# Public Interest Disclosure Legislation in Australia:

# Towards the Next Generation

## *Summary*

Prepared as part of the Australian Research Council 'Linkage' Project *'Whistling While They Work'* by


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## Foreword

Whistleblowing, or the preparedness of officials and employees to make public interest disclosures about wrongdoing within their organisations, is vitally important to ensuring integrity and accountability in the public sector. It will not happen unless there is a sound legislative structure to facilitate and protect public interest disclosures.

There are now many laws around Australia that guide how disclosures in the public sector can be made, how they should be acted on, and how those who make them should be managed and protected. There are variations in style, coverage and principle among the different laws. There are strengths in some laws that other jurisdictions could heed. There are weaknesses in all laws that need to be addressed, perhaps by common answers.

Ombudsman offices have a special interest in ensuring the effectiveness of public interest disclosure laws. Partly that stems from our role in safeguarding the integrity of public institutions. Partly too it is a special responsibility given to Ombudsman offices in some of the current legislation.

With other government agencies and oversight bodies with a shared interest, we joined a national research project initiated by Griffith University to review Australian laws and practices. The project is titled 'Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector'.

This paper by Dr A J Brown comparing Australian legislation has been prepared as part of this national project. The paper analyses the current public interest disclosure legislation by asking a series of ten fundamental questions that any such legislation needs to address. While our final views on the issues raised by Dr Brown will not be formed until after considerable further research and discussion, our own practical experience is that these issues need to be considered in revising the legislation. His call for a national and coherent approach deserves special attention.

We encourage government agencies and the public to consider the issues raised in this paper, and to respond with comments to the project's research team. Your comments will help inform our collective thinking about what might constitute 'best practice' in public interest disclosure legislation, and contribute to recommendations for reform.

We commend the paper to you and invite your feedback.

**John McMillan**
Commonwealth Ombudsman

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Queensland Ombudsman

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| | |
|---|---|
| *Commonwealth* | Commonwealth Ombudsman<br>Australian Public Service Commission |
| *NSW* | Independent Commission Against Corruption<br>New South Wales Ombudsman |
| *Queensland* | Crime & Misconduct Commission<br>Queensland Ombudsman<br>Office of the Public Service Commissioner |
| *Western Australia* | Corruption & Crime Commission<br>Ombudsman Western Australia<br>Office of the Public Sector Standards Commissioner |
| *Victoria* | Ombudsman Victoria |
| *Northern Territory* | Commissioner for Public Employment |
| *Australian Capital Territory* | Chief Minister's Department |
| *Non-government partner* | Transparency International Australia |

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## Responding to this paper

Submissions or comments in response to this paper are invited by **30 March 2007** and should be directed to:

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# Public Interest Disclosure Legislation in Australia: Towards the Next Generation

## Summary

The willingness of public officials to voice concerns on matters of public interest is increasingly recognised as fundamental to democratic accountability and public integrity. At the same time, 'whistleblowing' is one of the most complex, conflict-ridden areas of public policy and legislative practice.

This paper reviews the eleven legislative proposals that have dealt with the management of public sector whistleblowing in Australia since 1993, including the nine Acts now in force and two current proposals:

***Table 1. Australian public interest disclosure Acts & Bills, in date order***

| No. | Act / Bill | Jurisdiction |
|---|---|---|
| 1 | *Whistleblowers Protection Act* 1993 | South Australia |
| 2 | *Whistleblowers Protection Act* 1994 | Queensland |
| 3 | *Protected Disclosures Act* 1994 | New South Wales |
| 4 | *Public Interest Disclosure Act* 1994 | Australian Capital Territory (1) |
| 5 | *Public Service Act* 1999, section 16 'Protection for whistleblowers' | Commonwealth (1) |
| 6 | *Public Interest Disclosure Bill* 2001 [2002] (Private member's Bill) | Commonwealth (2) |
| 7 | *Whistleblowers Protection Act* 2001 | Victoria |
| 8 | *Public Interest Disclosures Act* 2002 | Tasmania |
| 9 | *Public Interest Disclosure Act* 2003 | Western Australia |
| 10 | *Public Interest Disclosure Bill* 2005 (Government Bill) | Northern Territory |
| 11 | *Public Interest Disclosure Bill* 2006 (Government Bill) | Australian Capital Territory (2) |

The paper presents – and suggests some possible answers to – ten fundamental questions about the current tapestry of Australian whistleblower protection laws.

Comparative analysis of the legislation is difficult because, over time, different jurisdictions have experimented with the result that no two frameworks are the same. There has also been little empirical evidence of their performance. These gaps are currently the focus of a national research project, 'Whistling While They Work: Enhancing the Theory and Practice of Internal Witness Management in the Australian Public Sector'.

Comments are welcome on the legislative issues reviewed here, which will be fed back into the research and the deliberations of the participating governments.

Table 15 summarises the results of the analysis, ranking existing provisions according to those which are most problematic, or missing, or appear closest to legislative best practice. While this produces overall rankings, the first general conclusion is that no single existing Australian whistleblower protection law or Bill provides a 'best practice' model. Every jurisdiction has managed to enact at least some elements of best practice, but all have problems – sometimes unique, sometimes general or common problems.

## *Table 15. A ranking of Australian public interest disclosure provisions*

**3** = current best practice
**2** = provisions are adequate / conventional
**1 =** not applicable / law is silent or weak
**0** = current major problem or problematic omission

| | | *1* **SA** **1993** | *2* **Qld** **1994** | *3* **NSW** **1994** | *4* **ACT** **1994** | *5* **Cth** **1996** | *6* **Cth Bill 2001** | *7* **Vic** **2001** | *8* **Tas** **2002** | *9* **WA** **2003** | *10* **NT Bill 2005** | *11* **ACT Bill 2006** |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **1. How should whistleblowing be defined, etc?** | a. Title | 0 | 0 | 2 | 3 | 1 | 3 | 0 | 3 | 3 | 3 | 3 |
| | b. Objectives / long title | 2 | 2 | 3 | 0 | 0 | 0 | 3 | 3 | 2 | 3 | 3 |
| **2. Who should be eligible for whistleblower protection?** | a. Internal information sources | 0 | 2 | 3 | 0 | 2 | 0 | 0 | 3 | 0 | 0 | 0 |
| | b. Any public official | 1 | 3 | 2 | 1 | 0 | 1 | 1 | 2 | 1 | 1 | 1 |
| | c. Public contractors & employees | 1 | 2 | 0 | 1 | 0 | 1 | 1 | 3 | 1 | 1 | 1 |
| | d. Anonymous disclosures | 1 | 2 | 1 | 0 | 1 | 0 | 3 | 3 | 1 | 3 | 0 |
| | e. Former organisation members | 1 | 1 | 2 | 1 | 1 | 1 | 1 | 3 | 1 | 1 | 1 |
| | f. Supplement/additional information | 1 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 1 | 2 | 0 |
| | g. Other internal witnesses | 1 | 2 | 0 | 1 | 0 | 1 | 3 | 1 | 1 | 3 | 2 |
| | h. Any reprisal target | 2 | 3 | 0 | 3 | 1 | 3 | 2 | 2 | 3 | 2 | 2 |
| **3. Public & private sector covered by same law(s)?** | | 0 | 0 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 | 2 |
| **4. What types of wrongdoing should be able to be disclosed?** | a. Comprehensive categories | 3 | 3 | 3 | 0 | 3 | 0 | 0 | 0 | 3 | 0 | 0 |
| | b. Criminal etc thresholds | 2 | 2 | 2 | 2 | 2 | 2 | 0 | 0 | 2 | 0 | 1 |
| | c. Wrongdoing by any / all officials | 3 | 3 | 2 | 2 | 0 | 2 | 2 | 2 | 3 | 2 | 2 |
| | d. Wrongdoing by contractors | 2 | 2 | 0 | 2 | 0 | 2 | 2 | 0 | 3 | 2 | 2 |
| **5. How do we guard against misuse?** | a. Offence for false / misleading | 0 | 3 | 2 | 1 | 1 | 1 | 2 | 2 | 0 | 2 | 1 |
| | b. Subjective / objective test | 2 | 2 | 2 | 2 | 1 | 2 | 0 | 0 | 2 | 0 | 2 |
| | c. Entirely policy disputes | 1 | 3 | 0 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| | d. Entirely personal grievances | 1 | 2 | 2 | 2 | 0 | 2 | 2 | 2 | 2 | 2 | 0 |
| | e. Vexatious (abuse of process) | 1 | 1 | 3 | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 1 |
| | f. Discretions not to investigate | 1 | 1 | 1 | 2 | 1 | 2 | 2 | 3 | 3 | 2 | 2 |

| *Table 15 continued* | | *1* | *2* | *3* | *4* | *5* | *6* | *7* | *8* | *9* | *10* | *11* |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | **SA 1993** | **Qld 1994** | **NSW 1994** | **ACT 1994** | **Cth 1996** | **Cth Bill 2001** | **Vic 2001** | **Tas 2002** | **WA 2003** | **NT Bill 2005** | **ACT Bill 2006** |
| **6. How should disclosures be received, handled & investigated?** | a. Receipt mechanisms | 2 | 3 | 2 | 2 | 0 | 0 | 2 | 2 | 3 | 2 | 2 |
| | b. Obligation to investigate | 1 | 2 | 1 | 3 | 3 | 3 | 3 | 3 | 3 | 3 | 3 |
| | c. Independent review of discretions | 1 | 1 | 1 | 1 | 1 | 1 | 3 | 3 | 2 | 3 | 1 |
| | d. Clearinghouse for all investigations | 1 | 2 | 1 | 1 | 1 | 1 | 3 | 3 | 2 | 3 | 1 |
| | e. Coordinated investigation systems | 2 | 2 | 2 | 2 | 0 | 2 | 0 | 0 | 3 | 0 | 0 |
| | f. Public reporting requirements | 0 | 3 | 0 | 2 | 2 | 2 | 3 | 3 | 2 | 3 | 2 |
| **7. What legal protection should be provided?** | a. Relief from liability | 2 | 3 | 3 | 2 | 0 | 2 | 3 | 1 | 1 | 3 | 1 |
| | b. Loss of protection | 2 | 2 | 2 | 2 | 2 | 2 | 1 | 0 | 1 | 1 | 0 |
| | c. Anti-reprisal offences | 0 | 1 | 2 | 1 | 0 | 1 | 1 | 1 | 1 | 2 | 1 |
| | d. Civil law remedies | 2 | 2 | 0 | 2 | 0 | 2 | 2 | 2 | 2 | 2 | 0 |
| | e. Industrial & equitable remedies | 2 | 3 | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 1 | 2 |
| | f. Injunctions & intervention | 1 | 3 | 1 | 2 | 1 | 2 | 2 | 2 | 1 | 2 | 1 |
| **8. Disclosures to non-government actors?** | a. Members of parliament | 1 | 2 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| | b. Media | 0 | 0 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| **9. How should whistleblowers & internal witnesses be managed?** | a. Internal disclosure procedures | 0 | 2 | 0 | 2 | 1 | 2 | 3 | 0 | 3 | 3 | 0 |
| | b. Confidentiality | 2 | 3 | 3 | 1 | 0 | 1 | 1 | 1 | 3 | 3 | 2 |
| | c. Information | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 3 | 2 | 2 | 0 |
| | d. Reprisal risk, prevention etc | 0 | 2 | 0 | 2 | 0 | 2 | 0 | 0 | 0 | 1 | 1 |
| **10. How can public integrity agencies play more effective roles?** | a. Internal witness management | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| | b. Reprisals and compensation | 1 | 2 | 1 | 2 | 1 | 2 | 1 | 1 | 1 | 1 | 1 |
| | c. Monitoring, research, policy | 1 | 1 | 1 | 1 | 1 | 1 | 2 | 2 | 2 | 2 | 1 |
| | | 126 | 50 | 82 | 63 | 61 | 37 | 59 | 65 | 67 | 73 | 71 | 47 |
| | | **%** | 39.7 | 65.1 | 50.0 | 48.4 | 29.4 | 46.8 | 51.6 | 53.2 | 57.9 | 56.3 | 37.3 |

1. **How should whistleblowing be defined (and what should be the title and objectives of the legislation)?**

   Whistleblowing is the 'the disclosure by organisation members of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action'. The objectives of current public interest disclosure laws are largely consistent: to facilitate public interest disclosures by establishing processes by which they can be made, ensuring that they are properly dealt with, and protecting those who make them.

   However in practice the term 'whistleblower' is also subject to opposing stereotypes. Legal uses of it in four laws (SA, Qld, Cth, Vic) are problematic. The best title for all Australian public sector legislation is *Public Interest Disclosure Act*.

2. **Who should be eligible for whistleblower protection?**

   Currently only three Acts (NSW, Cth, Tas) are consistent with the above definition of whistleblowing. The rest enable not just 'organisation members' but 'any person' to make disclosures as if they were a public official. This requires reform.

   Public sector whistleblowing laws should be limited to disclosures or other evidence provided by public officials, public contractors or their employees, some volunteers, former officials at risk of reprisals, and anonymous persons who appear to be in the above categories. Protection should flow to further witnesses and family, friends or associates of those who provide information. No existing law achieves best practice in all these respects, although the closest is the Tasmanian Act.

3. **Should public and private sector whistleblowing be in the same law?**

   Not in Australia, at least for the foreseeable future. While sector-blind laws have proved possible in some countries such as the UK, for a variety of reasons Australian private sector whistleblower protection is now better provided under other laws, which are expanding. The two public sector laws (SA, Qld) which attempt to cover certain types of private sector wrongdoing do not do so comprehensively, and would be best amended to maintain a clear public sector focus.

4. **What types of wrongdoing should be able to be disclosed?**

   Only three laws (SA, Qld, WA) currently take a reasonably comprehensive approach to identifying the public sector wrongdoing that can be contained in disclosures. Current best practice is found in WA, whose law is the only one nationally to clearly permit disclosures about public contractors.

   Three laws (Vic, Tas, NT) contain an extremely high threshold allowing the reporting and protection of only the most serious types of disclosures (e.g. criminal wrongdoing). The adoption of this threshold in Victoria was apparently the result of a drafting error, since repeated elsewhere. Consequently this legislation represents a highly problematic model for other jurisdictions.

5. **How do we guard against misuse of whistleblowing processes?**

   All laws require a revised approach to allow clearer and more effective identification of those public interest matters requiring the protection of the scheme, better filtering of disclosures not intended to be protected, and clearer discretions for when investigation is not required. Currently only the NSW Act provides that vexatious disclosures are not protected (as opposed to need not be investigated).

**6. How should disclosures be received, handled and investigated?**

A revised approach to the relationship between whistleblower protection laws and existing integrity systems is needed in many jurisdictions, especially the Commonwealth, Victoria, Tasmania, NT and the ACT. New approaches are needed for ensuring that whistleblowers have multiple disclosure avenues, with prospective best practice lying in a mix of the Queensland and WA approaches.

The Victorian, Tasmanian and NT instruments have a confusing dual classification (both 'protected' and 'public interest' disclosures) which should be abolished. However they attempt to provide a central agency with a clearinghouse role, with the potential for a more coordinated approach to investigations and review of decisions not to investigate disclosures, which needs to be revised and developed. While most legislation provides for public reporting of activity under the Act, two jurisdictions (SA, NSW) lack any system of reporting, leaving implementation largely unknown.

**7. How can legal protection of whistleblowers be made more effective?**

Some jurisdictions still have no or weak legal protection for whistleblowers (notably Cth, SA, NSW). Prosecutions for reprisal offences are still difficult, with a need to re-examine reprisal provisions as well as a more strategic approach to test cases. Only three jurisdictions (SA, Qld, WA) provide flexible injunction or compensation remedies for aggrieved whistleblowers based in employment and discrimination law, rather than supreme court action. While little is known about their use, there appears to be insufficient official support for the process of ensuring that detriment suffered by whistleblowers is remedied.

**8. The public interest 'leak': when should disclosures to non-government actors be protected?**

Only one jurisdiction (NSW) extends protection, in certain circumstances, to officials who make public interest disclosures to members of parliament or the media. Further debate is needed on when public whistleblowing remains necessary or reasonable, so that this glaring deficiency might be rectified in all jurisdictions, and legal protection extended in these instances.

**9. How should whistleblowers and internal witnesses be managed?**

Practical protection is as important as legal protection. All jurisdictions, save the Commonwealth, have confidentiality requirements. However in many jurisdictions (SA, NSW, Cth, Tas) there are no requirements for agencies to develop procedures for the protection of whistleblowers, or other internal witness management systems. The development of clearer statutory guidance for such systems is a major priority.

**10. How can public integrity agencies play more effective roles in the management of whistleblowers and internal witnesses?**

A variety of integrity agencies play important roles under current regimes, especially in investigations. Under only three instruments (Vic, WA, NT) is a central integrity agency given a clear overall coordination responsibility. In most instances there is insufficient legislative support for integrity agencies to ensure effective internal witness support, reprisal investigations, monitoring and policy development.

The second general conclusion is that the most effective path to better legislative practice involves a new 'second generation' of whistleblower laws, drawing on all the lessons of the first generation, rather than trying to solve individual problems through continuing amendments to the existing laws.

There are also strong arguments why the laws should be more uniform across Australia's nine federal, state and territory public sectors. While existing diversity provides valuable lessons, the key issues are fundamentally common, and public integrity and standards would benefit nationally from a clearer legislative consensus on these questions.

It is open to any existing jurisdiction to replace current provisions or proposals with the first of this 'second generation'. Various current Bills and reviews provide an opportunity for this. An obvious candidate to initiate comprehensive reform is the Commonwealth Government, whose current provisions have been shown on this analysis to be the most limited and problematic.

While progress is needed towards more comprehensive reform, the most important need is care and deliberation over the nature of current legislative strengths and weaknesses. This legislation is of great public importance. By suggesting a new framework for comparison and evaluation of these laws, it is hoped that new steps can be taken towards ensuring its effectiveness, through clearer discussion of its fundamental principles, and a clearer consensus on what 'best practice' might represent.