

# **Whistleblowers Protection Act 2001 (Vic)**

## **The Ombudsman's Perspective**

*Notes to accompany presentation by Susan Lakey,  
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## **PART 1: Overview of the Whistleblowers Protection Act 2001**

### **Introduction**

The *Whistleblowers Protection Act 2001 (Vic)* (the Act) came into force on 1 January 2002.

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 who may suffer reprisals in relation to the making of those disclosures.

The new concepts in the Act include:

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

### **Overview of the Scheme**

The legislative scheme essentially comprises of two steps:

#### Step 1:

Receipt of a disclosure by the public body or Ombudsman – information is received and assessed to see whether 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' and the person who disclosed the information receives the protections under the Act.

#### Step 2:

Does the protected disclosure amount to a 'public interest disclosure' within Part 4 of the Act? If it does, the public body must refer the disclosure to the Ombudsman, who will make a 'formal determination' as to whether the protected disclosure amounts to a public interest disclosure.

- If the Ombudsman decides that the protected disclosure is not a public interest disclosure, the whistleblower does not lose the protections under the Act. The matter can be resolved through other complaint resolution methods.
- If the Ombudsman determines that it is a public interest disclosure, the Ombudsman will decide who is to investigate the matter. The protection for the whistleblower continues regardless of whether the investigation finds the allegations to be substantiated or not.

## **PART 2: The Ombudsman's Guidelines – Main Concepts**

Please note that section 68 of the Act requires public bodies to establish procedures for handling whistleblowers complaints.

When dealing with whistleblowers it is important to be aware of the advice contained in the Ombudsman's Guidelines (the Guidelines).

The Guidelines cover each stage of the process and contain model procedures, which a public body can choose to adopt. A PDF format copy of the Guidelines can be downloaded at [www.ombudsman.vic.gov.au](http://www.ombudsman.vic.gov.au), or alternatively a Word format copy can be obtained by calling the Office of the Ombudsman Victoria on (03) 9613 6222.

The following key areas are dealt with below.

1. Receipt of a disclosure
2. Welfare management for the whistleblower
3. Management of the person who is the subject of the allegations
4. Issues relating to natural justice

### **1. Receipt of a Disclosure**

The public body should have in place a centralised system for the receipt of disclosures under the Act. It will often involve the public body's head office.

Public bodies should have a contact person(s) who will receive the disclosure so that the external or internal whistleblower can make a disclosure directly to them. The Department of Justice has established 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 aware of the contact person for the receipt of disclosures in order to make an appropriate referral.

The Guidelines suggest the appointment of the following personnel to handle disclosures under the Act:

#### 1. Protected Disclosure Officer (PDO):

The PDO receives the complaint and makes an assessment regarding whether is a protected disclosure. There can be a number of PDOs within large bodies (e.g. different regional offices).

The PDO is responsible for forwarding the protected disclosure to the Protected Disclosure Co-ordinator (see below).

The PDO can also act as a contact point for advice about the Act generally.

## 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 managed by some other complaint process.

The PDC should be of sufficient seniority to have direct contact with the head of the public body (e.g. CEO).

Where the PDC believes that the allegation may amount to a public interest disclosure, s/he must refer the matter to the Ombudsman for a formal determination.

The PDO and PDC can be the same person within a public body. This is in contrast to the positions of Investigator and Welfare Manager, whose respective roles must be performed by different people.

Please note that the Act confers responsibility on the public body to receive the disclosure and make a final decision on whether it amounts to a protected disclosure and a public interest disclosure. Therefore the receipt of disclosures cannot be outsourced to a consultant. However, a consultant can be retained to provide advice as to whether a complaint falls within Part 2 of the Act.

The PDC has the role of appointing an investigator, where the Ombudsman determines that the matter is a public interest disclosure and refers the matter back to the public body for investigation. The PDC can outsource the investigation.

## **2. Welfare Management for the Whistleblower**

The Act protects both internal and external whistleblowers.

The Act aims to ensure that the whistleblower is given sufficient protection to go about his/her job without harassment or victimisation from peers or superiors.

The whistleblower should also be advised that his/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 (e.g. in circumstances where only the whistleblower had access to a certain information). The whistleblower should be informed of the situation and told that the other protections within the Act will still apply.

If the whistleblower reports an incident of harassment, discrimination or adverse treatment that would amount to detrimental action taken in reprisal for the making of a disclosure, the welfare manager will record the details of the incident; advise the whistleblower of his or her rights and advise the PDO or CEO of the detrimental action.

Whistleblowers should be informed as to the progress of the investigation from time to time.

### **3. Management of the person who is the subject of the allegations**

The person against whom an allegation has been made is equally entitled to welfare management and support. The allegation will most probably be very serious and as much as possible, their identity should be protected so far as is possible. Generally, by protecting the whistleblower and his/her allegations, the identity of the person who is subject of the allegations will also be protected.

### **4. Issues relating to natural justice**

The principles of natural justice should be followed in the investigation of a public interest disclosure. The principles of natural justice concern procedural fairness and aim to ensure that an objective decision maker reaches a fair decision.

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 opportunity to respond. However, this does not mean the person must be advised of the allegation as soon as the disclosure is received or the investigation has commenced. Rather, it is sufficient that the allegation be put to him or her at some point 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 set out accurately in the report.