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**House of Representatives Standing
Committee on Legal and
Constitutional Affairs**

**Inquiry into Whistleblowing
Protections within the Australian
Public Sector**

**Submission from the Western Australian
Commissioner for
Public Sector Standards**

Friday, 29 August 2008

**Submission Embargoed until
Monday 8 September 2008**

Level 12 St Martin's Tower, 44 St Georges Terrace Perth WA 6000
Tel 08 9260 6600 Toll Free 1800 676 607 Fax 08 9260 6611
Email pssc@opssc.wa.gov.au Website www.opssc.wa.gov.

This Submission

The Office of the Public Sector Standards Commissioner (OPSSC) submits the following as a response to the terms of reference for the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into Whistleblowing Protections.

In this submission, OPSSC provides:

- detail on the West Australian *Public Interest Disclosure Act 2003* (WA PID Act); and
- comment from a broader perspective.

Please note that the terms Principal Executive Officer and Chief Executive Officer (CEO) are used interchangeably within this submission.

Terms of Reference

The Committee is to consider and report on a preferred model to protect public interest disclosures (whistleblowing) within the Australian Government public sector. The Committee's report should address aspects of its preferred model, covering:

1. The categories of people who could make protected disclosures:

a. these could include:

- (i) persons who are currently or were formerly employees in the Australian Government general government sector, whether or not employed under the Public Service Act 1999,**
- (ii) contractors or consultants who are currently or were formerly engaged by the Australian Government;**
- (iii) persons who are currently or were formerly engaged under the Members of Parliament (Staff) Act 1984, whether as employees or consultants; and**

West Australian Public Interest Disclosure Legislation

In Western Australia (WA) the *Public Interest Disclosure Act 2003*¹ (section 5 (1)) provides for any person to make a disclosure of public interest information.

Other Comments

If the Committee's preferred model is one where members of the public do not make protected disclosures, it may be necessary to consider who else may require legislative protections within the workplace; for example, volunteers carrying out a public function.

- b. the Committee may wish to address additional issues in relation to the protection of disclosures by persons located outside Australia, whether in the course of their duties in the general government sector or otherwise;**

Other Comments

The work of the Commonwealth Government extends to overseas locations. The Committee should give consideration as to how disclosures may be handled outside of Australia, and how international jurisdictional issues can be resolved.

2. The types of disclosures that should be protected:

- a. these could include allegations of the following activities in the public sector: illegal activity, corruption, official misconduct involving a significant public interest matter, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment; and**

West Australian Public Interest Disclosure Legislation

In summary, section 3 of the PID Act outlines public interest information as information that shows or tends to show a public body is, has been, or will be involved in wrongdoing. Categories of wrongdoing covered by the Act are:

- improper conduct;

¹ *Public Interest Disclosure Act 2003* can be viewed at http://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_767_homepage.html

- offence under state law;
- substantial misuse of public resources;
- substantial mismanagement of public resources;
- substantial risk to public health, safety or the environment: and
- a matter of administration that can be investigated by the State Ombudsman.

Other Comments

The types of disclosures in the Committee's terms of reference appear sufficiently comprehensive to ensure a broad range of integrity matters are protected.

Should the Committee's preferred model be one where public sector agencies have a role in assessing and applying legislative requirements, for example, handling disclosures, then the Committee may wish to consider how those administering the legislation within agencies will have a full understanding of the types of matters that are relevant and attract protection.

Such an understanding avoids vexed situations where those assessing, and those wishing to make disclosures, have differing views about what matters are covered under the legislation.

b. the Committee should consider:

- i. **whether protection should be afforded to persons who disclose confidential information for the dominant purpose of airing disagreements about particular government policies, causing embarrassment to the Government, or personal benefit; and**

West Australian Public Interest Disclosure Legislation

The PID Act (section 8 (2) (b)) outlines instances where a proper authority (proper authority includes public sector agencies) may refuse to investigate or discontinue an investigation. This includes situations where the disclosure is considered to be vexatious or frivolous.

Other Comments

The dominant purpose of a disclosure is an interesting issue. A person's motives for disclosure may be self-serving, but their disclosure may nevertheless contain information that meets the definition of a disclosure that should be protected and further investigated. In WA, OPSSC's approach has been to encourage those

responsible for receiving disclosures to consider the information in the disclosure and the PID Act's requirements for making a disclosure, rather than the motives of the discloser.

If the Committee believes that there are types of information that should not be subject to public interest disclosure legislation they may wish to propose that this is specified within legislation as exclusions. This approach will assist those assessing public disclosure matters, and potential disclosers, to understand what domains are not covered by the Act.

ii. whether grievances over internal staffing matters should generally be addressed through separate mechanisms;

West Australian Public Interest Disclosure Legislation

The PID Act aims to ensure openness and accountability in government by facilitating the disclosure of public interest information and protecting those who make appropriate disclosures.

The PID Act is seen as being distinct from other processes available to employees. For example, a grievance or complaint process, because the PID Act does not aim to resolve a dispute or facilitate the resolution of issues for an individual. Once a disclosure is made the person no longer 'owns' the disclosure and unlike a grievance matter an employee cannot withdraw a disclosure.

Other Comments

The purpose of public interest disclosure legislation is to protect employees who make appropriate disclosures of public interest information. If public interest disclosure legislation is expanded to include grievances about internal staffing matters, its legislative requirements may impede resolution processes and in particular, informal processes.

Public interest disclosure legislation should be reserved for public interest information of significance. Other processes should exist within agencies to assist employees to resolve grievances about internal staffing matters that do not contain public interest information.

3. The conditions that should apply to a person making a disclosure, including:

(a) whether a threshold of seriousness should be required for allegations to be protected, and/or other qualifications (for

example, an honest and reasonable belief that the allegation is of a kind referred to in paragraph 2(a));and

West Australian Public Interest Disclosure Legislation

Proper authorities investigate disclosures where:

- the information disclosed is public interest information (categories discussed previously);
- is made to a proper authority; and
- relates to a matter or person the authority has the power to investigate (section 8).

In making a disclosure, a person must believe that the information they disclose is true or may be true (section 5 (2) (a) and (b)).

Other Comments

Public interest disclosure legislation serves as an early warning system for wrongdoing within agencies. As such, it is important that any 'threshold of seriousness' is not set too high. It is also important to consider that often it is not until an investigation has commenced that a view on the seriousness of information disclosed can be properly judged. The legislative ability to discontinue an investigation may assist in this regard. The PID Act (section 8 (2)) provides instances when an investigation may be discontinued including when the matter is considered trivial and/or the disclosure is vexatious or frivolous.

Conditions can assist in protecting the integrity of public interest disclosure legislation. However, it is important that legislation does not contain too many conditions or qualifications as this may dissuade employees from making disclosures and add to the complexity of assessing disclosures.

Provided the person has a reasonable and honest belief that their disclosure is true or is of the serious kind referred to in 2 (a) (terms of reference above) then it would be appropriate that the issues be left to a review/investigation process to determine the substance of the information disclosed.

(b) whether penalties and sanctions should apply to whistleblowers who;

i. in the course of making a public interest disclosure, materially fail to comply with procedures under which disclosures are to be made; or

West Australian Public Interest Disclosure Legislation

The PID Act has a number of situations where a person may lose the protections of the Act. For example, where a person fails without reasonable excuse to assist a person investigating a matter to which the disclosure relates, or discloses information contained in a disclosure outside of the Act (section 17).

The PID Act (section 16) also has sanctions in the form of a fine or imprisonment (\$24,000 or imprisonment for two years) where a person discloses information that might identify or tend to identify anyone as a person who has made an appropriate disclosure or anyone who is the subject of a disclosure. Exceptions to these provisions do, however, apply (section 16).

Other Comments

For the purposes of ensuring disclosures can be appropriately investigated, and the identities of those involved in the process are protected, the Committee's preferred model could consider penalties and sanctions.

Should the Committee's preferred model include obligations for disclosers, then the Committee could also consider legislative provisions to ensure potential disclosers are made aware of these obligations. The PID Act (section 23) requires Principal Executive Officers to prepare and publish internal procedures.

OPSSC has also taken steps to raise the awareness of potential disclosers. These include:

- conducting awareness raising sessions and workshops for public sector employees;
- producing a series of information brochures that are distributed to public sector agencies to provide to potential disclosers;
- designating a section of the OPSSC's website to information about the public interest disclosure process;
- providing a PID advice and referral service for potential disclosers and agency PID Officers;
- providing training to those designated to receive disclosures within public authorities (PID Officers); and
- producing a DVD for use by public authorities to raise awareness of the PID Act.

These materials can be made available to the Committee.

ii. knowingly or recklessly make false allegations;

West Australian Public Interest Disclosure Legislation

The PID Act (Section 24 (1) (a) and (b)) creates an offence for the making of a false or misleading disclosure (\$12,000 fine or imprisonment for one year). In summary, a person must not knowingly make a false or misleading disclosure or be reckless about whether it is a false or misleading disclosure.

Other Comments

To encourage reporting of public interest information and enhance the perception of any legislation applying to public interest disclosures, it is necessary to ensure the disclosure process is safeguarded against misuse. In particular, this could include misuse by those who knowingly make false or misleading disclosures.

4. The scope of statutory protection that should be available, which could include:

- a. protection against victimisation, discrimination, discipline or and employment sanction, with civil or equitable remedies including compensation for any breaches of this protection;**
- b. immunity from criminal liability and from liability for civil penalties; and**
- c. immunity from civil law suits such as defamation and breach of confidence;**

West Australian Public Interest Disclosure Legislation

The PID Act provides a range of protections for a person who makes an appropriate disclosure including immunity from:

- civil or criminal liability;
- disciplinary action, dismissal and termination of employment;
- any breach of a duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by a written law) applicable to the person (section 13).

The identity of the person making an appropriate disclosure is also protected except in certain circumstances, for example, where it is necessary to investigate the matter effectively (section 16).

Under the PID Act, Principal Executive Officers also have a role to provide employees protection from detrimental action or the threat of detrimental action (section 23 (1) (b)). Detrimental action includes injury, damage or loss, intimidation or harassment, adverse discrimination or disadvantage or a reprisal.

Under the PID Act, a person who takes or threatens to take detrimental action because anyone has made or intends to make a disclosure commits an act of victimisation. A person subject to an act of victimisation has the choice of making a complaint to the Equal Opportunity Commission or taking civil action (section 15).

As far as the OPSSC is aware, to date these provisions have not been tested to any extent that comment on their effectiveness could be made in this submission.

Other Comments

Adequate and enforceable protections need to exist within disclosure legislation in order to encourage people to make appropriate disclosures. Legislation also needs to provide clearly for prosecution/action to be taken against those who do not comply, without breaching the confidentiality provisions.

Considering that most reprisals are likely to occur within the workplace, the Committee could consider a legislated role for agency CEOs to provide employees with protection.

5. Procedures in relation to protected disclosures, which could include:

- a. how information should be disclosed for disclosure to be protected: options would include disclosure through avenues within a whistleblower's agency, disclosure to existing or new integrity agencies or a mix of the two;**

West Australian Public Interest Disclosure Legislation

The PID Act requires agency CEOs to designate a position within their agency to receive disclosures (section 23 (1) (a)). Disclosures can also generally be made to a number of integrity agencies named in the Act (For example, OPSSC, State Ombudsman, Police, Corruption and Crime Commission and the Office of the Auditor General).

Other Comments

The WA model recognises that often agencies are best placed to deal with their integrity matters and implement improvements. It also recognises that there will be times when a discloser will want to make a disclosure outside of their agency to another authority.

The only issue OPSSC has encountered in relation to the CEO's designation role is that not all agencies have designated a range of people who can receive disclosures. In some agencies, only one position/person may be designated. To facilitate the making of disclosures OPSSC has actively encouraged agencies to designate a range of positions/people across their organisations.

If the Committee's preferred model includes designated positions within agencies to receive disclosures, they may need to consider how to ensure such positions reflect the size and complexity of agencies.

- b. the obligations of public sector agencies in handling disclosures;**

West Australian Public Interest Disclosure Legislation

Under the PID Act public sector agencies play an active role in the handling of disclosures. Agency CEOs are responsible for designating a position to receive disclosures; providing protection for those who make an appropriate disclosure of public interest information and ensuring compliance with the Act (section 23).

Designated positions/persons within public sector agencies are responsible for:

- undertaking or causing matters to be investigated (using existing agency procedures to investigate);
- taking action; and
- providing reports to those who have made an appropriate disclosure of public interest information (sections 8, 9 and 10).

Other Comments

The WA model allows agency CEOs to deal with wrongdoing in their agency and take immediate action to stop it from occurring. One difficulty with the PID Act's obligations is that they also apply to small boards and committees that meet infrequently and may have a difficulty with the resources to receive and assess disclosures.

If the Committee's preferred model recommends a role for agencies in handling disclosures, they may wish to consider how smaller agencies and/or boards and committees with limited resources can be assisted to implement and comply with the legislation. In WA, the PID Act also applies to local government authorities along with many other legislative obligations such as occupational health and safety, disability plans and financial requirements. Twenty four of these local government authorities have fewer than twenty employees. The burden of such legislation should be minimized, such as through external resources or assistance.

c. The responsibilities of integrity agencies (for example, in monitoring the system and providing training and education); and

West Australian Public Interest Disclosure Legislation

In WA OPSSC is the integrity agency that has been given a number of legislated responsibilities under the PID Act (sections 18-22). These responsibilities include:

- establishing a code of conduct setting out minimum standards to be complied with by a person to whom a disclosure of public interest information is received;
- assisting public sector agencies to comply with the Act and the code of conduct;
- monitoring compliance by public sector agencies with the Act and the code of conduct;
- preparing guidelines on internal procedures and ensuring all public sector agencies have copies of these guidelines; and

- reporting annually on the performance of the Commissioner under the Act and compliance or non compliance with the Act and the code of conduct.

To assist the Commissioner to report to Parliament agency CEOs are also required to report annually to the Commissioner on the number of disclosures received, the results of any investigation and such other matters as prescribed (section 23 (f) (i) (ii) and (iii)).

Activities the OPSSC undertakes to assist agencies to comply with the PID Act include:

- providing training to employees designated to receive disclosures within agencies (PID Officer);
- designating a section of OPSSC's website to information about the public interest disclosure process;
- providing a PID advice and referral service for potential disclosers and agency PID Officers;
- developing publications to raise employee awareness of the Act;
- conducting awareness raising sessions and workshops for public sector employees; and
- producing a DVD for use by agencies to raise awareness of the PID Act.

Other Comments

Integrity agencies can play an important role in raising awareness of public interest disclosure legislation, ensuring a cohesive and co-coordinated approach to how disclosures are managed and promoting confidence in the disclosure process by monitoring the system.

Should the Committee's preferred model have a role for public sector agencies to handle disclosures, then they could also include a role for an integrity agency to monitor the disclosure process. Monitoring activities may include:

- reviewing decisions by agencies not to investigate matters;
- the legislative ability to evaluate the management of disclosures and review the quality of investigations being undertaken;
- the legislative ability to review the adequacy of protections provided by agencies (systemically and for specific disclosures);
- providing assistance and support to agencies undertaking investigations, if requested;
- recording disclosure matters made within the public sector and action, if any, taken by public sector agencies and reporting on these matters; and
- providing training for agencies on how to manage disclosures in accordance with legislation.

Monitoring compliance would determine if disclosures are being appropriately managed and/or fully investigated, and agencies are taking action to address issues. Monitoring and reporting about disclosure activity will also ensure that there is transparency to the process. Monitoring may also assist in providing potential disclosers with confidence that their public interest information will be appropriately handled.

The PID Act has no requirement for agency CEOs to raise awareness of the Act within their agencies. The Committee could consider a preferred model that includes a role for both an integrity agency and agency CEO to promote awareness of public interest disclosure legislation. This joint approach would no doubt assist to raise and maintain a level of awareness within the public sector.

- d. Whether disclosure to a third party could be appropriate in circumstances where all available mechanisms for raising a matter within Government have been exhausted:**

West Australian Public Interest Disclosure Legislation

The PID Act does not provide for disclosures to be made to a third party, for example, a person not designated to receive disclosures such as a member of the media.

- 6. The relationship between the Committee's preferred model and existing Commonwealth laws: and**

West Australian Public Interest Disclosure Legislation

The PID Act contemplates other legislation in section 25 where it states,

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

Other Comments

In order to minimise legislative conflict, the Committee could consider how their preferred model would relate to existing legislation, such as privacy legislation.

7. Such other matters, as the Committee considers appropriate:

The Committee may also wish to consider the following.

Awareness raising

- A legislated role for agency CEOs to raise awareness of public interest disclosure legislation and ensure information about its existence is integrated into current agency processes and policies, for example, agency induction programs.
- How to ensure that those who encounter public interest information within agencies recognise that it is public interest information and respond appropriately. As an example, OPSSC has conducted workshops aimed at building the capacity of public sector employees (grievance and complaint officers, human resource practitioners and line managers) to identify public interest disclosure matters and direct potential disclosers to the proper authority for receiving a disclosure, the agency's PID Officer.

Agency Culture

- Legislation alone will not ensure that wrongdoing is reported. Consideration should also be given to ways in which public sector agencies develop and/or sustain a reporting culture.

Support processes

- Support can be provided by ensuring legislation allows disclosers to access support mechanisms without breaching confidentiality provisions, for example, a counselling service.

Interface with existing processes

- The Committee could also consider how a preferred model might interact with the legislation and roles of existing integrity bodies. For example, in WA there can be overlap between the PID Act and the role of the Corruption and Crime Commission. This overlap is not viewed as a problem and where issues arise they can be

resolved locally. What is likely to be a problem is where there are gaps in the overarching integrity framework, that is, integrity matters that are not picked up by any process.

Review

- A review process could be enshrined in the model recommended. A review of legislation after a number of years could ensure legislation remains relevant and effective. The WA PID Act provided for a review to be undertaken three years after its proclamation (section 27).