WHISTLEBLOWERS PROTECTION ACT 2001
A view from the Ombudsman's Office

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Part 1: Overview of the Whistleblowers Protection Act 2001

Introduction

The Victorian *Whistleblowers Protection Act* 2001 (the Act) came into force on 1 January this year. The purposes of the Act are:

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies;
- to investigate such matters; and
- to protect persons who make disclosures and persons who may suffer reprisals in relation to the making of those disclosures.

While the Act itself is new, there is actually very little that is new in the Act. Individuals, who have been called whistleblowers since 1 January 2002, were previously called complainants by the Ombudsman and indeed by public bodies themselves. There are however some new concepts in the Act. These include:

- the protection given to whistleblowers;
- MPs and municipal councillors fall within the scope of the Act; and
- every public body, if it does not already have an internal complaints handling process, will be required to implement one. This process must be in accordance with the Act and the Ombudsman's guidelines.

An "umbrella" view of the scheme

Before going into the detail of the legislation itself, it may assist a better understanding of the Act to give an outline of the scheme.

In its essence, the scheme comprises two steps.

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- Step 1
  Receipt of a disclosure – information is received and assessed to see if it meets the statutory criteria in Part 2 of the Act. If it does, it is deemed under Part 3 of the Act to be a protected disclosure. Hence, the person, who disclosed the information, receives the protections under the Act.
- Step 2
  Is the disclosure a public interest disclosure? If it is deemed to be so, the disclosure must be referred to the Ombudsman, who will make a formal determination as to whether the matter is a public interest disclosure.
- If it is *not* a public interest disclosure, the whistleblower does not lose the protections of the Act. The matter may be resolved through other complaint resolution methods.
- If it *is* a public interest disclosure, the Ombudsman will decide who will investigate the matter. Whether matters are found to be substantiated or not, protection for the whistleblower continues. Furthermore, the body against which disclosure has been made owes ongoing obligations to the whistleblower.

The scheme in greater detail

Scope of the Act

The scope of the Act is wider than that of the *Ombudsman Act* 1973. The definition of "public body" comprehends municipal councils, and the definition of "public officer" comprehends MPs and municipal councillors.

What is a protected disclosure?

A complaint or allegation is only a protected disclosure if it is made in accordance with the Act and the Ombudsman's guidelines.

Section 5 of the Act, which sets out what matters constitute a disclosure, is a rather strange piece of legislative drafting. This section poses the question 'who can make a disclosure?' and goes on to provide the answer:

> a natural person who believes on reasonable grounds that a public officer or public body has engaged, is engaging or proposes to engage in improper conduct in their capacity as a public officer or a public body or has taken, is taking or proposes to take detrimental action.

Natural Person

Only a natural person can make a protected disclosure. If a disclosure is made to a public body by a company or a group (eg. a local residents action group), it is advisable for the protective disclosure coordinator to request that a single employee of the company or member of the group make the disclosure personally.

A complaint can be made in writing or orally and can be made anonymously. The complaint must be made either to the public body to which it relates or to the Ombudsman.

Improper Conduct

Improper conduct is defined as corrupt conduct, a substantial mismanagement of public resources, conduct involving substantial risk to public health or safety or the environment, which would, if proved, constitute a criminal offence, or an offence for which the officer could be dismissed.

The second reading speech for the Act speaks of this kind of conduct being serious wrongdoing – this is probably a good marker to bear in mind when contemplating this type of conduct. The Ombudsman's office will be interpreting improper conduct quite narrowly within the spirit of the legislation. The notion of corrupt conduct is being interpreted as requiring an element of dishonesty. Hence an allegation of medical negligence does not have the requisite dishonesty element, however if there is some kind of conspiracy or cover up in relation to the negligence, this may contain the relevant dishonesty.

Believes on Reasonable Grounds

Given the definition of a disclosure, the other question that must be determined is 'what constitutes a belief on reasonable grounds?'. The courts in other contexts have had much to say about this concept. As a starting point, one can say that a belief is something more than a mere suspicion.

"Reasonable grounds" is an objective test. It is whether a reasonable person in possession of the information would form a belief that the conduct occurred – the courts at times have referred to "reasonable probability".

Hence, whilst we cannot spell out with great clarity what constitutes reasonable grounds for believing something, we at least know that it is more than a mere suspicion, and is more similar to reasonable probability.

In order to ascertain whether or not someone has 'reasonable grounds', one needs to look at the facts and circumstances and evidence or proof that the whistleblower provides to substantiate his or her allegations. At this stage in the process, the onus is on the potential whistleblower to provide the facts, circumstances and evidence to justify the protections under the Act. It is not up to the public body to provide this for them.

If the allegation satisfies the indicia within Part 2 of the Act, it becomes a 'protected disclosure'. This means that both the allegation and the whistleblower enjoy the protection provided by the Act.

What is a Public Interest Disclosure?

If it is decided that a disclosure is a protected disclosure, the public body must next determine whether the matter is a public interest disclosure. Section 28 of the Act provides that this must be done within 45 days from the receipt of the disclosure.

In doing this, the public body must consider whether the disclosure "shows, or tends to show" that the conduct has occurred. Legal interpretation of this phrase in other contexts generally indicates that the disclosure reveals or makes known the conduct. In considering this disclosure to see whether it is a public interest disclosure, the

Ombudsman would expect the public body, where appropriate, to check its own records and speak further with the whistleblower.

If the public body decides that the matter is a public interest disclosure, it must refer the matter to the Ombudsman for a formal determination. If there are any doubts or queries when determining these matters, the Ombudsman's Office should be contacted to discuss the matter.

Referral and Investigation of a Public Interest Disclosure

When a matter is referred to the Ombudsman as a possible public interest disclosure, the Ombudsman will make a formal determination thereon. If the Ombudsman determines that a matter is a public interest disclosure, the matter must be investigated. The Ombudsman can undertake the investigation himself or refer it to the public body, the Chief Commissioner of Police, the Auditor-General, the Environmental Protection Authority or any other body the Ombudsman believes is best qualified to do the investigation.

In the case of a referral of the matter to the public body for investigation, Part 6 of the Act applies. Part 6 allows the Ombudsman to take over the investigation, if he is not satisfied with the actions of the public body in investigating the matter. Furthermore, Part 6 allows the public body to refer the matter to the Ombudsman, if considers that its own investigation is being obstructed.

Section 82 of the Act requires that the public body furnish the Ombudsman with a report of its findings and the steps taken in light thereof.

Protections Afforded to the Whistleblower

The protections afforded to the whistleblower under the Act comprise the following:

- immunity from civil and criminal liability and disciplinary action for making the disclosure;
- immunity from liability for breaching confidentiality provisions;
- protection from actions in defamation;
- right to sue for damages or to stop actions in reprisal;
- the Ombudsman and public bodies cannot reveal the whistleblowers identity in any reports made under the Act;
- it is an offence to reveal information as a result of a disclosure or investigation except in limited circumstances (s.22. Penalty – $6,000.00 fine and/or 6 months imprisonment);
- it is an offence to take detrimental action against a person in reprisal for a protected disclosure (s.18. Penalty – $24,000.00 and/or 2 years imprisonment).

Part 2: The Main Concepts within the Ombudsman's Guidelines

When dealing with whistleblowers it is important to be aware of the advice, which is contained within the Ombudsman's Guidelines (the guidelines). The guidelines cover each stage of the process and contain model procedures, which a public body can adopt. Note that s.68 of the Act requires public bodies to establish procedures for handling whistleblowers complaints. The guidelines can be found at www.ombudsman.vic.gov.au.

The following key areas are dealt with below.

1. The receipt of a disclosure;
2. The welfare management for the whistleblower and the protections available to him or her;
3. The natural justice concerns arising with respect to the subject of the complaint.

Receipt of a Disclosure

This should be a centralised process, as the process will often involve the public body's head office. The Ombudsman's office generally finds that it usually deals with the public bodies' head offices on the other matters that it investigates (eg under the *Ombudsman Act* 1973 and the *Police Regulation Act* 1958).

You should identify who within your organisation is to receive the disclosure so that the external or internal whistleblower can make a disclosure directly to them. The Dept of Justice (DOJ) is setting up a "Public Bodies Register", which will list all the public bodies who are subject to the Act and the relevant contact person within these bodies. Furthermore, the DOJ has also set up a central telephone service, which will provide people with the relevant contact details. It can be accessed by dialing 1300 366 356.

All staff should be made aware of the Act, and their body's procedures. In particular, reception staff and staff at call centres should be trained so that they are aware to whom they should refer a complaint if a person mentions the Act.

The guidelines advise that there should be two officers.

1. Protected Disclosure Officer (PDO):

   The PDO is the person who receives the disclosure and makes an assessment as to whether is a protected disclosure. There can be a number of these within large bodies or bodies with a regional structure. They are a contact point for advice about the Act and can receive disclosures. They are responsible for forwarding the protected disclosure to the protected disclosure coordinator.

2. Protected Disclosure Coordinator (PDC):

   The PDC has responsibility for the assessment of protected disclosures. They decide whether a protected disclosure may amount to a public interest disclosure, or whether it should be handled by some other complaint process. They should be of sufficient seniority to have direct contact with the CEO. Where the PDC is of the

opinion that the allegation may amount to a public interest disclosure, he or she must refer the matter to the Ombudsman for a formal determination.

The PDO and PDC can be one and the same person within an organisation. However, whilst these roles can be performed by the same individual, the guidelines make it clear that the roles of investigator and welfare manager must be separate from each other.

The guidelines are sufficiently flexible to allow a public body to out-source these roles if it does not want to perform them in house. This means that a nominated external consultant can receive and assess the disclosures. However, there is still a statutory responsibility upon the public body to make a final decision on whether the disclosure is a protected disclosure or public interest disclosure. Hence, the consultant can only have an advisory role.

The PDC also has the role of appointing an investigator if the Ombudsman determines that the matter is a public interest disclosure and refers the matter back to the public body for investigation. As with the receipt of the allegation, the investigation can also be out-sourced.

Welfare Management of the Whistleblower

The Act is quite unique because it protects both internal and external whistleblowers. The requirements to protect an internal whistleblower are of course more substantial. In addition, the person who is the subject of the allegations is also entitled to welfare management.

Internal Whistleblowers

An internal whistleblower is to be given sufficient protection to go about his or her job without harassment or victimisation from peers or superiors. The whistleblower should also be advised that his or her confidentiality will be protected as far as possible. This is particularly important when and if the matter reaches the stage of investigation, as it may be impossible to investigate without people becoming aware of the whistleblower's identity (eg. if only the whistleblower had access to a certain class of information). The whistleblower should be informed of this fact and told that the other protections within the Act will still apply.

External Whistleblowers

In the case of external whistleblowers, the rights and protections should be explained to them and also the confidentiality required under the Act. However, so far it is unclear what other protection they may require.

The Subject of the Allegation

The subject of an allegation is equally entitled to a welfare manager and support. It may be the case that an investigation will not be substantiated and this person, on becoming aware they are the subject of a complaint, may be very rightly upset. The allegation will most probably be very serious and as much as possible, their confidentiality should be protected.

Natural Justice for the Subject of the Allegation

The principles of natural justice should be followed in any investigation of a public interest disclosure. The principles of natural justice concern procedural fairness and aim to ensure that a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals, and enhances public confidence in the process.

Public bodies should take particular note of the following points.

- The person who is the subject of the disclosure is entitled to know the allegations made against him or her and must be given the right to respond. However, this does not mean this person must be advised of the allegation as soon as the disclosure is received or the investigation has commenced. Rather, it means that the subject of the allegation must have the allegations put to him or her prior to the conclusion of the investigation.
- All relevant parties to a matter should be heard and all submissions should be considered;
- If the investigator is contemplating making a report adverse to the interests of any person, that person should be given the opportunity to put forward further material that may influence the outcome of the report and that person's defence should be fairly set out in the report.

Part 3: General Discussion of "Corrupt Conduct"

The purpose of this part of the paper is to explain the concept of "corrupt conduct" as defined by the Act. Of all the types of 'improper conduct' comprehended by the Act, corrupt conduct is the most comprehensively described. It is the breadth of its description which may prove problematic, when public bodies seek to decide whether disclosed conduct is improper or not.

Corrupt conduct is defined in s.3 of the Act as meaning:

(a) conduct of a person that affects the *honest performance* of a public body's or officer's functions; or

(b) performance of a public officer's functions *dishonestly or with inappropriate partiality*; or

(c) conduct of a public officer, or former public officer, that amounts to a *breach of public trust*; or

(d) misuse of information or material acquired in the course of the performance of their functions (whether for a person's benefit, the public body's benefit or otherwise); or

(e) conspiracy or an attempt to engage in any of the conduct listed in (a)-(d).

The above definition is very broad. It could be considered to include any conduct which involves dishonesty, from taking stationery from the office for personal use, to the taking of bribes for the granting of a benefit eg. a planning permit or a pollution licence.

At its most basic, dishonesty or corruption could be considered to be the foregoing of a public interest for a private benefit. If the definition were to be left in these broad terms, it could result in trivial or minor infractions being the subject of whistleblower complaints. Fortunately, the definition can to some extent be read down by the requirement in paragraph (f) of the definition of improper conduct. This paragraph requires that such conduct, if proved, must constitute:

(a) a criminal offence; or

(b) reasonable grounds for dismissal of the public officer.

The second reading speech gives further confirmation that the conduct in question must be of a serious nature. Mr Wynne MP, speaking on behalf of the Attorney-General who was absent, stated that the conduct contemplated by the Act involves serious impropriety, and that the legislation makes it clear that public interest disclosures are about serious wrong-doings.

Similar Acts in other States define corrupt conduct in more precise terms. The NSW *Protected Disclosures Act* 1994 adopts the definition of 'corrupt conduct' contained in the *Independent Commission Against Corruption Act* 1988 (*ICAC Act)*. This contains a list (which is inclusive, not exhaustive) of conduct which may be considered corrupt. The list includes the following type of conduct: official misconduct, bribery, blackmail, fraud, violence, tax or revenue evasions etc. This provides some guidance as to what conduct is considered corrupt, ie it must be reasonably 'high level'.

If corrupt conduct under the Victorian legislation is seen to relate to dishonesty – as is contemplated in the provisions which further define corrupt conduct – then it differs from the NSW legislation which includes violence as corrupt conduct. Violence does not contain the requisite level of dishonesty to constitute corruption under the Victorian legislation.

In the case of *Balog v Independent Commission Against Corruption*,[1] the High Court noted that corrupt conduct was defined in ss 7, 8 and 9 of the *ICAC Act*. However, the Court went further and defined corrupt conduct as extending to:

> generally to any conduct of any person that adversely affects or could adversely affect the honest exercise or impartial exercise of official functions or which constitutes or involves the dishonest or partial exercise of official functions or a breach of public trust. It also includes conduct that adversely affects the exercise of official functions and involves any one of a number of specified criminal offences, including bribery, blackmail, perverting the course of justice and the like. Nevertheless, conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or dispensing with the services of a public official or otherwise terminating those services.

An interesting point to note is that many of the phrases used in this judgment have been specifically adopted in the Victorian legislation to further define corrupt conduct - particularly 'honest exercise', 'dishonesty', 'breach of public trust' and 'reasonable grounds for dismissing'.

A Victorian example of corrupt conduct was provided in the Supreme Court case of *Grollo, Grollo, Grofam Pty Ltd & Ors v Peter MacAuley*.[2] The Federal Court described corrupt conduct as the "improper interference with the due administration of justice under the law of the Commonwealth or with a view to the protection of an offender against the law from detection or punishment".

We now turn to consideration of some of the phrases used to further define corrupt conduct in the Victorian legislation:

1. Dishonesty

In *Peters v R*,[3] the High Court considered the tests for dishonesty in the English case of *R v Ghosh*[4] and the Victorian case of *R v Salvo*.[5] It should be noted that dishonesty requires both *mens rea* and *actus reus*.

2. Breach of Public Trust

In the case of *R v Woods*,[6] a breach of public trust was held to have occurred when a public officer had lodged fraudulent expense claims.

3. Inappropriate Partiality

Of all the terms used within the Act, the phrase "inappropriate partiality" had the least amount of commentary or discussion to be found, either in case law or in similar legislation. A phrase more commonly used is "lack of impartiality" rather than "inappropriate partiality". As partiality is defined as being the opposite of impartiality, discussions on a lack of impartiality may shed some light on what is meant by "inappropriate partiality". The ordinary meaning of "partiality" is to be "inclined antecedently to favour one party in a cause, or one side of the question more than the other". To be inappropriate it must be that it is not suitable to the case, or it is unfitting or improper.

Part 4: Draft practice note

CURRENT APPROACH OF THE OMBUDSMAN VICTORIA TO THE PHRASE "*REASONABLE GROUNDS FOR BELIEF*" IN THE WHISTLEBLOWERS PROTECTION ACT 2001

1. **Introduction**

1.1 This practice note is designed to help those within "public bodies" (as defined by the *Whistleblowers Protection Act* 2001 ("the Act") who are charged with the responsibility of assessing whether a disclosure made under the Act falls within the definition of a "protected disclosure" contained in part 2 of the Act.

1.2 It must be emphasised that each case must be considered on its own merits by reference to the relevant statutory criteria. This practice note is intended to give general guidance only and reflects the approach which the Ombudsman intends to adopt in relation to the definitions within the legislation. The Ombudsman's approach to these definitions will evolve over time with the use and operation of the Act.

2. **What is a "protected disclosure" for the purposes of the Act?**

2.1 One of the main purposes of the Act is to provide protection for people who provide information about serious impropriety in public bodies.

2.2 Such information must meet certain statutory criteria in order to be deemed a protected disclosure. It is critical to understand that not all information provided about impropriety will be considered to be a protected disclosure.

2.3 There is no definition in the Act of what constitutes a protected disclosure. However, section 5 states that:

"A natural person who believes on reasonable grounds that a public officer or 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 18 -

may disclose that improper conduct or detrimental action in accordance with this Part."

2.4 For further clarification of the meaning of "improper conduct", the reader is directed to Practice Note No. 1 "Current approach of the Ombudsman Victoria to the definitions of "improper conduct" and "corrupt conduct" in the *Whistleblowers Protection Act 2001*."

2.5 The following is a guide to the approach that the Ombudsman intends to adopt in relation to the phrase "believes on reasonable grounds".

3. **Belief**

3.1 The High Court has defined belief as: "an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture".[7]

3.2 A mere suspicion that the conduct has occurred is not sufficient. The courts have held that suspicion is a lesser state of mind than belief.[8]

3.3 However, an honest belief that impropriety has occurred is not sufficient under the Act. Instead, it must be a belief based on reasonable grounds.

4. Belief based on reasonable grounds

4.1 For reasonable grounds of belief, the usual test applied by the courts is whether a reasonable person would have formed that belief, having regard to all the circumstances.[9]

4.2 This test is an objective one, that is, whether a reasonable person, possessed of the same information that the person making the disclosure holds, would believe that there was reasonable grounds to suggest that the improper conduct had occurred.

4.3 Similar to a belief, reasonable grounds for a belief is also taken to require something more than a reasonable suspicion.[10]

4.4 Nor can a belief be held to be based on reasonable grounds, where it is based on a mere allegation, or conclusion, which is unsupported by facts or circumstances. The existence of facts and circumstances are required to show that the reasonable grounds are probable. For example, it is not sufficient for a person to base a disclosure on the statement "I know X is accepting bribes to grant planning permits to Y developer". This is a mere allegation unsupported by any further facts and circumstances.

4.5 However, the requirement for facts and circumstances to be present to support a belief does not mean that it is necessary that the person have a prima facie case, merely that the belief be probable. The courts have held that "the standard of 'reasonable grounds to believe'…is not to be equated with proof beyond a reasonable doubt or a prima facie case. The standard to be met is one of reasonable probability".[11]

5. 'Reasonable grounds for belief' and hearsay evidence

5.1 The Ombudsman takes the view that in some circumstances, hearsay evidence may be used to establish reasonable grounds, provided that the hearsay is trustworthy. To determine the trustworthiness of the hearsay, the United States Supreme Court has developed a two part test.[12]

5.1.1 The first part of the test establishes the reliability of the information. It is satisfied if:

- the person tells how he or she obtained the information, either by personal observation, or in some other dependable way; or
- the information is extremely detailed, so that the average person would conclude that the person had knowledge of the facts and was not relying on rumours.

5.1.2 The second part of the test focuses on the credibility of the person providing the whistleblower with the information. Credibility can be established in a number of ways. Some examples of ways in which credibility may be established include: past reliability of the informant; making statements against one's interests; being a good citizen; being an eyewitness to an incident.

6. General Observations

6.1 The phrase "reasonable grounds for belief" requires more than a suspicion and the belief must have supporting facts and circumstances. While the Act is in its initial stages of operation, those who are unsure of its application should contact the office of the Ombudsman for further guidance and advice about the operation of the Act.

Endnotes

1 (1990) 169 CLR 625.
2 (1993) 45 FCR 336.
3 [1998] HCA 7 (2 February 2998).
4 [1982] QB 1053.
5 [1980] VR 401.
6 [1999] ACTSC 60 (17 June 1999).
7 *George v Rockett* (1990) 170 CLR 104 at 116.
8 *Holmes v Thorpe* [1925] SASR 286 at 291.
9 *Jackson v Mijovich* (unreported, NSW Sup Ct, 22 March 1991, Finlay J, No 30020/90).
10 *Seven Seas Publishing Limited v Sullivan* [1968] NZLR 663 at 666-7.
11 *R v De Bot* (1986) 54 CR (3d) 120.
12 The test is based on the cases of *Aguilar v Texas* (1964) 84 S Ct 1509 and *Spinelli v US* (1969) 89 S Ct 584.