental to democratic accountability and public integrity"[11], then the encouragement and facilitation of these disclosures must be a primary objective of this legislation.

4.2 What's in a Name?

Just as legislation addressing whistleblowing needs to focus on the act of disclosure of wrongdoing rather than the person making the disclosure, it needs to focus on a certain type of wrongdoing. It should be concerned about wrongdoing that adversely affects the public interest, not the person's own particular interest. Disclosures relating to personal disagreements or individual situations are generally not in the public interest, unless they are indicative of systemic abuse that would or does have serious consequences.

11 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation', Dr AJ Brown, Griffith University, November 2006, p1

"While not necessarily explicitly referring to principles and

values, contributors to the inquiry referred to rights, responsibilities and obligations. A series of concise values-based principles, framed as rights and responsibilities, could provide a clearer message of the intention of the legislation. In principle:

- it is in the public interest that accountability and integrity in public administration are promoted by identifying and addressing wrongdoing in the public sector;
- people within the public sector have a right to raise their concerns about wrongdoing within the sector without fear of reprisal;
- people have a responsibility to raise those concerns in good faith;
- governments have a right to consider policy and administration in private; and
- government and the public sector have a responsibility to be receptive to concerns which are raised."[12]

This extract from a recent House of Representatives report subsequently leads into a conclusion that the Australian Government should adopt the term Public Interest Disclosure as the name of recommended legislation. These same principles are inherent to the Tasmanian Act and this confirmed for the review team that the use of the term public interest disclosure instead of the more colloquial 'whistleblower' was not only acceptable, but more accurate in describing the intent of the Act. The emphasis needs to be equally on the three key aspects; that is reporting; investigating; and protection of witnesses.

4.3 Protection

The NSW Ombudsman's 2004 review of the NSW Protected Disclosures legislation noted three 'almost universal pre-requisites' that need to be fulfilled before most employees would make a disclosure about problems in their organisation:

- "They must be aware they can make a disclosure and how to go about doing so, including to whom, how, what information should be provided, etc.;
- They must believe that making a disclosure will serve 'some good purpose', including that appropriate action will be taken by the recipient; and
- They must be confident that they will be protected from suffering reprisals or from being punished for having made the disclosure." [13]

So the protection of the person making the disclosure is an important means of encouraging these disclosures, and so would be an important additional objective of public interest disclosure legislation.

It can also be seen from the NSW Ombudsman's experience that an equally important factor in encouraging disclosures is the level of knowledge and confidence the person making the disclosure has in knowing how to make a disclosure, that the disclosure will be acted upon appropriately, and that the disclosure will, therefore, achieve some benefit to the public interest. Consequently, if the primary objective is to encourage the disclosure of wrongdoing, then a further objective is required to ensure that any disclosure is subjected to proper investigation and action.

Of course, proper investigation and action must afford all parties procedural fairness, a principle which is more widely referred to as natural justice. This important principle includes the following factors:

- the investigation and decision making process must allow a person whose interests will be adversely affected by the decision, an opportunity to be heard;
- the investigator must be disinterested or unbiased in the matter to be decided;
- the person adjudicating on a dispute must have no pecuniary or proprietary interest in the outcome of the proceedings and must not reasonably be suspected, or show a real likelihood, of bias;
- an individual shall not be penalised by a decision affecting her or his rights or legitimate expectations unless s/he has been given prior notice of the case against her

12 Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector, House of Representatives, Standing Committee on Legal and Constitutional Affairs, 2009, para2.48

13 Reported in 'Public Interest Disclosure Legislation in Australia: Towards the Next Generation', Dr AJ Brown, Griffith University, November 2006, p5

or him and a fair opportunity to answer it and the opportunity to present her or his own case; and

- the decision must be based upon evidence.

4.4 Beyond the Public Sector

The Tasmanian legislation limits disclosures to improper conduct of public bodies and public officers. However, there are a number of other legislative provisions that apply to, and a number of strategies that have been taken up by, private sector organisations.

One area that generated considerable discussion related to contractors. An increasing number of agencies are contracting out the provision of services that would normally come under their direct responsibility. In some agencies this is becoming a significant trend. The Act enables a contractor to disclose wrongdoing by a public body, but there were questions raised about where the final responsibility rests should the contractor engage in wrongdoing, and whether the same regulatory standards that apply to the agency can be applied to the contractor. Furthermore, the people who are generally in the best position to witness wrongdoing in these circumstances, the contractor's employees, are not currently included as a person who may make a disclosure under this Act.

Combining protection provisions to cover both the public and private sectors would be problematic because of the great variations in regulatory regimes between the sectors. Private sector activities are in many cases regulated by Commonwealth provisions relating to areas such as company regulation, investor/shareholder protection, consumer protection, competition, and environmental protection, and with the continuing trend toward uniform national business regulation there would be little point in trying to regulate the private sector through State legislation. Furthermore, regulatory requirements for public sector agencies are often more rigorous than that required of the private sector, or even what would be reasonable to expect of the private sector. Combining public and private sector protection requirements into a single legislative package without conflicting with existing, and sometimes overriding requirements, would therefore be very complex and would not necessarily reduce confusion and uncertainty in the community about public interest disclosure provisions.

There would also be differences in the way that 'public interest' would be defined between the two sectors, and how agencies could be expected to respond. On balance the review team concluded that it would make for better legislation to limit the coverage of this legislation to the public sector only.

4.5 The Principles

In summary, then, it would appear that the current long title of the Tasmanian *Public Interest Disclosures Act 2002* appropriately represents what the balance, the purpose and the objectives of best practice public interest disclosure legislation should be:

> "An Act to encourage and facilitate disclosures of improper conduct by public officers and public bodies, to protect persons making those disclosures and others from reprisals, to provide for the matters disclosed to be properly investigated and dealt with and for other purposes."

However the review team concluded that it would aid in the use of the legislation and in promoting an ethical culture to spell this out in a series of principles to be applied when using the legislation.

Recommendation 2

The *Public Interest Disclosures Act 2002* be amended to include a section which outlines the principles to be observed when applying the legislation in the following terms -

A function or power conferred, or duty imposed, by this Act is to be performed so as to:

- encourage and facilitate internal disclosures of improper conduct by public officers and public bodies;
- protect persons making those disclosures and others from reprisals;
- provide for improper conduct disclosed to be properly investigated and dealt with; and
- provide all parties with natural justice.

5 ENCOURAGE AND FACILITATE DISCLOSURES OF IMPROPER CONDUCT

5.1 Scope of the Act

In considering the first principle, to encourage and facilitate disclosures of improper conduct, the question arises as to whose wrongdoing should come within the scope of the Act.

Section 6 of The *Public Interest Disclosures Act 2002* provides that:

> "(1) A public officer who believes on reasonable grounds that another public officer or a public body –
>
> (a) has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or
>
> (b) has taken, is taking or proposes to take detrimental action in contravention of **section 19** – may disclose that improper conduct or detrimental action in accordance with this Part.
>
> (2) A contractor who believes on reasonable grounds that the public body with which the contractor has entered into a contract –
>
> (a) has engaged, is engaging or proposes to engage in improper conduct in its capacity as a public body; or
>
> (b) has taken, is taking or proposes to take detrimental action in contravention of **section 19** –may disclose that improper conduct or detrimental action in accordance with this Part."

So currently it is wrongdoing by a public body or a public officer that falls into the scope of the Act. The review team spent some time considering who or what falls into the definition of a public officer and a public body, and whether there should be amendments to the current position.

5.2 Definition of Public Body and Public Officer

The Act defines a public body as:

- an agency;
- the general manager of a council [local government], in relation to an employee of that council;
- a body established by or under an Act for a public purpose;
- a body where the members, or a majority of members, are appointed by the Governor or a Minister of the Crown;
- a Government Business Enterprise; or
- a State-owned company.

A public officer is defined as:

- a member of Parliament;
- a councillor [local government];
- a member, officer or employee of a public body;
- a member of the governing body of the public body;
- an employee of a council; or
- the holder of an office established by or under an Act, where the appointment is made by the Governor or a Minister.

However, sections 4(1) and 4(2) list bodies and persons that are excluded from these definitions. These are:

In relation to public bodies -

- the courts;
- the Tasmanian Industrial Commission;
- tribunals;
- a body prescribed under the Act [to date none have been prescribed];

In relation to public officers -

- a Supreme Court judge;
- an Associate Judge of the Supreme Court [formerly the Master];
- a magistrate;
- the Director of Public Prosecutions;
- the Auditor-General ;
- the Ombudsman;
- the State Service Commissioner; and
- an officer appointed under the *Parliamentary Privilege Act 1898*.

The review team considered whether there should be any additions or further exclusions made to the definition of public body and public officer, and so to the scope of the Act.

The legislation in South Australia, Queensland and Western Australia cover a much broader range of officials, including most of the officers or bodies included in the list of exclusions in Tasmania.

One submission received drew attention to particular examples of inconsistency in the Act between the definition of 'public officer' and 'public body', and the subsequent exemptions.

> " … it is confusing that the Auditor-General is excluded from the definition of "public officer" by virtue of section 4(2)(e), while the Tasmanian Audit Office, being an agency, falls within the definition of "public body" in section 3. It is not clear, for example, why those persons designated in 4(2)(e) are not public officers and therefore covered by the provisions of the PID Act. It seems strange, for example, that an officer working at Parliament House who is employed under the provisions of the *Parliamentary Privilege Act 1898* is exempt from the Act, whereas parliamentarians themselves are not so exempted. Similarly, if the Commissioner for Police is a public officer and therefore subject to the provision of the Act, why is the State Service Commissioner exempt?"[14]

Similarly, Members of Parliament, including Ministers, are public officers, but the staff who work for them are not included. Ministerial staff and the like are not generally employees of an agency or public officers by virtue of how they are employed, described as "crown prerogative".

Tribunals generally are put in place with dual roles, that is to undertake an administrative role and to also to make certain decisions of a judicial like nature. Tribunals are included in other administrative legislation, such as freedom of information, in relation to their administrative functions, but not their deliberative functions. The total exclusion here is inconsistent with the approach elsewhere.

14 Submission from Department of Treasury and Finance, p8

These inconsistencies have been highlighted by some contributors as eroding the legislation's value and credibility. The review team could not find any compelling reason why the inconsistencies needed to be continued and therefore why they should not be resolved in this process.

Recommendation 3

The *Public Interest Disclosures Act 2002* be amended to:

- include ministerial staff as public officers;
- remove the exclusion for parliamentary staff from the definition of public officer;
- limit the exclusion for tribunals and the Tasmanian Industrial Commission from the definition of public body to their deliberative function; and
- remove the exclusion of non judicial officers from the definition of public officer.

5.3 Council Owned Companies

Another area raised by the review team concerns Local Government and the establishment of companies by Councils to carry out some traditional Council activities such as road maintenance or the maintenance of public grounds. A significant development in Tasmania is the current moving of the water and sewerage services to this type of company. These moves have become

a concern in other jurisdictions and there is consideration being given to including these companies in the coverage of their public interest disclosure legislation. The review team concluded that as a matter of principle these companies should be included in the same way as government business enterprises and State owned companies.

Recommendation 4

The *Public Interest Disclosures Act 2002* be amended to specifically include council owned companies in the definition of a public body.

5.4 Other internal witnesses

The general principle of all public interest disclosure laws in Australia is the facilitation of disclosures by so called internal witnesses. The Tasmanian Act currently allows for disclosures by public officers or contractors to be covered by the provisions of the Act.

The Western Australian *Public Interest Disclosure Act 2003* includes a very comprehensive definition of a 'public sector contractor' and they are included in the list which must be investigated where a disclosure is made:

> "public sector contractor means —
>
> (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;
>
> (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 paragraph (a) or (b) and each person who contracts with another person for the execution of the whole or part of the requirements of a contract referred to in those paragraphs." [15]

The review team concluded that the term contractor was too narrowly defined in Tasmania and that this definition improved upon our current Act as in our current scheme it would extend the right to disclose beyond the primary contractor to their employees and subcontractors who are a group who may have internal knowledge and therefore may detect improper conduct. These employees and/or subcontractors of a contractor were just as likely to fear disclosing improper conduct because of the impact it may have on their livelihoods.

The recent House of Representatives Committee report[16] also looked at the issue of who might be an internal witness and saw that there is a category of people, which is hard to define, which may indeed have internal access where they may discover improper conduct, this group may include volunteers, interns, work experience placements and the like. It may be that these people have an ongoing relationship with the public body and therefore it may be that they could fear detriment from making a disclosure.

The recommendation in the House of Representatives' report is to provide for some discretion for a decision maker to deem other persons as public officials and thus within the scope of the legislation:

> "Those who may be deemed a public official would have an 'insider's knowledge' of disclosable conduct under the legislation and could include current and former volunteers to an Australian Government public sector agency or others in receipt of official information or funding from the Australian Government. [17]"

The review team were convinced by the arguments in the House of Representatives' report and concluded that the Tasmanian Act would be strengthened by a similar provision,

15 Section 3(1) Public Interest Disclosure Act 2003, Western Australia

16 Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector, House of Representatives, Standing Committee on Legal and Constitutional Affairs, 2009, pp52-54

17 Ibid, recommendation 5

where there is a discretion available to allow a person to be deemed to be a contractor and therefore able to make a disclosure in accordance with the Act.

Recommendation 5

The *Public Interest Disclosures Act 2002* be amended to:

- include employees and subcontractors in the definition of contractor; and
- include a provision to enable those receiving a public interest disclosure in accordance with section 7 to deem certain other persons to be 'contractors' for the purposes of making a disclosure.

5.5 Defining improper conduct

After considering whose wrongdoing should be covered by the Act, the next question is what form of wrongdoing should be covered. The Tasmanian legislation provides for the disclosure of 'improper conduct' and 'detrimental action', where improper conduct is defined as:

> (a) corrupt conduct; or
>
> (b) a substantial mismanagement of public resources; or
>
> (c) conduct involving substantial risk to public health or safety; or
>
> (d) conduct involving substantial risk to the environment –
>
> that would, if proved, constitute –
>
> (e) a criminal offence; or
>
> (f) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public officer who was, or is, engaged in that conduct;

and detrimental action includes:

> (a) action causing injury, loss or damage; and
>
> (b) intimidation or harassment; and
>
> (c)discrimination, disadvantage or adverse treatment in relation to a person's employment, career, profession, trade or business, including the taking of disciplinary action; and
>
> (d) threats of detrimental action;

While this appears to be a substantial list a number of submissions, and also discussions with the Office of the Ombudsman, have suggested that this definition is largely responsible for the extremely low number of public interest disclosures being made in Tasmania.

The definition of improper conduct is felt to be difficult in that subsections (e) and (f) create a threshold for what constitutes improper conduct. That is, the improper conduct must constitute either a criminal offence, or reasonable grounds for dismissal before it triggers the ability to provide protection under the Act for the person making the disclosure. All contributors felt this to be too high as even serious allegations about activities amounting to maladministration, public wastage or organisational negligence are not be covered by the Act, unless at least one officer can be identified as sufficiently individually culpable to be dismissed or charged with a criminal offence.

Many disclosures about defective practices and procedures may concern serious wrongdoing, but would still not be able to meet this threshold. This threatens the utility of the entire Act in many instances.

While it is recognised that it is important to maintain a threshold to help qualify the types of wrongdoing that are matters of concern and to filter out the less serious or trivial complaints, it appears that the Tasmanian threshold is working against the aim of encouraging and facilitating disclosure, and so affects the usefulness of the legislation overall. If people are unable to be assured of protection, they are more likely to keep silent than risk possible reprisal or even legal action against them.

The review team, therefore, considered what might constitute improper conduct. As a starting point we considered the list developed as part of the 'Whistling While They Work' project from surveying employees, people who had made disclosures, case handlers and managers[18]. The following table is from the project report and shows what the survey group felt were wrongdoing (the numbers and letter categorisations are a reference to the survey instrument):

18 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations / editor, A J Brown, 2008, p329

Table 2 - Wrongdoing categories and types

CATEGORY	WRONGDOING TYPE
1. Misconduct for material gain	a. Theft of money b. Theft of property c. Bribes or kickbacks d. Using official position to get personal services or favours e. Giving unfair advantage to a contractor, consultant or supplier f. Improper use of agency facilities or resources for private purposes g. Rorting overtime or leave provisions h. Making false or inflated claims for reimbursement
9. Conflict of interest	i. Failing to declare a financial interest in an agency venture j. Intervening in a decision on behalf of a friend or relative k. Improper involvement of a family business
12. Improper or unprofessional behaviour	l. Downloading pornography on a work computer m. Being drunk or under the influence of illegal drugs at work n. Sexual assault o. Stalking (unwanted following or intrusion into personal life) p. Sexual harassment r. Racial discrimination against a member of the public s. Misuse of confidential information
19. Defective administration	t. Incompetent or negligent decision making u. Failure to correct serious mistakes v. Endangering public health or safety w. Producing or using unsafe products bb. Acting against organisational policy, regulations or laws
24. Waste or mismanagement of resources	y. Waste of work funds z. Inadequate record keeping aa. Negligent purchases or leases
27. Perverting justice or accountability	cc. Covering up poor performance dd. Misleading or false reporting of agency activity ee. Covering up corruption ff. Hindering an official investigation gg. Unlawfully altering or destroying official records
32. Personnel and workplace grievances	q. Racial discrimination against a staff member x. Allowing dangerous or harmful working conditions hh. Unfair dismissal ii. Failure to follow correct staff-selection procedures jj. Favouritism in selection or promotion ll. Bullying of staff
38. Reprisals against whistleblowers	kk. Reprisal against whistleblowers
39. Other	mm. Other

On first considerations the review team felt that personnel and workplace grievances probably did not represent public interest concerns. However, on further consideration it could be seen that an example of each of these types of behaviour above, including personnel and workplace grievances, could be found that could be considered to be conduct serious enough as to be contrary to the public interest. It appeared to be a question of degree or extent. The difficult task was to find the appropriate level between what is a less serious complaint, and not raising the level so high that the purpose of the Act was compromised.

It was agreed that the Tasmanian legislation should be clear on what types of wrongdoing are covered and it should be comprehensive. Consequently, in trying to set the appropriate threshold of behaviour to bring the conduct under the Act it is necessary to avoid using general concepts such as 'in the public interest' without better spelling out what is within the legislation. The legislation needs to address a broader range of improper conduct than currently defined by the Act, but in broadening the range we need to also ensure that only the more serious or significant matters fall within the purview of the legislation.

This would be assisted by making the definition a specific issue which is to be covered in guidelines issued by the Oversight agency.

Recommendation 6

The *Public Interest Disclosures Act 2002* be amended to:

- remove the current threshold for public interest disclosures;
- provide for a new threshold of public interest disclosures, namely, improper conduct which is either serious or significant; and
- define improper conduct as including:
  - illegal or unlawful activity;
  - corrupt conduct;
  - maladministration;
  - breach of public trust;
  - professional misconduct;
  - wastage of public funds;
  - dangers to public health and/or safety;
  - dangers to the environment;
  - official misconduct (including breaches of applicable codes of conduct); and
  - detrimental action against a person who makes a public interest disclosure under the legislation.

5.6 Role of a key oversight agency

As highlighted earlier in this paper if an Ethics Commission is established it may well be appropriate to move the role currently undertaken by the Ombudsman to the new body. For that reason we have looked at the role as not just what might be a role for the Ombudsman, but what might be the role of any key oversight agency.

The Guidelines published by the Ombudsman in accordance with the current Act describe the role of the Ombudsman as central in handling disclosures of improper conduct made under the current Act. Specifically the guidelines describe the current role of the Ombudsman as:

- preparing and publishing guidelines to assist public bodies in interpreting and complying with the Act;
- reviewing written procedures established by public bodies and making recommendations in relation to those procedures;
- determining whether a disclosure received by the Ombudsman warrants investigation;
- investigating disclosures;
- monitoring investigations initiated by public bodies or referred to public bodies;
- monitoring the action taken by public bodies where the findings of an investigation reveal that improper conduct has occurred;

- reporting to Parliament where public bodies fail to implement recommendations made by the Ombudsman at the conclusion of an investigation;
- collating and publishing statistics about disclosures handled by the Ombudsman;
- educating and training public bodies.

The role of the oversight agency also needs to be positive, this can be achieved through routine monitoring. The PID Act requires reporting of determination and these reports should then trigger regular monitoring of progress.

Following discussion with the working group members and specific input from the office of the Ombudsman the review team concluded that all of the roles included above were appropriate for an oversight agency within the scheme of public interest disclosure legislation.

In line with the House of Representative review outcomes[19] the review team considered other roles which might be attached to the oversight agency and concluded that the additional roles recommended for the Commonwealth Ombudsman in the likely Australian Government legislation were also appropriate to the Tasmanian situation. In particular the review team concluded that it would allow for best practice to be propagated across public bodies and

would assist in promoting confidence in the systems supporting the legislation to adopt these additional roles:

- set standards for the investigation, reconsideration, review and reporting of public interest disclosures;
- approve public interest disclosure procedures proposed by agencies; and
- providing an anonymous and confidential advice line.

Another vital role, highlighted by the Treasury submission to this review, is that the processes developed through the legislation must afford all parties procedural fairness. The review team concluded that given the role of the oversight agency in preparing guidelines and the recommended additional role in approving procedures that another role of the oversight agency must be providing guidance in respect of natural justice.

Recommendation 7

The *Public Interest Disclosures Act 2002* be amended to provide for the key oversight agency to also have the power to:

- publish standards and approve procedures to be adopted by public bodies, such approval to be reviewed at least every three years;
- publish guidelines on the application of natural justice to all parties involved in an investigation of a public interest disclosure;
- provide advice on the operation of the Act; and
- proactively monitor the progress of PID investigation undertaken by public bodies.

19 Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector, House of Representatives, Standing Committee on Legal and Constitutional Affairs, 2009, pp134-137

6 INVESTIGATION AND HANDLING OF DISCLOSURES

6.1 Making a Disclosure

The Tasmanian *Public Interest Disclosures Act 2002* sets out two pathways for the disclosure of improper conduct or detrimental action. A disclosure by a public body or by a public officer may be made directly to the Ombudsman. Alternately, a disclosure may be made internally within the agency or organisation concerned. In this second instance, the person or body to whom the disclosure may be made will vary according to the type of agency or organisation, and in instances such as where the disclosure concerns a Member of Parliament, the Act specifies to whom the disclosure may be made.

The following table sets out the various avenues for making a disclosure under the Act.

Table 3 Person or Body to whom disclosure may be made

PERSON/BODY WHO IS THE SUBJECT OF THE DISCLOSURE	PERSON/BODY TO WHOM THE DISCLOSURE MUST BE MADE
Member, officer or employee of a public body (other than the police force)	That public body, or the State Service Commissioner (if applicable) or the Ombudsman [the current Oversight agency]
Member of the police force	The Commissioner of Police
The Commissioner of Police	The Ombudsman
Member of Parliament (Legislative Council)	President of the Legislative Council
Member of Parliament(House of Assembly)	Speaker of the House of Assembly
Councillor (Local Government)	The Ombudsman
Council employee	The General Manager of the Council, or the Ombudsman

In light of recommendation 3, this list will need to be expanded to address the proposed amendment to the definitions of public officer and public body. Legislation will need to state the appropriate avenues for the additional persons or bodies to make a disclosure.

Recommendation 8

That section 7 of the *Public Interest Disclosures Act 2002* be amended to provide that disclosures of improper conduct relating to:

- persons employed under the provisions of the *Parliamentary Privilege Act 1898* be made to the Speaker of the House or the President of the Council or the oversight agency;
- the Auditor-General be made to the oversight agency;
- the State Service Commissioner be made to the oversight agency;
- the Director of Public Prosecutions be made to the oversight agency;
- the Ombudsman be made to the Speaker of the House of Assembly or the President of the Legislative Council or the oversight agency if other than the Ombudsman.

The 'Whistling While They Work' project found that it is more appropriate that public officers first use the internal process of their public body to disclose suspected wrongdoing, and use an external body such as the Ombudsman as a last resort. Reasons for this include:

- The person receiving the disclosure knows the public body and how it operates;
- Usually the managers in that body are in the best position to act quickly; and
- '… most employees do not wish to pit themselves against the organisation, embarrass their agency or colleagues unnecessarily or seek celebrity.'[20]

Broadly speaking, it would seem that the important factors for encouraging disclosures are: clear processes for making the disclosure and for what will happen subsequently; confidence that the disclosure will achieve some positive outcome and that action will be taken; and appropriate protection for the person making the disclosure.

With regard to processes, the current Act requires the Ombudsman to prepare and publish guidelines for the procedures to be followed by public bodies in relation to disclosures, investigations and the protection of the person making the disclosure. The Ombudsman has prepared these guidelines and they may be found on the Ombudsman's website at **www.ombudsman.tas.gov.au/public_interest_disclosures**. For their part, public bodies must establish procedures that comply with any guidelines published by the Ombudsman. The body is to make the procedures available to the public, and some agencies have a copy of the procedures available on their external website. The Ombudsman may review a public body's procedures at any time to ensure that they comply with the Act and the guidelines, although it appears that to date the Ombudsman has not made any formal reviews of any agency's procedures.

Even with clearly established procedures in place, there also needs to be the appropriate people to carry out the process, and regular promotion within an organisation of both the organisation's commitment to the process and how to access the process.

The Ombudsman Guidelines suggest the public body clearly identify the officers who will be involved and clearly describe their roles. The Guidelines note that there are in fact a number of roles that should be identified, while recognising that some roles may need to be combined in smaller organisations:

- protected disclosure officer – the contact point for general advice about the Act, to receive the disclosure, to assess the whether disclosure is a protected disclosure, to ensure the discloser's confidentiality, and to forward the disclosures and supporting evidence to the protected disclosure coordinator.
- protected disclosure coordinator – has a central clearinghouse role in the process, including assessing if a 'protected interest disclosure' is a 'public interest disclosure', investigating the disclosure (or appointing an investigator and overseeing the investigation),

20 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations, op cit, p278

advising the relevant people of the progress of the investigation and making any required notifications, and maintaining statistics.

- welfare manager – responsible for looking after the general welfare of the person making the disclosure.

The Guidelines further list the general criteria for the appointment of officers, including:

- Direct access to the principal officer;
- Sufficient seniority and status;
- Training on the requirements of the Act and the guidelines; and
- Skills and experience.

From the perspective of the person making the disclosure the description may need to include characteristics such as ready availability, impartiality, and commitment to the value of the process.

However, in spite of all the initiatives in the guidelines, the working group assisting the review team felt that more needed to be done to assist people to make disclosures, particularly internally. Furthermore, action needed to occur at both the public body level and the oversight agency level. Areas that were considered to need further development included:

- guidelines and processes – should be reviewed by the oversight agency on a regular basis;
- PID staff - should be trained and skilled appropriately, with skill levels reviewed and maintained regularly through a system of accreditation and continuing training coordinated by the oversight agency;
- all agency staff - should be informed and educated about how to make a PID and to whom; and
- public bodies - should clearly state their view on the important role of disclosures in identifying problems and thus enabling them to be resolved.

The submission from the Community and Public Sector Union proposed that the *State Service Act 2000* also be amended to 'include provisions that highlight the importance of public interest disclosures. Inclusion in the State Service Principles provision at s.7 and/or the State Service Code of Conduct at s.9 would elevate whistleblowing to the same level as other vital general duties owed to the State. ….. we believe that inclusion to some degree in the State Service Act would serve to encourage whistleblowers to make disclosures confidently and comfortably.'[21]

The review team concluded that the same effect could be achieved by defining the role of the principal officer in this Act, particularly as the provisions of the State Service Act do not apply to the majority of principal officers covered by the legislation.

21 Submission for the review of the Public Interest Disclosures Act (2002), Community and Public Sector Union, 13 February 2009, pp2,3

Recommendation 9

The *Public Interest Disclosures Act 2002* be amended to provide for a public interest disclosure officer(s) to be appointed in each public body by the principal officer of that public body for a renewable three year period and that prior to appointment/reappointment the principal officer of the public body is to ensure that the officer s/he is appointing has the skills and knowledge to fulfil the role of PID officer.

Recommendation 10

The *Public Interest Disclosures Act 2002* be amended to provide that the principal officer is responsible for:

- preparing procedures for approval by the oversight agency;
- receiving public interest disclosures and ensuring they are dealt with in accordance with the legislation and the approved procedures;
- ensuring the protection of witnesses;
- ensuring the application of the principles of natural justice in the agency's processes;
- ensuring the promotion of the importance of public interest disclosures, including ensuring easy access to information about the legislation and the public body's procedures;

- providing access for witnesses, and others involved in the process of investigation, to confidential employee assistance programs; and

- providing access for witnesses, and others involved in the process of investigation, to appropriate trained internal support staff.

And also amended to provide for the principal officer to delegate any of these functions to a public interest disclosure officer.

6.2 Manner of disclosure

The legislation in a number of other jurisdictions also specifies the manner in which a disclosure must be received. For example, it must be in writing, or must be specified as a public interest disclosure before it may be considered. An unfortunate consequence of requirements such as these is that disclosures that would be considered to be public interest disclosures may not be able to even be assessed because of a 'technical' breach.

The Tasmanian legislation permits disclosures to be made both orally and in writing, but it must be made in accordance with prescribed procedure (S6(a)(b)). One conclusion from the 'Whistling While They Work' project was that "legislation should allow a public interest disclosure to be made to a variety of different people or agencies, including:

- the immediate or any higher supervisor of the person making the disclosure;
- the CEO of the agency;
- any designated unit or person in an agency;
- any dedicated hotline, including external hotlines contracted by an agency; any external agency with jurisdiction over the matter"[22] eg Ombudsman, Auditor-General, State Service Commissioner.

On first glance it would appear that the Tasmanian legislation does not preclude any of the above, so it is probably more a matter to be included in the Ombudsman's guidelines. Increasing the points where a disclosure may be made would assist the object of encouraging and facilitating disclosures. However, there would need to be coordination of the handling of these disclosures once they were received to ensure that the subsequent assessment and action was undertaken by the appropriately trained and skilled officer, and there was consistency in the process. This is where the role of a position such as the public interest disclosure co-ordinator, described earlier, would be critical.

The making of disclosures should not be limited to written form only, and it is still important to maintain a legislative provision that disclosures can be made orally and in writing. 'Writing' includes electronic forms such as email.

6.3 Anonymous disclosures

Section 8 of the Act provides that a person to whom a disclosure may be made may receive an anonymous disclosure. One submission received suggested that the ability

22 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations, op cit, p284

for anonymous disclosures to be made should not be permitted by the legislation. "… such a disclosure could not be deemed to be a protected disclosure, as there would be no employee to be protected. Even so, an anonymous disclosure, if unfounded, may adversely affect the employee against whom the disclosure has been made, both in terms of health and career."[23]

Victoria, Queensland, and Northern Territory (to commence soon) also provide for disclosures to be made anonymously. However, section 16 of the ACT *Public Interest Disclosure Act 1994* states:

> "Nothing in this Act requires a proper authority to investigate a public interest disclosure if the person making the disclosure does not identify himself or herself".

There is a well known example of how effective anonymous disclosures of information can be in addressing wrongdoing in the 'Crime stoppers' initiative operated by Tasmania Police. The fact that information may be given anonymously is rigorously publicised, and the value of this information in solving crimes is regularly noted. Where anonymous information needs to be followed up, a public call for assistance with further information appears to generally achieve a response. Experience in other jurisdictions has shown that while some people make their first contact with the public body anonymously, they usually reveal their identities once they are assured that the disclosure will be dealt with appropriately and confidentially.

The review team concluded there is a need to provide for anonymous disclosure, but that a threshold test should apply to those accepting anonymous disclosures, namely that they are satisified that the discloser is someone to whom the Act applies.

Recommendation 11

Section 8 of the *Public Interest Disclosures Act 2002* be amended to allow for anonymous disclosure where the person to whom a disclosure is made is satisfied that the disclosure is being made by a public officer or contractor.

6.4 Making a disclosure outside the existing process

A number of submissions raised the issue of including provision in legislation for disclosures to a third party, outside the internal and external regulatory processes, such as the media, to be able to be protected under legislation. The Tasmanian legislation excludes what could be termed as 'public whistleblowing'.

One suggestion is that disclosures to a third party should be available should either of the first two avenues fail ie if authorities fail to act, a further (public) disclosure could be made that would attract legal protection. For example, the New South Wales *Protected Disclosures Act 1994* provides for a disclosure by a public official to a member of Parliament or a journalist to be protected by the Act where the disclosure has already been made to the relevant public body or investigating authority, and a decision has been made to not investigate the matter, or after 6 months there has been no notification whether the matter is going to be investigated, the investigation is not completed, or no action has been recommended. It has been argued that this would improve confidence in the system

Another suggestion as to where it may be of value to allow disclosure to a third party to be protected is where an investigation has commenced but is progressing too slowly, and there is a 'substantial and specific danger' to public health or safety.[24]

The working group considered a range of possibilities but concluded that attempts to distinguish between circumstances where 'public whistleblowing' might be justified and where it would be considered to be leaking to the media or some other form of unauthorised disclosure would be complex. Systems such as applying a set of rules to each case to determine if the disclosure was driven by a duty to the public interest or by some personal motive are subjective and create confusion.

Ultimately, the review team concluded that there is insufficient justification for the inclusion of provisions allowing this type of disclosure in

23 Submission from Department of Treasury and Finance, p9

24 See ss18&19, Queensland Whistleblowers Protection Act 1994

the Tasmanian context. In doing so, the review also concluded that the existing external regulatory process of reporting to the Ombudsman, which would be enhanced by introducing routine and ongoing monitoring of the investigatory process (see Recommendation 7), addresses the concerns of contributors.

6.5 Assessing a Public Interest Disclosure

The *Public Interest Disclosures Act 2002* requires a disclosure to be assessed twice to be deemed a public interest disclosure. When a public body first receives a disclosure, whether it is a complaint, report or allegation of improper conduct or detrimental action, the responsible officer must determine whether the matter falls under the Act. The disclosure must be made in accordance with Part 2 of the Act ie the person must believe on reasonable grounds that the improper conduct or detrimental action has occurred, is occurring or will occur, and the disclosure has been made to the appropriate body or person, made orally or in writing, and according to the prescribed procedure. Disclosures made in this way are protected disclosures.

Where a disclosure is assessed to be a protected disclosure, it is then assessed as to whether it is a public interest disclosure. This assessment must be made within 45 days of receipt of the disclosure.

In determining whether the disclosure is a public interest disclosure, the body or person who has received the disclosure must consider whether the disclosure shows or tends to show that a public body or public officer has either:

- engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or public body; or
- has taken, is taking or proposes to take detrimental action.[25]

While the determination that the disclosure is a public interest disclosure only occurs on the second assessment, protection for the person making the disclosure already applies once the disclosure is assessed to be a protected disclosure. So it could be argued that there is no detriment to the person from this dual classification process as the first assessment attracts the protection, regardless of whether the disclosure is then investigated. This is particularly important given the very high threshold that must be currently met for a disclosure in Tasmania to be assessed as a public interest disclosure in the second assessment.

However, with an expansion of the range of what could be considered improper conduct for the purposes of the Act, it is questionable whether there is any advantage in maintaining the dual assessment and classification process. If it is more likely that a disclosure will be assessed to be a public interest disclosure, then more disclosures will be able to be investigated in any case. It is also simpler, and would be less confusing and distressing for the person making the disclosure, for the disclosure to be assessed only once.

25 Public Interest Disclosures Act 2002 Part 5 s30, s33. Does not apply to a disclosure that has been referred to the State Service Commissioner and is being dealt with under the *State Service Act 2000*

Recommendation 12

The *Public Interest Disclosures Act 2002* be amended to provide for a single test to be applied to all disclosures in the first instance, which combines the current tests for a protected disclosure and a public interest disclosure, such that a public interest disclosure is either –

- one that the person making the disclosure believes on reasonable grounds that improper conduct or detrimental action has occurred, is occurring or will occur; or
- one which does show that the improper conduct or detrimental action has occurred, is occurring or will occur.

This test needs to be applied in a reliable and consistent manner. Uncertainty as to the assessment and required action on both parts will discourage reporting. Consequently, the assessment should be carried out by a limited number of appropriately skilled responsible officers, the decision should be made in writing and have reasons attached, and the person making the disclosure should be notified of the decision in a timely manner. The assessment phase

should be subject to a particular timeline, specified in the legislation. This process, other than the role of the public interest disclosure officer recommended earlier, is adequately provided for in the current legislation. (See section 7.1 for further discussion on protected disclosures.)

6.6 Referral of disclosure

When initially assessing the disclosure it may become clear that it is more appropriate that the disclosure be investigated by another body. For a public body to respond to a disclosure, the disclosure must be made about an employee, officer or member of that public body. The legislation also requires that disclosures about certain officers or a public body be directed to specified positions (see Table 3 and recommendation 8). The responsible officer would need to suggest to the person making the disclosure that they make a disclosure to the appropriate position or body, for example, the State Service Commissioner when the disclosure concerns employment practices. However, there is provision for the public body to refer the disclosure directly, although it is limited.

The Tasmanian legislation allows a public body to refer an investigation of a disclosed matter to the Ombudsman if the public body considers that its own investigation is being obstructed.

However, there is a step before the investigation stage where the public body must notify the Ombudsman of its determination that the disclosure is a public interest disclosure. And where the public body decides that it will not investigate the disclosure and notifies the person making the disclosure accordingly, that person may then request that the public body refer the disclosed matter to the Ombudsman. This in effect provides an external review of the public body's decision to not investigate, although it is dependent upon action by the person making the disclosure.

This process of applying for review is more closely associated with complaint handling than reporting by witnesses and the review team concluded that it would be more consistent with the principles outlined earlier and with the overall concept of protecting the public interest for there to be an automatic review where the public body determines that a matter is not a public interest disclosure or should not be investigated, as the consequences of these decisions and the risk of mistake – especially where the test is subjective – can be significant.

Recommendation 13

The *Public Interest Disclosures Act 2002* be amended to provide for review on the papers or otherwise by the oversight agency of all determinations by a public body where the public body determines that a disclosure is not a public interest disclosure or should not be investigated.

The current legislation allows for a number of referral mechanisms, including:

- The Ombudsman to the Commissioner for Police;
- The Ombudsman to the State Service Commissioner;
- The State Service Commissioner to a public body;
- The State Service Commissioner to the Ombudsman;
- The Ombudsman to the Auditor-General.

These mechanisms are appropriate and should remain in place. However, it was raised in the Treasury submission that the legislation should clarify the provision under which the investigation is to be undertaken, for example if the disclosure is referred to the Auditor General then the Auditor General would be using the *Financial Management and Audit Act 1990*. It is somewhat inherent that this is the case, however the issue will be clarified at the time of drafting amendments.

6.7 Refusal of Applications

Under the current legislation, an application for a disclosure to be considered as a public interest disclosure does not need to be considered further if:

- the disclosure has not been made in accordance with the Act; and
- the alleged conduct has occurred more than 3 years before the commencement of the Act.

Where the Ombudsman or the public body is investigating a disclosed matter, they can decide not to investigate where:

- they consider the disclosure to be trivial, vexatious, misconceived, or lacking in substance;
- the subject matter of the disclosure has been adequately dealt with elsewhere;
- the person making the disclosure has commenced proceedings elsewhere in relation to the same matter and the body conducting the proceedings can order similar remedies to those under this Act; and
- the person making the disclosure knew the information for more than 12 months and has no satisfactory explanation for the delay in making the disclosure.

It is also suggested that there are other areas that should be considered as grounds for refusal. These include:

- personal grievances; and
- incorrect and misleading information.

A disclosure should involve more than personal grievance to fall within the Act. It is important to ensure that the focus remains on matters relating to the public interest and to ensure that the Act's provisions re protection are not used to assist someone in a personal conflict. However, it can be difficult to assess that a matter is a purely a personal grievance. Professor AJ Brown suggests that a 'matter is solely a personal grievance if, should the individual involved be satisfied that appropriate action has been taken, the whole matter is then automatically taken as resolved. Public interest matters are ones that, even if they involve personal grievances, are not necessarily resolved just because the personal interests are satisfied.'[26]

This is not addressed in the Tasmanian legislation, and there appears to be little provision for this in other jurisdictions. Furthermore, in many cases these grievances will be dealt with more appropriately under other complaint systems. The review team concluded that there should be provision in the legislation that such a disclosure need not be investigated as a Public Interest Disclosure.

The Tasmanian Act provides for an offence if a person knowingly provides false information, either in an initial disclosure or during an investigation. This approach is appropriate, although the review team considered that it was also appropriate to provide for an investigation to be declined if the disclosure is based on false or misleading information, regardless of the motive of the person making the disclosure. The review team could envisage situations where a person makes a disclosure on reasonable grounds, but is not in a situation to know that the information they have is false or incomplete.

26 Public Interest Disclosure Legislation in Australia: Towards the Next Generation', op cit, p23

Recommendation 14

The *Public Interest Disclosures Act 2002* be amended to provide for additional grounds for the oversight agency or a public body to decline to investigate a public interest disclosure, namely where:

- the disclosure relates solely to the personal interests of the person making the disclosure; or
- the disclosure is based on false or misleading information.

6.8 Investigation of Public Interest Disclosures

One of the main aims of the *Public Interest Disclosures Act 2002* is 'to provide for the matters disclosed to be properly investigated and dealt with …' (long title). This is important, not only to ensure that improper conduct is identified and stopped or rectified, but also to build up confidence in the process for possible future disclosures.

To achieve this it is important to have clear, up to date, defined processes about how disclosures are to be investigated.

The Tasmanian legislation provides some guidance. Firstly, the Ombudsman has a duty to investigate every disclosure determined by them to be a public interest disclosure, and the investigation is to be conducted in private. The Ombudsman is given freedom to investigate a disclosure in any manner that is seen fit. However, as one of the functions of

the Ombudsman is to prepare and publish guidelines on the procedures regarding investigations to be followed by public bodies, a good proportion of those procedures would be applicable to the Ombudsman's investigations as well. The Act also provides the Ombudsman with certain powers, such as in relation to taking evidence and the power to enter premises. Public bodies also have a duty to investigate, and are required to establish and make available procedures developed in accordance with the Ombudsman's guidelines.

However, before an investigation starts it is important to ensure that disclosures that should be investigated are actually investigated. In Tasmania, this is covered by the provisions that disclosures that have been assessed and meet all the requirements to be a public interest disclosure must be investigated by the Ombudsman (S39) or the public body (S63), although there is some discretion regarding disclosures to the Ombudsman about parliamentarians. There is also a duty on public bodies to notify the Ombudsman of determinations that a disclosure is a public interest disclosure, and a duty on the Ombudsman to monitor investigations. These two requirements act as a check built into the process. This is particularly important in the case of internal disclosures, where the person assessing the disclosure may be subjected to internal pressure, or through self interest may try, to block

further investigation or action through deciding not to investigate.

This notification and reporting regime, therefore, plays an important part in ensuring that appropriate disclosures are actually investigated. Another means relates to the people conducting the assessment and investigation. If those people are appropriately skilled and trained as recommended earlier (recommendation 9), and have sufficient seniority to be less subject to influence, there should be less risk of an investigation being stymied.

Next, there is the need to ensure that investigations are investigated properly (as stated in the aim). This is addressed partly by the requirements regarding the Ombudsman's function to prepare and publish guidelines on the procedures regarding investigations to be followed by public bodies, and the public body's requirement to establish and make available procedures developed in accordance with the Ombudsman's guidelines. As recommended in recommendation 7, a further requirement that the public body's procedures be formally approved and reviewed on a regular basis with a view to current best practice, and a focus on appropriately skilled and trained staff, establishes a good basis for the proper investigation of disclosures.

The current legislation requires that a public body, on making a finding of improper conduct, must take all reasonable steps to prevent the conduct continuing or reoccurring and to take steps to remedy any harm or loss. The public body is also required to report the action taken to the Ombudsman and is therefore subject to external scrutiny as to the action they take.

The current Act also requires extensive annual reporting of Public Interest Disclosure activity by both the Ombudsman and by each public body.

On balance the review team concluded that there is not a need to change the investigatory and reporting processes defined in the current Act.

7 PROTECTION OF PERSONS MAKING DISCLOSURES

> *… the more that official action focuses on the whistleblower in response to a disclosure, the more difficult it can become to protect that person, and others. It is now widely argued that the best responses are those which remove the public focus from the whistleblower, and instead focus on the substance of the disclosure and minimisation of workplace conflict surrounding it. … a range of individuals may need to be carefully managed and protected in various ways, once a public interest disclosure has been made – not just a person who makes an original disclosure."*[27]

27 Public Interest Disclosure Legislation in Australia: Towards the Next Generation', Dr AJ Brown, op cit, p7

7.1 What Disclosures should be Protected?

Under the existing Tasmanian legislation, disclosures are protected from the time they are assessed to be a protected disclosure, that is, they have been made in accordance with part 2 of the Act. The disclosure must meet the following criteria:

- The disclosure was made by a public officer or contractor;
- Where the disclosure is made by a contractor, the disclosure must be about the public body with which the contractor has entered into contract;
- The disclosure relates to conduct of a public body or public officer acting in their official capacity;
- The alleged conduct is either improper conduct or detrimental action;
- The person making the disclosure has reasonable grounds for believing the alleged conduct has occurred.

However, Whistleblowers Australia in their submission to the Commonwealth Government Inquiry into Whistleblowing in the Australian Public Service, which was also forwarded to the Tasmanian review, felt strongly that protection should apply from the first instance of when the person makes a disclosure, and that the prime obligation in handling the disclosure must be to provide immediate protection, advice and assistance to the person making the disclosure, even though it is only *potentially* a public interest disclosure.[28]

The nature of whistleblowing involves interpersonal, organisational or professional conflict. However, there are conflicts that do not raise public interest concerns, or where other processes exist for their investigation and resolution. How do you ensure that PID is not used (or over-used) as an alternative vehicle for conflicts that should be dealt with under other processes?

Clearly one way of discouraging misuse of the PID process is to only provide protection for public interest disclosures, although that does not fully promote the principles suggested earlier in this paper. The focus of the legislation

28 Submission by Whistleblowers Australia to House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Whistleblowing in the Australian Public Service, August 2008, pp29,30

should be on encouraging disclosure in the first instance, regardless of any subsequent issues such as the substance of the disclosure, or the motives or apprehended motives of the person making the disclosure. To this end the review team concluded that protection should be afforded to all internal witnesses from the point of disclosure, irrespective of a possible future decision that it is not a public interest disclosure or not to be investigated. In particular, at the early stage of assessment that protection is afforded by high levels of confidentiality, and should the process end prior to investigation the file should remain confidential and be sealed.

The review team concluded that the current two step assessment process of deciding if it is a protected disclosure and then determining if the disclosure is a public interest disclosure does not tip the balance in favour of encouragement of disclosure as it may signal to someone that to speak up and not meet the first test will result in lack of confidentiality applying and therefore potential reprisal. In our view affording protection to all disclosures purporting to be public interest disclosures does not accrue a detriment to a public body, but does send a strong signal that the public body wants internal witnesses to come forward about any level of wrongdoing and, even if it is not progressed as a PID investigation, it will be taken seriously, treated as confidential and, if need be, the matter will be directed it to a more suitable avenue for rectification.

Recommendation 15

The *Public Interest Disclosures Act 2002* be amended to provide that any disclosure made to a person to whom a disclosure may be made and purporting to be a public interest disclosure is a protected disclosure.

7.2 Confidentiality

Section 23 of the Tasmanian legislation creates an offence to disclose information obtained in the course of handling or investigating a protected disclosure except in certain circumstances ie:

- where exercising the functions of a public body under the Act;
- when making a report or recommendation under the Act;
- when publishing statistics in the annual report of a public body; and
- in criminal proceedings for certain offences under the Act.

Confidentiality provisions may be seen as being a means of promoting secrecy about improper conduct in an agency and allowing potential public interest disclosures to languish outside the public eye. But, the 'Whistling While They Work' research shows that they help to create the circumstances in which internal witnesses feel safe and secure enough to come forward with a disclosure. Maintaining confidentiality of the identity of the person making the disclosure is also one of the best ways of preventing reprisal action.

On the other hand the Act provides that reports of determinations and outcomes of investigations conducted internally must be provided to the external oversight body (currently the Ombudsman) and for reports of PID activities in Annual Reports.

While the PID Act does not specifically address it, there also needs to be discretion exercised in relation to the identity of the subject of the disclosure. The Ombudsman's Guidelines state, 'disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the discloser and the person who is the subject of the disclosure.'[29]

On balance the review team concluded that it was not necessary to amend the existing confidentiality provisions in the Tasmanian legislation.

7.3 Other internal witnesses

Sometimes a disclosure may arise from means other than a direct disclosure eg an audit or a complaint from outside the organisation. "In any of these situations, internal staff may then subsequently choose to come forward, or may be directly called on to give evidence which, when they elect to tell the truth, becomes decisive. Some employees may disclose vital evidence by accident, or without fully understanding its significance – in which case it should still be treated as a public interest

29 Ombudsman's Guidelines, p37

disclosure, since they may still need careful management and protection."[30]

The Tasmanian legislation does not specifically provide for these people to be protected, even though s49(1) enables the Ombudsman to obtain information from any person and in any manner he or she thinks fit in order to investigate a disclosed matter. Nor does it appear to provide a general protective coverage for them. For example, would the description in Part 2 of the person making a disclosure be broad enough to cover an internal witness who, for example, disclosed information accidentally, and so may not satisfy the 'believes on reasonable grounds' provision? The Queensland *Whistleblowers Protection Act 1994* provides that a disclosure made during the proceedings of a court or tribunal is a public interest disclosure made to the court or tribunal as an appropriate entity (s35). The Victorian legislation provides that anyone who provides information in an investigation by the Ombudsman or Director of a public body has the same protection and immunity as a witness has in proceedings in the Supreme Court (s107A).

In addition, it is recognised that the person making the disclosure is not the only potential target for reprisals. Protections that only attach to a person making a voluntary public interest disclosure will not contribute to the objective of facilitating disclosures. These additional internal witnesses may be crucial in the investigatory process and may equally be subject to reprisal and detrimental action in the same way as the other initial internal witness. The working group was of a view that this group should also be able to be provided with protection as it is vital to investigatory processes that all possible witnesses are encouraged to participate.

The review team concluded that there are a group of potential internal witnesses who may only come forward after an initial process has commenced and if they can be assured of protection in the same way as the initial internal witness.

Recommendation 16

The *Public Interest Disclosures Act 2002* be amended to provide that further information provided to a person to whom a disclosure may be made, or through an investigatory process in accordance with the Act, and relating to a matter already determined to be a public interest disclosure may be deemed to be a further protected disclosure.

7.3 Repeat disclosures

Currently the PID Act provides that if it is determined that a disclosure is not a public interest disclosure and the person who made the disclosure seeks to make a further disclosure, the further disclosure is not protected (see Section 24).

The likely intent of this is to discourage repeat applicants who attempt to have the matter reopened on the same material from doing so and presumably wasting resources. However it is arguable that if a decision was made that something was not a public interest disclosure and subsequently the issue grows in significance or seriousness then this provision would run counter intuitive to the principles of the Act.

The review team concluded that the unintended consequences of Section 24 could be removed whilst still dealing with the so called repeat applicant, by amending the grounds for refusing to investigate a public interest disclosure to include a provision which allows a public body or the oversight agency to refuse to investigate if the disclosure relates to a matter already determined and the disclosure does not provide significant or substantial new information.

Recommendation 17

The *Public Interest Disclosures Act 2002* be amended to:

- delete section 24;
- include in section 40 and 64 an additional ground for refusing to investigate a public interest disclosure, namely "that the matter which is the subject of the disclosure has already been determined and the additional disclosure does not provide significant or substantial new information".

30 Public Interest Disclosure Legislation in Australia: Towards the Next Generation', op cit, p12

7.4 Situations where protection should be lost

Section 87 of the Tasmanian Act states that a person 'must not knowingly provide false information to a person conducting an investigation under this Act', and it is an offence to do so. For an investigation to have commenced, the disclosure would have been assessed as a public interest disclosure and would attract protection up to that point.

Provisions in the South Australian and Western Australian legislation address making a false or reckless disclosure. For example, the South Australian *Whistleblowers Protection Act 1993* makes it an offence for a person to make a disclosure of false public interest information knowing it to be false or being reckless about whether it is false (s10). Furthermore, the person making the disclosure is not protected by the Act.

To knowingly provide false or misleading information is clearly an abuse of the process afforded by the legislation and the review team can see no compelling reason why someone found guilty of this offence should not lose the protection of the legislation.

Recommendation 18

The *Public Interest Disclosures Act 2002* be amended to provide that a person found guilty of an offence in accordance with Section 87 should no longer be a person to whom Part 3 applies.

7.5 Welfare

For protection to be provided to a person from the time they make a disclosure, there needs to be a system or process that starts monitoring the welfare of the person making the disclosure from the point of the first disclosure. This is particularly important in the light of recent research that indicates that the most common sources of perceived mistreatment are workplace based, either through action by management or other work colleagues.[31] There are provisions in place for dealing with reprisals once they occur, but there is only limited provision in the Tasmanian legislation to deal with the prevention of reprisal action, for example where section 19 acts as a deterrent by creating an offence for taking detrimental action. Surely the prevention of detrimental action before it occurs would be the best form of protection.

One of the difficulties in this area lies in establishing whether and at what point the treatment of the person making the disclosure is or is not justified and amounts to detrimental action. In order to make this decision, monitoring of the welfare of the person making the disclosure needs to occur as early as possible, and an assessment made of the possible risks to person.

Peter Roberts, in his paper to the 12th Annual Corporate Governance in the Public Sector Conference commented on procedures for responding to reprisals. He noted that "one area which was not done well by [Australian] organisations was assessing the risk of reprisal when an employee comes forward with a disclosure. Very few organisations had any sort of formal process for undertaking this task which the research team considers to be essential for the proper protection of whistleblowers".[32] There needs to be a procedure that is independent of any possible future investigation process that allows for documentation of the person's organisational position and conditions as close as possible to the time of making the initial disclosure, assessment of any possible risks of reprisal (including possible risks to other people such as family members or work colleagues), and ongoing monitoring of and support for the person's welfare. The main elements of such a procedure would include:

- "clear documentation as to when and how concerns about wrongdoing were first aired;
- collection by the relevant investigator of the evidence existing at the time of the report regarding the reporter's work performance and workplace relationships, undertaken with the knowledge and participation of the reporter;

31 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations, op cit, p308

32 'Ensuring Agency Accountability: Principles and Protection for Whistle-blowing in the Public Sector', Peter Roberts, 12th Annual Corporate governance in the public sector conference, February 2009, Canberra, p8

- when the fact of a report is still confidential, alternative strategies such as a general audit of the work histories of all employees in the relevant section to establish the relative position of the employee, in parallel with the primary investigation"[33];
- assessment of possible risks of reprisal against the person making the disclosure and possible related people;
- ongoing monitoring of the welfare of the person and provision of support;
- appointment of appropriately skilled staff such as welfare manager/s to instigate and manage the above procedures.

The current Guidelines developed by the Ombudsman do consider the welfare of the discloser. The Guidelines state that the protected disclosure coordinator should appoint a welfare manager, and list the role of the welfare manager as to:

- examine the immediate welfare and protection needs of a discloser and seek to foster a supportive work environment;
- advise the discloser of the legislative and administrative protections available to him or her;
- listen and respond to any concerns of harassment, intimidation or victimisation in reprisal for making a disclosure;
- keep a contemporaneous record of all aspects of the case management of the discloser including all contact and follow-up action; and
- ensure the expectations of the discloser are realistic.

All the above actions should be considered as routine and are additional to procedures for the investigation of real allegations of reprisal or failures in duty of care. They require an active management approach, and while it can be difficult to formulate minimum content of procedures in legislation, they should be clearly raised in the Guidelines developed by the oversight agency for inclusion by public bodies in their own procedures. This would then be a clear statement by the public body that they take their responsibilities and duty of care as an employer seriously.

Recommendation 19

The *Public Interest Disclosures Act 2002* be amended to provide for public body procedures to include procedures for the protection of the welfare of a person making a protected disclosure.

7.6 Remedies

Even when a public body has taken all reasonable measures to protect a discloser against direct or indirect detriment, the person making the disclosure may still be subject to reprisal action. In this circumstance the first response must be for the public body to assess the detriment suffered by the person and to take remedial action. If the public body does not take remedial action, then action should taken by the oversight agency.

In considering the likely form of the proposed new Commonwealth public interest disclosures legislation, Peter Roberts suggests that remedial action would take the form of:

- stopping the detrimental action and preventing its recurrence, including by way of injunction;
- placing the person in the situation they would have been in but for the detrimental action, including if necessary the transfer of the person (with their informed consent) to another equivalent position;
- an apology;
- compensation (pecuniary and/or non-pecuniary) for the detriment suffered, if the detriment could have been prevented, avoided or minimised;
- disciplinary or criminal action against any person responsible for the detriment. [34]

The Tasmanian legislation has some clear provisions relating to this area and on balance the review team considered that these existing protections provided a mix of remedies that addressed both the protection of the person making the disclosure from reprisal, and should detrimental action occur, enabling the action to be stopped and remedy to be made.

33 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations, op cit, p309

34 'Ensuring Agency Accountability: Principles and Protection for Whistle-blowing in the Public Sector', Peter Roberts, 12th Annual Corporate governance in the public sector conference, February 2009, Canberra, p13

8 MAJOR REFERENCES

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3. Whistleblowing Around the World; Law, Culture and Practice", Public Concern at Work and Open Democracy Advice Centre.
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5. Whistleblowing: The State of the Art, Dehn, G and Calland, R, Public Concern at Work and Open Democracy Advice Centre
6. Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector, House of Representatives, Standing Committee on Legal and Constitutional Affairs, 2009
7. Ensuring Agency Accountability: Principles and Protection for Whistle-blowing in the Public Sector', Peter Roberts, 12th Annual *Corporate governance in the public sector conference*, Canberra, February 2009

APPENDIX ONE

Submissions Received:

1. Dobson Electrical Pty Ltd (Received: 3 December 2008)
2. Review of *Public Interest Disclosures Act 2002* – Glenorchy City Council (Received: 23 January 2009)
3. Review of the *Public Interest Disclosure Act 2002* – Clarence City Council (Received: 5 February 2009)
4. Whistleblowers Australia (Received: 8 February 2009)
5. Launceston City Council's Submission - Review of *Public Interests Disclosure Act 2002* – Launceston City Council (Received: 10 February 2009)
6. Submission for the review of the *Public Interest Disclosures Act* (2002) – Community and Public Sector Union (Received: 13 February 2009)
7. Treasury Submission to the Review of the *Public Interest Disclosures Act 2002* – Department of Treasury and Finance (Received: 16 February 2009)
8. Cynthia Kardell (Received: 24 February 2008)

APPENDIX TWO

A new framework for internal witness management systems[35]

"This document sets out a framework of the 'dimensions' of internal witness management systems that are currently found and/or might be desirable in public sector agencies. The ultimate aim of the research is to fully understand what makes a comprehensive and viable whistleblowing system within an organisation.

These seven dimensions and 39 sub-dimensions were drawn from a variety of sources: background literature; a July 2005 symposium held by the project in Canberra; issues emerging from empirical data collected by the project (including the agency survey); an analysis of the written whistleblowing procedures supplied to the project by 175 agencies; and workshops with the project's case study agencies in July 2007 and July 2008; and revised findings from and comments on the draft report of October 2007.

The framework provides a consistent approach for description and comparison of the different approaches to whistleblower management and support found among different agencies. It also provides a structure for the analyses to be presented in the second project report, outlining current and prospective best practice across a diverse range of organisations.

The dimensions of an internal witness management system

Dimension and sub-dimensions

1. Organisational commitment

1.1. Management commitment to the principle of whistleblowing and statements of the organisation's support for the reporting of wrongdoing through appropriate channels.

1.2. Understanding of the benefits and importance to the entity of having a whistleblowing mechanism.

1.3. Commitment that a credible investigation process will follow the receipt of a whistleblowing report and that any confirmed wrongdoing will be remedied.

1.4. Commitment to protect and respect internal witnesses.

1.5. Positive organisational engagement on whistleblowing issues with external integrity agencies, staff associations and client groups.

2. Reporting pathways

2.1. Clear *internal* pathways setting out how, to whom and about whom whistleblowing reports may be made, including

35 Whistleblowing in the Australian public sector : enhancing the theory and practice of internal witness management in public sector organisations, op cit, Appendix C

guidance on the most appropriate pathways for different types of reports.

2.2. Clear *external* pathways setting out how, to whom and about whom whistleblowing reports may be made, including guidance on the most appropriate pathways for different types of reports.

2.3. Clear and understood relationships between internal and external reporting.

2.4. Clear advice to employees on who may invoke the whistleblowing mechanism (that is, employees, contractors, and so on).

2.5. Clear advice to employees on the types of concerns about which it is appropriate to use the whistleblowing mechanism, including levels of proof required (for example, certainty versus suspicion regarding the truth of concerns).

2.6. Organisational capacity for differentiating, where appropriate, between employment-related grievances and public interest disclosures.

2.7. Mechanisms for ensuring responses to whistleblowing are undertaken with the appropriate informality/formality, as the case requires.

2.8. Commitment that anonymous reports will be acted on.

3. Management obligation to employees

3.1. Realistic assurance of the confidentiality of reports.

3.2. Assessment of the risk of reprisal against internal witnesses.

3.3. Procedures and resources for responding to reprisal risks against internal witnesses.

3.4. Commitment that staff who report wrongdoing will not suffer any disciplinary or similar action as a result.

3.5. Mechanisms to ensure positive action by the entity to protect internal witnesses, including restitution/compensation when protective action becomes unsuccessful or impossible.

3.6. Continuing monitoring of the welfare of whistleblowers.

3.7. Clear procedures for the protection of the rights of people against whom allegations have been made.

3.8. Appropriate sanctions against false or vexatious allegations.

4. Organisational support for internal witnesses

4.1. Systems and/or services for providing active management and support of internal witnesses.

4.2. Procedures and resources for the investigation of reprisal action against internal witnesses, including action against any people found responsible.

4.3. Provision of information, advice and feedback to internal witnesses on actions being taken in response to disclosure.

4.4. Exit strategies for finalising whistleblowing cases.

4.5. Regular evaluation of the effectiveness of the program.

5. Institutional arrangements

5.1. Clear understanding of the whistleblowing-related roles and responsibilities of key players—internal and external to the organisation.

5.2. Effective sharing of responsibility for the support and management of whistleblowers between line managers, corporate management and external agencies.

5.3. Effective separation of investigation and support functions.

5.4. Proactive (not reactive) operation of the whistleblower support program.

5.5. Embedding of policies and procedures in existing management systems and corporate governance arrangements, including mechanisms for recording, tracking and reporting all whistleblowing reports.

6. Skills and resources

6.1. Financial resources dedicated to the whistleblower program.

6.2. Investigation competencies and training.

6.3. Reprisal investigation competencies and training.

6.4. Support, counselling and management competencies and training.

7. Promulgation of procedures

7.1. Multiple strategies for ensuring staff awareness of the whistleblowing program.

7.2. Clear information about legislative protection.

7.3. Easy-to-comprehend procedures, including relationship with other procedures.

7.4. High level of employee awareness and comprehension of and confidence in procedures."