



PARLIAMENT OF VICTORIA

Independent Broad-based Anti-corruption
Commission Committee

Improving Victoria's whistleblowing regime: a review of the *Protected Disclosure Act 2012 (Vic)*

Parliament of Victoria
Independent Broad-based Anti-corruption Commission Committee

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Committee functions

The IBAC Committee is constituted under section 12A of the *Parliamentary Committees Act 2003*.

1. The functions of the Committee are—
 - a. to monitor and review the performance of the duties and functions of the IBAC;
 - b. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the IBAC that require the attention of the Parliament;
 - c. to examine any reports made by the IBAC;
 - d. to consider any proposed appointment of a Commissioner and to exercise a power of veto in accordance with the *Independent Broad-based Anti-corruption Commission Act 2011*;
 - e. to carry out any other function conferred on the IBAC Committee by or under this Act or the *Independent Broad-based Anti-corruption Commission Act 2011*;
 - f. to monitor and review the performance of the duties and functions of the Victorian Inspectorate, other than those in respect of VAGO officers or Ombudsman officers;
 - g. to report to both Houses of the Parliament on any matter connected with the performance of the duties and functions of the Victorian Inspectorate that require the attention of the Parliament, other than those in respect of VAGO officers or Ombudsman officers;
 - h. to examine any reports made by the Victorian Inspectorate, other than reports in respect of VAGO officers or Ombudsman officers;
 - i. to consider any proposed appointment of an Inspector and to exercise a power of veto in accordance with the *Victorian Inspectorate Act 2011*.
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 - a. investigate a matter relating to the particular conduct the subject of—
 - i. a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or
 - ii. a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint;
 - b. review any decision by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011* to investigate, not to investigate or to discontinue the investigation of a particular complaint or notification or a protected disclosure complaint within the meaning of that Act;
 - c. review any findings, recommendations, determinations or other decisions of the IBAC in relation to—
 - i. a particular complaint or notification made to the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*; or
 - ii. a particular disclosure determined by the IBAC under section 26 of the *Protected Disclosure Act 2012*, to be a protected disclosure complaint; or

- iii. a particular investigation conducted by the IBAC under the *Independent Broad-based Anti-corruption Commission Act 2011*;
 - ca. review any determination by the IBAC under section 26(3) of the *Protected Disclosure Act 2012*;
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 - i. prejudice any criminal investigation or criminal proceedings; or
 - ii. prejudice any investigation being conducted by the IBAC; or
 - iii. contravene any secrecy or confidentiality provision in any relevant Act.
- 2. Despite anything to the contrary in subsection (1), the IBAC Committee cannot—
 - a. investigate a matter relating to particular conduct the subject of any report made by the Victorian Inspectorate;
 - b. review any decision to investigate, not to investigate, or to discontinue the investigation of a particular complaint made to the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011*;
 - c. review any findings, recommendations, determinations or other decisions of the Victorian Inspectorate in relation to a particular complaint made to, or investigation conducted by, the Victorian Inspectorate in accordance with the *Victorian Inspectorate Act 2011*;
 - d. disclose any information relating to the performance of a function or exercise of a power by the Victorian Inspectorate which may —
 - i. prejudice any criminal investigation or criminal proceedings; or
 - ii. prejudice an investigation being conducted by the IBAC; or
 - iii. contravene any secrecy or confidentiality provision in any relevant Act.

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This report is available on the Committee's website.

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Chair's foreword

I am pleased to present the third report of the Victorian Parliament's Independent Broad-based Anti-corruption Commission Committee (IBACC), *Improving Victoria's whistleblowing regime: a review of the Protected Disclosure Act 2012 (Vic)*.

The Committee was established following the creation of the Independent Broad-based Anti-corruption Commission (IBAC) and the Victorian Inspectorate (VI) by the Liberal-National Government in 2011. At the time, the creation of IBAC was described by the Government as among 'the most far-reaching and fundamental reforms to the anti-corruption and integrity system in Victoria's history.'

There is no doubt that integrity systems are vital in our modern democracy. They serve an important purpose by helping to make government and public administration transparent and accountable.

In December 2015, the Committee's *Strengthening Victoria's key anti-corruption agencies?* report identified concerns raised by key stakeholders regarding the nature and operation of the protected disclosure regime. The Committee decided to review the protected disclosure ('whistleblowing') regime, and, in particular, the *Protected Disclosure Act 2012 (Vic)* ('*PD Act 2012 (Vic)*'). The Act governs disclosures about improper conduct in the Victorian public sector.

Whistleblowers make a valuable contribution to democracy by helping to ensure honest, accountable and efficient public administration. Specifically, they play a crucial role in the identification, investigation and prevention of corruption and other forms of improper conduct.

However, it is well known that whistleblowers can suffer reprisals for exposing wrongdoing. The *PD Act 2012 (Vic)* is one way of trying to protect whistleblowers against reprisals, in part by safeguarding their identity and the content of their disclosures. This also helps ensure that whistleblowers have the confidence to come forward to expose wrongdoing.

This report reviews the nature and operation of the *PD Act 2012 (Vic)*. It draws on wideranging research and evidence and applies best-practice principles to assess the legislation. The Committee also examined interstate and international experience.

In undertaking its work, the Committee has found that the *PD Act 2012 (Vic)* conforms in many respects to best-practice principles. But in other respects, best-practice principles are not being met at all, or there is at least room for improvement in how they are recognised or implemented within the whistleblowing regime.

While the Committee does not believe the Act should be repealed, it considers that it should be fine-tuned through selected amendments. To this end, the Committee has made a number of recommendations covering the law and processes on making, assessing and investigating disclosures; the protection of whistleblowers from reprisals; and the provision of compensation and assistance to whistleblowers.

However, the Committee recognises that legal improvements are only part of the answer to improving Victoria's whistleblowing regime. Many Victorians depend more on information and education explaining the legislation than on the Act itself. While some excellent resources for the public and the public sector already exist, there is scope for further improvements, especially with respect to online information about whistleblowing.

In carrying out its review of the *PD Act 2012* (Vic), the Committee drew upon the considered advice of agencies operating within the Victorian integrity system, academics, and individuals with practical experience within integrity agencies in other Australian and overseas jurisdictions. In particular, the Committee would like to thank the IBAC Commissioner, Mr Stephen O'Bryan QC, for generously sharing IBAC's expertise and experience with Victoria's whistleblowing regime.

The Committee benefited greatly from the views, experience and expertise of a broad range of people through submissions, hearings, briefings and interstate and overseas meetings. As a result, the Committee gained valuable insights into the practical operation of protected disclosure schemes. The Committee is most appreciative of the time, effort and valuable contributions that all these individuals and organisations have made. In particular, the Committee greatly appreciated hearing from whistleblowers who bravely shared their experiences.

I would also like to thank my Committee colleagues, Hon Marsha Thomson MP (Deputy Chair), Mr Sam Hibbins MP, Mr Danny O'Brien MP, Mr Simon Ramsay MLC, Mr Tim Richardson MP and Ms Jaclyn Symes MLC, for their cooperative and bipartisan approach to the preparation of this report and their involvement in the work of the Committee.

Finally, the Committee thanks the Secretariat for their hard work, in particular the Executive Officer, Ms Sandy Cook; the Research Officer, Dr Stephen James, who drafted the final report; and the Committee Administrative Officer, Ms Justine Donohue. The Committee also thanks Ms Kirstie Twigg and Ms Gillian Bourke for their earlier work and Mr James Catlin for his contributions as a consultant.

I commend this report to the Parliament.



Hon Kim Wells MP
Chair

Executive summary

Introduction

Whistleblowing makes a significant contribution to an effective democracy by helping to ensure honest, accountable and efficient public administration.ⁱ Specifically, whistleblowing plays a vital role in the identification, investigation and prevention of corruption and other forms of wrongdoing.

While the classic definition of a whistleblower is of an insider,ⁱⁱ often an employee with special knowledge about their own organisation, this report recognises that outsiders can also disclose valuable information about wrongdoing. This is consistent with the current law in Victoria and aligns well with IBAC's public-oriented approach to the reporting of suspected corruption.

The Committee acknowledges that whistleblowers need protection. The evidence has shown that a substantial proportion of whistleblowers will be mistreated, many by their own managers.ⁱⁱⁱ Even whistleblowers who are not mistreated are likely to find the experience stressful.^{iv} The *Protected Disclosure Act 2012 (Vic)* ('*PD Act 2012 (Vic)*') is one way of protecting whistleblowers against reprisals, in part by safeguarding their identity and the content of their disclosures. This also advances another key purpose of the Act—to facilitate the making of lawful disclosures about improper conduct in the public sector.

The *PD Act 2012 (Vic)* was introduced with the aim of simplifying the process of making a whistleblower complaint in Victoria and integrating it within a redeveloped integrity system.^v The Act made IBAC the clearing house for assessing whether a disclosure amounts to a protected disclosure and reduced the number of organisations who could receive and investigate disclosures.

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- i Transparency International, *International principles for whistleblowing legislation: best practices for laws to protect whistleblowers and support whistleblowing in the public interest* (2013) 2; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 769.
 - ii A J Brown and Marika Donkin, 'Introduction' in A J Brown (ed), *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press, 2008) 1, 8.
 - iii 'Summary' in A J Brown (ed), *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press, 2008) xxi, xxvii–xxviii.
 - iv Ibid xxi, xxviii.
 - v Victoria, *Parliamentary Debates*, Legislative Assembly, 14 November 2012, Volume 506, 4984 (Andrew McIntosh, Minister Responsible for the Establishment of an Anti-Corruption Commission).

The report

Purpose

As part of the Committee's review of the legislation introduced in December 2015 to strengthen Victoria's integrity system, the Committee received evidence regarding the nature and operation of the state's protected disclosure regime.^{vi} This evidence raised a number of issues concerning the *PD Act 2012* (Vic) and the effective operation of the protected disclosure scheme.^{vii} In response to these issues, the Committee determined to undertake a review of the Act.

In undertaking this work, the Committee received submissions from individuals, groups and organisations in relation to the following questions:

- What works well in the current *PD Act 2012* (Vic)?
- What are some of the challenges with the *PD Act 2012* (Vic)?
- Are the provisions relating to assessment and investigation of protected disclosure complaints appropriate, or should alternatives be considered?
- Is the type of conduct that can be disclosed under the *PD Act 2012* (Vic) appropriate, or should it be expanded?
- Are the current confidentiality and secrecy provisions effective? What are the advantages and disadvantages?
- Are the protections for individuals from detrimental or retributive action sufficient? Should they be changed?

In addressing the key issues in this Review, the Committee has sought to apply best-practice principles regarding the nature and operation of whistleblower laws, drawing on interstate and international experience. While the Victorian regime, and the *PD Act 2012* (Vic) in particular, meets many of the best-practice principles, the Committee has identified a number of ways it might be improved.

Scope

Since this Review was focused on the *PD Act 2012* (Vic) and related state legislation, this report discusses federal legislation only where it is useful to debates about the Victorian protected disclosure regime.

Moreover, this report devotes less attention to the private sector since the Victorian legislation focuses on complaints and disclosures about improper conduct in the *public* sector. However, where there were lessons to be learnt from the private sector, the Committee has evaluated their relevance to Victoria.

vi Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic); Victoria, *Strengthening Victoria's key anti-corruption agencies?*: IBAC Committee, Parl Paper No 126 (2016).

vii Victoria, *Strengthening Victoria's key anti-corruption agencies?*: IBAC Committee, Parl Paper No 126 (2016) xiii, 66-75, 78-9, 96.

Finally, the report only touches on disclosures and complaints regarding Victoria Police. Later this year the Committee will inquire into the oversight of complaints about Victoria Police, and relevant concerns regarding the procedures for disclosures about police will be considered then.

Improving Victoria's whistleblowing regime

How to reform the *PD Act 2012 (Vic)*

From the early stages of the Committee's review of the *PD Act 2012 (Vic)*, the issue arose of not only whether, but if so *how*, the Act should be amended and improved. Concerns were raised with the Committee in relation to the complexity of the terminology and processes of the Act as well as whether it fell short of the relevant best-practice principles.

Issues were also raised about the interaction of the *PD Act 2012 (Vic)* with other legislation. Specifically, concern was expressed that the number of external cross-references in the Act to other legislation—including the *IBAC Act 2011 (Vic)*, the *Victorian Inspectorate Act 2011 (Vic)* ('*VI Act 2011 (Vic)*') and the *Ombudsman Act 1973 (Vic)*—made the *PD Act 2012 (Vic)* even more difficult to understand and navigate.

In addition, the Committee's attention was drawn to the question of whether the title of the *PD Act 2012 (Vic)* needed to be changed to better reflect its purposes and make it more accessible to the public, and potential disclosers in particular.

After reviewing the evidence, the Committee identified three options for reforming the *PD Act 2012 (Vic)*:

- Repeal the *PD Act 2012 (Vic)* and replace it with new legislation.
- Consolidate all the provisions relating to the protected disclosure scheme in a single Act.
- Amend selected provisions in the *PD Act 2012 (Vic)* and associated legislation.

Repeal of the *PD Act 2012 (Vic)*?

FINDING 7: The *PD Act 2012 (Vic)* should not be repealed. (p.166)

The Committee does not believe repealing the *PD Act 2012 (Vic)* and replacing it with new legislation is warranted. The Committee has found that in many respects the legislation meets best-practice principles. Moreover, the Act was only introduced recently and was subject to significant amendment in 2016. It takes time for public sector bodies and investigating agencies to become familiar with the legislation. IBAC, the Victorian Ombudsman and the Victorian Public Sector Commission have made considerable efforts, and invested substantial resources,

to produce information and provide training for the public and the public sector about the Act. It would be disruptive and costly to repeal the Act when these bodies are becoming more familiar with it.

Consolidation of protected disclosure provisions in one Act?

FINDING 8: That all the legislative provisions relating to the protected disclosure scheme should not be consolidated into a single Act. (p.172)

In Australia it is not unusual to have different pieces of legislation governing integrity, investigative and oversight agencies together with a whistleblower protection Act. In part this is because the objectives, functions and investigative and oversight powers of such bodies are not only concerned with whistleblower disclosures.

It would be an unusual step to try to incorporate all of the provisions relating to protected disclosures in the one Act, and it would make the *PD Act 2012 (Vic)* a much larger volume. No other Australian jurisdiction has done this and the Committee received evidence from only one stakeholder to do so. Therefore, the Committee does not believe that all provisions relating to protected disclosures in Victoria should be consolidated in a single Act.

RECOMMENDATION 21: That the Victorian Government consult with the Office of the Chief Parliamentary Counsel in order to reduce, where practicable, the number of internal and external legislative cross-references in the *PD Act 2012 (Vic)*. (p.173)

The Committee does not believe that there should be wholesale consolidation of all the provisions relating to protected disclosures in Victoria in the *PD Act 2012 (Vic)*. However, efforts should be made to reduce the number of internal cross-references in provisions of the *PD Act 2012 (Vic)* as well as external cross-references to other legislation. Cross-references can make both the comprehension of, and navigation within, the Act more difficult.

A reduction in the number of internal and external cross-references in the *PD Act 2012* would make the Act less difficult to understand and navigate, though it would require the careful attention of parliamentary counsel to achieve the best outcome.

Amend the *PD Act 2012 (Vic)*?

The Committee believes that the *PD Act 2012 (Vic)* can be improved by selected amendments to address the shortcomings identified. For example, the threshold to prove a reprisal is presently too high, the meaning of ‘public body’ in the Act needs to be clarified and extended and the issue of misdirected disclosures needs to be addressed. See the discussion in the following section: ‘Amending the *PD Act 2012 (Vic)*.’

The Committee also believes the design of the Act can be improved, which will make it easier to understand and navigate.

The design of the *PD Act 2012* (Vic)

RECOMMENDATION 19: That the Victorian Government improve the design of the *PD Act 2012* (Vic) so that it is easier to use and navigate. This should include better use of headings, notes, examples and tables, as well as useful hyperlinks in digital versions of the Act. (p.168)

The Committee believes that the design of the *PD Act 2012* (Vic) could be improved to make it easier to navigate. For example, clearer and more useful headings could be used. Further, the Act could use simplified outlines of divisions in text boxes as does the *Public Interest Disclosure Act 2013* (Cth). These give an accessible summary of what the division covers. In addition, the *PD Act 2012* (Vic) could employ tables, notes and examples more effectively to make the legislation more accessible.

Moreover, given that many users will be reading digital versions of the *PD Act 2012* (Vic), such as a PDF file, all entries in the Act's Table of Provisions should be hyperlinked. This will enable the reader to go directly to a particular provision. Hyperlinks could also be considered for terms in the legislation that are defined in the definitions section of the Act (section 3). The effective use of hyperlinks, as used in a number of other Australian jurisdictions, would make the Act easier to navigate.

In making any of these changes to the Act, it would be prudent for Parliamentary Counsel to consult with in-house and external plain-language experts.

A new title for the *PD Act 2012* (Vic)?

FINDING 9: The *Protected Disclosure Act 2012* (Vic) should not be changed to include the words 'public interest.' (p. 176)

The Committee received some evidence suggesting that the title of the Act be changed from the *Protected Disclosure Act* to the *Public Interest Disclosure Act* on the basis that this would better communicate that the legislation protects disclosures made in the public interest. However, almost all the Australian whistleblower Acts that have '*Public Interest*' in their titles also have the public interest identified in a 'purposes' section of the Act and use the term 'public interest disclosure' to describe disclosures that are protected under the legislation.

In contrast, the *PD Act 2012* (Vic), the *Protected Disclosure Regulations 2013* (Vic), and indeed all the procedures, guidelines and public information about the scheme, use the term 'protected disclosure.' The Committee therefore believes it would be confusing to change the title of the Act to the *Public Interest Disclosure Act*—it would risk causing confusion among public sector bodies and the general public who are becoming increasingly familiar with the current terminology in the Act.

RECOMMENDATION 22: That the title of Victoria's protected disclosure legislation be changed to the *Protected Disclosure (Whistleblower Protection) Act 2012* (Vic). (p.178)

The Committee has received evidence that there is much greater recognition by the public of the terms ‘whistleblower,’ ‘whistleblowing’ and ‘whistleblower protection’ than there is of technical legal terms like ‘disclosure’ and ‘protected disclosure.’

The Committee also notes that the terms ‘whistleblowing’ and ‘whistleblower’ are widely used in the academic literature and, more importantly, by the leading NGOs and international organisations that have contributed to the development of best-practice principles and debates about how to effectively protect people who expose wrongdoing.

Since terms such as ‘whistleblower’ are much more familiar to the general public than terms such as ‘protected disclosure,’ the Committee believes it would be beneficial to include a reference to whistleblowing in the title of the *PD Act 2012* (Vic). This will not only better communicate to members of the public what the legislation is about, but also help challenge any remaining prejudices against whistleblowers.

An additional benefit of including a reference to whistleblowing in the Act is that the legislation will be better known and much easier to find using internet search engines.

For these reasons the Committee recommends that the title of the *PD Act 2012* (Vic) be changed to include a reference to whistleblowing protection.

Amending the *PD Act 2012* (Vic)

The Committee received evidence on a range of possible amendments to improve the *PD Act 2012* (Vic). It has made findings and recommendations concerning the coverage of the Act; the law and processes on making, assessing and investigating disclosures; the protection of disclosers; and compensation and assistance for disclosers.

The coverage of the *PD Act 2012* (Vic)

FINDING 1: That it is not necessary to change s 9(1) of the *PD Act 2012* (Vic), which provides that ‘a natural person’ may make a disclosure under the Act. (p.49)

The Committee has concluded that this provision of the Act, which allows anyone to make a disclosure about improper conduct in the public sector, should not be changed. Such a provision is not unusual in Australian jurisdictions and it recognises that outsider whistleblowers, not just insider whistleblowers, can disclose valuable information about improper conduct.

FINDING 2: The Committee is satisfied that the coverage of improper conduct under the *PD Act 2012* (Vic), in conjunction with the *IBAC Act 2011* (Vic), is adequate. (p.59)

This finding concerns the breadth of improper conduct that whistleblowers can make a disclosure about. The Committee is satisfied that the current provisions cover a sufficiently wide range of corrupt conduct, including misconduct in public office, and other forms of improper conduct. Maladministration, for instance, is covered in substance if not by name.

FINDING 3: The Victorian Parliament's system for handling disclosures in accordance with the *PD Act 2012 (Vic)* should remain as it is. In particular, the present discretion of a Presiding Officer to notify a possible protected disclosure to IBAC does not need to be changed. (p.79)

The Committee considers that the present system for making and handling disclosures about the alleged improper conduct of MPs via the Presiding Officers of the Parliament of Victoria does not need to be changed. The present discretion of Presiding Officers to notify a disclosure to IBAC is satisfactory, reflecting as it does the Westminster traditions of representative democracy, responsible government and the independence of parliament to control and discipline its own members.^{viii}

RECOMMENDATION 4: That IBAC advise a person who has made a complaint directly to them about an MP that if they want protection under the *PD Act 2012 (Vic)* they must make a disclosure to the relevant Presiding Officer. (p.79)

The Committee recognises that a potential discloser may be uncertain about how to make a protected disclosure about an MP. The Committee therefore recommends that IBAC advise anyone who makes a direct complaint to them about an MP, and who wants to be protected under the *PD Act 2012 (Vic)*, that they must make a disclosure to the relevant Presiding Officer.

While the Committee considers that the Parliament of Victoria's present system for handling disclosures about MPs is satisfactory, it has recommended improvements to the Parliament's protected disclosure procedures, particularly regarding their accessibility to members of the public, as required under the *PD Act 2012 (Vic)*. In addition, it has recommended the publication of a plain-language factsheet to inform the public about disclosures about MPs. See the discussion in the section entitled: 'Improving information, education and support.'

RECOMMENDATION 5: That the Victorian Government amend section 6 of the *IBAC Act 2011 (Vic)* to provide that a body that receives substantial public funds is a public body for the purposes of the Act. (p.83)

The range of public bodies that can be the subject of a disclosure is already broad under the *PD Act 2012 (Vic)*. However, to ensure that the *PD Act 2012 (Vic)* encompasses all the bodies effectively performing a public function, the Committee recommends that bodies receiving substantial public funds be

^{viii} Law Reform Committee (Victoria), *Review of Members of Parliament (Register of Interests) Act 1978* (December 2009) 98; State Services Authority (Victoria), *Review of Victoria's integrity and anti-corruption system* (2010) 26.

defined as public bodies under the protected disclosure regime. This ensures that public funds are accounted for, wrongdoing is exposed and whistleblowers are protected in a complex environment in which overlaps between the private and public sectors are common.

RECOMMENDATION 6: That the Victorian Government consult with the Victorian Ombudsman, IBAC and the Auditor-General with regard to simplifying the definition of ‘public body,’ and making it consistent across the relevant Victorian legislation. (p.83)

The Committee received evidence that the definition of ‘public body’ in the relevant legislation is complex and inconsistent across integrity bodies such as the Victorian Ombudsman, IBAC and the Auditor-General. The Ombudsman, for example, submitted that the definition should be simplified and made consistent across the main integrity bodies in Victoria. The Committee has therefore concluded that the Victorian Government should give consideration to simplifying the definition of ‘public body’ and making it consistent across integrity agencies in Victoria.

RECOMMENDATION 7: That the Victorian Government give the Victorian Ombudsman adequate jurisdiction under the *Ombudsman Act 1973* (Vic) to investigate protected disclosure complaints with respect to bodies who receive substantial public funds. (p. 84)

The Committee has received evidence that it is challenging for the Victorian Ombudsman to determine whether her office has power to investigate a body that appears to be receiving public funds. Given that IBAC refers many protected disclosure complaints back to the Victorian Ombudsman, the Committee considers it essential that the Victorian Ombudsman have adequate jurisdiction to investigate protected disclosure complaints relating to bodies receiving substantial funds.

Making disclosures under the *PD Act 2012* (Vic)

RECOMMENDATION 8: That the Victorian Government amend the *PD Act 2012* (Vic) to include tables showing disclosers which bodies, and/or persons, can receive what kinds of disclosures. (p.88)

Under Part 2 of the *PD Act 2012* (Vic), whistleblowers must make a disclosure to a body that is authorised to receive the disclosure. The Committee received evidence that the Act is complex in this regard. To assist potential disclosers, the Committee has recommended that tables showing which body or person they have to disclose to in order to be considered for whistleblower protections.

RECOMMENDATION 9: That the Victorian Government simplify the processes for making a disclosure under Part 2 of the *PD Act 2012* (Vic). (p.88)

The Committee has received persuasive evidence from a wide range of experts, integrity agencies and other stakeholders that the requirements for making a disclosure under the *PD Act 2012* (Vic) are often complex and prescriptive. Therefore, the Committee recommends that the Victorian Government simplify the processes for making a disclosure under Part 2 of the *PD Act 2012* (Vic).

RECOMMENDATION 10: That the Victorian Government amend the law so that IBAC may assess any notification it receives, whatever the source (with the exception of notifications of disclosures made under sections 19 and 21(3) of the *PD Act 2012* (Vic)), as a possible protected disclosure complaint. (p.90)

The Committee received evidence, in particular from the IBAC Commissioner, that IBAC is unable to assess a disclosure as a possible protected disclosure complaint if it has not been made to the right body in accordance with Part 2 of the *PD Act 2012* (Vic). The recommendation addresses this problem of misdirected disclosures. It would allow IBAC to assess any notification it receives (except a disclosure about an MP) as a possible protected disclosure complaint. This will ensure that whistleblowers do not miss out on protection simply on the basis of a misdirected disclosure.

RECOMMENDATION 11: That the Victorian Government should investigate whether there is merit in amending the *PD Act 2012* (Vic) to protect a disclosure to a journalist after an inadequate response by an investigating agency, or when there is a ‘substantial and imminent danger’ to public health, safety or the environment. (p.107)

Best-practice principles require the protection of third-tier disclosures to journalists under particular conditions, and their protection is common in Australian jurisdictions. The Committee received arguments and evidence in support of third-tier disclosure and recommends that the Victorian Government investigate whether there is merit in introducing it in Victoria. However, the Committee has identified a number of concerns with third-tier disclosure which should be taken into account in any Government investigation. These include the possible negative impacts on investigations of alleged improper conduct, unfair damage to reputations, varying standards of media reporting and questions over the operation of third-tier disclosure in practice. What role the courts might play in relation to third-tier disclosure is also, in the Committee’s view, uncertain.

Referring protected disclosure complaints for investigation

FINDING 4: That the power of IBAC to refer protected disclosure complaints under the *IBAC Act 2011* (Vic) does not need to be changed. (p.112)

The Committee has received evidence that the current system of referrals of protected disclosure complaints by IBAC is too restrictive, and that protected disclosure complaints might be safely, effectively and efficiently referred to a much wider range of organisations. For example, IBAC could perhaps refer protected disclosure complaints to organisations it can presently only refer ordinary complaints to.

However, the Committee considers that the better solution is to authorise the Victorian Ombudsman, which has vast experience as a complaint-handling body, to refer protected disclosure complaints it receives from IBAC to appropriate organisations for investigation. In sum, IBAC would continue to only refer complaints to Victoria Police, the VI and the Victorian Ombudsman. However, the Victorian Ombudsman would be given the power to refer protected disclosure complaints it receives to appropriate bodies.

RECOMMENDATION 12: That the Victorian Government amend the law to provide that the Victorian Ombudsman has the power to refer protected disclosure complaints to other appropriate organisations for investigation under certain conditions. These conditions include:

- that the Ombudsman exercise new monitoring and oversight powers over that investigation, including the power to take over an investigation
- that, in the case of a referral *to an organisation that is the subject of the disclosure*,
 - the Ombudsman be reasonably satisfied that the investigation can be impartial and effective, and that the discloser can be protected against reprisals
 - that the discloser be informed in writing by the Ombudsman of any such planned referral and the reasons for it
 - that the discloser have the right to object to the planned referral and to receive a written response to that objection from the Ombudsman. (p.113)

The Victorian Ombudsman has vast experience handling complaints across a wide range of areas of Victorian law, having been engaged in the field since 1973. The Committee is thus of the view that, instead of expanding the range of organisations IBAC can refer to, the *Victorian Ombudsman* be given power to refer protected disclosure complaints it has received from IBAC to a wide range of appropriate complaint-handling bodies, including, in some cases, organisations that are the subjects of disclosures.

While IBAC, the VI and Victorian Ombudsman have said that the present system of referrals of protected disclosure complaints is too restrictive, each has nevertheless recognised the special status of protected disclosure complaints and the need for impartial and effective investigations in which disclosers are protected against reprisals.

Therefore the Committee considers that any referral of a protected disclosure complaint to an organisation that is the subject of the disclosure must only be made under the conditions identified in the recommendation. It would undermine the rationale of the *PD Act 2012 (Vic)* if a whistleblower's disclosures about improper conduct within their own organisation were sent back to that organisation in an unrestricted fashion.

Protecting whistleblowers against reprisals

RECOMMENDATION 13: That the Victorian Government amend the *PD Act 2012 (Vic)* to remove the 'substantial reason' requirement for detrimental action in reprisal for a protected disclosure. (p.123)

To establish that there has been detrimental action in reprisal for a protected disclosure ('a reprisal'), the protected disclosure must have been 'a substantial reason for the person taking the action.' The Committee has received evidence that this threshold is too high and sends the message that detrimental action in response to a protected disclosure is acceptable provided the disclosure was only *one of* the reasons for the reprisal.

Given the evidence that the mistreatment of whistleblowers, especially by managers, is a significant problem, and that mistreatment can be disguised as legitimate management action, the Committee believes the 'substantial reason' threshold is too high and should be removed from the Act.

Maintaining confidentiality

RECOMMENDATION 14: That the Victorian Government simplify and clarify the confidentiality provisions in the *PD Act 2012 (Vic)*. (p.130)

The Committee received evidence that the confidentiality provisions are complex and can be difficult for disclosers, bodies receiving disclosures, and even investigating agencies, to understand.

The Committee considers that the confidentiality provisions ought to be simplified and clarified. They should, for example, more clearly distinguish between prohibitions on disclosure that apply to whistleblowers and those that apply to bodies receiving disclosures (or information about them).

RECOMMENDATION 15: That the Victorian Government include a table as a schedule to the *PD Act 2012 (Vic)* that clearly lists what disclosers and bodies receiving disclosures (and information about them) may and may not disclose according to the confidentiality provisions. (p.130)

The Committee believes that the inclusion of a table in the *PD Act 2012 (Vic)* that lists what disclosers (whistleblowers) and bodies receiving disclosures are allowed to disclose is a practical way to help them understand and comply with their obligations.

Compensating whistleblowers

FINDING 6: US-style rewards, including *qui tam* actions, should not be introduced into Victoria's whistleblower protection scheme. (p.160)

The Committee received some evidence lending qualified support to US-style rewards systems, especially *qui tam* actions in which a citizen sues on behalf of a government which has been defrauded and may receive a portion of any damages recovered as a reward. However, while the Committee believes whistleblowers should be compensated, it does not believe they should be rewarded for making a disclosure.^{ix}

ix See the discussion in section 6.4.2 in Chapter 6 of this report.

While qui tam actions have made a significant contribution to fraud recovery in the US, they have also been criticised for encouraging frivolous and cynical claims and eroding an integrity-based culture in which improper conduct is reported because it is the right thing to do. Further, the proponents of qui tam actions have not demonstrated how such suits would work within Victoria's criminal and civil law systems and, in particular, how they would interact with the *PD Act 2012* (Vic) and other relevant legislation.^x

Therefore the Committee considers that efforts should be made to improve the existing system of compensating disclosers rather than introducing rewards and qui tam actions, which are intimately connected with distinctive American laws, institutions and procedures.

RECOMMENDATION 17: That the Victorian Government introduce a provision into the *PD Act 2012* (Vic) that, generally, costs would not be awarded against a discloser taking proceedings in tort for damages for reprisal under section 47 provided that:

- the claim is not vexatious, and that
- they conducted the litigation reasonably. (p.148)

The Committee has received evidence that suing in tort for damages to compensate for harm suffered due to a reprisal is often, like other litigation, costly, stressful, time consuming and uncertain.

A particular disincentive for a whistleblower contemplating taking court action is the risk of being ordered to pay the other side's costs. To address this issue, the Committee has recommended that the *PD Act 2012* (Vic) be amended to provide that a court generally not award costs against a whistleblower provided that their claim is not vexatious and they have conducted their suit in a reasonable manner. The Committee notes the problem of vexatious litigants and considers that this recommendation strikes the right balance.

The Committee does not believe that whistleblowers should be rewarded for making a disclosure. However, the Committee has recommended that the Victorian Government provide financial assistance to whistleblowers to cover their reasonable legal and career-transition costs. See the discussion in the following section: 'Improving information, education and support.'

Improving information, education and support

While the Committee has emphasised the importance of improving the *PD Act 2012* (Vic) and the related laws that it has reviewed, it recognises that legal improvements are not the only way to enhance Victoria's whistleblowing regime.

The Committee understands, for example, that many people and organisations depend more on information and education explaining the *PD Act 2012* (Vic) than on the Act itself. IBAC, the Victorian Ombudsman and a range of other public

x See the discussion in section 6.4.2 in Chapter 6 of this report.

sector bodies have already produced excellent plain-language resources for the public. There is scope, however, to make further improvements to information—especially online information—that explains the operation of Victoria’s whistleblowing regime.

Also, recognising the cost and stress of litigation, the Committee has recommended that the Victorian Government provide financial assistance to whistleblowers to cover their reasonable career-transition and legal costs.

Whistleblowing website hub for legal information and services

RECOMMENDATION 16: That the Victorian Government consider establishing a whistleblowing website hub to facilitate the provision of legal information and services to whistleblowers through a range of public, private, community and professional bodies. (p.147)

The Committee considers that there are targeted ways to reduce the costs, stress and risk whistleblowers can experience when they choose to litigate their claim.

For instance, greater efforts can be made to provide disclosers with plain-language legal information about their compensation options so they can make a more informed choice about whether to pursue litigation and, if so, of what kind. This kind of information helps disclosers understand the law in a basic sense and assists them to find appropriate legal advice if necessary.

The Committee therefore believes that the Victorian Government should consider establishing a professional and community organisation legal website hub to help facilitate access to relevant legal information and services for whistleblowers. These services could be provided through a combination of law firms (pro bono), Victoria Legal Aid, relevant community legal organisations, the Law Institute of Victoria and the Victorian Bar.

Other digital forms of communication about the whistleblowing regime

RECOMMENDATION 20: That investigating agencies, such as IBAC and the Victorian Ombudsman, make greater use of a range of digital forms of communication, such as online videos, to explain the protected disclosure regime to the public service and the public generally. (p.171)

The Committee recognises the importance of people being able to readily find accessible, accurate and authoritative online information about the protected disclosure regime. One way to further this aim is to ensure that public bodies and integrity agencies have effective websites that capture internet search traffic relating to whistleblowing.

While the Committee acknowledges that IBAC and the Victorian Ombudsman provide good examples of the effective provision of online information about protected disclosures, it recommends that they, and other investigating agencies, make greater use of a range of digital forms of communication, such as short videos.

Information about disclosures regarding MPs

RECOMMENDATION 1: The Parliament of Victoria should make its *Protected Disclosure Act 2012 procedures for making a disclosure [whistleblower complaint] about a Member of Parliament* readily accessible on its website. The information on the web page where the procedures can be downloaded should provide a clearer and fuller explanation of the Act and its application to disclosures about MPs and other officials. (p.67)

RECOMMENDATION 2: In consultation with IBAC, the Parliament should produce a plain-language factsheet on disclosures (whistleblower complaints) about MPs and other parliamentary officials. It should be available as a downloadable PDF on Parliament’s website. Parliament should also consider making it available in other accessible formats. (p.68)

RECOMMENDATION 3: The Parliament of Victoria, in consultation with IBAC, should review its *Protected Disclosure Act 2012 procedures for making a disclosure [whistleblower complaint] about a Member of Parliament* and the factsheet every six months to ensure accuracy. They should both include an ‘Accurate at’ date. (p.68)

Under the *PD Act 2012* (Vic) the Parliament of Victoria’s procedures for disclosures on MPs are required to be ‘readily available to the public.’^{xi} While the procedures are on the Parliament’s website, navigation to them is difficult rather than straightforward and intuitive. A member of the public would have to find them by clicking on ‘Publications & Research,’ on the homepage and then ‘Protected Disclosure Act’—only the title of the legislation is given.^{xii} Finally, the user must download a PDF file entitled *Protected Disclosure Procedures*.^{xiii} It is unlikely that most members of the public would draw a connection between the name of the legislation and Parliament’s procedures for whistleblowing complaints about MPs.

Therefore, the Committee considers that the procedures should appear more prominently on the Parliament’s website under a heading such as ‘Information on protected disclosures (whistleblowing).’

Further, the present web page on disclosures only provides a very limited explanation of the function of the *PD Act 2012* (Vic), who can make a disclosure, whose conduct can be the subject of a disclosure and how disclosures can be made. The web page should provide better context for a member of the public in

xi *PD Act 2012* (Vic) s 65(3).

xii See, respectively, the following Parliament of Victoria website pages: <www.parliament.vic.gov.au/publications>, <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

xiii See Parliament of Victoria, <www.parliament.vic.gov.au/images/Protected_Disclosure_Procedures_July_2015.pdf>.

plain language, specifically mentioning the range of conduct and parliamentary officials, including MPs, that can be subject to a disclosure as well as how to make a disclosure. The web page should be reviewed and updated regularly, as needed. Parliament should also provide a downloadable factsheet on the *PD Act 2012* (Vic) and Parliament's procedures.

The welfare management provisions of the *PD Act 2012* (Vic)

FINDING 5: The provisions in the *PD Act 2012* (Vic) with regard to welfare management are adequate, especially when understood in conjunction with IBAC's comprehensive guidelines. (p.136)

The Committee recognises the importance of high quality procedures and policies on the welfare of whistleblowers as well as an organisational commitment to provide adequate resources to implement, review and improve them.^{xiv} This is consistent with the relevant best-practice principles. However, the Committee considers that the provisions in the *PD Act 2012* (Vic) with regard to welfare management are adequate, especially when understood in conjunction with IBAC's comprehensive guidelines on welfare management.

Financial assistance for whistleblowers

RECOMMENDATION 18: That the Victorian Government provide financial assistance to cover the reasonable legal and career-transition costs of whistleblowers who have suffered harm as the result of making a disclosure. (p.149)

While the Committee considers that the present remedies under the *PD Act 2012* (Vic) should be retained, it believes that the Victorian Government should provide financial assistance to whistleblowers to cover their reasonable career-transition^{xv} and legal costs. The financial assistance program should be administered by an appropriate government department, with perhaps VCAT jurisdiction to hear appeals against a denial of assistance within its Review and Regulation List.

The Committee received evidence that sometimes whistleblowers can no longer continue to work in their chosen careers. Therefore, the Committee considers that the proposed financial assistance should cover, not only reasonable legal costs, but also the reasonable costs of education, training and advice for transition into a new career if necessary.

xiv See also Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011); IBAC, *Guidelines for protected disclosure welfare management* (October 2016); IBAC, *Protected disclosure procedures: a checklist for entities receiving disclosures* (May 2014) 3.

xv See, for example, Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 25.

Conclusion

The Committee has received evidence from a wide range of academics and stakeholders, including heads of investigating agencies such as IBAC, the Victorian Ombudsman and the VI, as well as public sector bodies and whistleblowers. This evidence has reinforced the importance of whistleblowers to an effective democracy and to ensuring honest, accountable and efficient public administration.

The evidence has also shown that a substantial proportion of whistleblowers suffer mistreatment as the result of making a disclosure. The *PD Act 2012 (Vic)* recognises that protecting disclosers is vital, both to prevent harm and loss and to help to ensure that people have the confidence to report wrongdoing in the public sector in the first place.

This Review of the *PD Act 2012 (Vic)* has found that, while in many respects it meets relevant best-practice principles it falls short in some areas. For example, the threshold for proving a reprisal is too high, the meaning of ‘public body’ needs to be clarified, the issue of misdirected disclosures needs to be addressed and selected provisions should be clarified and simplified.

However, the Committee does not consider that the *PD Act 2012 (Vic)* needs to be repealed and replaced with new legislation. Judicious amendment of the Act will improve it significantly. The Committee also recognises that the design of the Act can be enhanced to make it easier to understand and navigate.

Moreover, the Committee understands that many people and bodies will depend more on information and education explaining the Act than on the Act itself. IBAC, the Victorian Ombudsman and a range of other public sector bodies have already produced excellent plain-language resources for the public. There is scope, however, to enhance digital resources that explain the legislation.

The *PD Act 2012 (Vic)* plays an essential part in encouraging Victorians to come forward to report improper conduct in the public sector. The Committee is confident that the Act can be fine-tuned to further encourage lawful disclosures about improper conduct in the public sector and to protect, compensate and support those who make them.

List of abbreviations

DELWP	Department of Environment , Land, Water and Planning
G20	Group of Twenty
IBAC	Independent Broad-based Anti-corruption Commission
ICAC	Independent Commission Against Corruption
MIPO	misconduct in public office
NGO	non-government organisation
OECD	Organisation for Economic Cooperation and Development
PCAW	Public Concern at Work
PSO	protective services officer
PwC	PricewaterhouseCoopers
SEO	search engine optimisation
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
VAGO	Victorian Auditor-General's Office
VI	Victorian Inspectorate
VLAF	Victorian Legal Assistance Forum
WWTW	Whistling While They Work

1.1 The importance of whistleblowing

Whistleblowers play an essential role in exposing corruption, fraud, mismanagement and other wrongdoing that threaten public health and safety, financial integrity, human rights, the environment and the rule of law. By disclosing information about such misdeeds, whistleblowers have helped save countless lives and billions of dollars in public funds, while preventing emerging scandals and disasters from worsening.¹

Whistleblowing is an essential part of any modern democracy.² It contributes to democratic, honest, open, transparent, well-informed, accountable and efficient government and public administration.³ Citizens need to be confident, for example, that government powers and resources are being used lawfully, honestly and in the public interest.⁴ More specifically, whistleblowing is vital to efforts to identify, investigate and expose corruption; to subject it to the law; and to prevent it whenever possible.

Whistleblowing also benefits the organisation being held to account.⁵ Organisations that are open to, and prepared for, whistleblowing can improve their governance. Whistleblowing can help an organisation become more open, transparent and accountable by providing information it can use to improve its policies, practices and overall performance. For example, whistleblowers can be part of an early warning system—identifying potential problems, and existing

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- 1 Transparency International, *International principles for whistleblower legislation: best practices for laws to protect whistleblowers and support whistleblowing in the public interest* (2013) 2 ('Transparency International, *International principles for whistleblower legislation*').
 - 2 Ibid; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766. See also the references cited in n 3, below.
 - 3 Ibid; A J Brown, Nerisa Dozo and Peter Roberts, *Whistleblowing processes and procedures—an Australian and New Zealand snapshot. Preliminary results: Whistling While They Work 2 Survey of Organisational Processes and Procedures* (Griffith University, 2016) 1–4 ('Brown, Dozo and Roberts, *Whistleblowing processes and procedures*'); A J Brown (ed), *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press, 2008) ('Brown, *Whistleblowing in the Australian public sector*'); A J Brown, *Public interest disclosure legislation in Australia: towards the next generation—an issues paper* (Commonwealth Ombudsman, New South Wales Ombudsman and Queensland Ombudsman, 2006) ('Brown, *Public interest disclosure legislation in Australia*') Foreword, i; A J Brown and Paul Latimer, 'Symbols or substance? Priorities for the reform of Australian public interest disclosure legislation' (2008) 17(1) *Griffith Law Review* 223, 223–4 ('Brown and Latimer, *Symbols or substance?*'); Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768–9; A J Brown, 'Towards "ideal" whistleblowing legislation? Some lessons from recent Australian experience' (2013) 2(3) *E-Journal of International and Comparative Labour Studies* 4, 4–13 ('Brown, *Towards "ideal" whistleblowing legislation?*'); Paul Latimer and A J Brown, 'In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures' (2007) 12(2) *Deakin Law Review* 1, 1–4 ('Latimer and Brown, *In whose interest?*'); A J Brown, Wim Vandekerckhove and Sulette Dreyfus, 'The relationship between transparency, whistleblowing, and public trust' in Padideh Ala'i et al (eds), *Research handbook on transparency* (Edward Elgar, 2014) 30, 30–32, 34–5, 53–4.
 - 4 United Nations Office on Drugs and Crime (UNODC), *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 2; Peter Bowden, 'A comparative analysis of whistleblower protection' (Paper presented at the Australian Association for Professional and Applied Ethics, Adelaide, 28–30 September 2005) 1–3.
 - 5 David Bevan, 'Whistleblowing: the Queensland experience' (2002) 33 *Australian Institute of Administrative Law Forum* 1, 1–2.

systemic problems, and helping to devise prevention strategies.⁶ This is not only in the public interest, but in the enlightened self-interest of any organisation wanting to reduce the risk of harm, including financial loss, legal liability, customer dissatisfaction and reputational damage.⁷ These and related benefits were recognised in the Foreword to the *Australian standard on whistleblower protection programs for entities AS8004—2003*:

A whistleblower protection program is an important element in detecting corrupt, illegal or other undesirable conduct ... within an entity, and, as such, is a necessary ingredient in achieving good corporate governance.

An effective whistleblower program can result in—

- more effective compliance with relevant laws;
- more efficient financial management of the entity through, for example, the reporting of waste and improper tendering processes;
- a healthier and safer workplace through the reporting of unsafe practices;
- more effective management;
- improved morale within the entity; and
- an enhanced perception and the reality that the entity is taking its governance obligations seriously.⁸

Often whistleblowers are employees familiar with their organisation's policies and practices who have access to inside knowledge. Consequently they are well placed to identify corruption and other improper conduct, and how it might have been covered up.⁹ This not to suggest, however, that whistleblowing by members of the public cannot be valuable.

Leading studies have shown that the information whistleblowers provide is generally reliable and valuable. In their seminal study, A J Brown and his colleagues found, for example, that information from whistleblowers is more likely to be verified than information from other sources.¹⁰ Indeed, they concluded that whistleblowers are 'the single most important source of information for the purposes of uncovering wrongdoing.'¹¹ This characterisation of whistleblowing is also supported by a study carried out by the Association

6 Ibid.

7 Ibid. See also A J Brown and Chris Wheeler, 'Project findings: an agenda for action' in Brown, *Whistleblowing in the Australian public sector* 289, 289, 298–9.

8 Quoted in Commonwealth, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector: House of Representatives Standing Committee on Legal and Constitutional Affairs*, Parl Paper No 40 (2009) 21–2 ('Commonwealth, *Whistleblower protection* (2009)').

9 Indira Carr and David Lewis, 'Combating corruption through employment law and whistleblower protection' (2010) 39(1) *Industrial Law Journal* 52, 52–59; Transparency International Australia, *Whistleblowing, Position paper no 8* (January 2016); Sulette Lombard and Vivienne Brand, 'Corporate whistleblowing: public lessons for private disclosure' (2014) 42 *Australian Business Law Review* 351, 352; Simon Wolfe et al., *Whistleblower protection rules in G20 countries: the next Action Plan*. Public consultation draft. (Blueprint for Free Speech, The University of Melbourne, Griffith University, Transparency International Australia, 2014) 1, 10–11; A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 1, 8–14.

10 A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 261, 296. See also Brown, *Towards 'ideal' whistleblowing legislation?*

11 Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 261, 296.

of Certified Fraud Examiners in 2014.¹² It found that more than 40% of frauds uncovered were detected through internal tip offs—the most common way they came to light.¹³

The importance of whistleblowing in combating corruption has also been recognised in a wide range of international and regional agreements, understandings, laws, standards and guidelines.¹⁴ For example, Article 33 of the United Nations Convention against Corruption (UNCAC) (2003) provides that

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.¹⁵

Australia is a party to UNCAC and has also participated in the G20's anti-corruption efforts, which include the development of best-practice principles for whistleblower protection legislation.¹⁶

Since the high-profile investigations into corruption in Australia in the 1980s and 1990s, the vital role of whistleblowing has been recognised in a wide range of federal and state inquiries.¹⁷ Victorian governments have also acknowledged the critical part whistleblowing plays in detecting and combating corruption, and

12 Association of Fraud Examiners, *Report to the nations on occupational fraud and abuse: 2014 Global Fraud Survey* (2014).

13 Ibid 4.

14 UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015), especially 89–91; Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015) 2 (referring to standards and guidelines for whistleblower protection legislation produced by the Organisation for Economic Cooperation and Development (OECD), Council of Europe, Organization of American States, Government Accountability Project and Transparency International).

15 Quoted in UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 95 (see also Articles 8 and 13 of UNCAC, extracted at 95–6).

16 UNODC, *United Nations Convention against Corruption: signature and ratification status as of 12 December 2016* (21 December 2016) <www.unodc.org/unodc/en/treaties/CAC/signatories.html>; Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015) 26–8. See also Cat Barker, *Australia's performance against anti-corruption treaty reviewed* (9 July 2012), Parliament of Australia <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/July/Australias_performance_against_Anti-corruption_treaty_reviewed>.

17 Parliamentary Library, Parliament of Australia, 'Whistleblowing in Australia—transparency, accountability ... but, above all, the truth' (2005) 31 *Research Note* 1; Olivia Dixon, 'Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct' (2016) 40(1) *Melbourne University Law Review* 168, 170. See, for example, Electoral and Administrative Review Commission [Queensland], *Report on protection of whistleblowers* (1991); Senate Select Committee on Public Interest Whistleblowing, Parliament of Australia, *In the public interest* (1994) ('Commonwealth, *In the public interest* (1994)'); Commonwealth, *Whistleblower protection* (2009); Senate Economics References Committee, Parliament of Australia, *Corporate whistleblowing in Australia: ending corporate Australia's cultures of silence: Senate Economic References Committee issues paper: Inquiry into the Implications of Financial Advice Reforms* (2016) ('Commonwealth, *Corporate whistleblowing in Australia* (2016)'); Philip Moss, *Review of the Public Interest Disclosure Act 2013 [Cth]* (2016); NSW Ombudsman, *Oversight of the Public Interest Disclosures Act 1994: annual report 2014–2015* (2016); Department of the Chief Minister, Northern Territory Government, *Anti-Corruption, Integrity and Misconduct Commission Inquiry: final report* (2016); Queensland Ombudsman, *A review of the Public Interest Disclosure Act 2010: issues paper* (2015); Commonwealth Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit sectors* (due to report by 30 June 2017) <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections>. The Victorian Department of Premier and Cabinet is also reviewing aspects of the state's integrity system, some of which bear on whistleblowing—see Department of Premier and Cabinet, *Community consultation on IBAC, the Victorian Ombudsman and the Auditor-General* (21 December 2016) <www.dpc.vic.gov.au/index.php/news-publications/ibac-discussion-paper>.

thus in improving the integrity of the public sector. This has been reflected in a range of Victorian inquiries and in the development and refinement of integrity laws. These include legal developments with respect to the Auditor-General, the Victorian Ombudsman, the Office of Police Integrity and its broad-based successor, IBAC, and the Victorian Inspectorate (VI).¹⁸ Whilst this history will not be covered here, it is important to note that ‘protected disclosures’ (whistleblowing) are recognised under the law in order to encourage the reporting of improper conduct by protecting whistleblowers from retaliatory action.¹⁹

1.2 Defining whistleblowing

The most commonly accepted definition of whistleblowing is ‘disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.’²⁰ This definition was used by Professor A J Brown and his colleagues in their Whistling While They Work (WWTW) research project, one of the largest investigations into whistleblowing ever undertaken in the world.²¹

Under this definition, disclosers can only be considered whistleblowers if they are a current or former member of the organisation that is the subject of the disclosure.²² In Brown’s view, only these kinds of insiders will have distinctively valuable knowledge, experience and access to information about the organisation.²³ Outsiders such as customers, clients and public complainants will not.²⁴ In addition, it is as an insider that the conflicting pressures of loyalty, peer pressure and potential reprisals are most likely to be brought to bear—all acting as disincentives to the disclosure of wrongdoing.²⁵ Thus, according to this view, it is a discloser’s membership of an organisation that makes what they

18 For accounts of the history of integrity agencies and whistleblowing laws in Victoria up to 2012, when the new whistleblowing legislation (*Protected Disclosure Act 2012 (Vic)* (*‘PD Act 2012 (Vic)’*)) was passed, see: Victoria, *Strengthening Victoria’s key anti-corruption agencies?: IBAC Committee*, Parl Paper No 126 (2016) 20–2 (*‘IBAC Committee, Strengthening Victoria’s key anti-corruption agencies? (2016)’*); Catriona Ross, Bronwen Merner and Adam Delacorn, ‘Independent Broad-based Anti-corruption Commission Bill 2011’ (Current Issues Brief No 1), Parliamentary Library Research Service, Victoria (2011) 1–9; Stephen Charles, ‘Is the High Court helping to fight corruption?’ [Winter 2016] 159 *Victorian Bar News* 61; William De Maria, ‘The Victorian *Whistleblower Protection Act*: patting the paws of corruption?’ (Seminar Paper, Department of Business Law and Taxation, Monash University, 3 May 2002); and Adriana Orifici and Tamsin Webster, ‘A new whistle at work’ (2013) 87(1) *Law Institute Journal* 30.

19 *PD Act 2012 (Vic)* s 1.

20 A J Brown and Marika Donkin, ‘Introduction’ in Brown, *Whistleblowing in the Australian public sector* 1, 8 (quoting M P Nicelli and J P Near’s definition).

21 John McMillan, Bruce Barbour and Robert Needham et al, ‘Foreword’ in Brown, *Whistleblowing in the Australian public sector* ix. It should be noted, however, that the study did not gather data from Victoria (*‘Summary’* in Brown, *Whistleblowing in the Australian public sector* xxi, xxii).

22 *Ibid* 8–10. Although Brown and Paul Latimer relax this requirement by recognising contractors with an organisation, and employees of those contractors, as potential whistleblowers—see Brown and Latimer, *Symbols or substance?* 230–1.

23 A J Brown and Marika Donkin, ‘Introduction’ in Brown, *Whistleblowing in the Australian public sector* 1, 8–10

24 *Ibid* 10.

25 *Ibid* 9.

disclose so valuable and exposes them to the risk of retaliation.²⁶ Versions of this definition have been endorsed by a number of Australian parliamentary inquiries and papers.²⁷

However, there are contending perspectives and evidence regarding this definition. This report qualifies the definition to read ‘whistleblowing is disclosure by any person of illegal, immoral or illegitimate practices to persons or organisations that may be able to effect action.’ This revised definition recognises whistleblowing by outsiders, which reflects the legal position in Victoria, Queensland, South Australia, Western Australia, the Australian Capital Territory and the Northern Territory.²⁸ In these jurisdictions a discloser is *not* required to be a member or former member of the organisation they are making a disclosure about. They are not required, for instance, to be a public official—any member of the public can blow the whistle. Under the *Protected Disclosure Act 2012* (Vic) (*PD Act 2012* (Vic)), ‘a natural person’ may make a disclosure about a person’s, public officer’s or public body’s engagement in improper conduct.²⁹

This broader definition of whistleblowing, that encompasses disclosures by outsiders, properly recognises that insiders are not the only valuable sources of information about wrongdoing within organisations. If being inside an organisation can give a whistleblower distinctive advantages, so can being outside it. Outsider whistleblowers can sometimes see things an insider cannot. For example, the patient who sees another patient being mistreated by a nurse, the passenger who suspects that a pilot is intoxicated or the passer-by who witnesses a construction worker dumping toxic waste in a river. In emergency situations—such as imminent security threats, environmental disasters or health crises—the role of outsider whistleblowers could be even more important.

In addition, there is the possibility that insiders will have adopted at least some of the values of the organisation they work for. These values may have become warped over time so that various forms of wrongdoing have become normalised and almost invisible to employees.³⁰ It would be surprising if this were not the case, for instance, in an organisation in which corrupt practices are widespread. Even if an insider recognises the wrongdoing, the peer pressure to stay silent

26 A J Brown and Marika Donkin, ‘Introduction’ in Brown, *Whistleblowing in the Australian public sector* 8–10; Brown and Latimer, *Symbols or substance?* 230–1; Paul Latimer and A J Brown, ‘Whistleblower laws: international best practice’ (2008) 31(3) *University of New South Wales Law Journal* 766, 768; Brown, *Towards ‘ideal’ whistleblowing legislation?* 6–8; Latimer and Brown, *In whose interest?* 2–3; Brown, *Public interest disclosure legislation in Australia* iv, 8–13.

27 See, for example, Commonwealth, *Corporate whistleblowing in Australia* (2016) 7; Senate Economic References Committee, *Performance of the Australian Securities and Investments Commission* (2014) (‘Commonwealth, *Performance of the Australian Securities and Investments Commission* (2014)’) 197; Department of Justice, Tasmania, *Strengthening trust in government—the spotlight on improper conduct. Review of the Public Interest Disclosures Act 2002 Directions Paper* (2009) (‘Tasmania, *Strengthening trust in government* (2009)’) 13–15.

28 *PD Act 2012* (Vic) s 9(1); *Public Interest Disclosure Act 2010* (Qld) ss 12–13; *Whistleblowers Protection Act 1993* (SA) s 5; *Public Interest Disclosure Act 2003* (WA) s 5(1); *Public Interest Disclosure Act 2012* (ACT) s 14; *Public Interest Disclosure Act* (NT) s 10(1).

29 *PD Act 2012* (Vic) s 9(1).

30 See, for example, J S Nelson, ‘The normalization of corruption’ [2016] *Journal of Management Inquiry* 1; Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39; Alison Taylor, ‘What do corrupt firms have in common? Red flags of corruption in organizational culture’ [April 2016] *Center for the Advancement of Public Integrity, Columbia Law School, Integrity in Brief Series* 1; Marie Hutchinson et al, ‘“The worse you behave, the more you seem, to be rewarded”’ (2009) 21 *Employee Responsibilities and Rights Journal* 213.

can be overwhelming. Sometimes an insider's frustration and disillusionment in the face of repeated attempts to raise concerns within an organisation about wrongdoing can also play a part.³¹ Given these possibilities, the different perspectives and relative freedom of outsider whistleblowers are an important addition to the information insiders can supply.

The value of 'external tip-offs' from outsider whistleblowers has been demonstrated in a number of studies:

- A 2010 global report by PricewaterhouseCoopers (PwC) on fraud in the public sector found that 14% of fraud cases had been detected due to external tip-offs.
- PwC's Global Economic Crime Survey in 2011 found that 7% of corporate fraud cases were discovered due to external tip-offs.
- The 2014 Report to the Nations on Occupational Fraud Abuse by The Association of Certified Fraud Examiners found that more than half the tip-offs came from non-employees.
- KPMG's 2011 examination of fraud investigations in Europe, the Middle East, the Americas, and Asia and the Pacific reported that 14% of tip-offs were from anonymous sources and 8% from customers or suppliers.³²

Moreover, a broader definition of whistleblowing that includes outsider whistleblowers has been recognised by a number of official inquiries, non-government organisations (NGOs) and international guidelines. For example, in 1994 the Australian Senate Select Committee on Public Interest Whistleblowing adopted

as broad a definition as possible to include disclosures by people from within or outside the organisation in which the wrongdoing occurred and embracing a wide range of activities to constitute wrongdoing.³³

It recommended that 'any person' be able to make such disclosures.³⁴ The pioneering 1991 Report on Protection of Whistleblowers by the Queensland Electoral and Administrative Review Commission also defined whistleblowing broadly—a whistleblower is '*a person who discloses wrongdoing to another person, whether within or outside the organisation in which the wrongdoing has occurred.*'³⁵ It further concluded that there was

no compelling reason why greater protection should be offered to persons who report wrongdoing by their employer than is available to any person ... who reports illegal conduct of any nature to an appropriate law enforcement authority, whether it be the police or a government agency responsible for administering regulatory

31 'Summary' in Brown, *Whistleblowing in the Australian public sector* xxv; A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 9–10.

32 Cited in UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 3–5.

33 Commonwealth, *In the public interest* (1994) xiii. See also the references cited in n 30, above.

34 *Ibid* xviii.

35 Electoral and Administrative Review Commission [Queensland], *Report on protection of whistleblowers* (1991) 14 (emphasis in original); Commonwealth, *In the public interest* (1994) 7.

laws e.g. anti-pollution legislation. ... [The] Commission can see no warrant for arbitrarily limiting the availability of statutory protections to encourage the reporting of illegal conduct ... [They] should be available for whatever incentive they can provide to encourage any person to assist law enforcement authorities with their difficult tasks.³⁶

The advocacy organisation Whistleblowers Australia has taken the same view.³⁷ The Law Institute of Victoria has also supported the broad approach, noting that people outside a public sector organisation can have valuable information about possible wrongdoing within it:

There will be situations where outsiders will be best placed to initiate and provide the pertinent evidence substantiating an allegation of serious wrongdoing ... For example, there are many persons working in the private and charitable sectors that can become aware of maladministration and be in a position to make a disclosure.³⁸

Importantly, the United Nations Office on Drugs and Crime (UNODC), has taken a broad approach, although it uses the term ‘reporting persons.’³⁹ UNODC has emphasised that combating corruption effectively ‘requires a commitment from the whole of society’ and that ‘a range of persons and institutions—from members of the public, to companies and non-governmental organizations—are in a position to report corruption to competent authorities, and that they can all be sources of important information.’⁴⁰ These principles underpin the relevant UN treaty, UNCAC. The role of members of the public as whistleblowers, for example, is recognised in Article 13 of UNCAC, and Article 33 provides, as we have seen, that:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.⁴¹

The broad definition of whistleblowing also aligns well with IBAC’s functions in relation to identifying, investigating, exposing and preventing corruption.⁴² Consistent with its legislative functions, IBAC has invested heavily in educating

³⁶ Electoral and Administrative Review Commission [Queensland], *Report on protection of whistleblowers* (1991) 14; Commonwealth, *In the public interest* (1994) 8. See also Peter Bowden, ‘A comparative analysis of whistleblower protection’ (Paper presented at the Australian Association for Professional and Applied Ethics, Adelaide, 28–30 September 2005) 2.

³⁷ Commonwealth, *Whistleblower protection* (2009) 34.

³⁸ Quoted in *ibid* 36.

³⁹ UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 9.

⁴⁰ *Ibid* 1, 3.

⁴¹ *Ibid* 6–7, 95–6 (extracts from UNCAC).

⁴² *Independent Broad-based Anti-Corruption Act 2011* (Vic) (*‘IBAC Act 2011 (Vic)’*). The Victorian Public Sector Commission (VPSC), which promotes good governance in the Victorian public sector, takes a similarly broad approach—see VPSC, *Protected disclosures procedures* (2017) <vpvc.vic.gov.au/about-vpsc/protected-disclosures-procedures> and VPSC, *Legislative framework: the Public Sector Administration Act 2004* (2017) <vpvc.vic.gov.au/about-vpsc/legislative-framework-the-public-administration-act-2004>. This is also the case with Victoria Police: Victoria Police, *Guidelines for making, handling and investigating protected disclosures* (2014).

members of the public about the nature of corruption and other public sector wrongdoing, where they can report it and what protections might be available to them.⁴³

This broad definition is consistent with current Victorian law, recognises the value of external tip-offs and advances IBAC's broad functions of identifying, investigating, exposing and preventing corruption.

1.3 The purpose of this report

Given the importance of whistleblowing in combating corruption, whistleblowing was raised with the Committee as part of its review of the legislation introduced in December 2015 to strengthen Victoria's integrity system. In undertaking that review, the Committee received evidence regarding the nature and operation of the state's protected disclosure regime.⁴⁴ This evidence raised a number of issues concerning the effective operation of the regime, including:

- inflexible legislative requirements regarding which particular body a discloser must initially disclose to
- uncertainty about when Victoria Police must notify IBAC of complaints about police officers, and if and when Victoria Police can start its own investigation into them
- the treatment of all complaints by police about police as protected disclosures
- how easily disclosers can get support
- the handling of complaints and disclosures about the conduct of Victorian Members of Parliament (MPs)
- the limited range of bodies IBAC can refer protected disclosure complaints to for investigation
- the inability of IBAC to 'park' or 'suspend' complaints for a reasonable period while, for example, it monitors the progress of investigations by other bodies.⁴⁵

⁴³ On IBAC's educative and preventive functions, see *IBAC Act 2011* (Vic) ss 8, 15. See also IBAC Committee, *Strengthening Victoria's key anti-corruption agencies?* (2016) 22–5; Victoria, *The performance of the Independent Broad-based Anti-corruption Commission and the Victorian Inspectorate, 2015/16: IBAC Committee*, Parl Paper No 234 (2016) 11–15; IBAC, Victorian Ombudsman and Victorian Auditor-General's Office, *Safeguarding integrity: a guide to the integrity system in Victoria* (2016) 1, 7, 14–25 ('IBAC, Victorian Ombudsman and Victorian Auditor-General's Office, *Safeguarding integrity*'); IBAC, *Annual Report 2015/2016* (2016) 29–38; IBAC, *Thinking of making a protected disclosure?* (2014) <www.ibac.vic.gov.au/docs/default-source/education-resources/thinking-of-making-a-protected-disclosure-information-sheet.pdf>. IBAC is running a community anti-corruption campaign with the tag line 'When something's not right. Report it.'—see *Groundbreaking anti-corruption community campaign starts today* (2016) <www.ibac.vic.gov.au/news-and-features/article/ground-breaking-anti-corruption-community-campaign-starts-today>.

⁴⁴ Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic); IBAC Committee, *Strengthening Victoria's key anti-corruption agencies?* (2016).

⁴⁵ IBAC Committee, *Strengthening Victoria's key anti-corruption agencies?* (2016) xiii, 66–75, 78–9, 96.

In response to these issues, the Committee also determined to undertake a review of the Act.⁴⁶

In undertaking this work, the Committee received submissions from individuals, groups and organisations in relation to the following questions:

- What works well in the current *PD Act 2012* (Vic)?
- What are some of the challenges with the *PD Act 2012* (Vic)?
- Are the provisions relating to assessment and investigation of protected disclosure complaints appropriate or should alternatives be considered?
- Is the type of conduct that can be disclosed under the *PD Act 2012* (Vic) appropriate or should it be expanded?
- Are the current confidentiality and secrecy provisions effective? What are the advantages and disadvantages?
- Are the protections for individuals from detrimental or retributive action sufficient? Should they be changed?

The Committee also notes the work of the Government concerning its broad, ongoing review of Victoria's integrity system⁴⁷

In addressing the key issues in this Review, the Committee has sought to apply best-practice principles regarding the nature and operation of whistleblower laws, drawing on interstate and international experience.⁴⁸ While the Committee found that the Victorian regime, and the *PD Act 2012* (Vic) in particular, conforms to a number of the best-practice principles, it has identified a number of ways it might be improved.

1.4 The scope of this report

Since this Review has focused on the *PD Act 2012* (Vic) and related state legislation, this report discusses federal legislation only where it is useful to debates about the Victorian protected disclosure regime.

In addition, since the Victorian legislation focuses on complaints and disclosures about corruption and other improper conduct in the public sector, this report devotes very little attention to the private sector. Whistleblowers making disclosures about wrongdoing in the private sector are given some protection

⁴⁶ Under the *Parliamentary Committees Act 2003* (Vic), s 12A, the Committee's functions include monitoring and reviewing the performance by IBAC and the VI of their respective duties and functions, and reporting to the Parliament of Victoria on any matter in connection with them.

⁴⁷ Department of Premier and Cabinet, *Community consultation on IBAC, the Victorian Ombudsman and the Auditor-General* (21 December 2016) <www.dpc.vic.gov.au/index.php/news-publications/ibac-discussion-paper>.

⁴⁸ The best-practice principles are discussed in section 1.7.8 in this chapter.

through a patchwork of federal legislation.⁴⁹ However, where there were lessons to be learnt from the private sector, the Committee has evaluated their relevance to Victoria.

Finally, while the report addresses some of the key concerns about disclosures and complaints regarding Victoria Police, they are not dealt with in depth. Later this year the Committee will inquire into the oversight of complaints about Victoria Police, and relevant concerns regarding disclosures about police will be more fully considered then.

1.5 The need to protect whistleblowers

The risk of whistleblowers suffering reprisals for exposing wrongdoing is well recognised.⁵⁰ Indeed, protecting whistleblowers from the harm of reprisal action is a key rationale for whistleblower legislation. One of the main purposes of the *PD Act 2012* (Vic), for example, is to protect from reprisal persons who make disclosures about ‘improper conduct by public officers, public bodies and other persons.’⁵¹ Whistleblowers often lose their jobs, experience financial hardships and suffer health problems. Some whistleblowers will not be able to work in their chosen careers again. These practical impacts make the protection of whistleblowers even more important.⁵²

49 The main Acts are the *Corporations Act 2001* (Cth), Part 9.4AAA, the *Fair Work Act 2009* (Cth) and the *Fair Work (Registered Organisations) Act 2009* (Cth) (as amended by the *Fair Work (Registered Organisations) Act 2016* (Cth)). These are supplemented by protections in other legislation, including the *Banking Act 1959* (Cth), *Life Insurance Act 1995* (Cth), *Superannuation Industry (Supervision) Act 1993* (Cth) and *Insurance Act 1973* (Cth)—see Olivia Dixon, ‘Honesty without fear? Whistleblower anti-retaliation protections in corporate codes of conduct’ (2016) 40(1) *Melbourne University Law Review* 168, 168–81; Sulette Lombard and Vivienne Brand, ‘Corporate whistleblowing: public lessons for private disclosure’ (2014) 42 *Australian Business Law Review* 351; Commonwealth, *Corporate whistleblowing in Australia* (2016); Commonwealth, *Performance of the Australian Securities and Investments Commission* (2014); Promontory Australia, *Review of whistleblowing protection by Australian banks*. Final report of the Australian Bankers’ Association (2016); Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015) 27–8. The Commonwealth Parliamentary Joint Committee on Corporations and Financial Services is currently inquiring into whistleblowing protections, including in the corporate sector—see Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit sectors (due to report by 30 June 2017) <www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections>.

50 See, for example, Brown, *Whistleblowing in the public sector*; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015); Brian Martin, ‘What’s the meaning of whistleblowing?’ [January 2002] *The Whistle* 6; Thomas A Faunce and Stephen N C Bolsin, ‘Three Australian whistleblowing sagas: lessons for internal and external regulation’ (2004) 181(1) *Medical Journal of Australia* 44; Stephen Bolsin et al, ‘Whistleblowing and patient safety: the patient’s or the profession’s interests at stake?’ (2011) 104 *Journal of the Royal Society of Medicine* 278; K Jean Lennane, ‘“Whistleblowing”: a health issue’ (1993) *British Medical Journal* 667; Commonwealth, *In the public interest* (1994) 60–75; Whistleblowers Australia, undated submission to the Moss review, 2016—Philip Moss, *Review of the Public Interest Disclosure Act 2013* [Cth] (2016); Sonja R Cleary and Kerrie E Doyle, ‘Whistleblowing need not occur if internal voices are heard: from the deaf effect to hearer courage’ (2016) 5(1) *International Journal of Health and Policy Management* 59; Dr Inez Dussuyer, Professor Anona Armstrong AM, Dr Kumi Heenetigala and Dr Russell Smith, College of Law & Justice, Victoria University, Submission, 27 July 2016; Inez Dussuyer et al, *Preventing victimisation of whistleblowers* (Victoria University, 2016); Philip Moss, *Review of the Public Interest Disclosure Act 2013* [Cth] (2016) 6, 8, 15, 17, 53–60; Brian Martin, ‘Research that whistleblowers want—and what they need’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 497.

51 *PD Act 2012* (Vic) s 1.

52 See the discussion in Chapter 5 of this report.

1.5.1 The incidence of mistreatment of whistleblowers and general negative impacts

As noted earlier, the WWTW study was one of the largest conducted in the world. By gathering and analysing extensive empirical data relating to public sector whistleblowers in Australia it sought to evaluate the accuracy of common perceptions of whistleblowers' experience.⁵³ Moreover, since the protection and support of whistleblowers against reprisals are key rationales for whistleblowing schemes, the study aimed to identify the incidence of the mistreatment of whistleblowers and other negative impacts.

The WWTW research project distinguishes the 'deliberate mistreatment' of a whistleblower in response to a disclosure—that might, for example, amount to a reprisal under relevant laws—from the general negative impacts a whistleblower could experience, such as increased stress and anxiety.⁵⁴

Mistreatment

While the WWTW study has challenged the stereotype that the vast majority of whistleblowers will be mistreated by their organisation, it found that the risk of mistreatment remains significant.⁵⁵ The WWTW study gathered data from 7663 people employed as public officials in Commonwealth, New South Wales, Queensland and Western Australian organisations.⁵⁶ This was supplemented by a range of other surveys, including surveys of managers and 'case-handlers' (who dealt with reported wrongdoing).⁵⁷

While the survey of the 7663 public official employees showed that '78 per cent of ... whistleblowers said they were treated either well or the same by management and co-workers in their organisation as a result of reporting,' 22 per cent 'said they were treated badly by management and/or co-workers.'⁵⁸

One of the limitations noted in the WWTW report was that the employee survey only gathered data from current, not former, employees.⁵⁹ It is plausible to think that at least some former employees will have left their organisation after blowing the whistle made continued employment there intolerable.⁶⁰ The WWTW

53 'Summary' in Brown, *Whistleblowing in the Australian public sector* xxvii–xxviii; A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 1–8.

54 Brown, *Whistleblowing in the Australian public sector* xxvii–xxviii; Rodney Smith and A J Brown, 'The good, the bad and the ugly: whistleblowing outcomes' in Brown, *Whistleblowing in the Australian public sector* 109, 109–11, 127–34.

55 Brown, *Whistleblowing in the Australian public sector* xxvii–xxviii; Rodney Smith and A J Brown, 'The good, the bad and the ugly: whistleblowing outcomes' in Brown, *Whistleblowing in the Australian public sector* 109, 109–11, 127–34.

56 'Summary' in Brown, *Whistleblowing in the Australian public sector* xxii.

57 *Ibid* xvii, xxii.

58 *Ibid* xxvii.

59 *Ibid*.

60 *Ibid*.

study took this limitation into account and concluded that ‘the total proportion of whistleblowers experiencing mistreatment would be unlikely to exceed 30 per cent.’⁶¹

The WWTW study also showed that managers are more likely than co-workers to mistreat whistleblowers:

Eighteen per cent of whistleblowers indicated they were treated badly by management, compared with 9 per cent of whistleblowers who indicated they were treated badly by co-workers (with 5 per cent indicating they were treated badly by both).⁶²

The WWTW report concluded that

there was a greatly reduced likelihood that an employee would report wrongdoing if they assessed it to be caused by their supervisor or other managers, with fear of reprisal emerging as an extra strong reason for not reporting in these circumstances ... [In] practice, it is indeed management reaction that poses the greatest potential problem for whistleblowers.⁶³

This data has important implications for the protection and support of whistleblowers making internal disclosures within their organisations. It demonstrates that employees cannot always rely on protection and support from their managers when they blow the whistle on wrongdoing within their organisations.⁶⁴

General negative impacts

Even if a whistleblower is not deliberately mistreated, blowing the whistle is often an unpleasant experience that can lead to severe negative impacts on workplace conditions, health, relationships, finances and employment prospects. If the whistleblower is being deliberately mistreated these impacts will be even more damaging.⁶⁵ Further, in practice it will sometimes be difficult to disentangle ‘mistreatment’ from ‘general negative impacts’ given the sophisticated, ingenious and subtle forms that deliberate mistreatment can take.⁶⁶

The WWTW study found that ‘approximately 62 per cent of all whistleblower respondents’ experienced increased stress, with around 43% ‘suffering extreme stress.’⁶⁷ The likelihood of whistleblowers experiencing increased stress was also

61 Ibid.

62 Ibid.

63 Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 125.

64 ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxiv–xxv, xxix; A J Brown and Jane Olsen, ‘Whistleblower mistreatment: identifying the risks’ in Brown, *Whistleblowing in the Australian public sector* 137, 152. These issues are further discussed in Chapter 5 of this report, which concerns the protection of whistleblowers.

65 ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxviii; Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 111, 128–9, 131–4.

66 Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 128–9.

67 ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxviii.

recognised by the managers and case-handlers surveyed. Fifty-four per cent of them believed whistleblowers “often” or “always” experienced “emotional, social, physical or financial” problems’ due to reporting wrongdoing.⁶⁸

1.5.2 The nature of mistreatment and general negative impacts

Mistreatment

The WWTW study found that a whistleblower who was mistreated was likely to suffer from a number of forms of mistreatment. These forms of mistreatment were designed to have a cumulative impact, to make the whistleblower feel increasingly uncomfortable at work.⁶⁹

According to the study, the most common forms of mistreatment of whistleblowers were:

- ‘threats’
- ‘intimidation’
- ‘torment’
- ‘undermining of authority’
- ‘heavier scrutiny of work’
- ‘questioning of motives’
- ‘unsafe or humiliating work’
- ‘being made to work with wrongdoers.’⁷⁰

The WWTW report noted that these kinds of reprisals can be carried out ‘more or less surreptitiously and without formal change to the status of the whistleblower.’⁷¹ They are also difficult to prove—some of these reprisals, for example, might be disguised as legitimate performance management of the whistleblower.⁷² The report concludes that the survey results

show that when bad treatment does occur, or is perceived to occur, it is unlikely to involve a single decisive blow such as a sacking or demotion and is more likely to involve a series of smaller blows over time.⁷³

⁶⁸ ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxviii; Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 111, 133. See also Inez Dussuyer et al, *Preventing victimisation of whistleblowers* (Victoria University, 2016).

⁶⁹ Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 128.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² ‘Summary’ in Brown, *Whistleblowing in the public sector* xxviii; Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 134–5.

⁷³ Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 129.

General negative impacts

The WWTW study also found that even whistleblowers who were treated well by their organisation experienced ‘more negative feelings’ as a result of reporting wrongdoing.⁷⁴ The study revealed that the ‘average whistleblower felt decreased trust, disempowerment, betrayal, persecution, frustration, increased stress, anxiety, increased mood swings, withdrawal from others, decreased self-worth and decreased self-esteem.’⁷⁵ These findings are well supported in the literature and in the firsthand accounts of many whistleblowers.⁷⁶

While not every whistleblower will be mistreated, the evidence suggests that a significant proportion will, and most will find the experience stressful. Moreover, fear of mistreatment predictably deters many potential whistleblowers from reporting wrongdoing. The WWTW study also shows that whistleblowers who have been mistreated after reporting wrongdoing are less likely to report any future wrongdoing they might see in their organisation.

1.5.3 The need for protection

There are two main reasons to protect whistleblowers: first, to protect whistleblowers from a range of harms, and, second, to encourage the reporting of wrongdoing. As noted earlier, whistleblowing makes an important contribution to the identification and combating of corruption, and hence to integrity in the political system and economy. The WWTW project has emphasised the importance of an ‘if in doubt, report’ culture within public sector.⁷⁷ Without a reasonable assurance that whistleblowers will receive the protection of the law and the support of their organisation that culture will not be established and maintained. The WWTW study found that

The main reasons for not reporting, given by respondents who did not report, were a belief that no action would be taken or a fear of reprisal, or that management would not protect them from reprisal, especially in circumstances in which the perceived wrongdoers included managers ... [The] best ways to ensure staff will speak up are by demonstrating that if wrongdoing is reported, something will be done and whistleblowers will be supported.⁷⁸

⁷⁴ Ibid 131.

⁷⁵ Ibid 133.

⁷⁶ See, for example, Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting in public sector organisations* (ANU E Press, 2011) 80; Blueprint for Free Speech prizewinner stories: <www.blueprintprize.org>; Inez Dussuyer et al, *Preventing victimisation of whistleblowers* (Victoria University, 2016); Brian Martin, ‘Research that whistleblowers want—and what they need’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 497; Sonja Cleary, *Nurse whistleblowers in Australian hospitals: a critical case study* (PhD Thesis, Deakin University, 2014); Kathrine Grover, *An Australian whistleblowing experience in healthcare: a study of six women from the New South Wales public health system who were labelled by the media as whistleblower nurses* (PhD Thesis, University of New England, 2012); Sally McDonald, *Reporting misconduct: a descriptive study of whistleblowing in nursing* (Master of Nursing thesis, Edith Cowan University, 1999).

⁷⁷ ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxi.

⁷⁸ Ibid xxv. See also UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) iii, 1–2, 6–7, 45–65.

Legislation is one important way of protecting and supporting whistleblowers, as evident in the purposes of the *PD Act 2012* (Vic).⁷⁹

1.6 Overview of the Victorian whistleblowing system

The central piece of legislation governing Victoria's whistleblowing system is the *PD Act 2012* (Vic), in conjunction with the principal Acts for IBAC, the Victorian Inspectorate and the Victorian Ombudsman.⁸⁰ The purposes of the *PD Act 2012* (Vic) are to 'encourage and facilitate' disclosures about 'improper conduct' in the public sector and also disclosures about reprisals taken against disclosers. In addition, the Act protects disclosers from reprisals, ensures the confidentiality of the disclosures and safeguards the identity of disclosers.⁸¹ These protections are subject to a range of qualifications and exceptions.

Among the key features of any whistleblowing system are the requirements regarding who can disclose, about what, to whom, and with what kinds of protections and outcomes.⁸² This section only provides a snapshot of these characteristics, which are dealt with in more detail in the next chapter.

The *PD Act 2012* (Vic) provides that 'a natural person' may make a disclosure about improper conduct on the part of persons, public officers and public bodies.⁸³ Thus, companies or businesses cannot, for example, make a disclosure, only people.⁸⁴ People can disclose about a wide range of 'corrupt' and other 'improper' conduct in the public sector.⁸⁵ This includes official conduct of a public officer or public body that involves 'substantial mismanagement of public resources,' or 'substantial risk to public health or safety,' or 'substantial risk to the environment.'⁸⁶ Disclosures may be made in writing, orally and anonymously.⁸⁷ As noted earlier, the *PD Act 2012*(Vic) is focused on wrongdoing in the public, not private, sector.

The *PD Act 2012* (Vic) prescribes the entities that disclosures can be made to, including public service bodies and councils, Victoria Police, the Victorian Ombudsman, IBAC and the Victorian Inspectorate.⁸⁸ A disclosure must be disclosed to the right entity to comply with the *PD Act 2012* (Vic) and be assessed as a possible protected disclosure.⁸⁹ The Victorian whistleblowing system is a

79 *PD Act 2012* (Vic) s 1.

80 *IBAC Act 2011* (Vic), *VI Act 2011* (Vic) *Ombudsman Act 1973* (Vic).

81 *PD Act 2012* (Vic) s 1.

82 These characteristics have been examined by academics, such as Professor A J Brown and Associate Professor Paul Latimer, as well as a wide range of official inquiries—see, for example, the works cited in section 1.1 of this chapter.

83 *PD Act* ss 6, 9(1).

84 'A company or business cannot itself make a protected disclosure, but its officers or employees can.'—IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12.

85 *PD Act 2012* (Vic) ss 3 (definitions of 'corrupt conduct', 'improper conduct' and 'public sector'), 4, 6.

86 *PD Act 2012* (Vic) s 4(2)(f); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12.

87 *PD Act 2012* (Vic) s 12.

88 *PD Act 2012* (Vic) ss 12–19.

89 *PD Act 2012* (Vic) pt 2 div 2; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12–13.

two-tiered system.⁹⁰ Under specific conditions, it allows a discloser to make a disclosure to a public sector body (first tier) and in many cases to an integrity body directly, such as IBAC (second tier). It does not, however, allow protected public disclosures, such as to the media (third tier). This issue is examined in Chapter 4.

If an entity that has received a disclosure considers it ‘may be a protected disclosure’ it must pass it on (‘notify it’) to IBAC. IBAC then assesses whether it is a protected disclosure.⁹¹ The VI, however, assesses any disclosures about IBAC it has received.⁹² While this account represents the general position, some qualifications and exceptions need to be noted—for example, in relation to disclosures about Members of Parliament (MPs) and some disclosures about police.⁹³

If IBAC determines that a disclosure is a protected disclosure, known as a ‘protected disclosure complaint’, it must refer it to an authorised entity for investigation, investigate it itself or dismiss it.⁹⁴ IBAC can only refer protected disclosure complaints to one of the following entities: the Chief Commissioner of Police, the Victorian Ombudsman or the Victorian Inspectorate.⁹⁵

Finally, the *PD Act 2012* (Vic) aims to protect disclosers by penalising reprisals (‘detrimental action’) against them. It also penalises unlawful disclosures of the content of protected disclosures and of the identity of disclosers. In addition, it provides for civil remedies such as injunctions and damages for harm suffered by a discloser as a result of detrimental action.⁹⁶

1.7 The Committee’s Review

The Committee has conducted a comprehensive research process to gain a thorough understanding of the content, purpose and practical operation of the *PD Act 2012* (Vic). The Committee has also, where appropriate, compared the *PD Act 2012* (Vic) with whistleblowing legislation in other Australian, and overseas, jurisdictions in order to enhance its understanding of common problems and the potential solutions to them.

In conducting its work, the Committee has employed a variety of processes and obtained information through a number of sources, as outlined below.

⁹⁰ ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxv, xxxvii; A J Brown and Marika Donkin, ‘Introduction’ in Brown, *Whistleblowing in the Australian public sector* 10–11; Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the public sector* 278–82; A J Brown and Chris Wheeler, ‘Project findings: an agenda for action’ in Brown, *Whistleblowing in the Australian public sector* 311; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 29–31; Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015) 3.

⁹¹ *PD Act 2012* (Vic) pt 3.

⁹² *PD Act 2012* (Vic) ss 17, 31, 56; *IBAC Act 2011* (Vic) s 71; *VI Act 2011* (Vic) ss 11, 12, 12A.

⁹³ These qualifications and exceptions are discussed briefly in the next chapter. Disclosures regarding MPs are discussed at length in Chapter 3.

⁹⁴ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 24; *IBAC Act 2011* (Vic) s 58.

⁹⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 24; *IBAC Act 2011* (Vic) s 73(3).

⁹⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28–32; *PD Act 2012* (Vic) pts 6, 7.

1.7.1 Literature review and background briefings

The Committee began its investigations by conducting a thorough literature review. This included an analysis of relevant academic articles and the consideration of reports of other parliamentary committees on the operation of protected disclosure legislation within Australia and selected overseas jurisdictions. The Committee also reviewed principles and policy guidelines from international organisations such as the OECD, the UNODC and Transparency International. A Research Officer also attended the Victorian Government Protected Disclosure Forum organised by IBAC on 6 March 2016.

In addition, the Committee received informal briefings from the Special Minister of State, the Hon Gavin Jennings MLC, on 15 August 2016 and 20 February 2017.

1.7.2 Written submissions

The Committee called for submissions through an advertisement placed in *The Age* on 6 April 2016, and publicised the Review through Twitter. The Committee also wrote to a number of stakeholders, seeking their input and participation in the review. The Committee determined to write to academics with research experience in the area, public sector organisations and the integrity agencies responsible for carrying out investigations and assessments to provide it with a thorough and broad understanding of the impact of the *PD Act 2012* (Vic) on different areas of the public sector.

In particular, the Committee sought the views of organisations with different roles within the current protected disclosure framework. This included organisations currently able to receive disclosures, those unable to receive disclosures and a mixture of both large and small organisations. In addition, integrity agencies involved in the investigation and assessment of protected disclosures were contacted for their views and expertise in dealing with the current legislation.

A list of submissions received by the Committee is contained in Appendix 1.

1.7.3 Hearings in Melbourne

The Committee invited a number of individuals who had made submissions to the review, and other interested parties, to attend closed, in camera or public hearings. The Committee also invited a number of whistleblowers to give evidence to the Committee. Closed and public hearings were held on 23 March, 11 April, 23 May, 20 June and 15 August 2016 in Melbourne. In camera hearings were held in Melbourne on 6 and 20 February and 6 March 2017. A list of hearings conducted by the Committee is contained in Appendix 2.

1.7.4 Closed hearings in Sydney

The Committee determined in undertaking its investigations that it was important to understand other legal approaches to whistleblowing, and how they might assist in addressing the issues raised with the *PD Act 2012* (Vic).

In order to gain a better understanding of these issues, the Committee travelled to New South Wales to learn more about the operation of its long-established *Public Interest Disclosures Act 1994* (NSW). The Committee conducted closed hearings with the New South Wales Ombudsman, which is responsible for promoting awareness of the legislation and monitoring its operation.⁹⁷ In addition, the Committee conducted a closed hearing with the Independent Commission Against Corruption (ICAC) and met informally with members of the Parliamentary Committee on the ICAC and of the Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission. A list of hearings conducted by the Committee is contained in Appendix 3.

1.7.5 Meetings overseas

Since whistleblower protection laws are vital to an effective integrity system, the Committee considered that it would gain invaluable information by visiting overseas jurisdictions. This enabled the Committee to examine a range of whistleblowing regimes and to ascertain whether any aspects of them could be usefully introduced in Victoria. Meetings were also conducted with international organisations such as the OECD, UNODC and Transparency International to investigate the effectiveness of the whistleblower guidelines and processes that have been developed to assist member states and countries to implement whistleblower regimes. A list of the Committee's overseas meetings is contained in Appendix 4.

1.7.6 Consultant

Given this is a very complex area of law, the Committee engaged Victorian barrister-at-law Mr James Catlin to assist with providing advice and with drafting an initial report.

1.7.7 Stakeholder input into the Review

In carrying out its work, the Committee has drawn upon the views, experience and expertise of a broad range of people. The submissions, closed and public hearings, briefings and interstate and overseas meetings have provided valuable insights into the practical operation of protected disclosure schemes. The insights of integrity agencies, individuals who work within the current framework and those with specialised knowledge of the legislative approaches have been crucial. The Committee gives special thanks to a number of whistleblowers who bravely

⁹⁷ New South Wales Ombudsman, *Public interest disclosures* <www.ombo.nsw.gov.au/what-we-do/our-work/public-interest-disclosures>.

shared their experiences. The Committee is most appreciative of the time, effort and valuable contributions that all these individuals and organisations have made to this Review.

1.7.8 Best-practice principles

In carrying out its investigations for this report, the Committee undertook research to identify relevant best-practice legislation across Australia and the world. Both within Australia and abroad, whistleblower legislation varies in form, structure and available remedies. As Professor A J Brown, the leading researcher on whistleblowing systems in Australia, has noted, no Australian whistleblowing law or Bill supplies a single ‘best-practice’ model.⁹⁸ While each jurisdiction has enacted some elements of best practice, no Act meets every aspect of it.⁹⁹

Due to the divergence of statutory regimes, academic research has focused on the development of a number of best-practice principles that can be used to design and review whistleblowing legislation. These principles, outlined in Table 1.1 below, were identified and drawn from the largest study of whistleblowing conducted in the world during 2007–09, the WWTW project.¹⁰⁰

However, it is important to note that there are a number of other international best-practice principles and models. For example, Transparency International, the Organisation for Economic Cooperation and Development (OECD) and the Group of Twenty (G20) have provided guidance and principles for the creation of whistleblower legislation.¹⁰¹

For the purposes of the work of this Committee, the best-practice principles of the WWTW project have been used as the main model.¹⁰² This is because the principles came out of an Australian study conducted within the legal, social and cultural context of the Australian public sector. It has, therefore, considerable relevance to Victoria. The Committee also notes that these best-practice principles were developed in conjunction with the ombudsman of each state, along with the Corruption and Crime Commission in Western

⁹⁸ A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 23 March 2016.

⁹⁹ A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 23 March 2016.

¹⁰⁰ Brown, *Whistleblowing in the Australian public sector*.

¹⁰¹ Transparency International, *International principles for whistleblower legislation*; G20 Anti-Corruption Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (G20 and OECD, no date); Simon Wolfe et al, *Whistleblower protection rules in G20 countries: the next Action Plan*. Public consultation draft. (2014); Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015).

¹⁰² Brown, *Whistleblowing in the Australian public sector*.

Australia and the Crime and Corruption Commission in Queensland. However, the Committee has also reviewed and been informed by other principles relating to whistleblowing laws.¹⁰³

The Committee has reviewed the *PD Act 2012* (Vic) with these principles in mind along with the evidence it has received from a wide range of sources.

Table 1.1 Best-practice legislation—the key principles

Principle	Description
1. Objectives and title	<p>The objectives of the legislation should be to:</p> <ul style="list-style-type: none"> • support public interest whistleblowing by facilitating the disclosure of wrongdoing • ensure that public interest disclosures are properly assessed and, where necessary, investigated and actioned. • ensure that a person making a public interest disclosure is protected against detriment and reprisal. <p>The objectives of the Act should be captured in the long and short title of the legislation. The title <i>Public Interest Disclosure Act</i> is preferred to the titles <i>Whistleblower Protection Act</i> or <i>Protected Disclosures Act</i>.</p>
2. Subject matter of disclosure	<p>Legislation should specify the types of wrongdoing about which a disclosure can be made. These should include all significant wrongdoing or inaction within government that is contrary to the public interest. This should include:</p> <ul style="list-style-type: none"> • an alleged crime or breach of the law • official corruption, including abuse of power, breach of trust and conflict of interest • official misconduct • defective administration, including: <ul style="list-style-type: none"> – negligence or incompetence – improper financial management that constitutes a significant waste of public money or time – any failure to perform a duty that could result in injury to the public, such as an unacceptable risk to public safety, health or the environment.
3. Person making disclosure	<p>A disclosure should qualify as a 'public interest disclosure' if <i>either</i> of the following tests are satisfied:</p> <ul style="list-style-type: none"> • The discloser holds an honest and reasonable belief that the disclosure shows proscribed wrongdoing (the subjective test). • The disclosure does show, or tends to show, proscribed wrongdoing, irrespective of the person's belief (the objective test). <p>The motivation or intention of the person making the disclosure should not be relevant, and they should not be required to make use of a special form.</p>

¹⁰³ See, for example, Transparency International, *International principles for whistleblower legislation*; G20 Anti-Corruption Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (G20 and OECD, no date); Simon Wolfe et al, *Whistleblower protection rules in G20 countries: the next Action Plan*. Public consultation draft. (2014); Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015); UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015); Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date); Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016).

Principle	Description
4. Receipt of disclosure	<p>Legislation should permit a disclosure to be made to a variety of different people or agencies, including:</p> <ul style="list-style-type: none"> • the immediate or any higher supervisor of the discloser • 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 (for example, an ombudsman, corruption commission, auditor-general or public sector standards commissioner).
5. Recording and reporting	<p>All disclosures should be formally recorded, noting:</p> <ul style="list-style-type: none"> • the time of receipt • the general subject matter of the disclosure • how the disclosure was handled. <p>Recording systems, including required levels of detail, should be consistent with minimum standards across the public sector (see principle 7, below).</p>
6. Acting on a disclosure	<p>An agency receiving a disclosure should be obliged to:</p> <ul style="list-style-type: none"> • assess that disclosure and take prompt and appropriate action, which can include investigation or referral to an external agency • keep the discloser informed—to the extent that this is practicable and reasonable—of any proposed action, as well as the progress of any action and any outcomes • include in its annual report a summary of the number of disclosures received and action taken.
7. Oversight agency	<p>An external agency with responsibility for disclosures should be designated as the oversight agency for the administration of the legislation. The responsibilities of the agency should include:</p> <ul style="list-style-type: none"> • being notified by agencies of all disclosures, recording how they were dealt with and resolved • having the option to provide advice or direction to an agency on how a disclosure should be handled, to manage an agency's investigation or to take over an investigation. • providing advice or direction to agencies on what steps should be taken to protect disclosers or to provide remedial action for a discloser who has suffered detriment due to their disclosure. • promoting the objectives of the legislation within government and publicly, including through training and public education • conducting a public review of the operation of the legislation at least once every five years.
8. Confidentiality	<p>Disclosures should be received and investigated in private to safeguard, to the maximum extent possible within the agency's control, the identity of the discloser. Disclosures should be able to be made confidentially and, where practical, individual disclosures should be handled without disclosing the identity of the discloser or even that a disclosure has been made.</p> <p>This principle is subject to the need to disclose a person's identity to other parties, for example where it is necessary:</p> <ul style="list-style-type: none"> • for the effective investigation of a disclosure • to provide procedural fairness • to protect a person who has made a disclosure • to make a public report on how a disclosure was dealt with.

continued overleaf

Principle	Description
9. Protection of person making disclosure	<p>A discloser should be protected against criminal or civil liability, or other detriment, for making a disclosure to which the legislation applies. For example, the discloser:</p> <ul style="list-style-type: none"> • should not be liable to prosecution for breach of a statutory secrecy provision • should not incur civil liability—for example, for defamation or breach of confidence • should not be subject to discipline or other workplace sanction, such as reduction in salary or position, or termination of employment • should be entitled to legal redress if they suffer detriment as a result of making the disclosure.
10. Disclosure outside an agency	<p>A disclosure made to a person or body that is not designated by the legislation to receive disclosures (for example, the media) should be protected in exceptional circumstances defined in the legislation. Protection should only apply if it is reasonable in all the circumstances to ensure that the subject matter of the disclosure is effectively investigated.</p>
11. Agency responsibility to ensure protection	<p>Agencies should be required under the legislation to:</p> <ul style="list-style-type: none"> • establish proper internal procedures in the agency for receiving, recording and investigating disclosures, for protecting disclosers and for safeguarding their privacy • ensure that their staff are aware of their responsibilities under the legislation, including to support and protect disclosers • (on receiving a disclosure) assess whether a discloser (or anyone else) faces any risk of detriment or requires special protection as a result • (where necessary) take all reasonable measures to protect a discloser against detriment. • take remedial action if a discloser suffers detriment as a result of making a disclosure. <p>It should be the duty of an agency's senior executives to ensure that these responsibilities are met by the agency.</p>
12. Remedial action	<p>When a discloser suffers detriment as a result of a disclosure, the agency (or, failing that, the oversight agency) to take the following action as necessary to prevent or remedy the detriment:</p> <ul style="list-style-type: none"> • stopping the detrimental action and preventing its recurrence, including through an injunction • placing the discloser in the situation they would have been in but for the disclosure—with their informed consent this might include transferring a discloser to another equivalent position • apologising • providing compensation, including monetary and non-monetary compensation, for the detriment suffered • taking disciplinary or criminal action against any person responsible for the detriment.
13. Continuing assessment and protection	<p>To the extent practicable, the impact on disclosers making disclosures under the legislation should be assessed on a continuing basis (for example, every two or five years). This assessment can be conducted by either the agency that to which the disclosure was made or an appropriate oversight agency.</p>

Source: Adapted, with only minor modifications, from A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in A J Brown (ed), *Whistleblowing in the public sector: enhancing the theory and practice of internal witness management in public sector organisations* (ANU E Press) 261, 261–88 (especially 283–7).

1.8 The structure of this report

An overview of the background to, and current operation of, the *PD Act 2012* (Vic) is provided in Chapter 2. Chapter 3 assesses the coverage of the *PD Act 2012* (Vic)—who under the Act should be able to disclose, about whom, and regarding what conduct. Chapter 4 addresses issues relating to how to make a disclosure,

and whether protected public disclosures should be able to be made, such as to the media. It also discusses how the assessment and investigation of protected disclosures might be improved. Chapter 5 examines issues relating to the protection of whistleblowers from reprisals, including concerns over welfare management and confidentiality requirements. Chapter 6 looks at the issue of compensation and rewards for whistleblowers, including international reward models such as ‘qui tam.’ Chapter 7 sums up the Committee’s conclusions on how the Victorian whistleblowing regime should be reformed and also discusses how Victorians can become better informed and educated about its operation and processes.

1.9 Conclusion

Whistleblowing makes a significant contribution to a well-functioning democracy by helping to ensure honest, accountable and efficient public administration. This chapter has also demonstrated the vital role whistleblowing plays in the identification, investigation and prevention of corruption and other forms of wrongdoing. This role has been recognised in international, regional, national and state laws, standards and guidelines. Victorian governments have also shown their commitment to whistleblowing legislation.

While the classic definition of a whistleblower is of an insider, a member of an organisation who has special knowledge about it, the definition of whistleblower used in this report recognises that outsiders can also contribute valuable information. This is consistent with the current law in Victoria and aligns well with IBAC’s public-oriented approach to the reporting of suspected corruption.

As this chapter has shown, whistleblowers need protection. A substantial proportion of whistleblowers will be mistreated, many by their own managers. Even whistleblowers who are not mistreated are likely to find the experience stressful. *PD Act 2012 (Vic)* is one way of trying to protect whistleblowers against reprisals, in part by safeguarding their identity and the content of their disclosures. As IBAC has recognised, and as will be discussed later in this report, whistleblowers need not only the protection of the law but appropriate support.

In undertaking its review, the Committee has found that the *PD Act 2012 (Vic)* conforms in many respects to best-practice principles. But in other respects, best-practice principles are not being met at all, or there is at least room for improvement in how they are recognised or implemented within the whistleblowing system.

The next chapter provides an overview of the background to, and current operation of, Victoria’s whistleblowing system.

The current operation of the *Protected Disclosure Act 2012 (Vic)*

2.1 Introduction

In the late 1980s and 1990s there was increasing recognition in Australia of the importance of enacting whistleblower protections. This was partly in response to a series of royal commissions and boards of inquiry into corruption that emphasised the importance of protecting individuals who had disclosed serious misconduct and corrupt behaviour.¹⁰⁴

In particular, the Fitzgerald Inquiry in Queensland highlighted the difficulties individuals faced in reporting corrupt conduct. This was due to prohibitions on the disclosure of confidential information obtained in the course of their employment, particularly in the public service.¹⁰⁵ The report also highlighted that individuals fearing reprisals needed to be given effective protection.¹⁰⁶ These findings were further reinforced by the Wood Royal Commission into the New South Wales Police Service.¹⁰⁷ As a result, a series of Bills was introduced by state governments across Australia, including in Victoria, that aimed to facilitate and encourage the disclosure of complaints.

As noted in Chapter 1, the Committee received concerns about the effective operation of Victoria's protected disclosure system. This chapter briefly discusses the background to the *Protected Disclosure Act 2012 (Vic)* ('*PD Act 2012 (Vic)*') in 2012 and provides an overview of the current Act, including the 2016 amendments,¹⁰⁸ and its operation. Subsequent chapters address the concerns with the protected disclosure system that were raised with the Committee.

¹⁰⁴ For example, the 1996 Wood Royal Commission into the New South Wales Police Force and the 1989 Fitzgerald Inquiry into Queensland Police—see New South Wales, Royal Commission into the New South Wales Police Service, *Final report—Volume II: Reform* (1997); Tony Fitzgerald, *Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989). See also Electoral and Administrative Review Commission, *Report on protection of whistleblowers* (1991); Parliamentary Committee for Electoral and Administrative Review, Parliament of Queensland, *Whistleblower's protection—interim measures* (1990); Parliamentary Committee for Electoral and Administrative Review, Parliament of Queensland, *Whistleblowers protection* (1992); A J Brown, 'Restoring sunshine to the Sunshine State' (2009) 18(3) *Griffith Law Review* 666; A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* (ANU E Press, 2008) 9; Catriona Ross, Bronwen Merner and Adam Delacorn, 'Independent Broad-based Anti-Corruption Bill 2011' (Current Issues Brief No 1, Parliamentary Library Research Service, Parliament of Victoria, 2011); Zac Dadic, 'Whistleblower protection and disclosures to Members of the Queensland Legislative Assembly' (2009) 24(2) *Australasian Parliamentary Review* 97.

¹⁰⁵ Tony Fitzgerald, *Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989).

¹⁰⁶ Tony Fitzgerald, *Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989) 133–4.

¹⁰⁷ New South Wales, Royal Commission into the New South Wales Police Service, *Final report—Volume II: Reform* (1997) 401–2, 405, 407, 410, 421.

¹⁰⁸ *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016 (Vic)*; IBAC Committee, *Strengthening Victoria's key anti-corruption agencies?* (2016).

2.2 Background to the *PD Act 2012 (Vic)*

2.2.1 Why was it introduced?

In Victoria, the structure and process for making a disclosure about wrongdoing in the public sector changed significantly in 2012 with the introduction of the *PD Act 2012 (Vic)*. The Act was introduced in the broader context of significant changes to the Victorian anti-corruption system with the establishment of IBAC and the VI. IBAC, for example, was established as the main anti-corruption body in the state and as the clearing house for the assessment of protected disclosures.

Prior to this, whistleblower disclosures were regulated by the *Whistleblowers Protection Act 2001 (Vic)* ('*WP Act 2001 (Vic)*'). The introduction of the Protected Disclosure Bill 2012 (Vic) was designed to simplify the process of making a disclosure, following criticism of the complex, multi-layered and multi-agency approach of the *WP Act 2001 (Vic)*.¹⁰⁹

2.2.2 What were the major changes?

The *PD Act 2012 (Vic)* made a number of fundamental changes to the way whistleblower complaints are handled in Victoria. This included transferring responsibility for the assessment of protected disclosures from the Victorian Ombudsman to IBAC.¹¹⁰ Other changes included:

- A revised requirement that public bodies authorised to receive disclosures establish readily available written procedures in relation to disclosures. These procedures must cover the making, receipt and handling of disclosures, and also provide for the protection of disclosers from 'detrimental action' (reprisals).¹¹¹
- Expanding the definition of 'public body' to include any body performing a public function on behalf of the state or public officer, whether under contract or otherwise—in order, for example, to encompass private firms doing work on behalf of the government.¹¹²

¹⁰⁹ Protected Disclosure Bill 2012 (Vic); Victoria, *Parliamentary Debates*, Legislative Assembly (Andrew McIntosh, Minister responsible for the establishment of an anti-corruption commission) 4894–5. See also State Services Authority, *Review of Victoria's integrity and anti-corruption system (2010)* ('*Proust review*'); Victoria, *Reporting wrongdoing in the workplace: problems for police*, Parl Paper No 144 (2012) (a review by Ron Bonington AM, then Acting Director, Police Integrity).

¹¹⁰ *PD Act 2012 (Vic)* s 26; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 24. But note that the VI assesses possible protected disclosures that relate to IBAC: *IBAC Act 2011 (Vic)* s 71; *PD Act 2012 (Vic)* s 31; *VI Act 2011 (Vic)* ss 11(2)(e)(f), 43(1)–(2), 44.

¹¹¹ *PD Act 2012 (Vic)* ss 58–9; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 10. But note that the now-repealed *Whistleblowers Protection Act 2001 (Vic)* ('*WP Act 2001 (Vic)*'), under s 68, also required public bodies to establish procedures regarding disclosures.

¹¹² *PD Act 2012 (Vic)* s 6; *IBAC Act 2011 (Vic)* s 6(1)(e); *Public Administration Act 2004 (Vic)* s 4(1) (definition of 'public sector body'); Adriana Orifici and Tamsin Webster, 'A new whistle at work' (2013) 87(11) *Law Institute Journal* 30, 31–2.

- Authorising only IBAC, the Chief Commissioner of Police, the Victorian Inspectorate and the Victorian Ombudsman to investigate protected disclosure complaints. Public bodies who had previously been able to investigate protected disclosures about themselves lost that power.¹¹³
- Reducing the number of public sector entities able to receive protected disclosures.¹¹⁴

2.3 Current operation of the *PD Act 2012 (Vic)*

A number of submissions and witnesses providing evidence to the Committee noted the complexity of the current procedure for making a disclosure under the *PD Act 2012 (Vic)*.¹¹⁵ One aspect of this complexity is that the protected disclosure system rests on a number of Acts, including, primarily, the:

- *PD Act 2012 (Vic)*
- *IBAC Act 2011 (Vic)*
- *Ombudsman Act 1973 (Vic)*
- *VI Act 2011 (Vic)*
- *Victoria Police Act 2013 (Vic)*.¹¹⁶

The Acts must be read together in order to understand:

- who may make a disclosure
- what a disclosure may be about
- how a disclosure may be made
- to whom a disclosure may be made
- how a disclosure is handled
- how a disclosure is assessed and determined
- how a discloser is protected.

In addition, IBAC has produced guidelines on the making and handling of protected disclosures and for the management of the welfare of disclosers.¹¹⁷

¹¹³ *PD Act 2012 (Vic)* ss 21–2, 26, 32–3; *IBAC Act 2011 (Vic)* ss 58, 60, 73(3); Adriana Orifici and Tamsin Webster, ‘A new whistle at work’ (2013) 87(1) *Law Institute Journal* 30. Under section 72 of the *WP Act 2001 (Vic)*, and subject to pt 6 div 2, public bodies were required to ‘investigate every disclosed matter that the [Victorian] Ombudsman ... referred to the body to be investigated.’

¹¹⁴ *PD Act 2012 (Vic)* pt 2 div 2; Adriana Orifici and Tamsin Webster, ‘A new whistle at work’ (2013) 87(1) *Law Institute Journal* 30.

¹¹⁵ See, for example, Mr Hugh Mosely, Partner, Risk Advisory, Deloitte Touche Tomatsu, Submission, 27 April 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016.

¹¹⁶ Note, also, the *Public Administration Act 2004 (Vic)* and the *Protected Disclosure Regulations 2013 (Vic)*.

¹¹⁷ IBAC, *Guidelines for making and handling protected disclosures* (October 2016); IBAC, *Guidelines for protected welfare management* (October 2016); *PD Act 2012 (Vic)* s 57 (requirement for IBAC to issue guidelines).

2.3.1 Who can make a disclosure?

As noted in the previous chapter, any ‘natural person’ may make a disclosure under the *PD Act 2012* (Vic).¹¹⁸ Thus, a person does not have to be a public official or the member of any organisation to make a disclosure. Any member of the public may make a disclosure, either on their own or together with other persons.¹¹⁹ Given the meaning of ‘natural person,’ companies cannot themselves make a disclosure, although company officers and employees can.¹²⁰

2.3.2 What can the disclosure be about?

Protected disclosures must be about particular conduct that involves a public body, a public officer or a private body performing a public function.¹²¹

What kinds of conduct?

A natural person can only make a protected disclosure about ‘improper conduct,’ as prescribed in the *PD Act 2012* (Vic) or ‘detrimental action’ taken in reprisal for a disclosure.¹²²

Improper conduct means:

- ‘corrupt conduct’ as defined in the *IBAC Act 2011* (Vic)¹²³ or
- ‘specified conduct’ as defined in the *PD Act 2012* (Vic).¹²⁴

Both corrupt conduct under the *IBAC Act 2011* (Vic) and specified conduct under the *PD Act 2012* (Vic) cover the following kinds of conduct:¹²⁵

- conduct of any person that adversely affects the honest performance by a public officer or public body of their functions as a public officer or public body;¹²⁶ or
- conduct of a public officer or public body that constitutes or involves the dishonest performance of their functions as a public officer or public body;¹²⁷ or

¹¹⁸ *PD Act 2012* (Vic) s 9(1).

¹¹⁹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12.

¹²⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; Peter Butt and David Hamer (eds), *LexisNexis Concise Australian Legal Dictionary* (eds) (LexisNexis, 4th ed, 2011) 393 (definition of ‘natural persons’).

¹²¹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6–8, 16.

¹²² *PD Act 2012* (Vic) ss 3 (definition of ‘improper conduct’), 4, 9(1).

¹²³ *PD Act 2012* (Vic) ss 3 (definition of ‘corrupt conduct’), 4(1)(a); *IBAC Act 2011* (Vic) s 4;

¹²⁴ *PD Act 2012* (Vic) s 4(1)(b), (2), (2A)–(2C).

¹²⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 7; Victorian Ombudsman, *Making a disclosure* (2017) <www.ombudsman.vic.gov.au/Disclosures/Making-a-disclosure>; Victorian Public Sector Commission, *Protected disclosures procedures* (2017) <vpsc.vic.gov.au/about-vpsc/protected-disclosures-procedures>.

¹²⁶ *IBAC Act 2011* (Vic) s 4(1)(a); *PD Act 2012* (Vic) s 4(2)(a).

¹²⁷ *IBAC Act 2011* (Vic) s 4(1)(b); *PD Act 2012* (Vic) s 4(2)(b).

- conduct of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;¹²⁸ or
- conduct of a public officer or public body that involves the misuse of information or material acquired in the performance of their functions as a public officer or public body (whether or not for the benefit of the public officer or public body or any other person);¹²⁹ or
- conduct by a person intended to adversely affect the effective performance or exercise by a public officer or public body of their functions or powers, which results in a benefit to them or one of their associates.¹³⁰

Conspiring or attempting to engage in any of the conduct outlined above is also covered.¹³¹

However, under the *IBAC Act 2011* (Vic), to qualify as *corrupt conduct* the conduct must be ‘conduct that would constitute a relevant offence.’¹³² A ‘relevant offence’ is defined as:

- an indictable offence against an Act; or
- any of the following common law offences:
 - attempt to pervert the course of justice
 - bribery of a public official
 - perverting the course of justice
 - misconduct in public office.¹³³

In contrast, *specified conduct* under the *PD Act 2012* (Vic) is conduct that does not qualify as corrupt conduct under the *IBAC Act 2011* (Vic), but which ‘if proved, would constitute ... a criminal offence’ or reasonable grounds for dismissal of an officer who has engaged in the conduct.¹³⁴ In addition, specified conduct encompasses conduct of a public officer or public body in their official capacity that involves substantial:

- mismanagement of public resources; or
- risk to public health or safety; or
- risk to the environment.¹³⁵

¹²⁸ *IBAC Act 2011* (Vic) s 4(1)(c); *PD Act 2012* (Vic) s 4(2)(c).

¹²⁹ *IBAC Act 2011* (Vic) s 4(1)(d); *PD Act 2012* (Vic) s 4(2)(d).

¹³⁰ *IBAC Act 2011* (Vic) s 4(1)(da); *PD Act 2012* (Vic) s 4(2)(da); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 7. An associate includes a relative: *PD Act 2012* (Vic) ss 4(2B)(b), (2C).

¹³¹ *IBAC Act 2011* (Vic) s 4(1)(e); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 7.

¹³² *IBAC Act 2011* (Vic) s 4(1); Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 28 April 2017.

¹³³ *IBAC Act 2011* (Vic) s 3 (definition of ‘relevant offence’); Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 28 April 2017.

¹³⁴ *PD Act 2012* (Vic) s 4(1)(b); Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 28 April 2017.

¹³⁵ *PD Act 2012* (Vic) s 4(2)(f); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 7; Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 28 April 2017.

A person can also make a disclosure about detrimental action taken, being taken or proposed to be taken by a public officer or public body ‘in reprisal for them (or another person) having made a protected disclosure or cooperated with the investigation of a protected disclosure.’¹³⁶ Under section 3 of the *PD Act 2012* (Vic), detrimental action includes

- (a) action causing injury, loss or damage;
- (b) intimidation or harassment
- (c) discrimination, disadvantage or adverse treatment in relation to a person’s employment, career, profession, trade or business, including the taking of disciplinary action.¹³⁷

Issues in relation to protected disclosures about detrimental action are discussed in Chapter 5.

Who can disclosures be about?

The kinds of bodies and people that disclosures can be made about has been usefully summarised as follows:

Disclosures can only be made about public bodies or public officers, or about the conduct of a person that adversely affects the honest performance of an official function by a public body or public officer, or intends to adversely affect their effective performance. This means that a disclosure must involve a public body or public officer.¹³⁸

This summary is an accurate account in general terms. However, identifying the precise meaning of the terms ‘public body’ and ‘public officer’ requires examination of a number of intricate and sometimes overlapping legislative provisions.

The terms ‘public body’ and ‘public officer’ are defined in section 6 of the *PD Act 2012* (Vic). ‘Public body’ means:

- (a) a public body within the meaning of section 6 of the *Independent Broad-based Anti-corruption Commission Act 2011*; or
- (b) the IBAC; or
- (c) any other body or entity prescribed for the purposes of this definition.¹³⁹

Under section 6(1) of the *IBAC Act 2011* (Vic), ‘public body’ means:

- a ‘public sector body’ as defined in section 4(1) of the *Public Administration Act 2004* (Vic)
- a body created by legislation for a public purpose (for example, a university)

¹³⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6; *PD Act 2012* (Vic) s 9.

¹³⁷ *PD Act 2012* (Vic) s 3 (definition of ‘detrimental action’). See also *PD Act 2012* (Vic) pt 6; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6, 8, 28–32.

¹³⁸ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 16; *PD Act 2012* (Vic) s 9(1).

¹³⁹ *PD Act 2012* (Vic) s 6 (definition of ‘public body’).

- the Electoral Boundaries Commission
- a council established under the *Local Government Act 1989* (Vic)¹⁴⁰
- ‘a body that is performing a public function on behalf of the State or a public body or public officer (whether under a contract or otherwise)’¹⁴¹
- any other body or entity prescribed for the purposes of this definition.¹⁴²

A ‘public sector body’ under section 4(1) of the *Public Administration Act 2004* (Vic) means

- (a) a public service body; or
- (b) a public entity; or
- (c) a special body.

A ‘public service body’ means:

- (a) a Department; or
- (b) an Administrative Office; or
- (c) the Victorian Public Sector Commission.¹⁴³

A ‘public entity’ includes a body established by an Act of Parliament, the Governor in Council or a Minister (for example, the board of a TAFE institute).¹⁴⁴

A ‘special body’ includes bodies such as a department of the Parliament of Victoria, the Commission for Children and Young People, the Office of the Health Services Commissioner, the Mental Health Commissioner, VCAT and the Victorian Electoral Commission.¹⁴⁵

Under section 6 of the *PD Act 2012* (Vic), ‘public officer’ means:

- (a) a public officer within the meaning of section 6 of the Independent Broad-based Anti-corruption Commission Act 2011; or
- (b) an IBAC Officer; or
- (c) any other person prescribed for the purposes of this definition.¹⁴⁶

¹⁴⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 16.

¹⁴¹ *IBAC Act 2011* (Vic) s 6(1).

¹⁴² *IBAC Act 2011* (Vic) s 6(1); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 16.

¹⁴³ *Public Administration Act 2004* (Vic) ss 4(1) (definition of ‘public service body,’ ‘Department’ and ‘Administrative Office’), 10–11. On the Victorian Public Sector Commission, see the *Public Administration Act 2004* (Vic) pt 4.

¹⁴⁴ *Public Administration Act 2004* (Vic) ss 5(1)(a), (1A)(a). Under certain conditions, the Governor in Council can ‘declare a body, or a class of body’ to be a public entity: *Public Administration Act 2004* (Vic) s 5(3). The Governor in Council consists of a ‘State Governor acting by and with the advice of the State Executive Council, comprising Ministers of the State Government.’—Peter Butt and David Hamer (eds), *LexisNexis Concise Australian legal dictionary* (LexisNexis, 4th ed, 2011) 264. See also Government House Victoria, *Role of the Governor* (undated) 5 <governor.vic.gov.au/victorias-governor/publications/role-of-the-governor-booklet>.

¹⁴⁵ *Public Administration Act 2004* (Vic) s 6. Under certain conditions, the Governor in Council may declare a body to be a special body: *Public Administration Act 2004* (Vic) s 6(4).

¹⁴⁶ *PD Act 2012* (Vic) s 6 (definition of ‘public officer’).

Under section 6 of the *IBAC Act 2011* (Vic), ‘public officer’ means ‘a person employed in any capacity or holding any office within the public sector’ (as encompassed by section 4(1) of the *Public Administration Act 2004* (Vic)). It also includes, as summarised by IBAC:

- public servants, including IBAC officers
- local government Councillors and council employees
- university employees and teachers
- Victoria Police personnel
- Members of Parliament, including Ministers
- ministerial officers, parliamentary advisers and officers, electorate officers
- judicial officers, including coroners, members of Victorian Civil and Administrative Tribunal (VCAT), associate judges, judicial registrars
- statutory office holders, including the Auditor-General and the Victorian Ombudsman, the Director of Public Prosecutions
- the Governor, Lieutenant-Governor or Administrator.¹⁴⁷

A person who is ‘performing a public function on behalf of the State or a public officer or public body (whether under contract or otherwise)’ also comes within the meaning of ‘public officer.’¹⁴⁸

It should be noted that a disclosure cannot be made under the *PD Act 2012* (Vic) about ‘the conduct ... or actions’ of the VI or a VI Officer.¹⁴⁹ There are also some other exemptions.¹⁵⁰

Other relevant factors

In IBAC’s view, it is implied from the *PD Act 2012* (Vic) and the ordinary meaning of the word ‘disclosure’ that a disclosure must ‘reveal’ some kind of conduct—that is, something that was previously unknown.¹⁵¹ If the content of the disclosure is already in the public domain, by virtue of exposure in the media for example, it will not usually be considered a protected disclosure.¹⁵²

A disclosure may relate to past, present or future conduct.¹⁵³

¹⁴⁷ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 16; *IBAC Act 2011* (Vic) s 6(1) (definition of ‘public officer’).

¹⁴⁸ *IBAC Act 2011* (Vic) s 6(1) (definition of ‘public officer’: (g)).

¹⁴⁹ *PD Act 2012* (Vic) s 9(3), 3 (definitions of ‘Victorian Inspectorate,’ ‘Victorian Inspectorate Officer’).

¹⁵⁰ *PD Act 2012* (Vic) s 9(3) (for example, a Public Interest Monitor or a court).

¹⁵¹ Mr Stephen O’Byrne QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 11 April 2016.

¹⁵² Mr Stephen O’Byrne QC, Commissioner, Independent Broad-based Anti-corruption Commission, Closed Hearing, Melbourne, 11 April 2016; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6.

¹⁵³ *PD Act 2012* (Vic) s 9(1); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6. This includes ‘conduct that occurred before 10 February 2013 when the ... [*PD Act 2012* (Vic)] came into effect’ (IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6)—see *PD Act 2012* (Vic) s 9(2).

2.3.3 How can a disclosure be made?

A disclosure may be made verbally or in writing by an individual or a group.¹⁵⁴

Verbal disclosures can be made in person or over the telephone, including by leaving a voice message.¹⁵⁵ If a disclosure is made verbally it must be made in private to the relevant organisation that can receive it.¹⁵⁶ This means the discloser must have a reasonable belief that only the following other persons are present (and that no-one else can hear the conversation):

- any lawyer representing the discloser
- anyone a disclosure may be made to under the *PD Act 2012 (Vic)* or *Protected Disclosure Regulations 2013 (Vic)*.¹⁵⁷

Written disclosures can be made to the relevant organisation by:

- delivering it in person to the office of the organisation
- mail addressed to the office of the organisation
- email to the email address of the office of the organisation, or to the official email address of a person nominated in the organisation's procedures or in the PD Regulations [*Protected Disclosure Regulations 2013 (Vic)*] to receive a disclosure
- online form (to IBAC and the Victorian Ombudsman only).¹⁵⁸

In order to make a disclosure under the *PD Act 2012 (Vic)* the discloser need not be able to identify the person or the body it relates to.¹⁵⁹

Disclosures may be made anonymously by email or telephone or in a face-to-face meeting where the discloser does not identify themselves.¹⁶⁰ However, under the *Protected Disclosure Regulations 2013 (Vic)* any conversation or meeting in which there is a disclosure must be private.¹⁶¹

¹⁵⁴ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *PD Act 2012 (Vic)* s 12;

¹⁵⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *Protected Disclosure Regulations 2013 (Vic)*.

¹⁵⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *Protected Disclosure Regulations 2013 (Vic)* reg 5.

¹⁵⁷ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *Protected Disclosure Regulations 2013 (Vic)* reg 5.

¹⁵⁸ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *Protected Disclosure Regulations 2013 (Vic)* reg 10.

¹⁵⁹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012 (Vic)* s 10.

¹⁶⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *PD Act 2012 (Vic)* s 12(2)(b); *Protected Disclosure Regulations 2013 (Vic)*.

¹⁶¹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14; *Protected Disclosure Regulations 2013 (Vic)*.

2.3.4 Who can a disclosure be made to?

The *PD Act 2012* (Vic) and the *Protected Disclosure Regulations 2013* (Vic) together set out which organisations, and which people within them, are authorised to receive certain disclosures.¹⁶² A discloser must disclose to an authorised organisation for it to be ultimately assessed by IBAC (or the VI in the case of disclosures about IBAC) as a protected disclosure complaint.¹⁶³

The majority of disclosures can be made to IBAC or another ‘investigating entity’ with jurisdiction to investigate the disclosure if it were determined to be a protected disclosure complaint.¹⁶⁴ These entities are Victoria Police, the Victorian Ombudsman and the Victorian Inspectorate.¹⁶⁵

Public service bodies and councils can only receive disclosures that relate to *their own* conduct, or that of one of their members, officers or employees.¹⁶⁶ Disclosures about public service bodies and councils can also be made to IBAC and to the Victorian Ombudsman provided that it is within her jurisdiction.¹⁶⁷

The *PD Act 2012* (Vic) prescribes in detail which organisations can receive disclosures depending on who the disclosure relates to (the subject of the disclosure).¹⁶⁸ In some cases, the disclosure must be made to a particular organisation and received by a particular person or persons.¹⁶⁹ These requirements are set out in Table 2.1 and Table 2.2, below.

¹⁶² IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) pt 2 (especially ss 12–19); *Protected Disclosure Regulations 2013* (Vic).

¹⁶³ *PD Act 2012* (Vic) ss 17, 26; Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 28 April 2017. But see also *PD Act 2012* (Vic) s 26(1)(d) and (2)(b).

¹⁶⁴ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 13.

¹⁶⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 13(2)(b).

¹⁶⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 13(3).

¹⁶⁷ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 13.

¹⁶⁸ *PD Act 2012* (Vic) ss 12–19.

¹⁶⁹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 12(1), 14–19.

Table 2.1 Where to report disclosures

Subject of the disclosure	Report to:
Chief Commissioner of Police	IBAC
Director of Public Prosecutions	
Chief Crown Prosecutor	
Solicitor General	
Governor	
Lieutenant Governor or Administrator	
Director, Police Integrity	
Electoral Commissioner	
Commissioner appointed under the <i>Inquiries Act 2014</i>	
A member of a Board or Inquiry	
A judicial officer	
A member of VCAT who is not a judicial officer	
A judicial employee	
A Ministerial officer	
A Parliamentary adviser	
An electorate officer	
A Parliamentary officer	
A Minister of the Crown who is not a member of Parliament	
A Councillor	
Freedom of Information Commissioner	
Commissioner of Privacy and Data Protection	
Health Services Commissioner	
The Chief Examiner or an Examiner appointed under section 21 of the <i>Major Crimes (Investigative Powers) Act 2004</i>	
A Victorian Ombudsman Officer	
A Victorian Auditor-General's Office officer	
A member of police personnel (other than the Chief Commissioner)	IBAC or a prescribed member of police personnel
Member of Parliament (Legislative Council)	President of the Legislative Council
Member of Parliament (Legislative Assembly)	Speaker of the Legislative Assembly
IBAC, including its officers	Victorian Inspectorate

Source: IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 13, Table 1.

Table 2.2 People who can receive disclosures

Organisation	Officers who can receive disclosures
IBAC	The Commissioner
	A Deputy Commissioner
	The Chief Executive Officer
	An IBAC employee
	An IBAC staff member assigned from another public body
Victorian Ombudsman	A Victorian Ombudsman Officer
Victorian Inspectorate	The Victorian Inspector
	A Victorian Inspectorate employee
	A Victorian Inspectorate staff member assigned from another public body
Victoria Police	A police member with a rank, including acting rank, of sergeant or above
Public sector body	Head of the relevant public sector body
	A person defined in the public service body's procedures as a person who can receive a disclosure about that body, eg Protected Disclosure Coordinator
	Manager or supervisor of the discloser
	Manager or supervisor of the person who is the subject of the disclosure
Council	Chief Executive Officer
	A person identified in the council's procedures as a person who can receive a disclosure about that council, eg Protected Disclosure Coordinator
	Manager or supervisor of the discloser
	Manager or supervisor of the person who is the subject of the disclosure

Source: IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 15, Table 2.

Police officer and protective service officer disclosures about other officers

As noted in the Introduction, complaints by police officers and protective services officers (PSOs) about other police officers and PSOs are treated in a distinctive fashion by the protected disclosure system.

Under section 167(3) of the *Victoria Police Act 2013 (Vic)*, police officers and PSOs are required to make a complaint about another officer if they have 'reason to believe' that they are guilty of misconduct.¹⁷⁰ Under this provision, the complaint

¹⁷⁰ *Victoria Police Act 2013 (Vic)* s 167(3); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6; Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

must be made to a more senior police officer or PSO or to IBAC.¹⁷¹ A complaint made in this way by a police officer or PSO qualifies as a protected disclosure under the *PD Act 2012* (Vic).¹⁷²

Under section 168 of the *Victoria Police Act 2013* (Vic), if a police officer or PSO has made a complaint about another officer (other than the Chief Commissioner of Police) to a more senior officer, that officer must refer the complaint to the Chief Commissioner if they consider that it may be a section 167(3) complaint.¹⁷³ Under section 22 of the *PD Act 2012* (Vic), the Chief Commissioner must notify any disclosure that s/he considers ‘may be a protected disclosure’ to IBAC for assessment.¹⁷⁴

2.3.5 How are disclosures handled?

When an organisation (‘entity’) receives a disclosure it must evaluate whether it may be a protected disclosure.¹⁷⁵ It must assess whether the conduct disclosed amounts to ‘improper conduct’ or ‘detrimental action,’ as discussed above.¹⁷⁶ To qualify as improper conduct or detrimental action the information disclosed must satisfy *one* of the two following tests, described here in general terms:

- The information shows or tends to show there is improper conduct or detrimental action.
- The discloser believes on reasonable grounds that the information shows or tends to show there is improper conduct or detrimental action.¹⁷⁷

A reasonable belief is one ‘based on facts that would be sufficient to make a reasonable person believe there was improper conduct or detrimental action.’¹⁷⁸ While the discloser is not required to prove the existence of improper conduct or detrimental action, they must have a ‘probable’ belief that there is such conduct or action.¹⁷⁹

The grounds for the reasonable belief can leave something to surmise or conjecture, but the belief must be more than just a reasonable suspicion.¹⁸⁰

171 *Victoria Police Act 2013* (Vic) s 167(3); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6; Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 24 October 2016.

172 *PD Act 2012* (Vic) s 3 (definition of ‘protected disclosure’); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6; Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 24 October 2016.

173 *Victoria Police Act 2012* (Vic) s 168; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6; Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 24 October 2016.

174 *PD Act 2012* (Vic) s 3 (definitions of ‘police complaint disclosure,’ ‘protected disclosure’), 5, 22, 26; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6; Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 24 October 2016.

175 IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 18; *PD Act 2012* (Vic) ss 9(1), 21.

176 IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 20; *PD Act 2012* (Vic) s 9(1).

177 IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 20; *PD Act 2012* (Vic) s 9(1).

178 IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 20; *PD Act 2012* (Vic) s 9(1).

179 IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 21.

180 IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 21.

Notification to IBAC

If the entity that has received a disclosure considers that it may be a protected disclosure it must notify it (pass it on) to IBAC for assessment as a possible protected disclosure complaint.¹⁸¹ If the entity does not consider that the disclosure may be a protected disclosure, it can consider addressing it through its internal complaint-handling processes.¹⁸²

It should be noted that disclosures relating to MPs must be made to the relevant Presiding Officer of the Parliament of Victoria (Speaker of the Legislative Assembly or President of the Legislative Council) who ‘may notify the disclosure’ to IBAC for assessment.¹⁸³ This process will be discussed in the next chapter.

2.3.6 How are disclosures assessed and determined?

When IBAC is notified of a potential disclosure it is required to assess whether it is, in its view, a protected disclosure. If IBAC concludes that the disclosure is a protected disclosure, under section 26 of the *PD Act 2012* (Vic) it must determine it as a ‘protected disclosure complaint.’¹⁸⁴ Under the *IBAC Act 2011* (Vic), IBAC is then required to refer the complaint to the relevant investigating agency (the Chief Commissioner of Police, the Victorian Ombudsman or the VI), or dismiss it or investigate it itself.¹⁸⁵ Under particular conditions, IBAC must advise the notifying entity and the discloser of the determination under section 26 of the *PD Act 2012* (Vic), and of its decision to refer, dismiss or investigate.¹⁸⁶

Under the *PD Act 2012* (Vic), the VI is required to assess whether a potential protected disclosure about IBAC is, in its view, a protected disclosure, and, if it is, to determine it as a ‘protected disclosure complaint.’¹⁸⁷ Under particular conditions, the VI also has obligations to advise the discloser of its determination.¹⁸⁸ The VI must investigate protected disclosure complaints.¹⁸⁹

At the conclusion of an investigation, IBAC and the other investigating agencies are also obliged under certain conditions to advise the discloser of any outcomes.¹⁹⁰

¹⁸¹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 22; *PD Act 2012* (Vic) ss 21–2.

¹⁸² IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 18.

¹⁸³ *PD Act 2012* (Vic) ss 19, 21(3).

¹⁸⁴ *PD Act 2012* (Vic) s 26(2)–(3); Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 28 April 2017. See also *PD Act 2012* (Vic) s 32.

¹⁸⁵ *IBAC Act 2011* (Vic) s 58.

¹⁸⁶ *PD Act 2012* (Vic) ss 27–30; *IBAC Act 2011* (Vic) s 59.

¹⁸⁷ *PD Act 2012* (Vic) s 31. See also *PD Act 2012* (Vic) s 33.

¹⁸⁸ *PD Act 2012* (Vic) s 31. See also *VI Act 2011* (Vic) s 45.

¹⁸⁹ *VI Act 2011* (Vic) s 44(2).

¹⁹⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 26; *IBAC Act 2011* (Vic) ss 163–4; *VI Act 2011* (Vic) ss 88–9; *Ombudsman Act 1973* (Vic) s 24; *Victoria Police Act 2013* (Vic) ss 181–2.

2.3.7 How are disclosers protected?

The *PD Act 2012* (Vic) provides a number of protections for disclosers. These apply from the moment the disclosure is made.¹⁹¹ They also apply regardless of whether IBAC has been notified by the receiving entity, or whether IBAC has determined that the disclosure is a protected disclosure complaint.¹⁹² Some of the protections in Part 6 of the *PD Act 2012* (Vic) do not apply if the discloser:

- provides information intending that it be acted on as a protected disclosure, or further information that relates to a protected disclosure, knowing it to be false or misleading
- claims that a matter is the subject of a protected disclosure knowing the claim to be false
- falsely claims that a matter is the subject of a disclosure that IBAC has determined to be a protected disclosure complaint.¹⁹³

Disclosers are not subject to any civil or criminal liability for making the disclosure nor, for example, to any disciplinary action for making it.¹⁹⁴ Disclosers will not be liable in defamation regarding information provided in a protected disclosure.¹⁹⁵ Disclosers are also protected against detrimental action, or threatened detrimental action, in reprisal for making a disclosure. As noted earlier in this chapter, detrimental action includes ‘action causing injury, loss or damage’; ‘intimidation or harassment’; and various forms of ‘discrimination, disadvantage or adverse treatment.’¹⁹⁶ Finally, disclosers are protected by confidentiality provisions in *PD Act 2012* (Vic).¹⁹⁷ Issues regarding confidentiality are discussed in Chapter 5.

Under these provisions, for example, a person or a body *that has received a disclosure* must not, unless they come within a legislative exception, disclose the content of the disclosure.¹⁹⁸ Nor, with some exceptions, can they disclose information that would be likely to identify the discloser.¹⁹⁹

The Act provides for a range of remedies and penalties for detrimental action and breaches of confidentiality.²⁰⁰

¹⁹¹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28; *PD Act 2012* (Vic) s 38(1).

¹⁹² IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28; *PD Act 2012* (Vic) s 38(1).

¹⁹³ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28; *PD Act 2012* (Vic) ss 72–3, 39(2), 40(2), 41(2).

¹⁹⁴ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28; *PD Act 2012* (Vic) ss 39–40.

¹⁹⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28; *PD Act 2012* (Vic) s 41.

¹⁹⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 8; *PD Act 2012* (Vic) s 3 (definition of ‘detrimental action’), 43, 45.

¹⁹⁷ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) pt 7.

¹⁹⁸ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) 30; *PD Act 2012* (Vic) ss 52, 54.

¹⁹⁹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) ss 53–4.

²⁰⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) ss 45(1), 46–53.

2.4 Conclusion

The *PD Act 2012 (Vic)* was introduced with the aim of simplifying the process of making a whistleblower complaint in Victoria and integrating it within a redeveloped integrity system. With the introduction of the legislation, IBAC became the clearing house for the assessment of whether a disclosure amounts to a protected disclosure and the number of entities who could receive and investigate disclosures was reduced.²⁰¹

The Act requires disclosures about improper conduct or detrimental action in the public sector to be made to an authorised body, including, variously, to IBAC and other investigating agencies, a public service body or a council. A range of bodies must notify any disclosures they think may be a protected disclosure to IBAC, which assesses whether it is a protected disclosure ('protected disclosure complaint'). IBAC must refer, dismiss or investigate a protected disclosure complaint. The *PD Act 2012 (Vic)* gives disclosers protections against detrimental action, liability for defamation and some other forms of potential liability. It also strictly limits disclosures by others about the content of disclosures, as well as the identity of disclosers.

The next chapter explores the adequacy of the coverage of the *PD Act 2012 (Vic)*, focusing on who and what a discloser should be able to make disclosures about.

201 Adriana Orifici and Tamsin Webster, 'A new whistle at work' (2013) 87(11) *Law Institute Journal* 30, 31-2.

3

Assessing the coverage of the *PD Act 2012 (Vic)*

3.1 Introduction

The *PD Act 2012 (Vic)* prescribes who is entitled to make a disclosure, about what kinds of wrongdoing, and about which people or organisations. The Committee received evidence that raised a number of concerns about the coverage of the *PD Act 2012 (Vic)*. The main issues were whether the present class of disclosers is too broad, whether maladministration should be added as a type of improper conduct, how disclosures about MPs should be handled, and the extent to which private bodies should be encompassed by the Act.

This chapter examines each of these issues, drawing not only on direct evidence received by the Committee but also relevant best-practice principles.

3.2 Should the range of disclosers be restricted?

As previously discussed, there is a debate about whether the definition of whistleblowers should extend to anyone who discloses information about improper conduct or be restricted to insider whistleblowers—that is, members of organisations they are disclosing about.²⁰² However, the current *PD Act 2012 (Vic)* allows anyone to make a disclosure about improper conduct—it is not limited to members or ex-members of organisations or to those with a particular relationship with an organisation.²⁰³ The Committee received evidence that the definition ought to be restricted.²⁰⁴

3.2.1 The argument for restriction

There is relatively little academic commentary on whistleblowing protection legislation in Australia and even less on the *PD Act 2012 (Vic)*.²⁰⁵ Professor A J Brown has been the leading researcher comparing and evaluating whistleblower protection laws in Australia. He also had the leading role in the Whistling While They Work (WWTW) project, which in 2008 completed one of the largest studies of whistleblowing in the world. The Committee has drawn on this study throughout its review of whistleblowing laws in Victoria. The Committee also received and drew on a wide range of evidence from other experts and official inquiries such as parliamentary reports.

²⁰² See the discussion in section 1.2 in Chapter 1 of this report.

²⁰³ *PD Act 2012 (Vic)* s 9(1) ('a natural person may disclose').

²⁰⁴ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Accountability Round Table, Submission, 5 May 2016.

²⁰⁵ One of the few academic analyses dedicated to the *PD Act 2012 (Vic)* is the following short article: Adriana Orifici and Tamsin Webster, 'A new whistle at work' (2013) 87(1) *Law Institute Journal* 30.

Professor A J Brown, a key advocate for the restriction of the range of disclosers, has argued in his evidence to Committee and his academic work that disclosers should only be members and ex-members of the organisations they are disclosing about, or others with a sufficiently close relationship with them.²⁰⁶ There are a number of reasons for this view.²⁰⁷

First, it can be argued that insider whistleblowers are familiar with their own organisations in ways that outsiders cannot be. Their location, experience, expertise and special access to knowledge means the information they provide is likely to be distinctively, if not uniquely, valuable.²⁰⁸

Second, there is an argument that insider whistleblowers need particular encouragement to blow the whistle. They are, for example, more likely than a member of the public to be subject to peer pressure, the pull of workplace loyalties (including the keeping of confidences), and reprisals. In short, on this view, they need both more encouragement to blow the whistle and more protection if they do.²⁰⁹

Third, it has been argued that while outsiders such as members of the public might need a range of protections against reprisals they do not need the same kinds of protections.²¹⁰ Moreover, it has been claimed that such outsiders are better protected by other laws, such as criminal laws or protections that could be added to legislation governing ombudsmen and other complaint-handling bodies.²¹¹ It has been argued that one should not try to protect both insiders and outsiders within whistleblowing legislation. To do so would undermine the distinctive focus of this kind of legislation on insider whistleblowers.²¹²

²⁰⁶ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Brown, *Public interest disclosure legislation in Australia* iv, 8–9; Brown, *Towards 'ideal' whistleblowing legislation?* 4, 11–13; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768, 772–6; Brown and Latimer, *Symbols or substance?* 230–1.

²⁰⁷ See the discussion in section 1.2 of this report and the references cited there. See also A J Brown, 'Protected Disclosure Act 2012 (Vic): ten problems?' (Based on comments to the Victorian Government Protected Disclosure Coordinators Forum, IBAC, Melbourne, 6 March 2016.), tabled with the Committee; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

²⁰⁸ A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 8–10; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768; Brown, *Towards 'ideal' whistleblowing legislation?* 11; Brown and Latimer, *Symbols or substance?* 230; Brown, *Public interest disclosure legislation in Australia* 8.

²⁰⁹ A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 8–10; Brown, *Public interest disclosure legislation in Australia* 8; Brown and Latimer, *Symbols or substance?* 230; Brown, *Towards 'ideal' whistleblowing legislation?* 11; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768.

²¹⁰ Brown and Latimer, *Symbols or substance?* 230–31; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 775–6; Brown, *Public interest disclosure legislation in Australia* 8–9; Brown, *Towards 'ideal' whistleblowing legislation?* 11–12.

²¹¹ Brown, *Public interest disclosure legislation in Australia* 8–9; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 775–6; Brown and Latimer, *Symbols or substance?* 230–31; Brown, *Towards 'ideal' whistleblowing legislation?* 11–12; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

²¹² A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 8–10; A J Brown, 'Protected Disclosure Act 2012 (Vic): ten problems?' (Based on comments to the Victorian Government Protected Disclosure Coordinators Forum, IBAC, Melbourne, 6 March 2016.), tabled with the Committee; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 775–6; Brown, *Public interest disclosure legislation in Australia* 8–9; Brown and Latimer, *Symbols or substance?* 230–31.

However, as discussed in Chapter 1, the Committee's view is that a broader understanding of whistleblowing is preferable, one that accords with the present law in Victoria and in a number of other Australian jurisdictions.²¹³

3.2.2 The advantages of the broader approach

Under the broader approach, whistleblowing means 'disclosure by *any person* of illegal, immoral or illegitimate practices to persons or organisations that may be able to effect action.'²¹⁴ As a matter of law, in Victoria any person may disclose about improper conduct in the public sector.²¹⁵ This is not uncommon. For a summary of who may disclose in Australian jurisdictions, see Table 3.1.

Table 3.1 Who may disclose: Australian jurisdictions

Jurisdiction	Legislative provision	Who may disclose
Commonwealth	<i>Public Interest Disclosure Act 2013</i> (Cth) s 26	Public officials and former public officials
Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i> (ACT) s 14	Any person (but members of the public are subject to different processes)
New South Wales	<i>Public Interest Disclosures Act 1994</i> (NSW) s 8	Public official or former public official
Northern Territory	<i>Public Interest Disclosure Act</i> (NT) ^(a) s 10(1)	An individual
South Australia	<i>Whistleblowers Protection Act 1993</i> (SA) ^(b) s 5	A person
Queensland	<i>Public Interest Disclosure Act 2010</i> (Qld) ss 12–13	Any person (but members of the public may only disclose about limited subject matters)
Tasmania	<i>Public Interest Disclosures Act 2002</i> (Tas) ss 6, 7A	A public officer and a contractor to a public body
Victoria	<i>Protected Disclosure Act 2012</i> (Vic) s 9(1)	A natural person
Western Australia	<i>Public Interest Disclosure Act 2003</i> (WA) s 5(1)	Any person

(a) As in force at 1 May 2016. Note: With respect to Northern Territory legislation, under the *Amendments Incorporation Act* (NT) (as in force at 1 January 1981) 'when ... [a Northern Territory] Act has been amended the year is omitted'—Leslie Wiseman, Northern Territory Office of Parliamentary Counsel, Correspondence, 31 March 2017.

(b) A Bill entitled the *Public Interest Disclosure Bill 2016* (SA) is presently being considered in the South Australian Parliament. This report only examines the *Whistleblowers Protection Act 1993* (SA).

There are a number of reasons why the present broader approach is preferable.²¹⁶ First, it recognises that insiders are not the only sources of reliable information about wrongdoing in organisations.

²¹³ See the discussion in section 1.2 of Chapter 1 in this report and the references cited there.

²¹⁴ Adapting M P Nicelli and J P Near's definition cited and discussed in section 1.2 of Chapter 1 of this report.

²¹⁵ *PD Act 2012* (Vic) s 9(1). See also the discussion in section 1.2 of Chapter 1 in this report.

²¹⁶ See also the discussion in section 1.2 of Chapter 1 in this report.

Second, insiders can struggle to identify wrongdoing in organisations in which wrongdoing has become normalised, or to speak out about it if they do.²¹⁷

Table 3.2 identifies some of the key ways corruption can be rationalised within an organisation.²¹⁸ In an intimidating environment, insider whistleblowers may be too afraid to come forward to report wrongdoing.²¹⁹ In addition, the lines between proper and improper conduct can become blurred, so that an insider whistleblower might find it difficult to distinguish between ‘business as usual’ and improper conduct.²²⁰ Thus, the relative independence, objectivity and freedom of outsider whistleblowers can be crucial.²²¹

Table 3.2 Rationalising corruption

Strategy	Description	Examples
Denial of responsibility	The actors engaged in corrupt behaviours perceive that they have no other choice than to participate in such activities.	‘What can I do? My arm is being twisted.’ ‘It is none of my business what the corporation does in overseas bribery.’
Denial of injury	The actors are convinced that no-one is harmed by their actions; hence the actions are not really corrupt.	‘No-one was really harmed.’ ‘It could have been worse.’
Denial of victim	The actors counter any blame for their actions by arguing that the violated party deserved whatever happened.	‘They deserved it.’ ‘They chose to participate.’
Social weighting	The actors assume two practices that moderate the salience of corrupt behaviours: 1. Condemn the condemner, 2. Selective social comparison.	‘You have no right to criticise us.’ ‘Others are worse than we are.’
Appeal to higher loyalties	The actors argue that their violation of norms is due to their attempt to realise a higher-order value.	‘We answered to a more important cause.’ ‘I would not report it because of my loyalty to my boss.’
Metaphor of the ledger	The actors rationalise that they are entitled to indulge in deviant behaviours because of their accrued credits (time and effort) in their jobs.	‘We’ve earned the right.’ ‘It’s all right for me to use the internet for personal reasons at work. After all, I do work overtime.’

Source: Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39, 41, Table 1. The table has been edited to conform to house style.

²¹⁷ J S Nelson, ‘The normalization of corruption’ [2016] *Journal of Management Inquiry* 1; Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39; Alison Taylor, ‘What do corrupt firms have in common? Red flags of corruption in organizational culture’ [April 2016] *Center for the Advancement of Public Integrity, Columbia Law School, Integrity in Brief Series* 1; Marie Hutchinson et al, “‘The worse you behave, the more you seem, to be rewarded’” (2009) 21 *Employee Responsibilities and Rights Journal* 213.

²¹⁸ Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39, 40–41.

²¹⁹ Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39; J S Nelson, ‘The normalization of corruption’ [2016] *Journal of Management Inquiry* 1; Marie Hutchinson et al, “‘The worse you behave, the more you seem, to be rewarded’” (2009) 21 *Employee Responsibilities and Rights Journal* 213.

²²⁰ Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39; J S Nelson, ‘The normalization of corruption’ [2016] *Journal of Management Inquiry* 1; Alison Taylor, ‘What do corrupt firms have in common? Red flags of corruption in organizational culture’ [April 2016] *Center for the Advancement of Public Integrity, Columbia Law School, Integrity in Brief Series* 1.

²²¹ Vikas Anand, Blake E Ashforth and Mahendra Joshi, ‘Business as usual: the acceptance and perpetuation of corruption in organizations’ (2004) 18(2) *Academy of Management Executive* 39, 51.

Third, the broader definition of whistleblowing has been accepted by a number of official inquiries and well-respected NGOs. It has also been recognised in a range of international laws, standards, guidelines and best-practice principles. For example, the broader definition is supported by Whistleblowers Australia, the UNODC, and in the Government Accountability Project's synthesis of best-practice principles.²²²

Fourth, the broad approach advances both the development of an 'if in doubt, report' culture²²³ and IBAC's public-oriented strategy for preventing corruption. For example, IBAC has estimated that it received up to 500 potential protected disclosures from members of the public during 2014/15.²²⁴ For a further discussion, of the reasons for retaining the breadth of the *PD Act 2012* (Vic), see Chapter 1.²²⁵

There are also a number of related reasons for allowing any person to report improper conduct that should be examined.

A number of academics have characterised outsider whistleblowers as more likely to be complainants who have been personally affected by the wrongdoing they are disclosing information about.²²⁶ They imply that, because these kinds of complainants have been personally affected by the wrongdoing in question, that their disclosures are less likely to be in the public interest. But there is no reason why a complaint might not involve disclosure of valuable information about public sector wrongdoing:

Contrary to many stereotypes, whistleblowing does not always take the form of a direct allegation that is then the sole trigger for an investigation. Integrity investigations are also triggered in a variety of ways—for example, by supervisor suspicions, a random audit, a complaint from outside the organisation, media comment on organisational failures, or a combination of these things.²²⁷

Moreover, complaints and disclosures are often intertwined. For instance, a disgruntled member of the public's complaint about their mistreatment by a public body can involve the disclosure of objective, reliable information about improper conduct. The exposure of this improper conduct could well be in the public interest. As the WWTW study explains,

222 Commonwealth, *Whistleblower protection* (2009) 34; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015) 9; Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016). See also Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016; Dr Sulette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Northern Territory Department of Justice (Policy Division), *Whistleblowers protection legislation: discussion paper* (June 2004), unpaginated (Section 5.5) ('While the most likely operation for a whistleblower scheme will be in employment, the operation of any scheme should not be unduly confined.').

223 A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 14.

224 Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

225 Section 1.2.

226 A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 10; Brown, *Public interest disclosure legislation in Australia* 8; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Brown and Latimer, *Symbols or substance?* 230; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768.

227 A J Brown, *Public interest disclosure legislation in Australia* 12.

[a] valid matter of public interest can be raised without the person who raises it necessarily being driven by altruistic motives. Public interest disclosures made for self-serving reasons or as part of a personal grievance nevertheless remain public interest disclosures.²²⁸

The quality of the information provided is more important than the motivation of the whistleblower. As the WWTW project has demonstrated, the stereotype of whistleblowers as troublemakers²²⁹ is as unfair as an expectation that they be saints:

Even if many whistleblowers are altruistic, to make this a defining characteristic and therefore a prerequisite for whistleblower protection is extremely problematic. On this approach a substantial proportion of whistleblowers will never qualify, simply because they might also have a personal or private interest in the outcome. Whistleblowers who cannot prove that they conform to a stereotype of pure or altruistic motivation—which could be the bulk of them—can be relegated to a different category, including the equal and opposite stereotype of mere ‘vengeful troublemakers’ ... Such stereotypes therefore confound the purpose of recognising whistleblowing in the first place.²³⁰

Furthermore, outsider whistleblowers might simply disclose information about improper conduct as witnesses who are *not* personally affected by the conduct. For example, a motorist driving through a suburb might see suspicious dumping of waste in a river by a local council worker. Outsider citizens, not just insider employees, can provide authorities with valuable information.²³¹

Allowing anyone to blow the whistle on wrongdoing is also more consistent with anonymous disclosures, and with the establishment and use of public hotlines, than a narrower approach that allows only public officials, for example, to disclose. Under the *PD Act 2012* (Vic), whistleblowers are allowed to make anonymous disclosures.²³² This satisfies international best practice principles.²³³

228 A J Brown and Marika Donkin, ‘Introduction’ in Brown, *Whistleblowing in the Australian public sector* 11. See also UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 9–10.

229 ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxiv–viii; A J Brown and Marika Donkin, ‘Introduction’ in Brown, *Whistleblowing in the Australian public sector* 25, 62, 76–7, 105.

230 A J Brown and Marika Donkin, ‘Introduction’ in Brown (ed), *Whistleblowing in the Australian public sector* 13 (citations omitted). See also A J Brown, Evalynn Mazurski and Jane Olsen, ‘The incidence and significance of whistleblowing’ in Brown, *Whistleblowing in the Australian public sector* 25, 36, 39; Richard Wortley, Peter Cassematis and Marika Donkin, ‘Who blows the whistle, who doesn’t and why?’ in Brown, *Whistleblowing in the Australian public sector* 53, 76–7; Marika Donkin, Rodney Smith and A J Brown, ‘How do officials report? Internal and external whistleblowing’ in Brown, *Whistleblowing in the Australian public sector* 105.

231 See also, UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015) 9 (complaints from the public as a ‘useful source of additional information’).

232 *PD Act 2012* (Vic) s 12(2)(b); *Protected Disclosure Regulations 2013* (Vic); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 14.

233 Paul Latimer and A J Brown, ‘Whistleblower laws: international best practice’ (2008) 31(3) *University of New South Wales Law Journal* 766, 774. See also A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 284–5; Mr Hugh Mosley, Partner, Risk Advisory, Deloitte Touche Tohmatsu, Submission, 27 April 2016; Transparency International, ‘Making government anti-corruption hotlines effective’ (Working Paper No 7, 2009); Simon Wolfe et al, *Whistleblower protection rules in G20 countries: the next action plan*. Public consultation draft. (Blueprint for Free Speech, The University of Melbourne, Griffith University, Transparency International Australia, June 2014) 1; Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016) <www.whistleblower.org/international-best-practices-whistleblower-policies>; Brown, *Public interest disclosure legislation in Australia* 11.

It would be less coherent to restrict the range of disclosers to, say, public officials and yet allow anonymous disclosures. How could one ensure that an anonymous discloser was a public official, especially given that the chief appeal of anonymity to a discloser is that they need not identify themselves?²³⁴ In terms of the public interest, the availability of anonymous disclosure provides at least three benefits: it helps protect vulnerable disclosers, it encourages them to disclose when they might not otherwise, and it focuses attention on the value of *the information* about wrongdoing they are providing.²³⁵ Without the combination of a broad approach to whistleblowing and the availability of an anonymous channel of disclosure, invaluable information about possible public sector wrongdoing might never come to the attention of the responsible authorities. Opportunities to identify, investigate and expose wrongdoing could be lost.

Restricting the range of whistleblowers: further challenges

It has been argued that outsider whistleblowers do not need the same kinds of protections against reprisals as insiders do.²³⁶ Nevertheless, it has been recognised that there can be reprisals against outsider whistleblowers and that they need some form of legal protection.²³⁷ One view is that disclosers ought to rely on the criminal law or on (possibly new) provisions in the governing legislation for integrity bodies to ensure they are protected against reprisals.²³⁸ It should be recognised, however, that using the criminal law to protect whistleblowers against reprisals is not always effective.²³⁹

There are two other challenges with this approach. First, it may be difficult to identify precisely how reprisals against an outsider whistleblower differ from those against an insider whistleblower. The fundamental point, consistent with the purposes of the *PD Act 2012* (Vic), is that a whistleblower be protected against various kinds of detrimental action, some of which may not amount to criminal conduct. Second, given evidence the Committee has received about the number

²³⁴ But see Brown, *Public interest disclosure legislation in Australia* 11.

²³⁵ See Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016.

²³⁶ A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 10; A J Brown, *Public interest disclosure legislation in Australia* 8–9; Brown and Latimer, *Symbols or substance?* 230–1; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Brown, *Towards 'ideal' whistleblowing legislation?* 11–13.

²³⁷ Brown and Latimer, *Symbols or substance?* 231; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768, 772–6; Brown, *Public interest disclosure legislation in Australia* 8–13; A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 8–14; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Brown, *Towards 'ideal' whistleblowing legislation?* 4, 11–13.

²³⁸ Brown and Latimer, *Symbols or substance?* 231; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 768, 772–6; Brown, *Public interest disclosure legislation in Australia* 8–13; A J Brown and Marika Donkin, 'Introduction' in Brown, *Whistleblowing in the Australian public sector* 8–14; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Brown, *Towards 'ideal' whistleblowing legislation?* 11–13.

²³⁹ Brown, *Towards 'ideal' whistleblowing legislation?* 4, 20 ('Overall, the criminalization of reprisals in Australia has proven more symbolic than substantive, with few prosecutions, and no known successes.');

Professor A J Brown, Professor of Public Policy and Law, Griffith University, Submission to Mr Philip Moss's review of the *Public Interest Disclosure Act 2013* (Cth), 6 May 2016.

and complexity of Acts relevant to the whistleblower regime in Victoria,²⁴⁰ it would be burdensome to draft or amend provisions providing protections in legislation governing, for example, IBAC, the Victorian Ombudsman and a whole range of other specialised integrity, complaint-handling and investigative bodies. One of the current benefits of the broad approach is that umbrella protection is provided to anyone who discloses information in compliance with the requirements of the *PD Act 2012* (Vic).

A further disadvantage of restricting the range of disclosers to public officials and similar actors is the challenge of identifying precisely which ones should be recognised and which should be excluded. This challenge is compounded by the intricate overlaps and interactions that now exist between the public and private sectors.²⁴¹ If a more restrictive approach were adopted, the *PD Act 2012* (Vic) would become even more complex. The challenge of identifying who should be recognised as a public official or related actor is evident in the discussions of a parliamentary committee in 2009.²⁴² It considered the recognition of a range of actors, including:

- Australian Public Service employees of departments, statutory agencies, executive agencies and other bodies under the *Public Service Act 1999* (Cth)
- employees of other organisations receiving Commonwealth government funding or information
- former public servants
- contractors and consultants
- parliamentary staff
- volunteers
- Australian officials overseas
- employees in Commonwealth agencies with existing whistleblower protection frameworks.²⁴³

One of the virtues of the *PD Act 2012* (Vic) is that these definitional debates need not be entered into. All disclosers are covered, without the risk of gaps in protection.

²⁴⁰ See, for example, Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Hugh Mosley, Partner, Risk Advisory, Deloitte Touche Tohmatsu, Submission, 27 April 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016; Dr Sulette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Accountability Round Table, Submission, 4 May 2016; Mr David Thompson, Protected Disclosure Coordinator, City of Boroondara, Submission, 9 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

²⁴¹ See A J Brown, 'Patchy laws leave corporate whistleblowers vulnerable' *The Conversation* (28 April 2016) <theconversation.com/patchy-laws-leave-corporate-whistleblowers-vulnerable-58406>.

²⁴² Commonwealth, *Whistleblower protection* (2009) 36–51.

²⁴³ *Ibid.*

If Victoria decided not to restrict the range of disclosers, another option could be to institute a two-track system in which both public officials and members of the public could disclose information about wrongdoing—but about different things, in different ways and, perhaps, with different levels and kinds of protection.²⁴⁴ Again, it would be challenging to draft such a differentiated system, and it would be likely to make the *PD Act 2012 (Vic)* more complex.

Despite the preference of some commentators for a restricted approach to disclosers, another disadvantage of such an approach is the challenge of identifying who gets whistleblower protection. In contrast there is much virtue in a whistleblower regime without any loopholes.²⁴⁵

The Victorian whistleblower regime already provides precisely this kind of universal protection to anyone who discloses in accordance with the *PD Act 2012 (Vic)*.

The current Victorian law on who may disclose recognises that insider whistleblowers are not the only source of valuable information about wrongdoing,²⁴⁶ meets best-practice principles, is consistent with IBAC's public-oriented strategies to address corruption and avoids further complexity. For these reasons, the Committee has found that there is no need to change the relevant provision of the *PD Act 2012 (Vic)*.

FINDING 1: That it is not necessary to change s 9(1) of the *PD Act 2012 (Vic)*, which provides that 'a natural person' may make a disclosure under the Act.

3.3 What type of improper conduct should the *PD Act 2012 (Vic)* cover?

The Committee received evidence that the scope of 'improper conduct' needs to be expanded to include maladministration.²⁴⁷ This section examines what the term 'maladministration' might encompass, the relevant best-practice principles and the present law in Victoria in comparative perspective. It then evaluates whether the current Victorian law covers, in substance if not by name, all the significant forms of wrongdoing that come within the category of maladministration.

²⁴⁴ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Brown, *Towards 'ideal' whistleblowing legislation?* 4, 14–15. A two-track approach operates in the Australian Capital Territory and Queensland: *Public Interest Disclosure Act 2012 (ACT)* s 14, *Public Interest Disclosure Act 2010 (Qld)* ss 12–13.

²⁴⁵ Brown, *Towards 'ideal' whistleblowing legislation?* 11–13; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(3) *University of New South Wales Law Journal* 766, 775.

²⁴⁶ See also Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 17 May 2016.

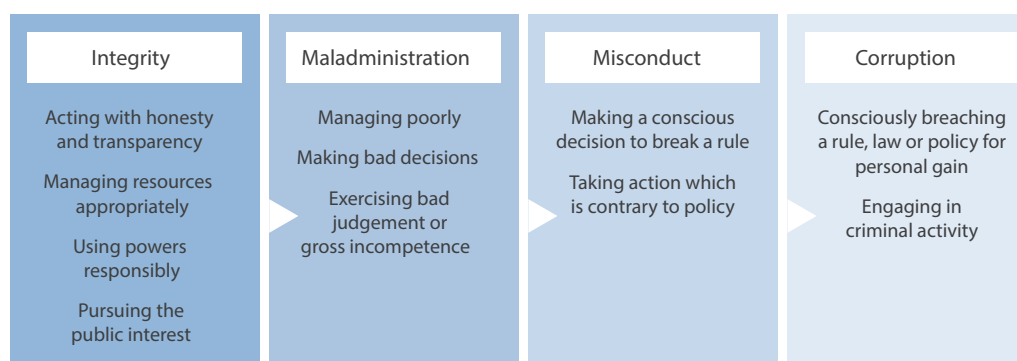
²⁴⁷ See section 3.3.2 in this chapter.

3.3.1 What is maladministration?

‘Maladministration’ is a broad term that can encompass a wide range of wrongdoing and poor administration. It is important to note at the outset that the type of wrongdoing maladministration describes might be covered under a whistleblowing protection Act even if the term ‘maladministration’ is not used. The nature of the wrongdoing—the content of the disclosable conduct—is more important than the label used. It is instructive in this regard that a number of statements of international best-practice principles rarely use the term maladministration.²⁴⁸ Even the first WWTW study uses the term only once.²⁴⁹

Nevertheless, the term *is* used in most Australian whistleblowing protection Acts (see Table 3.3, below), is a well-established category of wrongdoing and has some distinctive features. A useful general definition of maladministration is ‘administrative tasks that are not performed properly or appropriately. It can encompass inefficiency, incompetence and poorly reasoned decision making.’²⁵⁰ It covers wrongdoing generally falling short of criminal conduct that may be labelled ‘poor governance.’²⁵¹ Figure 3.1 shows where maladministration is commonly thought to lie on a spectrum of conduct, from ethical to corrupt conduct. It is important to bear in mind, however, that the depiction in Figure 3.1 cannot accommodate the complexities of relevant legal categories and definitions.

Figure 3.1 Spectrum of conduct



Source: IBAC, *Safeguarding integrity: a guide to the integrity system in Victoria* (2016) 16, Figure 4.

248 See, for example, Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 24–6 <blueprintforfreespeech.net/wp-content/uploads/2016/05/Report-Protecting-Whistleblowers-In-The-UK.pdf>. The following statements make no reference to maladministration: Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) <blueprintforfreespeech.net/wp-content/uploads/2015/10/Blueprint-Principles-for-Whistleblower-Protection.pdf>; G20 Anti-Corruption Action Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (2011) <www.oecd.org/g20/topics/anti-corruption/48972967.pdf>; CleanGovBiz, *Whistleblower protection* (OECD, 2012); Transparency International, *International principles for whistleblower legislation* (2013); OECD, *Committing to effective whistleblower protection—highlights* (OECD Publishing, 2016) <www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf>; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015).

249 A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 266.

250 State Services Authority, *Review of Victoria’s integrity and anti-corruption system* (2010) (‘Proust review’) 3.

251 Philip Moss, *Review of the Public Interest Disclosure Act 2013* [Cth] (2016) 36.

Table 3.3 Maladministration as disclosable conduct: Australian jurisdictions

Jurisdiction	Legislative provision	Maladministration included as a type of disclosable conduct?
Commonwealth	<i>Public Interest Disclosure Act 2013</i> (Cth) s 29	Yes
Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i> (ACT) s 8	Yes
New South Wales	<i>Public Interest Disclosures Act 1994</i> (NSW) s 14(1)	Yes
Northern Territory	<i>Public Interest Disclosure Act</i> (NT) s 5	Yes
South Australia	<i>Whistleblowers Protection Act 1993</i> (SA) s 4	Yes
Queensland	<i>Public Interest Disclosure Act 2010</i> (Qld) s 13(1)(a) and sch 4	Yes
Tasmania	<i>Public Interest Disclosures Act 2002</i> (Tas) s 3(1) (definition of 'improper conduct')	Yes
Victoria	<i>Protected Disclosure Act 2012</i> (Vic)	No
Western Australia	<i>Public Interest Disclosure Act 2003</i> (WA)	No

3.3.2 Arguments for adding 'maladministration' to the *PD Act 2012 (Vic)*

Professor A J Brown argued in his evidence to the Committee that, while one has to be careful to ensure that the category of disclosable conduct in whistleblower protection legislation is not too broad, there was 'no doubt that the Victorian legislation is absurdly narrow at the moment for its purpose.'²⁵² He argued that the category of improper conduct in the *PD Act 2012 (Vic)* needed to be broadened to encompass at least serious maladministration.²⁵³ This was especially the case given the role the Victorian Ombudsman has in investigating maladministration.²⁵⁴

Dr Suelette Dreyfus has also argued that the category of disclosable conduct must be sufficiently broad in order to cover various forms of wrongdoing identified by best-practice principles, such as those developed by the G20 and the NGO Blueprint for Free Speech.²⁵⁵

Finally, the Accountability Round Table argued that the *PD Act 2012 (Vic)* should cover, not just 'serious maladministration,' but all kinds of maladministration. The present Act, they believed,

²⁵² Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

²⁵³ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

²⁵⁴ Professor A J Brown, '*Protected Disclosure Act 2012 (Vic): ten problems?*' (Based on comments to the Victorian Government Protected Disclosure Coordinators Forum, IBAC, Melbourne, 6 March 2016.), tabled with the Committee.

²⁵⁵ Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

appears to overlook the reality that people deliberately engaged in serious misconduct will usually attempt to conceal that reality and the most that any other colleague may observe could appear to be possible minor maladministration.²⁵⁶

Thus, the Accountability Round Table argued that in order to uncover serious maladministration the disclosure of even minor maladministration needs to be protected in whistleblower legislation.²⁵⁷ However, this would make the Act too broad.²⁵⁸

3.3.3 Best-practice principles

All the accounts of best practice regarding disclosable wrongdoing agree that a broad approach needs to be taken in whistleblower protection legislation. This section explores a range of perspectives on this approach, with a particular focus on what might be encompassed by the term ‘maladministration.’

Transparency International states that disclosable conduct must include, but not be restricted to,

corruption; criminal offences; breaches of legal obligation; miscarriages of justice; dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up any of these.²⁵⁹

Gross waste or mismanagement, as well as cover-ups, are closely related to the notion of maladministration.

The UNODC endorses the Council of Europe’s Recommendation on the Protection of Whistleblowers, which includes ‘gross mismanagement of public bodies (including charitable foundations)’ and ‘gross waste of public funds,’ ‘corruption’ and ‘criminal activity.’²⁶⁰

Blueprint for Free Speech also provides a wide definition of disclosable conduct:

[W]rongdoing that harms or threatens the public interest (including corruption, criminal misconduct, dangers to public health and safety, fraud, financial misconduct and other legal, regulatory and ethical breaches).²⁶¹

The WWTW study identified 38 wrongful behaviours, which were grouped into the following categories:

²⁵⁶ Accountability Round Table, Submission, 4 May 2016.

²⁵⁷ The Law Council of Australia made a similar point in its submission to the Senate Select Committee on the Establishment of a National Integrity Commission (2016) 4 (‘Maladministration and misconduct may be related to corruption or indicate an increased risk of corruption.’).

²⁵⁸ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

²⁵⁹ Transparency International, *International principles for whistleblowing legislation* (2013) 4.

²⁶⁰ UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015) 24, quoting from the Explanatory Memorandum to the Council of Europe Recommendation on the Protection of Whistleblowers (2014), paragraph 43.

²⁶¹ Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 3 <blueprintforfreespeech.net/wp-content/uploads/2015/10/Blueprint-Principles-for-Whistleblower-Protection.pdf>.

- misconduct for material gain
- conflict of interest
- improper or unprofessional behaviour
- defective administration
- waste or mismanagement of resources
- perverting justice or accountability
- personnel or workplace grievances.²⁶²

The category of ‘defective administration,’ which is closest to the notion of maladministration, was broken down into the following types of wrongdoing:

- Incompetent or negligent decision making
- Failure to correct serious mistakes
- Endangering public health and safety
- Producing or using unsafe products
- Acting against organisational policy, regulations or laws.²⁶³

After evaluating these accounts of disclosable wrongdoing, the Committee has accepted the WWTW study’s distillation of best-practice principles. That is, disclosable conduct should include ‘all significant action or inaction’ within the public sector that goes against the public interest.²⁶⁴ This includes:

- an alleged crime or breach of the law
- official corruption, including abuse of power, breach of trust and conflict of interest
- official misconduct
- defective administration, including:
 - negligence or incompetence
 - improper financial management that constitutes a significant waste of public money or time
 - any failure to perform a duty that could result in injury to the public, such as an unacceptable risk to public safety, health or environment.²⁶⁵

²⁶² ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxi.

²⁶³ Richard Wortley, Peter Cassematis and Marika Donkin, ‘Who blows the whistle, who doesn’t and why?’ in Brown, *Whistleblowing in the Australian public sector* 64 (Table 3.5). See also Paul Latimer and A J Brown, ‘Whistleblower laws: international best practice’ (2008) 31(3) *University of New South Wales Law Journal* 766, 785 (‘abuse of authority,’ ‘gross waste’ and ‘mismanagement’); Brown and Latimer, *Symbols or substance?* 233–5 (‘illegal activity,’ ‘official misconduct’ and ‘maladministration’).

²⁶⁴ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 283.

²⁶⁵ *Ibid.*

3.3.4 Current Victorian law in comparative perspective

As discussed in the preceding chapter, under the *PD Act 2012 (Vic)*, a natural person may disclose information about a wide range of ‘improper conduct,’ which encompasses corrupt conduct as defined in the *IBAC Act 2011 (Vic)* and ‘specified conduct.’²⁶⁶ Specified conduct encompasses improper conduct that would constitute a criminal offence or reasonable grounds for dismissing a public officer.²⁶⁷ It also covers official conduct by a public body or officer that ‘involves substantial mismanagement of public resources’ or risks to public health, public safety or the environment.²⁶⁸ Disclosures can also be made about detrimental action in response to a disclosure.²⁶⁹

Putting aside for now the nuances of legal classifications, and the category of detrimental action, in general terms the *PD Act 2012 (Vic)* allows disclosures about the following kinds of improper conduct:

- conduct of any person that adversely affects the honest performance by a public officer or public body of their official functions;²⁷⁰ or
- conduct of a public officer or public body that constitutes or involves the dishonest performance of their official functions;²⁷¹ or
- conduct of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust;²⁷² or
- conduct of a public officer or public body that involves the misuse of information or material acquired in the performance of their official functions (whether or not for the benefit of the public officer or public body or any other person);²⁷³ or
- conduct by a person intended to adversely affect the effective performance or exercise by a public officer or public body of their functions or powers, which results in a benefit to the person or one of their associates.²⁷⁴
- perverting, or attempting to pervert, the course of justice²⁷⁵
- bribery of a public official²⁷⁶
- misconduct in public office²⁷⁷

²⁶⁶ *PD Act 2012 (Vic)* s 4. See also section 2.3.2 in Chapter 2 of this report.

²⁶⁷ *PD Act 2012 (Vic)* s 4(1)(b).

²⁶⁸ *PD Act 2012 (Vic)* s 4(2)(f).

²⁶⁹ *PD Act 2012 (Vic)* s 9(1)(a)(ii).

²⁷⁰ *IBAC Act 2011 (Vic)* s 4(1)(a); *PD Act 2012 (Vic)* s 4(2)(a); *IBAC, Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁷¹ *IBAC Act 2011 (Vic)* s 4(1)(b); *PD Act 2012 (Vic)* s 4(2)(b); *IBAC, Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁷² *IBAC Act 2011 (Vic)* s 4(1)(c); *PD Act 2012 (Vic)* s 4(2)(c); *IBAC, Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁷³ *IBAC Act 2011 (Vic)* s 4(1)(d); *PD Act 2012 (Vic)* s 4(2)(d); *IBAC, Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁷⁴ *IBAC Act 2011 (Vic)* s 4(1)(da); *PD Act 2012 (Vic)* s 4(2)(da); *IBAC, Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁷⁵ *IBAC Act 2011 (Vic)* ss 3 (definition of ‘relevant offence’), 4(1).

²⁷⁶ *IBAC Act 2011 (Vic)* ss 3 (definition of ‘relevant offence’), 4(1).

²⁷⁷ *IBAC Act 2011 (Vic)* ss 3 (definition of ‘relevant offence’), 4(1).

- conduct of a public body or public officer in their official capacity that ‘involves substantial mismanagement of public resources,’ or ‘substantial risk to public health or safety,’ or ‘substantial risk to the environment.’²⁷⁸

As noted above, most Australian jurisdictions include maladministration by name as a kind of disclosable conduct, with Victoria and Western Australia the exceptions. It is beyond the scope of this report to undertake an exhaustive comparative analysis of the relevant interstate legislative provisions on disclosable conduct. Instead, key features of interstate and territorial provisions on maladministration as a type of disclosable conduct will be briefly considered. Table 3.4 lists a range of definitions of maladministration in Australian jurisdictions.

Table 3.4 Definitions of maladministration in Australian jurisdictions

Jurisdiction	Legislative provisions	Definition of maladministration
Commonwealth	<i>Public Interest Disclosure Act 2013</i> (Cth) s 29, Item 4	Conduct that constitutes maladministration, including conduct that: <ul style="list-style-type: none"> (a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent.
Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i> (ACT) s 8(1)(b)(i)(2) (definition of ‘maladministration’)	<ul style="list-style-type: none"> • Section 8(1)(b)(i): maladministration that adversely affects a person’s interests in a substantial and specific way • Section 8(2) (definition of ‘maladministration’): <ul style="list-style-type: none"> (a) an action about a matter of administration that was— (b) contrary to a law in force in the ACT; or (c) unreasonable, unjust, oppressive, or improperly discriminatory; or (d) negligent; or (e) based wholly or partly on improper motives.
New South Wales	<i>Public Interest Disclosures Act 1994</i> (NSW) ss 11(2), 14(1)	Section 11(2): Conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is: <ul style="list-style-type: none"> (a) contrary to law, or (b) unreasonable, unjust, oppressive or improperly discriminatory, or (c) based wholly or partly on improper motives.
Northern Territory	<i>Public Interest Disclosure Act</i> (NT) s 5(1)(b)(iv)	Section 5(1)(b)(iv): substantial maladministration that specifically, substantially and adversely affects someone’s interests
South Australia	<i>Whistleblowers Protection Act</i> ^(a) 1993 (SA) s 4 (definition of ‘public interest information’)	Information that tends to show ... (b) that a public officer is guilty of maladministration in or in relation to the performance ... of official functions

continued overleaf

²⁷⁸ *PD Act 2012* (Vic) s 4(2)(f).

Jurisdiction	Legislative provisions	Definition of maladministration
Queensland	<i>Public Interest Disclosure Act 2010</i> (Qld) s 13(1)(a)(ii) and sch 4 (definition of 'maladministration')	Section 13(1)(a)(ii): <ul style="list-style-type: none"> • Maladministration that adversely affects a person's interests in a substantial and specific way • Schedule 4 (definition of 'maladministration'): ... administrative action that— <ul style="list-style-type: none"> (a) was taken contrary to law; or (b) was unreasonable, unjust, oppressive, or improperly discriminatory; or (c) was in accordance with a rule of law or a provision of an Act or practice that is or may be unreasonable, unjust, oppressive or improperly discriminatory in the particular circumstances; or (d) was taken— <ul style="list-style-type: none"> (i) for an improper purpose; or (ii) on irrelevant grounds; or (iii) having regard to irrelevant considerations; or (e) was an action for which reasons should have been given, but were not given; or (f) was based wholly or partly on a mistake of law or fact; or (g) was wrong.
Tasmania	<i>Public Interest Disclosures Act 2002</i> (Tas) s 3(1) (definition of 'improper conduct')	conduct that constitutes maladministration [not defined]

- (a) See also *Independent Commissioner Against Corruption Act 2012* (SA) s 5(4), which defines 'maladministration in public administration' as, in part, '(i) conduct of a public officer, or a practice, policy or procedure of a public authority ... that results in an *irregular and unauthorised use of public money or substantial mismanagement of public resources*; or (ii) conduct of a public officer involving *substantial mismanagement* in or in relation to the performance of official functions; and (b) includes conduct resulting from *impropriety, incompetence or negligence* ...' (emphasis added).

In general terms, 'maladministration' in Australian whistleblower protection legislation (see Table 3.4, above) includes conduct or action that is one or more of the following:

- contrary to law
- unreasonable
- unjust
- oppressive
- improperly discriminatory
- based on improper motives or purposes.

While most of these characteristics are readily comprehensible, what is meant by conduct that is 'oppressive' or 'based on improper motives or purposes' requires some explanation. Oppressive conduct includes harassment, intimidation, abuses of power, unconscionable decisions and actions and the use of heavy-handed means to an end.²⁷⁹ The New South Wales Ombudsman has described conduct based on improper motives or purposes as including:

²⁷⁹ Local Government Association of South Australia, *Understanding maladministration* (The ICAC Act—Key Issues for Local Government Information Paper 11, 2013) 4; New South Wales Ombudsman, *Maladministration* (Public Sector Agencies Fact Sheet No. 13, 2010).

- decisions or actions for a purpose other than that for which a power was conferred
- conflicts of interests
- bad faith or dishonesty
- decisions or actions induced or affected by fraud.²⁸⁰

The Australian Capital Territory (ACT) and Commonwealth legislation also specifies negligent conduct as part of maladministration (see Table 3.4, above). The ACT, Northern Territory and Queensland legislation requires the conduct to have adversely affected a person's interests (see Table 3.4, above).

3.3.5 Does the *PD Act 2012 (Vic)* already cover maladministration?

The *PD Act 2012 (Vic)*, combined with the offence of misconduct in public office (MIPO) under the *IBAC Act 2011 (Vic)*, covers almost all aspects of maladministration. Many aspects of maladministration come within broad readings of the following conduct provisions:

- conduct of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust²⁸¹
- conduct of a person intended to adversely affect the effective performance or exercise by a public officer or public body of their functions or powers, which results in a benefit to the person or one of their associates²⁸²
- official conduct of a public body or public officer that 'involves substantial mismanagement of public resources,' or 'substantial risk to public health or safety,' or 'substantial risk to the environment.'²⁸³
- misconduct in public office (MIPO).²⁸⁴

Improper conduct under the *PD Act 2012 (Vic)* covers not only intentional but also *reckless* breaches of the public trust, where, for instance, public officers act inconsistently with the duties of the position entrusted to them by the public. In this sense, breach of public trust overlaps with the margins of MIPO.

In addition, improper conduct includes conduct that adversely affects not only the honest, but also the *effective*, performance or exercise of official functions or powers, overlapping with maladministration as a form of bad governance.

Finally, a broad reading of 'substantial mismanagement of public resources' overlaps with maladministration as a type of 'defective administration,' as the WWTW project terms it.

²⁸⁰ New South Wales Ombudsman, *Maladministration* (Public Sector Agencies Fact Sheet No. 13, 2010).

²⁸¹ *IBAC Act 2011 (Vic)* s 4(1)(c); *PD Act 2012 (Vic)* s 4(2)(c); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁸² *IBAC Act 2011 (Vic)* s 4(1)(da); *PD Act 2012 (Vic)* s 4(2)(da); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 7.

²⁸³ *PD Act 2012 (Vic)* s 4(2)(f).

²⁸⁴ *IBAC Act 2011 (Vic)* ss 3 (definition of 'relevant offence'), 4(1).

Table 3.5 demonstrates that many aspects of maladministration are already covered by provisions in the *PD Act 2012* (Vic) and the *IBAC Act 2011* (Vic).²⁸⁵

Table 3.5 Maladministration: coverage under Victorian law

Type of maladministration	Legislative provision
Poor administration	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)
Improper or inappropriate performance of administrative tasks	knowingly or recklessly breaching public trust: <i>PD Act 2012</i> (Vic) s 4(2)(c)
Inefficiency	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)
Incompetence	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i) knowingly or recklessly breaching public trust: <i>PD Act 2012</i> (Vic) s 4(2)(c)
Poor governance	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)
Illegality	Corrupt conduct or conduct 'that is not corrupt conduct but that, if proved, would constitute—(i) a criminal offence': <i>PD Act 2012</i> s 4(1)(a)–(b)(i) MIPO: <i>IBAC Act 2011</i> (Vic) ss 3 (definition of 'relevant offence') 4(1)
Gross waste/mismanagement	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)
Abuse of authority	knowingly or recklessly breaching public trust: <i>PD Act 2012</i> (Vic) s 4(2)(c) MIPO: <i>IBAC Act 2011</i> (Vic) ss 3 (definition of 'relevant offence') 4(1)
Danger to public health or safety	substantial risk to public health or safety: <i>PD Act 2012</i> (Vic) s 4(2)(f)(ii)
Gross mismanagement of public bodies/funds	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)
Unauthorised use of public funds/property/resources	dishonest performance of ... functions as a public officer or public body: <i>PD Act 2012</i> (Vic) s 4(2)(b) knowingly or recklessly breaching public trust: <i>PD Act 2012</i> (Vic) s 4(2)(c) MIPO: <i>IBAC Act 2011</i> (Vic) ss 3 (definition of 'relevant offence') 4(1)
Improper or unprofessional behaviour	dishonest performance of ... functions as a public officer or public body: <i>PD Act 2012</i> (Vic) s 4(2)(b) knowingly or recklessly breaching public trust: <i>PD Act 2012</i> (Vic) s 4(2)(c) MIPO: <i>IBAC Act 2011</i> (Vic) ss 3 (definition of 'relevant offence') 4(1)
Negligence or incompetence	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)
Improper management that constitutes a significant waste of public money or time	substantial mismanagement of public resources: <i>PD Act 2012</i> (Vic) s 4(2)(f)(i)

²⁸⁵ Table 3.5 relies on characterisations of maladministration, and accompanying citations, in sections 3.3.1–3.3.5 of this chapter.

Type of maladministration	Legislative provision
Any failure to perform a duty that could result in injury to the public, such as an unacceptable risk to public safety, health or the environment	substantial risk to public health or safety: <i>PD Act 2012</i> (Vic) s 4(2)(f)(ii) substantial risk to the environment: <i>PD Act 2012</i> (Vic) s 4(2)(f)(iii)
Administrative actions that are unreasonable, unjust, oppressive, improperly discriminatory or based on improper motives or purposes	knowingly or recklessly breaching public trust: <i>PD Act 2012</i> (Vic) s 4(2)(c) MIPO: <i>IBAC Act 2011</i> (Vic) ss 3 (definition of 'relevant offence') 4(1)

Source: The discussion in sections 3.3.1–3.3.5, and accompanying citations, in this chapter.

The addition of MIPO to the *IBAC Act 2011* (Vic) in 2016²⁸⁶ has significantly expanded the range of disclosable conduct in Victoria. IBAC takes a broad view of MIPO, understanding it as:

Any conduct by a public sector employee which is unlawful or fails to meet the ethical or professional standards required in the performance of duties or the exercise of powers entrusted to them.²⁸⁷

IBAC has given the following examples of MIPO: the falsification of accounts, secret commissions, improper tendering processes, obtaining financial benefits by deception and misuse of power 'to harm, oppress or disadvantage a person.'²⁸⁸

This is consistent with judicial definitions and interpretations of MIPO in Victoria and the rest of the common law world. While the offence of MIPO requires '[wilful] ... misconduct ... by act or omission' such as wilful neglect or a failure to perform a public duty,²⁸⁹ it extends to a wide range of conduct that overlaps with common understandings of maladministration. This includes fraud, secret profits, hidden conflicts of interest, the use of public office and influence for private gain, and conduct based on improper motives or purposes (including corrupt, biased, dishonest, oppressive, malicious and unfair actions or decisions).²⁹⁰

In sum, the Victorian legislative provisions covering dishonesty, breach of public trust, MIPO, substantial mismanagement of public resources, and substantial risk to public health, safety and the environment adequately cover maladministration in substance if not by name. This coverage is considered adequate by IBAC, the Victorian Ombudsman and the VI.²⁹¹ The Committee also considers that maladministration is adequately covered by the present Victorian law.

FINDING 2: The Committee is satisfied that the coverage of improper conduct under the *PD Act 2012* (Vic), in conjunction with the *IBAC Act 2011* (Vic), is adequate.

²⁸⁶ *Integrity and Accountability Legislation Amendment Act (A Stronger System) Act 2016* s 3(f).

²⁸⁷ IBAC, *Summary: changes to the IBAC Act* (2016) (emphasis added).

²⁸⁸ IBAC, *Summary: changes to the IBAC Act* (2016).

²⁸⁹ Lenny Roth, 'Corruption offences' (NSW Parliamentary Research Service, e-brief, September 2013) 4, citing the Victorian Court of Appeal in *R v Quach* [2010] VSCA 106.

²⁹⁰ David Lusty, 'Revival of the common law offence of misconduct in public office' (2014) 38 *Criminal Law Journal* 337, 342, 348, 352–9.

²⁹¹ Mr Stephen O'Bryan QC, Correspondence, 24 October 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016.

3.4 Complaints and disclosures about MPs

Under the *PD Act 2012* (Vic)—unlike the Commonwealth public interest disclosures scheme,²⁹² which excludes MPs as subjects of disclosure—the Victorian scheme does allow disclosures to be made about the alleged improper conduct of an MP. However, the requirements differ from disclosures about other bodies or persons, and the Committee has received some evidence that raised concerns about the processes for disclosures about Victorian MPs.²⁹³

It has been emphasised that any special procedures for making a disclosure need to be justified.²⁹⁴ Whistleblowing legislation should, for example, cover ‘public interest–related wrongdoing in all areas of ... government—including by Ministers, their offices, and other members of parliament.’²⁹⁵ Further, it has been argued that ‘[l]egislative action is needed to ensure that equivalent processes and protections are triggered irrespective of where the wrongdoing occurs.’²⁹⁶

In Victoria, a person can make a complaint about an MP’s allegedly corrupt conduct directly to IBAC, or a disclosure about MP’s improper conduct to a Presiding Officer of the Parliament of Victoria.

During 2015/16, IBAC received 13 complaints with 18 allegations against MPs. All complaints were assessed by IBAC and all were dismissed. The Presiding Officers made no notifications to IBAC during this period.²⁹⁷ A review of the annual reports of the Victorian Legislative Assembly and Legislative Council between

292 *Public Interest Disclosure Act 2013* (Cth).

293 Emeritus Professor Ronald D Francis, College of Law & Justice, Victoria University, Submission, 23 April 2016; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016. See also Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015; Ms Belinda Wilson, Vice President, Law Institute of Victoria, Submission to the IBAC Committee’s inquiry into the Victorian integrity system, 13 January 2016; Law Institute of Victoria, *Strengthening Victoria’s integrity regime: position paper* (2015) 9; Law Institute of Victoria, Integrity Legislation Amendment Bill 2014: submission to the Attorney-General (2014).

294 See, for example, Mr Simon Wolfe, Head of Research, Blueprint for Free Speech, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2012 [Cth], 19 April 2013; Ms Elizabeth O’Keefe, Director, Transparency International, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 19 April 2013; *Proust review* 8, citing Griffith University and Transparency International, *Chaos or coherence? Strengths, opportunities and challenges for Australia’s integrity systems*. National Integrity Systems Assessment Final Report (Key Centre for Ethics, Law, Justice and Governance, Griffith University, 2005); Professor A J Brown, Professor of Public Law and Policy, Griffith University, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 22 April 2013.

295 Professor A J Brown, Professor of Public Law and Policy, Griffith University, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 22 April 2013.

296 Professor A J Brown, Professor of Public Law and Policy, Griffith University, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 22 April 2013. See also Mr Simon Wolfe, Head of Research, Blueprint for Free Speech, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 19 April 2013; Ms Elizabeth O’Keefe, Director, Transparency International, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs’s Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 19 April 2013.

297 Mr Alistair Maclean, Chief Executive Officer, IBAC, Correspondence, 16 March 2017.

2013/14 and 2015/16 has revealed that there have been no disclosures made to the Presiding Officers of the Parliament under the *Protected Disclosure Act 2012 (Vic)*.²⁹⁸

If a person wants to make a disclosure about an MP's allegedly improper conduct in order to gain the protections of the *PD Act 2012 (Vic)* a disclosure must be made to the Presiding Officer of the house of the Parliament of Victoria in which the MP sits.²⁹⁹

In contrast to other public bodies who have received a disclosure, if a Presiding Officer considers that a disclosure may be a protected disclosure they are not required to notify it to IBAC for assessment.³⁰⁰ This discretion, which is not unusual in Australian jurisdictions, has been justified as part of a Westminster approach to addressing concerns over MPs' conduct. Before considering the evidence and arguments relating to the discretion, it is important to examine the present law in Victoria more closely.

3.4.1 The Victorian law

Complaints and disclosures about the alleged improper conduct of a Victorian MP are governed by a range of laws and procedures, including the *IBAC Act 2011 (Vic)*, the *PD Act 2012 (Vic)* and the Parliament of Victoria's protected disclosure procedures.³⁰¹ This section examines how they operate with respect to complaints about MPs made directly to IBAC, and disclosures about MPs and Presiding Officers under the *PD Act 2012 (Vic)*, before discussing Parliament's procedures in more detail.

²⁹⁸ Department of the Legislative Assembly, *Annual report 2015–2016* (Parliament of Victoria, 2016) 64; Department of the Legislative Council, *Annual report 2015–2016* (Parliament of Victoria, 2016) 43; Department of the Legislative Assembly, *Annual report 2014–2015* (Parliament of Victoria, 2015) 63; Department of the Legislative Council, *Annual report 2014–2015* (Parliament of Victoria, 2015) 53; Department of the Legislative Assembly, *Annual report 2013–2014* (Parliament of Victoria, 2014) 62. Note: The Legislative Council did not report the number of disclosures that the President had received during 2013/14.

²⁹⁹ *PD Act 2012 (Vic)* ss 3 (definition of 'Presiding Officer'), 19(1)–(2). Note, however, that under section 19(3) of the *PD Act 2012 (Vic)* disclosures relating to a Minister of the Crown who is not a member of Parliament must be made to IBAC.

³⁰⁰ *PD Act 2012 (Vic)* s 21(3) ('the Presiding Officer may notify the disclosure to the IBAC'). Cf *PD Act 2012 (Vic)* s 21(2) ('the entity must ... notify the disclosure to the IBAC').

³⁰¹ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

Complaints about MPs made directly to IBAC

A person can make a complaint about the alleged corrupt conduct of an MP directly to IBAC.³⁰² However, any information disclosed in the complaint cannot be assessed by IBAC as a possible protected disclosure complaint.³⁰³ In other words, someone who complains about an MP directly to IBAC will not receive the protections of the *PD Act 2012 (Vic)*.³⁰⁴

Disclosures about MPs made under the *PD Act 2012 (Vic)*

A complaint/disclosure about an MP will only receive protection under the *PD Act 2012 (Vic)* if it follows the prescribed procedure.³⁰⁵ As noted, section 19(1)–(2) of the *PD Act 2012 (Vic)* requires disclosures about a member of the Legislative Assembly to be made to the Speaker of the Legislative Assembly, and about a member of the Legislative Council to the President of the Legislative Council.

Section 21(1)(3) of the *PD Act 2012 (Vic)* provides that if a disclosure is made to a Presiding Officer (the Speaker or the President), and that officer considers ‘that the disclosure may be a protected disclosure,’ s/he ‘may notify the disclosure to the IBAC’ for assessment as a possible protected disclosure complaint. As noted earlier, this discretion contrasts with the position of other public organisations. Under section 21(2) of the *PD Act 2012 (Vic)*, they must notify the disclosure to IBAC for assessment ‘no later than 28 days after the disclosure is made.’

Disclosures about Presiding Officers made under the *PD Act 2012 (Vic)*

Under the Victorian Parliament’s procedures, a disclosure *about* the Speaker or the President is to be made to the Clerk or Deputy Clerk of the Legislative Assembly or the Legislative Council as ‘protected disclosure officers.’³⁰⁶ They ‘may refer the disclosure direct to the Deputy Presiding Officer for consideration.’³⁰⁷ The Deputy Presiding Officers are the Deputy Speaker and Deputy President.³⁰⁸ Under this procedure, while a disclosure about a Presiding Officer is *received* by the relevant Clerk or Deputy Clerk, the *assessment* of whether it could be

302 *IBAC Act 2011 (Vic)* ss 6(1)(k) (definition of ‘public officer’), 51 (complaint about ‘corrupt conduct’); Mr Stephen O’Byrne QC, IBAC Commissioner, Correspondence, 24 October 2016; Mr Stephen O’Byrne QC, Commissioner and Dr John Lynch, General Counsel, IBAC, Closed Hearing, Melbourne, 11 April 2016; IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015). See also *IBAC Act 2011 (Vic)* s 6(1)(j) (‘a responsible Minister of the Crown’).

303 *PD Act 2012 (Vic)* s 12(1) (‘A disclosure under this Part [pt 2] must be made in accordance with the prescribed procedure.’); Mr Stephen O’Byrne QC, IBAC Commissioner, Correspondence, 24 October 2016; Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

304 Mr Stephen O’Byrne QC, IBAC Commissioner, Correspondence, 24 October 2016; Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

305 *PD Act 2012 (Vic)* ss 3 (definitions of ‘assessable disclosure,’ ‘protected disclosure’), 12(1), 19(1)–(2).

306 Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 5–6 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>; IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015).

307 Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 5 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

308 *Ibid* 6.

a protected disclosure, and whether the discretion to notify it to IBAC will be exercised, is undertaken by the Deputy Speaker or Deputy President as the case may be (see Table 3.6).³⁰⁹

Table 3.6 Disclosures about Presiding Officers

Subject of disclosure	Receiver of disclosure	Assessor of disclosure
Speaker of the Legislative Assembly	Clerk or Deputy Clerk of the Legislative Assembly acting as a protected disclosure officer	Deputy Speaker acting as a protected disclosure coordinator
President of the Legislative Council	Clerk or Deputy Clerk of the Legislative Council acting as a protected disclosure officer	Deputy President acting as a protected disclosure coordinator

On this interpretation, despite a statement in the procedures that '[t]he Clerk or Deputy Clerk *may* refer the disclosure direct to the Deputy Presiding officer for consideration,³¹⁰ they *must* do so as a matter of course. This is because only the relevant Deputy Presiding Officer has the power to assess disclosures and notify them to IBAC, exercising powers that would otherwise be exercised by the relevant Presiding Officer as a 'protected disclosure coordinator.'³¹¹

The Committee heard evidence from the IBAC Commissioner, Mr Stephen O'Bryan QC, that the intended purpose of this process is to avoid the conflict of interest that would arise were the President or Speaker to receive a disclosure about their own alleged improper conduct. The IBAC Commissioner explained the combined operation of section 19 of the *PD Act 2012 (Vic)* and regulation 12 of the *Protected Disclosure Regulations 2013 (Vic)*³¹² in the following way:

Section 19 of the *Protected Disclosure Act [2012 (Vic)]* and regulation 12 of the Protected Disclosure Regulations set out how disclosures about Members of Parliament can be made. In addition to the President and Speaker, regulation 12 allows these disclosures to be made to certain other persons.

As the legislation does not make special provision for disclosures about a Presiding Officer, these disclosures can only be made to the person who is the subject of the disclosure or the other persons permitted by regulation 12. Given the conflict of interest issues that arise with a Presiding Officer receiving a disclosure about his or her own conduct, in IBAC's view, it is appropriate for another senior officer to *receive* those disclosures.³¹³

However, while a disclosure about a Presiding Officer can be received by a Clerk or Deputy Clerk it must be assessed by the relevant Deputy Presiding Officer.

³⁰⁹ Ibid 6–8.

³¹⁰ Ibid 6.

³¹¹ Ibid 6 ('For the purposes of such disclosures [about Presiding Officers] only, all the obligations of the Presiding Officers will be carried out by the Deputy Speaker or Deputy President as Deputy Presiding Officers, as appropriate ...'), 7–8. <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³¹² Regulation 12 operates in conjunction with section 12(1) of the *PD Act 2012 (Vic)* regarding how oral and written disclosures are to be made. Regulation 12(1)(a), for example, provides that oral disclosures 'must be made ... to ... (a) the Speaker or the President as the case requires; or (b) an *employee of the office* of the President or the Speaker, as the case requires (emphasis added).'

³¹³ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 13 January 2017 (emphasis added).

The Parliament of Victoria's protected disclosure procedures

Under section 65 of the *PD Act 2012 (Vic)*, a Presiding Officer may

establish procedures—

- (a) to facilitate the making of disclosures to the Presiding Officer; and
- (b) for the handling of those disclosures and the notification of those disclosures to the IBAC ...

Among other requirements, the procedures must be consistent with any IBAC guidelines issued under section 64 of the *PD Act 2012 (Vic)*.³¹⁴ The procedures must also be 'readily available to the public and to each Member of the House.'³¹⁵

Parliament in consultation with IBAC has developed a set of procedures under section 65 of the *PD Act 2012 (Vic)*.³¹⁶ They are contained in a document entitled *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament*, which is on the Parliament's website.³¹⁷ The Presiding Officers have informed the Committee that '[i]nformation about the procedures is also provided to new members as part of their induction.'³¹⁸

The procedures are a guide to the relevant operation of the *PD Act 2012 (Vic)*. They cover the nature of improper conduct and detrimental action, the reporting and assessment of disclosures, the protection of confidentiality, the publishing of statistics on disclosures and the management of the welfare of disclosers and MPs.

The most important sections of the procedures for the present discussion concern the criteria applied by Presiding Officers in assessing whether a disclosure may be a protected disclosure and how they exercise their discretion to notify a protected disclosure about an MP to IBAC.³¹⁹

The procedures state:

To be a protected disclosure, a disclosure must satisfy the following criteria:

- Did a natural person (that is, an individual person rather than a corporation) make the disclosure?
- Does the disclosure relate to conduct of a Member of Parliament acting in his or her official capacity (including as a Minister)?
- Is the alleged improper conduct or detrimental action taken against any person in reprisal for the making of a protected disclosure by any person?

³¹⁴ *PD Act 2012 (Vic)* s 65(2)(c). IBAC has not issued any such guidelines: Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 13 January 2017.

³¹⁵ *PD Act 2012 (Vic)* s 65(3).

³¹⁶ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 13 January 2017.

³¹⁷ See <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³¹⁸ Hon Telmo Languiller MP, Speaker of the Legislative Assembly, and the Hon Bruce Atkinson MLC, President of the Legislative Council, Correspondence, 19 December 2016.

³¹⁹ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 7–8 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

- Does the information show or tend to show there is improper conduct or detrimental action?
- Does the complainant have reasonable grounds to believe that the information he or she has provided shows or tends to show there is improper conduct or detrimental action?³²⁰

There is a degree of ambiguity due to the way the last two bullet points are listed in the Procedures. It might imply that a complainant needs to satisfy the tests in *both* these bullet points. But they do not have to. Under the *PD Act 2012 (Vic)* a complainant need only satisfy one of these tests. That is, they need to demonstrate that the information shows, or tends to show, there is improper conduct or detrimental action *or* that s/he has a reasonable belief that it does.³²¹

As noted, even if a Presiding Officer considers that a disclosure may be a protected disclosure, s/he has a discretion whether to notify it to IBAC for assessment. Under the Procedures, a Presiding Officer exercising this discretion may take into account, but is not restricted to, the following issues:

- Is the disclosure trivial, frivolous or vexatious?
- Does the information provided show, or tend to show, support for the alleged conduct?
- If proven, would the disclosure amount to a failure to comply with the Code of Conduct provisions contained in the *Members of Parliament (Register of Interests) Act 1978 [(Vic)]*
- Is the matter the subject of any other investigation?
- Was there any delay in disclosing information and, if so, what explanation was given for such delay?³²²

The Presiding Officer ‘will use reasonable endeavours’ to decide within 28 days after receiving a disclosure whether to notify it to IBAC for assessment.³²³ If the Presiding Officer considers that a disclosure may be a protected disclosure, and decides to exercise the discretion to notify it to IBAC, s/he may communicate that decision to the discloser.³²⁴

If the Presiding Officer does not consider that the disclosure may be a protected disclosure—or decides not to notify a possible protected disclosure to IBAC—the Officer may inform the discloser of these circumstances.³²⁵

As explained earlier, the Procedures outline the process in relation to disclosures about a Presiding Officer. In an effort to avoid a conflict of interest, disclosures about a Presiding Officer are to be made to the Clerk or Deputy Clerk of the respective house of the Parliament of Victoria. The Clerk or Deputy Clerk

³²⁰ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 7 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³²¹ *PD Act 2012 (Vic)* s 9(1).

³²² Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 8 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

then refers the disclosure to the Deputy Presiding Officer for assessment, who assumes and exercises the powers of the Presiding Officer regarding disclosures about MPs.³²⁶

The Procedures also outline the processes if a Presiding Officer notifies a disclosure about an MP to IBAC and it determines that the disclosure is a protected disclosure complaint.³²⁷ IBAC will discuss with the Presiding Officer whether the MP who is the subject of the complaint should be informed.³²⁸ According to the Procedures, ‘if the matter is of significant public interest,’ the Presiding Officer may ‘make a statement in the House ... that the matter has been referred to IBAC.’³²⁹

If the complainant’s allegations are ‘clearly wrong or unsubstantiated’ the procedures provide that Parliament will ‘give its full support’ to the MP who is the subject of the complaint.³³⁰ If the matter has already been disclosed publicly, the Presiding Officer will also consider a request that s/he make a ‘statement of support setting out that the allegations were clearly wrong or unsubstantiated.’³³¹

Improving Parliament’s procedures on protected disclosures

As mentioned earlier, under the *PD Act 2012 (Vic)* the procedures are required to be ‘readily available to the public.’³³² While the procedures are on the Parliament’s website,³³³ navigation to them is difficult rather than straightforward and intuitive. A member of the public would have to find them by clicking on ‘Publications & Research,’ on the homepage and then ‘Protected Disclosure Act’—only the title of the legislation is given.³³⁴ Finally, the user must download a PDF file entitled *Protected Disclosure Procedures*.³³⁵

It is unlikely that most members of the public would draw a connection between the name of the legislation and Parliament’s procedures for whistleblowing complaints about MPs. The procedures should appear more prominently on the Parliament’s website under a heading such as ‘Information on protected

³²⁶ See the discussion of disclosures about Presiding Officers under the *PD Act 2012 (Vic)* in section 3.4.1 of this chapter.

³²⁷ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 8–9, 10 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³²⁸ Ibid 10. See also IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015).

³²⁹ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 10 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>. See also IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015).

³³⁰ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 10 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>. See also IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015).

³³¹ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) 10 <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>. See also IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015).

³³² *PD Act 2012 (Vic)* s 65(3).

³³³ Parliament of Victoria, *Protected Disclosure Act 2012: procedures for making a disclosure about a Member of Parliament* (July 2015) <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³³⁴ See, respectively, the following Parliament of Victoria website pages: <www.parliament.vic.gov.au/publications>, <www.parliament.vic.gov.au/publications/protected-disclosure-act-2012>.

³³⁵ See Parliament of Victoria, <www.parliament.vic.gov.au/images/Protected_Disclosure_Procedures_July_2015.pdf>.

disclosures (whistleblowing).’ The website should also be developed so that a global search of the website takes users to the procedures if key terms such as ‘complaints,’ ‘complaints about MPs’ and ‘whistleblower complaints’ are used.

The present web page on disclosures only provides a very limited explanation of the function of the *PD Act 2012* (Vic), who can make a disclosure, whose conduct can be the subject of a disclosure and how disclosures made. Moreover, it is only when the procedures document is opened that MPs are mentioned. The web page should provide better context for a member of the public in plain language. It should specifically mention the range of conduct and parliamentary officials, including MPs, that can be subject to a disclosure as well as how to make a disclosure. The web page should be reviewed and updated regularly, as needed. Parliament should also provide a downloadable factsheet on the *PD Act 2012* (Vic) and Parliament’s procedures. This should be available as a PDF and in a protected Word file. Parliament should also consider other accessible formats, such as audio.³³⁶

Any parliamentary factsheet should be produced in consultation with IBAC to ensure accuracy and to avoid any inconsistency with public information already produced by IBAC.³³⁷ The procedures themselves, and any factsheet, should be reviewed and updated every six months in consultation with IBAC. The procedures and factsheet should have an ‘Accurate at’ date so members of the public know the date at which any statements of law were accurate.

The present procedures have an issue date of July 2015. As a result, there are a number of legal inaccuracies in them. The procedures do not take account of important changes to the law in 2016, including amendments that allowed IBAC to investigate ‘corrupt conduct’ rather than ‘serious corrupt conduct,’³³⁸ that broadened the meaning of ‘corrupt conduct’ (including the recognition of MIPO)³³⁹ and that lowered the standards of proof.³⁴⁰ Members of the public are not presently receiving accurate information from the Parliament about the Victorian legislation relating to protected disclosures.

RECOMMENDATION 1: The Parliament of Victoria should make its *Protected Disclosure Act 2012* procedures for making a disclosure [whistleblower complaint] about a Member of Parliament readily accessible on its website. The information on the web page where the procedures can be downloaded should provide a clearer and fuller explanation of the Act and its application to disclosures about MPs and other officials.

³³⁶ See WC3’s (The World Wide Web Consortium) Web Content Accessibility Guidelines (WCAG) 2.0 <www.w3.org/TR/WCAG>; Government of Victoria, Accessibility statement (2017) <www.vic.gov.au/accessibility.html>; Department of Justice and Regulation (Victoria), Access to Justice Review (2016) <engage.vic.gov.au/accesstojustice>; Victorian Legal Assistance Forum (VLAF), Online Information Guidelines (2014) <www.victorialawfoundation.org.au/vlaf-online-legal-information-guidelines>; Parliament of Victoria, ‘Accessibility’ (12 April 2011) <www.parliament.vic.gov.au/accessibility>.

³³⁷ For example, IBAC’s factsheet: IBAC, *Information for Members of Parliament, electorate and parliamentary officers* (January 2015).

³³⁸ *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) ss 5, 8.

³³⁹ *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) ss 3(f), 4–5.

³⁴⁰ *Integrity and Accountability Legislation Amendment (A Stronger System) Act 2016* (Vic) ss 4(1), 4(4).

RECOMMENDATION 2: In consultation with IBAC, the Parliament should produce a plain-language factsheet on disclosures (whistleblower complaints) about MPs and other parliamentary officials. It should be available as a downloadable PDF on Parliament’s website. Parliament should also consider making it available in other accessible formats.

RECOMMENDATION 3: The Parliament of Victoria, in consultation with IBAC, should review its *Protected Disclosure Act 2012 procedures for making a disclosure* [whistleblower complaint] *about a Member of Parliament* and the factsheet every six months to ensure accuracy. They should both include an ‘Accurate at’ date.

IBAC guidelines on disclosures about MPs

Under section 64(1)–(2) of the *PD Act 2012 (Vic)*, IBAC *may* issue guidelines for procedures to ‘facilitate the making of disclosures’ to a Presiding Officer. Before making or amending any such guidelines, IBAC must have the ‘prior agreement of the relevant Presiding Officer.’³⁴¹ In addition, IBAC ‘must ensure its guidelines are readily available to the public, to the relevant Presiding Officer and to each Member of the relevant House of Parliament.’³⁴²

IBAC has informed the Committee that while it has not issued any guidelines regarding disclosures to Presiding Officers it was consulted by Parliament when it developed its protected disclosure procedures under section 65 of the *PD Act 2012 (Vic)*.³⁴³

3.4.2 The law in other Australian jurisdictions

The Committee has considered the law in other Australian jurisdictions regarding complaints and disclosures about MPs, with a focus on their principal whistleblowing protection legislation. Such a consideration allows for an assessment about how representative the Victorian laws are and what can be learnt from other Australian jurisdictions.

Commonwealth

A public interest disclosure cannot be made about a federal MP. They are not included in the list of ‘public officials’ about whom a disclosure can be made.³⁴⁴

³⁴¹ *PD Act 2012 (Vic)* s 64(3).

³⁴² *PD Act 2012 (Vic)* s 64(4).

³⁴³ Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 13 January 2017.

³⁴⁴ *Public Interest Disclosure Act 2013 (Cth)* s 69(1).

Australian Capital Territory

In the Australian Capital Territory, disclosures may be made about a ‘public sector entity.’³⁴⁵ This includes ‘a Legislative Assembly entity.’³⁴⁶ A ‘Legislative Assembly entity’ is defined to include members of the Legislative Assembly.³⁴⁷ In sum, disclosures can be made about wrongdoing by ACT MPs.

Under the *Public Interest Disclosure Act 2012* (ACT), anyone may make a public interest disclosure to a ‘disclosure officer’ or a Minister.³⁴⁸ If the discloser is a public official, they may disclose to their manager, a board member or another official in their organisation who can receive and act on disclosures.³⁴⁹

According to the *Public Interest Disclosure Procedures* of the Legislative Assembly of Australian Capital Territory (ACT), disclosures about MPs are generally assessed by the Clerk of the Assembly.³⁵⁰ The Clerk *must* make an assessment of the disclosure, *or s/he may*

- (if it concerns a possible breach of the Members’ Code of Conduct) refer it to the Speaker, who may refer it to the independent Commissioner for Standards for investigation, or
- refer it to another more appropriate entity for investigation, or
- ‘decide not to investigate it.’³⁵¹

Under the legislation and procedures, the Clerk may decide not to investigate on the basis of prescribed reasons. These are, in general terms:

- that the disclosure has been withdrawn
- that it is impracticable to investigate (because, for example, the complaint is an old one and/or the complainant has not rendered necessary assistance)
- it has already been investigated
- it would infringe upon the Assembly’s privileges
- there is a better way to handle the disclosable conduct described in the disclosure.³⁵²

³⁴⁵ *Public Interest Disclosure Act 2012* (ACT) s 9(1).

³⁴⁶ *Public Interest Disclosure Act 2012* (ACT) s 9(1)(b).

³⁴⁷ *Public Interest Disclosure Act 2012* (ACT) s 3 (Dictionary: definition of ‘Legislative Assembly entity’).

³⁴⁸ *Public Interest Disclosure Act 2012* (ACT) s 15(1)(a)–(b).

³⁴⁹ *Public Interest Disclosure Act 2012* (ACT) s 15(1)(c).

³⁵⁰ Legislative Assembly of the Australian Capital Territory, *Public interest disclosure procedures* (January 2014) 4, 8–10.

³⁵¹ Legislative Assembly of the Australian Capital Territory, *Public interest disclosure procedures* (January 2014) 8; *Public Interest Disclosure Act 2012* (ACT) ss 18–20. The Commissioner for Standards ‘investigates complaints about breaches, by MLAs [Members of the Legislative Assembly], of the Members’ Code of Conduct or the rules governing the registration or declaration of interests’ (Legislative Assembly of the Australian Capital Territory, *Complaining about a Member of the Legislative Assembly* (May 2015) 1). See also *Continuing resolution 5: Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory* (Resolution agreed by the Assembly 25 August 2005, and amended 24 October 2013); Standing Committee on Administration and Procedure (ACT), *Protocol for investigation of complaints against members* (adopted 24 March 2015).

³⁵² Legislative Assembly of the Australian Capital Territory, *Public interest disclosure procedures* (January 2014) 8–9; *Public Interest Disclosure Act 2012* (ACT) s 20.

If the Clerk is reasonably satisfied that the conduct described in the disclosure ‘involves, or could involve, an offence,’ s/he must refer it to the Chief Police Officer for the ACT.³⁵³

The Clerk therefore has a fairly broad discretion in relation to disclosures about MPs, but, in contrast to Victoria, it is explicitly limited by a range of *legislative* provisions—for example, regarding when s/he can decide not to investigate a public interest disclosure.³⁵⁴

New South Wales

Under the *Public Interest Disclosures Act 1994* (NSW), disclosures about the alleged wrongdoing of MPs may be made either to Parliament or directly to the Independent Commission Against Corruption (ICAC).³⁵⁵

Disclosure to parliament

Under the *Public Interest Disclosures Act 1994* (NSW), public officials and former public officials can make disclosures about the alleged wrongdoing of other public officials or former public officials.³⁵⁶ The definition of ‘public official’ includes an MP as a subject of disclosure.³⁵⁷

The *Public Interest Disclosures Act 1994* (NSW) requires disclosures about the conduct of MPs to be made to ‘the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council ...’³⁵⁸

In addition, the disclosure ‘must ... be made in accordance with any official procedure’ for reporting ‘allegations of corrupt conduct, maladministration or serious and substantial waste of public money by a member of Parliament.’³⁵⁹

That official procedure is contained in the public interest disclosures policies for the Legislative Assembly and the Legislative Council.³⁶⁰ They are effectively identical.³⁶¹ According to these policies, disclosures about Legislative Assembly members are to be made to the President or Clerk of the Legislative Assembly.³⁶² Disclosures about Legislative Council members are to be made to the President of the Legislative Council or the Clerk of the Parliaments.³⁶³

³⁵³ *Public Interest Disclosure Act 2012* (ACT) s 21.

³⁵⁴ *Public Interest Disclosure Act 2012* (ACT) ss 18–21.

³⁵⁵ In this section of the report, the Committee draws throughout on a response from the then New South Wales Acting Ombudsman, Professor John McMillan AO, to a question on notice from the Committee: Professor John McMillan AO, Correspondence, 18 May 2016.

³⁵⁶ *Public Interest Disclosures Act 1994* (NSW) s 4A, 8.

³⁵⁷ *Public Interest Disclosures Act 1994* (NSW) s 4A(1)(ii).

³⁵⁸ *Public Interest Disclosures Act 1994* (NSW) s 8(1)(c1).

³⁵⁹ *Public Interest Disclosures Act 1994* (NSW) s 14(2A).

³⁶⁰ New South Wales Legislative Assembly, *Public interest disclosures policy* (2011); New South Wales Legislative Council, *Public interest disclosures policy* (2011).

³⁶¹ New South Wales Legislative Assembly, *Public interest disclosures policy* (2011) 1; New South Wales Legislative Council, *Public interest disclosures policy* (2011) 1.

³⁶² New South Wales Legislative Assembly, *Public interest disclosures policy* (2011) 10.

³⁶³ New South Wales Legislative Council, *Public interest disclosures policy* (2011) 10.

The appropriate President or Clerk (known also as a ‘principal officer’) assesses whether the disclosure qualifies as a public interest disclosure.³⁶⁴ If the principal officer considers that it is a protected disclosure, s/he can decide ‘how to investigate its contents.’³⁶⁵ In doing so, the principal officer considers ‘a wide range of matters,’ which include:

- the seriousness of the allegations
- the nature of the conduct concerned, and
- the potential for detrimental action to be taken against the person making the disclosure.³⁶⁶

Disclosure to ICAC

Under section 10 of the *Public Interest Disclosures Act 1994* (NSW) a public official may also make a disclosure about an MP to ICAC in compliance with the *Independent Commission Against Corruption Act 1988* (NSW) (*ICAC Act 1988* (NSW)).

The key provision is section 10 of the *ICAC Act 1988* (NSW). Under this provision, anyone, including a public official, may make a complaint to IBAC about an MP, alleging ‘corrupt conduct.’ A public official making a disclosure in this way will be afforded the protections of the *Public Interest Disclosures Act 1994* (NSW).³⁶⁷

A public official who makes a disclosure under section 10 of the *Public Interest Disclosures Act 1994* (NSW) will *also* receive the protections provided in the *ICAC Act 1988* (NSW).³⁶⁸ These are similar to the whistleblower protections in the *Public Interest Disclosures Act 1994* (NSW).³⁶⁹ The protections provided in the *ICAC Act 1988* (NSW) have been described by the then Acting New South Wales Ombudsman, Professor John McMillan AO, as follows:

The protections available to a complainant are substantially the same as those available to a discloser under the PID Act [*Public Interest Disclosures Act 1994* (NSW)]. It is an offence to cause injury, loss or disadvantage to any person on account of his or her assisting, or giving evidence to the Commission [ICAC] (s 93, *ICAC Act* [1988 (NSW)]). It is also an offence for an employer to dismiss an employee, or prejudice an employee in their employment, on account of that employee assisting or giving evidence to the Commission (s 94, *ICAC Act* [1988 (NSW)]).³⁷⁰

³⁶⁴ New South Wales Legislative Assembly, *Public interest disclosures policy* (2011) 12; New South Wales Legislative Council, *Public interest disclosures policy* (2011) 12.

³⁶⁵ New South Wales Legislative Assembly, *Public interest disclosures policy* (2011) 12; New South Wales Legislative Council, *Public interest disclosures policy* (2011) 12.

³⁶⁶ New South Wales Legislative Assembly, *Public interest disclosures policy* (2011) 12; New South Wales Legislative Council, *Public interest disclosures policy* (2011) 12.

³⁶⁷ Professor John McMillan AO, Acting Ombudsman, New South Wales Ombudsman, Correspondence, 18 May 2016.

³⁶⁸ Professor John McMillan AO, Acting Ombudsman, New South Wales Ombudsman, Correspondence, 18 May 2016.

³⁶⁹ Professor John McMillan AO, Acting Ombudsman, New South Wales Ombudsman, Correspondence, 18 May 2016.

³⁷⁰ Professor John McMillan AO, Acting Ombudsman, New South Wales Ombudsman, Correspondence, 18 May 2016.

The Acting Ombudsman also noted that a complainant to ICAC is protected by the *Defamation Act 2005* (NSW), similar to protections found in standard whistleblower protection legislation.³⁷¹

In contrast, in Victoria, a person who complains about an MP directly to IBAC will not be given protection. They will only be given protection if they make a disclosure to a Presiding Officer of the relevant house and that Officer exercises a discretion to notify it to IBAC as a potential protected disclosure complaint.

Northern Territory

The system in the Northern Territory is similar to Victoria's. A disclosure about a Member of the Legislative Assembly must be made to the Speaker.³⁷² The Speaker then has a discretion whether to refer the disclosure to the Commissioner for Public Interest Disclosures ('the Commissioner'), who will assess the disclosure and determine, among other options, whether to investigate it.³⁷³ In contrast, if a disclosure about another 'public officer' is made to head of a public body, it must be referred to the Commissioner within 14 days after its receipt.³⁷⁴

South Australia

The law relating to disclosures about MPs in South Australia is uncertain. The *Whistleblowers Protection Act 1993* (SA) says that 'public interest information' means information that tends to show that an 'adult person (whether or not a public officer)' is or has been involved in:

- an illegal activity
- misuse of public money
- substantial mismanagement of public resources
- conduct that causes a substantial risk to public health, safety or the environment, or,
- that a public officer is guilty of maladministration.³⁷⁵

MPs qualify as subjects of disclosure for all these kinds of wrongdoing as an 'adult person (whether or not a public officer)' or as a 'public officer.'³⁷⁶ Lander observed in his review of the *Whistleblower Protection Act 1993* (SA) that 'Public officers include anyone employed by a public authority and some persons who are

³⁷¹ Professor John McMillan AO, Acting Ombudsman, New South Wales Ombudsman, Correspondence, 18 May 2016.

³⁷² *Public Interest Disclosure Act* (NT) ss 4 (definition of 'MLA'), 7(1)(a), 8(b), 10(1), 11(1)(a); Commissioner for Public Interest Disclosures, *Guidelines issued by the Commissioner for Public Interest Disclosures for the purposes of section 47 of the Public Interest Disclosure Act* (September 2010) 9.

³⁷³ *Public Interest Disclosure Act* (NT) ss 12(1), 21; Commissioner for Public Interest Disclosures, *Guidelines issued by the Commissioner for Public Interest Disclosures for the purposes of section 47 of the Public Interest Disclosure Act* (September 2010) 14–20.

³⁷⁴ *Public Interest Disclosure Act* (NT) s 12(2).

³⁷⁵ *Whistleblowers Protection Act 1993* (SA) s 4(1) (definition of 'public interest information').

³⁷⁶ *Whistleblowers Protection Act 1993* (SA) s 4(1) (definition of 'public officer').

engaged in the public sector but not employed, e.g. the Governor and a Member of Parliament.³⁷⁷ He suggested that the '[t]he legislative intention is to catch all people engaged in public administration in South Australia.'³⁷⁸

The Act further provides that, to be protected, the discloser must (generally) disclose to an appropriate authority.³⁷⁹ Section 5(4)(f) of the *Whistleblowers Protection Act 1993* (SA) states, in part, that

... a disclosure of public interest information is made to an appropriate authority if it is made ... where the information relates to a member of Parliament—to the Presiding Officer of the House of Parliament to which the member belongs.

While it is clear that MPs can be subjects of disclosure—and that disclosures may appropriately made to the relevant Presiding Officer—it is unclear what obligations, if any, that Officer has in relation to disclosures. For example, do they have any obligations to report the disclosure to another authority, or to assess or investigate it themselves?³⁸⁰

It should be noted that both the Independent Commissioner Against Corruption and the Office of Public Integrity have jurisdiction under the *Independent Commissioner Against Corruption Act 2012* (SA) ('*ICAC Act 2012* (SA)') regarding complaints about MPs as public officers.³⁸¹ It is beyond the scope of this report to examine the relevant provisions of this Act.

Queensland

Under the *Public Interest Disclosure Act 2010* (Qld), the law applying to disclosures about MPs is essentially the same as for any other disclosure.³⁸² A disclosure may be made to:

- the public sector entity that is the subject of the disclosure
- another public sector entity that can investigate the particular matter
- an MP
- (in strictly limited circumstances) a journalist.³⁸³

³⁷⁷ Bruce Lander, *A review of the Whistleblowers Protection Act 1993* (SA) (2014) 18.

³⁷⁸ *Ibid.*

³⁷⁹ *Whistleblowers Protection Act 1993* (SA) s 5(1)–(2)—but see s 5(3), which provides, in part, that 'this is *not* intended to suggest that an appropriate authority is the only person to whom a disclosure of public interest information may be reasonably and appropriately made' (emphasis added).

³⁸⁰ Bruce Lander, *A review of the Whistleblowers Protection Act 1993* (SA) (2014) 36.

³⁸¹ Under the Act, complaints can be made about public officers, which includes MPs: *ICAC Act 2012* (SA) s 4 (definition of 'public officer'). See also *ICAC Act 2012* (SA) ss 5, 7, 17, 19–20, div 2 (especially s 57 on victimisation) and the Independent Commissioner Against Corruption and Office of Public Integrity (SA) website: <icac.sa.gov.au>; ICAC (SA), *Directions and guidelines* (June 2015).

³⁸² Queensland Parliamentary Library and Research Service, *Research brief: protected disclosures against Queensland Members of Parliament* (16 February 2017) 2. The Committee draws on this research throughout this section of the report.

³⁸³ Crime and Misconduct Commission, Queensland Ombudsman and the Public Service Commission, *Managing a public interest disclosure: a guide for individuals working in the public sector* (2011) 1, 8–10; *Public Interest Disclosure Act 2010* (Qld) ss 5–7, 12–15, 17, 20, 34–5. See also Queensland Parliamentary Service, *Public interest disclosure policy* (October 2016); Queensland Parliamentary Committees, *Public interest disclosures to Parliamentary Committees policy* (December 2016) 1.

Under the Queensland system, public sector entities are the proper authorities to investigate a disclosure and must establish 'reasonable procedures' for the handling and investigation of disclosures.³⁸⁴ MPs who have received a disclosure do not have the power to investigate it but can refer it to an appropriate public sector entity for investigation. They can also raise it as an issue in Parliament.³⁸⁵

In addition to the general system described above, the Queensland Parliamentary Service has a public interest disclosure policy that applies to disclosures about MPs (among other persons) made by Service employees and members of the public.³⁸⁶

The policy prescribes a range of people who can receive disclosures from Service employees, including the Service's PID (Public Interest Disclosure) Coordinator.³⁸⁷ Disclosures can also be made to the Crime and Conduct Commission (on misconduct), Ombudsman (on maladministration), an MP or a journalist, as noted above.³⁸⁸ Members of the public may make a disclosure to the Clerk of the Parliament directly.³⁸⁹ In strictly limited circumstances, one can disclose to a journalist.³⁹⁰

A disclosure made to the Queensland Parliamentary Service is assessed by the PID Coordinator. The Coordinator assesses whether the disclosure qualifies as a public interest disclosure and if investigation is warranted. The Coordinator then makes recommendations, including reasons for any recommended investigation, to the Clerk. Disclosers can have decisions made about their disclosure, and its management, reviewed internally and externally (such as by the Public Service Commission, Queensland Ombudsman and the Crime and Conduct Commission).³⁹¹

Tasmania

Disclosures can be made about Tasmanian MPs as public officers under the *Public Interest Disclosures Act 2002* (Tas).³⁹² Disclosures about Members of the House of Assembly must be made to the Speaker, while disclosures about Members

³⁸⁴ *Public Interest Disclosure Act 2010* (Qld) ss 6–7, 15, 28, 30 (when a public sector entity 'may decide not to investigate or deal with a public interest disclosure'), 31 (referrals of disclosures); Crime and Misconduct Commission, Queensland Ombudsman and the Public Service Commission, *Managing a public interest disclosure: a guide for individuals working in the public sector* (2011) 1, 8–10. See also, Queensland Ombudsman, *Public interest disclosure standard no 1* (1 January 2013).

³⁸⁵ *Public Interest Disclosure Act 2010* (Qld) ss 34–5 (under s 35, the Act 'does not limit the immunities, powers, privileges or rights of the Legislative Assembly or its members or committees in relation to a public interest disclosure made to a member of the Legislative Assembly,' and, under subsection (2), such disclosures include 'a purported public interest disclosure').

³⁸⁶ Queensland Parliamentary Service, *Public interest disclosure policy* (October 2016).

³⁸⁷ *Ibid* 4.

³⁸⁸ *Ibid* 4.

³⁸⁹ *Ibid* 4.

³⁹⁰ *Public Interest Disclosure Act 2010* (Qld) pt 4 and s 20 (disclosure to a journalist).

³⁹¹ Queensland Parliamentary Service, *Public interest disclosure policy* (October 2016) 5.

³⁹² *Public Interest Disclosures Act 2002* (Tas) ss 4(2)(a), 6.

of the Legislative Council must be made to the President.³⁹³ The Speaker or the President may refer a disclosure to the Ombudsman.³⁹⁴ Thus, the discretion is almost identical to that of a Presiding Officer in Victoria.

If the Ombudsman determines that it is a public interest disclosure s/he must investigate it.³⁹⁵ The Ombudsman must report any findings from an investigation to the relevant Presiding Officer.³⁹⁶

Western Australia

Under section 5(3)(f) of the *Public Interest Disclosure Act 2003* (WA), a disclosure about an MP must be made to ‘the Presiding Officer of the House of Parliament to which the member belongs.’ The Presiding Officer in this regard is classed as a proper authority to receive the disclosure.³⁹⁷ Under the Western Australian system, generally proper authorities who have received a disclosure must, if the disclosure ‘relates’ to them, investigate it.³⁹⁸ However, Presiding Officers are *not* bound by this obligation to investigate. They are excluded from important obligations, outlined in sections 8–10, which apply to most proper authorities who have received a disclosure.³⁹⁹

This exclusion is achieved in an indirect fashion by section 7 of the *Public Interest Disclosure Act 2003* (WA). Sections 8–10 outline various obligations of proper authorities who have received disclosures, including the obligation to investigate unless there is an authorised ground to refuse or discontinue an investigation. But section 7 excludes the application of these obligations to a Presiding Officer. It does this by excluding a Presiding Officer from the definition of ‘proper authority’ for the purposes of sections 8–10. Section 7 provides, relevantly that:

[i]n sections 8, 9 and 10—

proper authority means a person to whom an appropriate disclosure of public interest information has been made ... *except that it does not include ... the Presiding Officer of a House of Parliament.* [emphasis added]

The result, it appears, is that a Presiding Officer has a discretion whether to investigate a disclosure s/he has received. Further, the Western Australian Parliament does not have—in contrast to a number of other Australian jurisdictions—specific guidelines or procedures relating to disclosures about MPs.⁴⁰⁰

³⁹³ *Public Interest Disclosures Act 2002* (Tas) s 7(4)(a)–(b). See also House of Assembly (Tasmania), *Public Interest Disclosures Act 2002: Procedures to be followed by the House of Assembly* (undated); Legislative Council (Tasmania), *Public Interest Disclosures Act: procedures to be followed by the Legislative Council* (undated).

³⁹⁴ *Public Interest Disclosures Act 2002* (Tas) s 79.

³⁹⁵ *Public Interest Disclosures Act 2002* (Tas) s 79, 81.

³⁹⁶ *Public Interest Disclosures Act 2002* (Tas) s 83.

³⁹⁷ *Public Interest Disclosure Act 2003* (WA) s 5(1).

³⁹⁸ *Public Interest Disclosure Act 2003* (WA) ss 5, 8–10 (but, under s 8(2), ‘a proper authority may refuse to investigate, or may discontinue the investigation of a matter’ on specified grounds).

³⁹⁹ *Public Interest Disclosure Act 2003* (WA) ss 7, 8–10.

⁴⁰⁰ Ms Janet Hocken, Librarian, Parliamentary Library, Parliament of Western Australia, Correspondence, 13 February 2017.

Is change needed?

The Committee received evidence that the *PD Act 2012 (Vic)* needs to be amended so that disclosures about MPs are treated consistently with disclosures about other public bodies and public officers.

Dr Suelette Dreyfus, for example, has made a number of criticisms of the current law. In her view, treating disclosures about MPs differently from disclosures about other officials, could undermine trust in the political system. In other words, the current law could undermine trust that any disclosure, regardless of who is the subject of it, will be assessed independently and impartially, and *seen* to be assessed in this fashion.⁴⁰¹ As a practical matter, Dr Dreyfus argues that whistleblowers are less likely to come forward if they think the matter will be dealt with in-house:

The possible internal loop created by referring disclosures involving members of parliament to the Presiding Officers of Parliament (who subsequently have no legislative obligation to refer the disclosure to IBAC) is concerning. Transparency is integral to all disclosure programs. Without the trust that a disclosure will be referred to an independent and transparent agency (rather than staying in the parliamentary realm), potential disclosers may be less willing to come forward with disclosures of potential corruption by ministers [*sic*] of parliament.⁴⁰²

In a submission to a federal inquiry into whistleblowing, Dr Dreyfus emphasised that corruption and wrongdoing can take place at all levels of the political system, including in parliament:

Whilst Australians place (rightly) great faith and trust and faith in their elected officials, there has been and always will be examples of corruption, maladministration and wrongdoing at all levels of government, including those perpetrated by elected officials. A properly enacted public interest disclosure bill should account for this possibility.⁴⁰³

The Law Institute of Victoria has criticised the procedure for handling disclosures about MPs in similar terms. In evidence to the Committee's review of the *Integrity and Accountability Legislation Amendment (A Stronger System) Bill 2015 (Vic)*, the Institute argued that

⁴⁰¹ Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

⁴⁰² Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

⁴⁰³ Dr Suelette Dreyfus, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs's Inquiry into the Public Interest Disclosure Bill 2013 [Cth], 19 April 2013. See also Vicki Dunne MLA (then Speaker of the ACT Legislative Assembly), 'Parliamentary integrity: an oxymoron?' A paper presented at the 45th Presiding Officers and Clerks Conference, Samoa, July 2014.

[i]n our view, the exceptions on reporting for disclosures about members of Parliament should be amended so that there is consistency and integrity in the IBAC scheme dealing with all protected disclosures. This will ensure public confidence in the scheme, rather than Members of Parliament making decisions about their colleagues.⁴⁰⁴

However, Victoria's Proust Review, completed in 2009, concluded that 'rigorous scrutiny' of MPs' conduct was not incompatible with the Westminster system.⁴⁰⁵ This is demonstrated under the present Westminster system in Victoria, in which a complaint may be made about the alleged wrongdoing of an MP—either directly to IBAC (regarding corrupt conduct) or via a disclosure to a Presiding Officer of the Parliament of Victoria (regarding the broader category of improper conduct).

3.4.3 The Committee's view

While there are variations in how disclosures about MPs are handled in Australia, there are some common themes. Generally, disclosures about MPs are treated differently from other subjects of disclosure.

Disclosures are generally made to the Presiding Officers or Clerks of the respective parliaments and dealt with by them. These officials often have a discretion whether to pass a disclosure on to a second-tier investigative agency such as a commissioner or ombudsman. Commonly, the Presiding Officer's, or another official's, discretion is subject to internal guidelines or procedures. In a number of cases, complaints about MPs can also be made to anti-corruption or other integrity agencies, but the discloser will not usually gain the wideranging protections of whistleblower protection legislation.⁴⁰⁶

Thus, the legislative regime for disclosures about MPs in Victoria is not unusual.

The main arguments for maintaining the current law on disclosures about MPs, accepted by the Committee, are based on the doctrines of the sovereignty and independence of parliament and the separation of powers within the Westminster system of representative democracy.⁴⁰⁷ In the Committee's view, it is for parliament to keep its own house in order and discipline its own members.⁴⁰⁸

⁴⁰⁴ Ms Belinda Wilson, Vice President, Law Institute of Victoria, Submission to the IBAC Committee's inquiry into the Victorian integrity system, 13 January 2016. See also Ms Katie Miller, President, Law Institute of Victoria, Closed Hearing, Melbourne, 23 November 2015; Law Institute of Victoria, *Strengthening Victoria's integrity regime: position paper* (2015) 9; Law Institute of Victoria, Integrity Legislation Amendment Bill 2014: submission to the Attorney-General (2014).

⁴⁰⁵ *Proust review*, xiv (see also 12).

⁴⁰⁶ New South Wales is a partial exception in that disclosers to ICAC under section 10 of the *Public Interest Disclosures Act 1994* (NSW) can get the benefit of whistleblower protection.

⁴⁰⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 14 November 2012, 4895 (Andrew McIntosh, Minister Responsible for the Establishment of an Anti-corruption Commission); Victoria, *Parliamentary Debates*, Legislative Assembly, 31 August 2000, 389 (Rob Hulls, Attorney-General) (at the time of the introduction of the Whistleblowers Protection Bill 2000 (Vic)).

⁴⁰⁸ Law Reform Committee, Parliament of Victoria, *Review of the Members of Parliament (Register of Interests) Act 1978* (2009) 98; *Proust review* 26.

The arguments for maintaining the status quo include a mixture of theoretical and pragmatic points. The following are the main arguments for preserving the present discretion of Presiding Officers in relation to disclosures about MPs:

- If it were mandatory for Presiding Officers to notify potential protected disclosures to IBAC, the independence of parliament would be infringed.
- Under the institution of representative democracy, MPs are politically accountable.⁴⁰⁹
- Parliament has adequate policies, procedures, rules and institutions to regulate and discipline MPs—‘self-regulation’ works.⁴¹⁰ In particular, the scheme for handling disclosures about MPs should be evaluated within the context of these forms of regulation.

The Committee considers that changing the current system by making the notification of potential protected disclosures to IBAC mandatory could undermine the sovereignty and independence of parliament and interfere with the doctrine of the separation of powers. Parliament needs to maintain its independence and exercise its hard-won powers, privileges, procedures and rules to hold the government to account and, as necessary, to discipline its members.⁴¹¹

Further, MPs are politically accountable for their actions. They must give an account of themselves in parliament, be subject to its scrutiny and answer to voters at the ballot box. If they are ministers, they are subject to the doctrine of ministerial responsibility and may resign due to their own wrongdoing or that of the department they are responsible for.⁴¹²

Moreover, Parliament’s self-regulation works.⁴¹³ There is a wide range of policies, procedures, rules and institutions to hold MPs to account. These include regulations in relation to entitlements and disclosures of financial and other interests and the avoidance of conflicts of interest as well as standing orders and sanctions for contempt of parliament and other breaches.⁴¹⁴ MPs are also subject, like other citizens, to an array of ordinary laws that are relevant to their official functions.

The Committee considers that the present system for making and handling disclosures about the alleged improper conduct of MPs via the Presiding Officers does not need to be changed. The Presiding Officers’ discretion to pass a possible protected disclosure on to an integrity agency such as IBAC is not unusual in Australian jurisdictions and reflects fundamental tenets of the Westminster system.

⁴⁰⁹ *Proust review* 26.

⁴¹⁰ On self-regulation within the Parliament of Victoria, see Law Reform Committee, Parliament of Victoria, *Review of the Members of Parliament (Register of Interests) Act 1978* (2009) 101–2.

⁴¹¹ Bruce McClintock, *Independent review of the Independent Commission Against Corruption Act 1988* (NSW Government, January 2005) 75–82, 92–4; *Proust review* 26; Law Reform Committee (Victoria), *Review of the Members of Parliament (Register of Interests) Act 1978* (December 2009) 98.

⁴¹² Law Reform Committee, Parliament of Victoria, *Review of the Members of Parliament (Register of Interests) Act 1978* (2009) 7–9; *Proust review* 26; Owen Hughes, *Australian Politics* (Macmillan Education Australia, 3rd ed, 1998) 298.

⁴¹³ Law Reform Committee, Parliament of Victoria, *Review of the Members of Parliament (Register of Interests) Act 1978* (2009) 101–2.

⁴¹⁴ *Ibid* Chapter 1 (especially 2–3), Chapter 2 (especially 9–10), Chapter 3 (especially 26–27), Chapter 4, Chapter 5 (especially 107–17).

However, the Committee considers that when a complaint about an MP is made directly to IBAC, IBAC should advise the complainant that it will not be able to be assessed for whistleblower protection. IBAC should further advise the complainant that if they want to be considered for whistleblower protection, they must make a disclosure to a relevant Presiding Officer in accordance with the *PD Act 2012 (Vic)*.

FINDING 3: The Victorian Parliament's system for handling disclosures in accordance with the *PD Act 2012 (Vic)* should remain as it is. In particular, the present discretion of a Presiding Officer to notify a possible protected disclosure to IBAC does not need to be changed.

RECOMMENDATION 4: That IBAC advise a person who has made a complaint directly to them about an MP that if they want protection under the *PD Act 2012 (Vic)* they must make a disclosure to the relevant Presiding Officer.

3.5 Scope of public bodies

The Committee has received evidence that there are gaps in Victoria's whistleblowing protection regime in that some non-public sector organisations that are effectively performing a public function are excluded from it.⁴¹⁵ This is an important issue given the pervasiveness of overlaps between the public and private sectors in Victoria, including public-private partnerships, complex government funding arrangements and the 'contracting out' of a range of public-oriented services.⁴¹⁶

3.5.1 Arguments for expanding the definition of 'public body'

Some submissions argued that this means disclosures about a range of improper conduct within these kinds of organisations cannot be disclosed. This could result in a whistleblower in such an organisation missing out on the protection of the *PD Act 2012 (Vic)*. Equally importantly, this might mean that improper conduct is not identified, investigated, brought to book and remedied.⁴¹⁷

⁴¹⁵ Mr Max Jackson and Ms Margaret Ryan, Partners, JacksonRyan Partners, Submission, 27 April 2016; Ms Karen Burgess, Submission, 27 April 2016; Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016.

⁴¹⁶ See, for example, Bruce McClintock, *Independent review of the Independent Commission Against Corruption Act 1988* (NSW Government, January 2005) 67–8; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Karen Burgess, Submission, 27 April 2016.

⁴¹⁷ Ms Karen Burgess, Submission, 27 April 2016; Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Mr Max Jackson and Ms Margaret Ryan, Partners, JacksonRyan Partners, Submission, 27 April 2016. See also VCOSS (Victorian Council of Social Service), *A more accountable Victoria: VCOSS response to discussion papers on VAGO and the Victorian Ombudsman* (June 2016) (response to the Victorian Department of Premier and Cabinet's *Community Consultation on IBAC, the Victorian Ombudsman and the Auditor-General* (DPC Consultation)): <www.dpc.vic.gov.au/index.php/news-publications/ibac-discussion-paper>; Accountability Round Table, Submission to the DPC Consultation, 19 May 2016; United Voices for People with Disabilities, submission to DPC Consultation, 20 May 2016; Joint submission from the Auditor-General, the Victorian Ombudsman and IBAC to the DPC Consultation, 20 May 2016.

These issues have been raised, in particular, in relation to the accountability for improper conduct in the disability sector in Victoria.⁴¹⁸ One whistleblower who worked with a non-government disability organisation, argued that the *PD Act 2012 (Vic)* should be extended to a range of organisations receiving public funding. It is valuable to quote from her testimony at length:

... I have become aware of the problems in the not-for-profit, Non-Government Organisations (NGOs) and charity organisations that accept public money by way of bequests, public donations, company fundraising, public and private funding. The Victorian Government supplies large amounts of public money to these organisations and therefore ... the definitions of the Protected Disclosure Act (Vic) 2012 should be widened to include not-for-profit, non-government and charity organisations. ...

It seems strange to me that NGOs, which accept large amounts of public money are able to avoid being scrutinised in light of corruption and fraud allegations. I feel this is entirely inadequate given the Act is supposed to be protecting the interests of the public, which is a much wider concept currently not covered by the Act. ...

These greater protections will assist workers to come forward sometimes on behalf of vulnerable people with a disability and clients, who, just [as] in my case, were not able to talk for themselves.⁴¹⁹

In this regard, however, it is important to remember that the *PD Act 2012 (Vic)* is a whistleblowing protection regime for the *public* sector. It does not cover private bodies, except by their connection with the public sector.⁴²⁰ For jurisdictional reasons—and due to the difficulty of combining provisions for public and private bodies in any comprehensive fashion in a single whistleblower protection Act—the Committee considers that the *PD Act 2012 (Vic)* should remain focused on the public sector.⁴²¹

Nevertheless, the *PD Act 2012 (Vic)* should cover all organisations which are effectively performing a public function.

418 Ms Karen Burgess, Submission, 27 April 2016. See also Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Mr Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Victorian Ombudsman, *Annual report (2016)* 4–5; Victorian Ombudsman, *Reports and investigations of allegations of abuse in the disability sector: Phase 2—incident reporting* (December 2015); VCOSS (Victorian Council of Social Service), *A more accountable Victoria: VCOSS response to discussion papers on VAGO and the Victorian Ombudsman* (June 2016); Mr Max Jackson and Ms Margaret Ryan, JacksonRyan Partners, Submission, 27 April 2016; United Voices for People with Disabilities, submission to DPC Consultation, 20 May 2016.

419 Ms Karen Burgess, Submission, 27 April 2016. See also Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman and Mr Evan Westmore, Assistant Director, Strategic Investigations, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; VCOSS, *A more accountable Victoria: VCOSS response to discussion papers on VAGO and the Victorian Ombudsman* (June 2016); Joint submission from the Auditor-General, the Victorian Ombudsman and IBAC to the DPC Consultation, 20 May 2016; Mr Max Jackson and Ms Margaret Ryan, JacksonRyan Partners, Submission, 27 April 2016; United Voices for People with Disabilities, submission to DPC Consultation, 20 May 2016.

420 *PD Act 2012 (Vic)* s 6.

421 Brown and Latimer, *Symbols or substance?* 244–8.

3.5.2 Current Victorian law

Under current Victorian law, a person can disclose about a public body or public officer, or someone adversely affecting the actions of that body or officer.⁴²² As discussed in Chapter 2, determining who is a public body or public officer is a complex task requiring attention to a number of legislative provisions. The detailed discussion in that chapter will not be revisited here. For the purposes of the present discussion, the important point is that a wide range of public bodies and officers come within the *PD Act 2012* (Vic)—it is not a narrow category.

For example, under the *PD Act 2012* (Vic) the categories of public bodies and officers include public sector bodies such as government departments, offices and public servants; organisations created by legislation for a public purpose; local councils; Victoria Police personnel; MPs, Ministers and related advisers and officers; judicial officers and statutory office-holders; and university employees and teachers.⁴²³ The breadth is evident in the fact that ‘public officer’ includes ‘a person employed in any capacity or holding any office in the public sector.’⁴²⁴

Moreover, the *PD Act 2012* (Vic) already contains provisions that may be used to extend its operation to organisations which, though not in the public sector, are effectively performing a public function.

3.5.3 Prescribed public bodies and bodies performing public functions

First, under section 6(c) of the *PD Act 2012* (Vic), a public body includes ‘any other body or entity prescribed for the purposes of this definition.’ Under this provision, a range of organisations could be prescribed as public bodies. And employees, for instance, within those organisations would be able to blow the whistle on improper conduct.

Second, the definition of ‘public body’ under the *PD Act 2012* (Vic),⁴²⁵ in conjunction with definitions in the *IBAC Act 2011* (Vic), includes ‘a body that is *performing a public function* on behalf of the State or a public body or public officer (*whether under contract or otherwise*).’⁴²⁶ Similarly, a ‘public officer’ includes ‘a person that is performing a public function on behalf the State or a public body or public officer (*whether under contract or otherwise*).’⁴²⁷ These broad provisions can be invoked to extend the operation of the *PD Act 2012* (Vic) to a wide range of non-government organisations performing public functions.

⁴²² *PD Act 2012* (Vic) ss 4, 6.

⁴²³ See the discussion of the meaning of ‘public body’ and ‘public officer,’ and accompanying citations, in section 2.3.2 in Chapter 2 of this report.

⁴²⁴ *IBAC Act 2011* (Vic) s 6; *Public Administration Act 2004* (Vic) s 4(1).

⁴²⁵ *PD Act 2012* (Vic) s 6.

⁴²⁶ *IBAC Act 2011* (Vic) s 6(1) (definition of ‘public body’—emphasis added).

⁴²⁷ *IBAC Act 2011* (Vic) s 6(1) (definition of ‘public officer’).

The breadth of the ‘public function’ provision means it is a better provision to rely on to extend the coverage of whistleblower protection than section 6(c) of the *PD Act 2012 (Vic)*, which involves prescribing particular organisations as public bodies.

While using section 6(c) of the *PD Act 2012 (Vic)* to name specific organisations as public bodies has the virtue of precision—one can ensure that particular organisations are covered, for example—it is unlikely to be a systematic solution to the problem of gaps in coverage. In contrast, the ‘public function’ provision (section 6(1) of the *IBAC Act 2011 (Vic)*) brings a wide range of organisations under the Act in a fashion that is coherently linked to the public-sector orientation of the Victorian system.

Section 6(3) of the *IBAC Act 2011 (Vic)* lists a range of factors that ‘may be taken into account’ when determining whether a public body or officer’s function is a public one. It is important to note that while the listed factors *may* be taken into account they are not mandatory. This also means that a wide range of other factors, not listed, can be taken into account in determining whether the function is a public one. Section 6(3) states that the factors that may be taken into account *include*:

- (a) that the function is conferred on the body or person by or under a statutory provision
- (b) that the function is of a regulatory nature;
- (c) that the body that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

Section 6(4) of the *IBAC Act 2011 (Vic)* clarifies that the list of factors is not exhaustive, and that any particular factor, or combination of factors, listed in the provision is not conclusive of whether a body is performing a public function:

To avoid doubt—

- (a) the factors listed in subsection (3) are not exhaustive of the factors that may be taken into account in determining if a function is a public function; and
- (b) the fact that one or more of the factors set out in subsection (3) are present does not necessarily result in the function being a public function.

Section 6(5) of the *IBAC Act 2011 (Vic)* provides that ‘[t]he fact that a body or person receives public funds does not of itself make that body or person a public body or person for the purposes of ... [the Act].’

In sum, the *PD Act 2012 (Vic)*, together with the *IBAC Act 2011 (Vic)*, provides broad coverage of public bodies, and of other organisations and persons performing public functions.

3.5.4 Bodies receiving substantial public funds

However, to ensure watertight coverage of such bodies—and in conformity with the principle that public resources be used in the public interest—section 6 of the *IBAC Act 2011* (Vic) should be amended to add that all bodies receiving ‘substantial’ public funds are public bodies.⁴²⁸ The term ‘substantial’ could be defined by Act or regulation or left to be interpreted according to its ordinary meaning.

Ensuring that bodies receiving substantial funds are included as public bodies in Victoria’s protected disclosure regime has been supported in evidence from the Victorian Ombudsman, Ms Deborah Glass OBE. This view was also supported in other evidence received by the Committee.⁴²⁹

RECOMMENDATION 5: That the Victorian Government amend section 6 of the *IBAC Act 2011* (Vic) to provide that a body that receives substantial public funds is a public body for the purposes of the Act.

The Ombudsman has also argued that the definition of a public body in the relevant legislation is complex and inconsistent across integrity bodies such as her office, IBAC and the Auditor-General. She has submitted that the definition ought to be simplified and made consistent across the main integrity bodies in Victoria.⁴³⁰ The Committee has concluded that the Government should give consideration to simplifying the definition of ‘public body’ and making it consistent across integrity agencies in Victoria.

Further, given that IBAC refers many protected disclosure complaints back to the Victorian Ombudsman, the Committee considers it essential that the Victorian Ombudsman have adequate jurisdiction to investigate protected disclosure complaints relating to bodies receiving substantial public funds.⁴³¹

RECOMMENDATION 6: That the Victorian Government consult with the Victorian Ombudsman, IBAC and the Auditor-General with regard to simplifying the definition of ‘public body,’ and making it consistent across the relevant Victorian legislation.

⁴²⁸ For example, government funding of the non-government disability sector in Victoria amounted to more than one billion dollars in 2015/16: Hon Jill Hennessy MP, Minister for Health and Minister for Ambulance Services, Correspondence, 12 February 2017.

⁴²⁹ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Mr Deborah Glass OBE, Ombudsman and Mr Evan Westmore, Assistant Director, Strategic Investigations, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016. See also Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Joint submission from the Auditor-General, the Victorian Ombudsman and IBAC to the DPC Consultation, 20 May 2016.

⁴³⁰ Ms Deborah Glass OBE, Ombudsman, Victorian Ombudsman, Submission, 17 May 2016; Mr Deborah Glass OBE, Ombudsman and Mr Evan Westmore, Assistant Director, Strategic Investigations, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016. See also Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 24 October 2016; Joint submission from the Auditor-General, the Victorian Ombudsman and IBAC to the DPC Consultation, 20 May 2016.

⁴³¹ Ms Deborah Glass OBE, Ombudsman, Victorian Ombudsman, Submission, 17 May 2016; Mr Deborah Glass OBE, Ombudsman and Mr Evan Westmore, Assistant Director, Strategic Investigations, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Joint submission from the Auditor-General, the Victorian Ombudsman and IBAC to the DPC Consultation (20 May 2016).

RECOMMENDATION 7: That the Victorian Government give the Victorian Ombudsman adequate jurisdiction under the *Ombudsman Act 1973 (Vic)* to investigate protected disclosure complaints with respect to bodies who receive substantial public funds.

3.6 Conclusion

This chapter has examined concerns regarding the range of recognised disclosers and what they may disclose about, including how disclosures about MPs are handled and whether the definition of public bodies in the *PD Act 2012 (Vic)* needs to be expanded.

The Committee has determined that there is no need to restrict the range of disclosers. The current law under which anyone can make a disclosure has the virtue of simplicity and meets best-practice principles regarding the effective identification, exposure and addressing of improper conduct in the public sector.

The Committee has also concluded that maladministration as a category of wrongdoing does not need to be added to the existing kinds of improper conduct, which include MIPO and breaches of trust. Maladministration is already covered by the *PD Act 2012 (Vic)* in substance if not by name.

Regarding the handling of disclosures about MPs, the Committee has recommended improvements to the Parliament of Victoria's protected disclosure procedures, particularly regarding their accessibility to members of the public, as required under the *PD Act 2012 (Vic)*. However, it has found that the present discretion of Presiding Officers to notify a disclosure to IBAC is satisfactory, reflecting as it does the Westminster traditions of representative democracy, responsible government and the independence of parliament to control and discipline its own members.

The range of public bodies that can be the subject of a disclosure is already broad under the *PD Act 2012 (Vic)*, and broader than some might think. However, to ensure that the *PD Act 2012 (Vic)* encompasses all the bodies effectively performing a public function, the Committee recommends that bodies receiving substantial public funds be defined as public bodies under the protected disclosure regime. This ensures that public funds are accounted for, wrongdoing is exposed and whistleblowers are protected in a complex environment in which overlaps between the private and public sectors are common.

The next chapter examines concerns raised regarding the making, assessment and investigation of disclosures.

4 Making, assessing and investigating disclosures

4.1 Introduction

The *PD Act 2012* (Vic) was introduced with the aim of simplifying the system of whistleblowing protection in Victoria. Significantly the Act made IBAC the clearing house for determining whether a disclosure qualifies as a protected disclosure complaint. Overall, the Committee has received evidence that the aim of simplifying whistleblower protection have not been fully realised. Complexities and inefficiencies remain regarding some of the laws and procedures for making, assessing and investigating disclosures in Victoria.

In light of this evidence, relevant best-practice principles and interstate experience, this chapter focuses on issues relating to the making of disclosures, the consequences of disclosing to the wrong body, disclosures to the media and the referral of protected disclosure complaints for investigation.

4.2 Making disclosures

4.2.1 The current law in Victoria

As discussed in Chapter 2, disclosures must be made in accordance with Part 2 of the *PD Act 2012* (Vic) and the *Protected Disclosure Regulations 2013* (Vic).⁴³² Part 2 sets out which kinds of disclosures about public bodies or public officers must be made to which bodies. In many cases, a disclosure can be made to IBAC, in others to a public body that must (if it considers that it may be a protected disclosure) notify it to IBAC for assessment. As the clearing house, IBAC assesses all possible protected disclosures and determines whether they qualify as protected disclosure complaints that it must investigate (if it has the jurisdiction to do so), dismiss or refer. Protected disclosure complaints may only be referred to the Victorian Ombudsman, VI or Victoria Police as appropriate.⁴³³

⁴³² See especially the discussion in sections 2.3.3 and 2.34 in Chapter 2 of this report and IBAC, *Guidelines for making and handling protected disclosures* (October 2016).

⁴³³ *PD Act 2012* (Vic) s 3 (definition of 'investigating entity'); *IBAC Act 2011* (Vic) s 73; IBAC, *Guidelines for making and handling protected disclosures* (October 2016), especially at 24–6.

4.2.2 Disclosing to the right body

One of the main criticisms of the *PD Act 2012* (Vic) is that it is complicated and prescriptive regarding who a discloser must disclose to in order to be considered for the whistleblower protections.⁴³⁴

As discussed in Chapter 2, the Act requires disclosure to the right body. It requires an understanding of the *PD Act 2012* (Vic) and the *Protected Disclosure Regulations 2013* (Vic), which outline which organisations, and which people within them, may receive certain disclosures.⁴³⁵ For example, public service bodies and councils may only receive disclosures that relate to *their own* conduct or that of their members, officers or employees.⁴³⁶

Complexities with the Act have been recognised by the IBAC Commissioner, the Victorian Ombudsman, the Victorian Inspector and other experts and stakeholders.⁴³⁷ In evidence to the Committee, the IBAC Commissioner has said that there are ‘challenges in how public bodies deal with the protected disclosure regime: dealing with complex protected disclosure legislation, including understanding which agencies can and cannot receive a protected disclosure ...’⁴³⁸

Similarly, the Victorian Ombudsman, Ms Deborah Glass OBE, has said that ‘much of the protected disclosure regime at present is unnecessarily complicated and inflexible ...’⁴³⁹ The Victorian Inspector, Mr Robin Brett QC, observed the following:

Notwithstanding the Inspectorate’s limited direct experience of the operation of the PD [protected disclosure] regime I am able to say that it is complex, difficult to understand and in some respects vague in its meaning ...

Those who operate within the regime, whether they be a person who makes a complaint about an agency, or an agency that receives a complaint or notification and must deal with it, or the IBAC which must determine whether the regime in fact

⁴³⁴ Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 10 May 2016; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016; Mr Hugh Moseley, Partner, Risk Advisory, Deloitte Touche Tohmatsu, Submission, 27 April 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Hon Lisa Neville, Minister for Water, Department of Environment, Land, Water and Planning, Submission, 17 June 2016.

⁴³⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) pt 2 (especially ss 12–19).

⁴³⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 13(3).

⁴³⁷ Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 10 May 2016. See also Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Closed Hearing, Melbourne, 21 March 2016; Mr Hugh Moseley, Partner, Risk Advisory, Deloitte Touche Tohmatsu, Submission, 27 April 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Hon Lisa Neville, Minister for Water, Department of Environment, Land, Water and Planning, Submission, 17 June 2016.

⁴³⁸ Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

⁴³⁹ Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016.

applies, or an agency to which a PD complaint is referred, must be able to understand what their duties, rights and obligations are, without having to puzzle over the meaning of some complex provision or set of provisions.⁴⁴⁰

Explaining how to make a disclosure

While the legislation is complex, bodies that can receive disclosures are required to produce procedures about how to make a disclosure to them.⁴⁴¹ IBAC recently reviewed the quality of procedures among these bodies and found they generally met the required standards.⁴⁴² However, having a procedure in place does not ensure that it is understood, fully implemented or effective in protecting the rights, interests and welfare of disclosers.⁴⁴³

Disclosers are also assisted by useful public-oriented information that has been produced by IBAC, the Victorian Ombudsman and the Victorian Public Sector Commission about what bodies can receive disclosures about alleged improper conduct in the public sector.⁴⁴⁴ The Committee considers that public bodies and integrity agencies should also make the best possible use of short videos (including animations) and other digital content to explain what disclosures they can receive, and how.

In addition to producing better plain-language information to explain the disclosure requirements of the Act to potential disclosers, the Committee believes efforts can also be made to simplify and better organise the Act itself.

Making the legislation easier to understand and use

The Act can be made more comprehensible and easier to use without being rewritten. While these issues will be addressed further in Chapter 7, a specific point regarding disclosure to the right body can be addressed here. Tables showing which body or person one has to disclose to for particular disclosures should be included as schedules to the Act. Tables like these have been used effectively in IBAC's *Guidelines for making and handling protected disclosures*.⁴⁴⁵

⁴⁴⁰ Mr Robin Brett QC, Victorian Inspector, VI, Submission, 10 May 2016.

⁴⁴¹ *PD Act 2012* (Vic) ss 58–61.

⁴⁴² IBAC, *Review of protected disclosure procedures: progress report* (January 2016). But cf IBAC, *Audit of Victoria Police complaints handling systems at regional level* (September 2016).

⁴⁴³ Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Hon Lisa Neville, Minister for Water, Department of Environment, Land, Water and Planning, Submission, 17 June 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016. See also Brown, *Whistleblowing in the Australian public sector*; A J Brown, Nerisa Dozo and Peter Roberts, *Whistleblowing processes and procedures—an Australian and New Zealand snapshot. Preliminary results: Whistling While They Work 2 Survey of Organisational Processes and Procedures* (Griffith University, 2016) 1–4.

⁴⁴⁴ See, for example, IBAC, *What is a protected disclosure?* (2017) <www.ibac.vic.gov.au/reporting-corruption/what-is-a-protected-disclosure>; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) (oriented towards the public sector); Victorian Ombudsman, *Protected Disclosure Act 2012—the role of the Ombudsman* (September 2016) <www.ombudsman.vic.gov.au/Fact-Sheets/For-Whistleblowers/Fact-Sheet-16-Protected-Disclosure-Act-2012-role-o>; Victorian Public Sector Commission, *Protected disclosures procedures* (2017) <vpssc.vic.gov.au/about-vpsc/protected-disclosures-procedures>.

⁴⁴⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 13, 15.

The Act should also make use of notes and examples where they would aid a discloser's understanding. For instance, the ACT's *Public Interest Disclosure Act 2012* uses these devices effectively. Section 15(1) of this Act, for example, lists a range of bodies who can receive disclosures. In order to help the reader, the section also gives examples of some of the kinds of persons who can receive disclosures. It further includes a note explaining when a disclosure may be made to a Member of the Legislative Assembly or a journalist:

15 To whom may a public interest disclosure be made?

- (1) A public interest disclosure may be made to—
- (a) a disclosure officer; or
 - (b) a Minister; or
 - (c) if the discloser is a public official for a public sector entity—
 - (i) a person who, directly or indirectly, supervises or manages the discloser; or
 - (ii) for a public sector entity that has a governing board—a member of the board; or
 - (iii) a public official of the entity who has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information.

Examples—subpar (iii)

- 1 the chief financial officer of a public sector entity in relation to a disclosure about the substantial misuse of public funds by an employee of the entity
- 2 a workplace bullying and harassment contact officer for a public sector entity in relation to a disclosure about an employee of the entity threatening physical violence against another employee
- 3 a public official on a clinical standards committee for a public hospital in relation to a disclosure about medical malpractice at the hospital that was causing or likely to cause a substantial danger to public health

Note 1 If s 27 applies, a public interest disclosure may be made to a member of the Legislative Assembly or a journalist.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

In addition to these kinds of measures, the Committee believes that the Government should simplify the processes for making a disclosure under Part 2 of the *PD Act 2012* (Vic).

RECOMMENDATION 8: That the Victorian Government amend the *PD Act 2012* (Vic) to include tables showing disclosers which bodies, and/or persons, can receive what kinds of disclosures.

RECOMMENDATION 9: That the Victorian Government simplify the processes for making a disclosure under Part 2 of the *PD Act 2012* (Vic).

4.3 Misdirected disclosures

If a disclosure is made to the wrong body (a misdirected disclosure), it is not a disclosure made in compliance with Part 2 of the *PD Act 2012* (Vic) and it cannot be determined as a protected disclosure complaint by IBAC.⁴⁴⁶ Currently, only a body that is authorised to receive a disclosure may properly notify it for assessment by IBAC.⁴⁴⁷ As the IBAC Commissioner, Mr Stephen O’Bryan QC, said:

The major reason a notification is not assessed as a protected disclosure compliant is that it is not technically a disclosure under Part 2 of the Protected Disclosure Act [2012 (Vic)]. An example is where a complaint has come from an entity that is not authorised under the Act to receive protected disclosures.⁴⁴⁸

This means that a person making such a disclosure, which might otherwise qualify as a protected disclosure complaint, misses out on the protections of the Act. The problem was not addressed fully by the amendments introduced by the *Integrity and Accountability Legislation (A Stronger System) Act 2016* (Vic).⁴⁴⁹ In evidence to the Committee in October 2016, the IBAC Commissioner recognised this as a continuing issue:

Outstanding concerns include the operation of the Protected Disclosure Act 2012 (Vic), which apparently excludes persons from consideration for protected disclosure status where they first make a disclosure to another public sector entity and where IBAC is not notified under the Protected Disclosure Act by an entity that is prescribed for the purpose of receiving such a disclosure.⁴⁵⁰

For example, councils and public service bodies can only receive disclosures about the conduct of *their own* employees, members and officers, and not that of other bodies.⁴⁵¹ Nor can a disclosure be made to an unauthorised body about the conduct of an entirely different body.⁴⁵² A common example of this are disclosures about alleged police wrongdoing that have been mistakenly made to the Victorian Ombudsman instead of to IBAC or the police.⁴⁵³

The IBAC Commissioner has argued that this problem could be remedied by amending the law to allow IBAC to assess *any* notification of a disclosure it receives, *whatever the source*, as a possible protected disclosure complaint:

We are of the view that there is merit in amending the Protected Disclosure Act [2012 (Vic)] so that IBAC is able to assess all notifications regardless of their source ...

⁴⁴⁶ *PD Act 2012* (Vic) ss 12(1), 13, 21, 26.

⁴⁴⁷ *PD Act 2012* (Vic) ss 13, 21, 26.

⁴⁴⁸ Mr Stephen O’Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016

⁴⁴⁹ But see *PD Act 2012* (Vic) s 26(1)(d) and 2(b), which allows IBAC to assess a disclosure which has not been notified in accordance with the Act, but does not allow it to determine that is a protected disclosure complaint—see Mr Stephen O’Bryan QC, Commissioner, IBAC, 28 April 2017.

⁴⁵⁰ Mr Stephen O’Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 24 October 2016.

⁴⁵¹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) s 13(1).

⁴⁵² IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 12; *PD Act 2012* (Vic) ss 12(1), 13.

⁴⁵³ Mr Stephen O’Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

[W]e are concerned regarding limitations around protections that can be provided to an individual if that person makes a notification to an entity other than IBAC, and where that entity is not authorised to receive a disclosure. There would be value in amending the Protected Disclosure Act so that all notifications to IBAC, regardless of their source, can be so assessed.⁴⁵⁴

The Committee agrees that the law should be amended so that disclosers do not miss out on possible protection under the *PD Act 2012* (Vic) on the basis of a misdirected disclosure. However, for the reasons discussed in Chapter 3, notifications to IBAC regarding disclosures about MPs and Ministers would still have to be made in accordance to the existing procedures under sections 19 and 21(3) of the *PD Act 2012* (Vic).

RECOMMENDATION 10: That the Victorian Government amend the law so that IBAC may assess any notification it receives, whatever the source (with the exception of notifications of disclosures made under sections 19 and 21(3) of the *PD Act 2012* (Vic)), as a possible protected disclosure complaint.

4.4 Third-tier disclosures

Concerns have been raised with the Committee that disclosers cannot make protected disclosures to the media in Victoria.⁴⁵⁵ This means that a discloser might have no safe and effective recourse in relation to the reporting of wrongdoing. For example, presently a discloser will not be protected for a disclosure to the media even after an inadequate response by an investigating agency or in the face of an impending emergency, such as a threat to public health, to safety or to the environment.

Best-practice principles require that disclosers have a wide range of channels through which to disclose. Disclosures should be able to be made not only at the first tier (to their own organisation) and second tier (to an integrity agency), but also at the third tier (to a journalist or other external entity). Third-tier disclosures are also known as ‘third-party disclosures,’ ‘external disclosures’ and ‘public whistleblowing.’⁴⁵⁶ The term ‘third-tier disclosures’ is used in this report.

The following discussion is confined to the question of whether disclosures should be able to be made to a journalist or the media more broadly.

⁴⁵⁴ Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

⁴⁵⁵ See, for example, Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

⁴⁵⁶ See, for example, A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 278–82; A J Brown, ‘Privacy and public interest disclosure: when is it reasonable to protect “whistleblowing” to the media?’ (2007) 4(2) *Privacy Law Bulletin* 19; Paul Latimer and A J Brown, ‘Whistleblower laws: international best practice’ (2008) 31(1) *University of New South Wales Law Journal* 766, 780–4; Brown, *Towards ‘ideal’ whistleblowing legislation?* 4, 26–31; Paul Latimer and A J Brown, ‘In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures’ (2007) 12(2) *Deakin Law Review* 2, 11–16; Brown and Latimer, *Symbols or substance?* 223, 236–41; Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal for Social Justice* 653; Commonwealth, *Whistleblower protection* (2009) 141.

4.4.1 Current Victorian law

Under the *PD Act 2012* (Vic), disclosures may not be made at the third tier to a journalist. The *PD Act 2012* (Vic) only provides protection for disclosures made at the first two tiers in accordance with the procedure in Part 2.⁴⁵⁷ Additionally, the Committee has received evidence from the IBAC Commissioner, Mr Stephen O'Bryan QC, that the word 'disclosure' is understood in its ordinary sense, so that what is disclosed must not already in the public media:

At the moment, as I think I said in a very early public report, we just give the word 'disclosure' its ordinary English meaning, which means something otherwise not known, something that is fairly much a secret. The moment it is out in the media it is no longer a secret and you have difficulty in interpreting the Act, at least from a lawyer's point of view, as a disclosure. So it pretty much rules it out [as a protected disclosure] if it has been disclosed in the media. I am not sure that there is an easy solution to that one but I have proposed this morning, as you have heard, that perhaps we could have a little bit of discretion around that.⁴⁵⁸

4.4.2 Best-practice principles

Third-tier disclosures have been justified on the basis that even when a disclosure has been notified to an integrity agency, it might not be investigated in a timely and effective fashion, and the discloser might not be kept properly informed of the progress of the investigation. The possibility of disclosure to the media provides an incentive for the integrity agency to investigate it in a thorough and effective fashion, keeping the discloser informed of the progress of the investigation as far as possible.⁴⁵⁹ Best practice and interstate experience in Australia supports disclosure at the third tier, but generally as a last resort and under strictly defined conditions.⁴⁶⁰

⁴⁵⁷ *PD Act 2012* (Vic) ss 3 (definition of 'assessable disclosure,' 'protected disclosure'), 12(1), 21, 26.

⁴⁵⁸ Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016. See also IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 6.

⁴⁵⁹ A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 278–82, 286.

⁴⁶⁰ Brown, *Whistleblowing in the Australian public sector*; A J Brown, 'Privacy and public interest disclosure: when is it reasonable to protect "whistleblowing" to the media?' (2007) 4(2) *Privacy Law Bulletin* 19; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(1) *University of New South Wales Law Journal* 766, 780–4; Brown, *Towards 'ideal' whistleblowing legislation?* 4, 26–31; Paul Latimer and A J Brown, 'In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures' (2007) 12(2) *Deakin Law Review* 2, 11–16; A J Brown and Latimer, *Symbols or substance?* 223, 236–41; Terry Morehead Dworkin and A J Brown, 'The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws' (2013) 11(2) *Seattle Journal for Social Justice* 653.

Best-practice principles require that whistleblowers be protected when they make disclosures at the first, second or third tiers. These principles, endorsed by Transparency International, Blueprint for Free Speech, the UNODC and the WWTW project,⁴⁶¹ are extracted in Table 4.1.

Table 4.1 Third-tier disclosures: best-practice principles

Organisation	Principles
Transparency International	'Principle 17: Reporting to external parties—in cases of urgent or grave public or personal danger, or persistently unaddressed wrongdoing that could affect the public interest, individuals shall be protected for disclosures made to external parties such as the media, civil society organisations, legal associations, trade unions, or business/professional organisations.' ^(a)
Blueprint for Free Speech	'Principle 6: A law must ensure that protection extends to disclosures made publicly or to third parties (external disclosures) including disclosures to the media, NGOs, labour unions, members of parliament, in circumstances that are clearly explained. There must also be protections of external disclosers in case of immediate threats, such as those to the environment, public health and safety, or where serious criminal acts have been committed.' ^(b)
UNODC	'While it is preferable that suspected wrongdoing is addressed early and close to the source of the problem, this is not always possible, and alternative channels for reporting wrongdoing should be considered ... In practice, in certain circumstances, it may only be by virtue of public disclosures of information that corruption is properly identified and effective action is able to be taken.' ^(c)
Whistling While They Work (WWTW) project	'Principle 10: A disclosure made to a person that is not designated by the legislation to receive disclosures (for example, the media) should be protected in exceptional circumstances as defined in the legislation.' ^(d)

(a) Transparency International, *International principles for whistleblower legislation* (2013) 7.

(b) Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 4.

(c) UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015) 39.

(d) A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 286.

4.4.3 Arguments for the protection of third-tier disclosures

Evidence received by the Committee, academic commentary and a number of official inquiries lend support to whistleblowers being able to make third-tier disclosures and receive protection if they do.

Dr Suelette Dreyfus gave evidence to the Committee that disclosers need protection for third-tier disclosures, such as to a journalist.⁴⁶² She added that the 'thresholds for being protected ... must be moderate and reasonable, not high or

⁴⁶¹ Transparency International, *International principles for whistleblower legislation* (2013) 7; Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 4; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015) 39; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 286. See also Transparency International Australia, *Whistleblowing: position paper no 8* (January 2016); Simon Wolfe et al, *Whistleblower protection rules in G20 countries: the next Action Plan*. Public consultation draft. (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2014) 1, 4, 12, 16, 20; Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2015) 3, 6, 11, 18.

⁴⁶² Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

impractical.⁴⁶³ Dr Dreyfus gave two main reasons for the protection of third-tier disclosures. First, the whistleblower is often in the best position to judge whether a disclosure can be made safely internally and whether there is a realistic chance that it will be assessed fairly and lead to an effective response:

[Whistleblowers] can best judge how risky it is to make a disclosure in a particular environment (Is it their boss, or their entire department, who is involved in the corruption?) ... Often only a whistleblower can know if it is 'safe' for them to report internally—that may be 'safe' in the sense of actually getting change in place regarding wrongdoing while not experiencing reprisal in a job. Or it may be personal safety.⁴⁶⁴

The second, related, reason to protect third-tier disclosures is that the whole system can fail. Dr Dreyfus termed this 'catastrophic system failure,' giving examples which included the Bjelke-Peterson Government in the lead-up to the Fitzgerald Inquiry, the New South Wales police at the time of the Wood Royal Commission and the Western Australian Premier's Office during 'WA Inc.'⁴⁶⁵ According to Dr Dreyfus, these examples 'remind us very clearly that external avenues, such as the media, are a necessity, not just an option.'⁴⁶⁶

Professor Brown explained to the Committee that the availability of protected third-tier disclosures provides an incentive for disclosures to be treated seriously and handled effectively and efficiently by first-tier organisations and second-tier integrity agencies like IBAC:

The third—public—tier is actually crucial for making the first and second tiers work, because we know from experience and from the research that the fact that somebody can go public or could go public and that the public expects that whistleblowers should go public at the end of the day if necessary actually is a huge driving influence on agencies trying to get it right in the first place. It is probably the single most important driving influence in the current time.⁴⁶⁷

Finally, the Accountability Round Table supported the protection of third-tier disclosures 'as a last resort when the internal and government review systems have failed to deal with the disclosure, and in other defined and exceptional circumstances ...'⁴⁶⁸

A Senate committee inquiry into whistleblowing in 1994 discussed the possible protection of third-tier disclosures to the media.⁴⁶⁹ It recognised that whistleblowers do not usually go to the media as a first resort. Typically, they make a disclosure to the media because internal systems have failed them,

⁴⁶³ Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

⁴⁶⁴ Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

⁴⁶⁵ Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

⁴⁶⁶ Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016.

⁴⁶⁷ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

⁴⁶⁸ Accountability Round Table, Submission, 4 May 2016.

⁴⁶⁹ Commonwealth, *In the public interest* (1994).

because to disclose internally would be to put their interests and welfare in jeopardy and/or because of a moral imperative to disclose about serious wrongdoing in the public interest.⁴⁷⁰ As the Senate committee observed,

Some whistleblowers have been so disillusioned with ‘the system,’ and have such a lack of faith in ‘the system,’ that they have felt there was no other avenue available to them. Some felt that going public was the only means by which they could ensure protection. Some whistleblowers have tried and tested the conventional means of reporting wrongdoing and been dissatisfied with the action, if any, taken. Other whistleblowers, weighed down by the enormity of the public interest involved, have felt an onerous responsibility to society and approached the media as the only medium through which the public could be informed, the wrongdoers brought to justice and the process of reform instigated. The Committee believes that in many cases, whistleblowers have not chosen to make public interest disclosures through the media, but rather they have been morally compelled to do so.⁴⁷¹

The Senate committee recommended that whistleblowers be protected when they go to the media ‘where to do so is excusable in all the circumstances,’ having regard to the seriousness of the wrongdoing alleged, the reasonableness of their belief in the truth of the allegation and that using conventional channels would be ‘futile’ or expose them to victimisation.⁴⁷²

In 2009, the issue of third-tier disclosures was revisited at the Commonwealth level by a House of Representatives committee.⁴⁷³ It recommended the protection of third-tier disclosures in limited circumstances. It did so on the basis of four main reasons. First, the media performs a vital democratic function in scrutinising governments and the public sector, exposing wrongdoing and bringing to light other matters of public interest.⁴⁷⁴ Whistleblowers’ disclosures, when necessary and justified, are a significant source of information for the media in carrying out this role.⁴⁷⁵ Second, citing the WWTW project’s research, whistleblowers rarely make disclosures directly to the media—so a flood of such disclosures is unlikely:⁴⁷⁶

Most people appear to be reluctant to place themselves in the public eye by making disclosures to the media. Whistleblowers themselves may be aware of the risks and unintended consequences of that avenue of disclosure.⁴⁷⁷

Third, given the media’s experience and expertise it can often perform an effective ‘filtering’ role in relation to allegations it receives from whistleblowers.⁴⁷⁸ It can fact-check, apply editorial standards, subject the allegations to legal review and exercise responsible judgements about whether, in the public interest, a story should be published.⁴⁷⁹ However, the committee also expressed some concern

⁴⁷⁰ Ibid 197.

⁴⁷¹ Ibid.

⁴⁷² Commonwealth, *In the public interest* (1994) 203.

⁴⁷³ Commonwealth, *Whistleblower protection* (2009) 139–56, 162–5.

⁴⁷⁴ Ibid 144

⁴⁷⁵ Ibid 144–6.

⁴⁷⁶ Ibid 164.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid 144–5.

⁴⁷⁹ Ibid.

about varying standards of review in the media.⁴⁸⁰ The fourth reason given was that the possibility of a protected third-tier disclosure being made provides an ‘incentive for investigative bodies to efficiently manage their own procedures and report back to a whistleblower.’⁴⁸¹

Taking these reasons into account, the 2009 committee recommended the protection of third-tier disclosures to the media:

A public interest disclosure scheme that does not provide a means for such matters to be brought to light will lack credibility. ... [Protection should be provided] where the matter has been disclosed internally and externally [such as to an integrity agency], and has not been acted on in a reasonable time having regard to the nature of the matter, and the matter threatens immediate serious harm to public health and safety.⁴⁸²

The Lander Review of the South Australian *Whistleblowers Protection Act 1993* also recommended the protection of third-tier disclosures.⁴⁸³ As will be discussed below, under the present South Australian Act protection can be found for third-tier disclosures to the media, but there is no purpose-built provision relating to them.⁴⁸⁴ The Lander Review noted the democratic role of the media in scrutinising the government and holding it to account, and the contribution of whistleblowers to this process.⁴⁸⁵ It concluded that ‘even with an optimal disclosure regime’ whistleblowers may sometimes need to disclose to the media ‘in order to ensure appropriate action or at least timely action,’ and that the community may well expect them to receive protection.⁴⁸⁶

The Review recommended protection where a discloser has used the formal legal channels but

[t]here has been a failure to investigate or a failure to keep the public officer informed and, where the re-disclosure covers substantially the same information as the initial disclosure and, provided that the information is substantially true, or that the discloser believes on reasonable grounds that the information is true.⁴⁸⁷

A range of academic commentary also supports the protection of third-tier disclosures under certain conditions, usually after disclosures have been made unsuccessfully to first- and second-tier organisations.⁴⁸⁸ Regarding disclosure

⁴⁸⁰ Ibid 144–50.

⁴⁸¹ Ibid 145.

⁴⁸² Ibid 162, 164.

⁴⁸³ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014).

⁴⁸⁴ *Whistleblowers Protection Act 1993 (SA)* s 5(3).

⁴⁸⁵ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 116–17.

⁴⁸⁶ Ibid 117.

⁴⁸⁷ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 120.

⁴⁸⁸ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 261, 278–82; Brown and Latimer, *Symbols or substance?* 223, 236–40; Paul Latimer and A J Brown, ‘In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures’ (2007) 12(2) *Deakin Law Review* 2, 11–13; Brown, *Towards ‘ideal’ whistleblowing legislation?* 4, 27–9; Paul Latimer and A J Brown, ‘Whistleblower laws: international best practice’ (2008) 31(1) *University of New South Wales Law Journal* 766, 780–84; Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal for Social Justice* 653, 682–3, 696–701; A J Brown, ‘Privacy and public interest disclosure: when is it reasonable to protect “whistleblowing” to the media?’ (2007) 4(2) *Privacy Law Bulletin* 19.

to the media as a *first* resort, most academic commentary endorses protection only if insisting on disclosure at the first and second tier would be unreasonable. For example, if there were no channels for such disclosures, if making such disclosures would be pointless, if serious reprisals were very likely, or if the situation called for emergency action (such as in response to an imminent threat to public health or safety).⁴⁸⁹

4.4.4 Third-tier disclosure in Australian jurisdictions

When enacted in 1994, the New South Wales *Public Interest Disclosures Act* was the first in Australia to provide explicit protection of third-tier disclosures to the media.⁴⁹⁰ Now, the protection of these disclosures in Australia is common. Only the Northern Territory, Tasmania and Victoria do not provide that protection (see Table 4.2).

Table 4.2 Third-tier disclosure to the media: Australian jurisdictions

Jurisdiction	Legislative provision	Protection of disclosure to the media?
Commonwealth	<i>Public Interest Disclosure Act 2013</i> (Cth) s 26	Yes
Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i> (ACT) s 27	Yes
New South Wales	<i>Public Interest Disclosures Act 1994</i> (NSW) s 19	Yes
Northern Territory	<i>Public Interest Disclosure Act</i> (NT)	No
South Australia	<i>Whistleblowers Protection Act 1993</i> (SA) s 5(3)	Yes (arguably): disclosure to 'whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure'
Queensland	<i>Public Interest Disclosure Act 2010</i> (Qld) s 20	Yes
Tasmania	<i>Public Interest Disclosures Act 2002</i> (Tas)	No
Victoria	<i>Protected Disclosure Act 2012</i> (Vic)	No
Western Australia	<i>Public Interest Disclosure Act 2003</i> (WA) s 7A	Yes

⁴⁸⁹ A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 278-82; Brown and Latimer, *Symbols or substance?* 223, 236-40; Paul Latimer and A J Brown, 'In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures' (2007) 12(2) *Deakin Law Review* 2, 11-13; Brown, *Towards 'ideal' whistleblowing legislation?* 4, 27-9; Paul Latimer and A J Brown, 'Whistleblower laws: international best practice' (2008) 31(1) *University of New South Wales Law Journal* 766, 780-84; Terry Morehead Dworkin and A J Brown, 'The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws' (2013) 11(2) *Seattle Journal for Social Justice* 653, 682-3, 695-701; A J Brown, 'Privacy and public interest disclosure: when is it reasonable to protect "whistleblowing" to the media?' (2007) 4(2) *Privacy Law Bulletin* 19.

⁴⁹⁰ Brown, *Towards 'ideal' whistleblowing legislation?* 4, 27.

Commonwealth

The *Public Interest Disclosure Act 2013* (Cth) provides protection for what it terms ‘external disclosure’ to anyone except a foreign official.⁴⁹¹ A journalist would come within this category. There are a number of criteria that the disclosure must satisfy in order to be protected.⁴⁹²

The information disclosed must tend to show (or the discloser has a reasonable belief that it shows) ‘disclosable conduct.’

- The discloser has previously disclosed the information internally.
- An investigation has been conducted and the discloser has a reasonable belief that there was an inadequate response to the investigation. Or, in certain circumstances, that an investigation has not been completed within a set time limit.
- The disclosure is not against the public interest.
- ‘No more information is publicly disclosed than is reasonably necessary to identify’ the disclosable conduct.

There are exclusions relating to intelligence information.⁴⁹³

In determining whether a disclosure is not, on balance, contrary to the public interest, regard must be had to a wide range of factors, *including*:

- whether it would ‘promote the integrity and accountability of the Commonwealth public sector’
- the degree to which it would ‘expose a failure to address serious wrongdoing in the Commonwealth public sector’
- how far it would protect the discloser from adverse consequences
- ‘the principle that disclosures by public officials should be properly investigated and dealt with’
- ‘the nature and seriousness of the disclosable conduct’
- ‘any risk that the disclosure could prejudice the proper administration of justice’
- ‘any other relevant matters.’

The range of factors that must be considered in applying the public interest test demonstrate its breadth. The test could operate to restrict significantly the range of third-tier disclosures that qualify for protection.

⁴⁹¹ *Public Interest Disclosure Act 2013* (Cth) s 26.

⁴⁹² *Public Interest Disclosure Act 2013* (Cth) s 26, Item 2.

⁴⁹³ *Public Interest Disclosure Act 2013* (Cth) s 26, Item 2(h)-(i).

In addition to external disclosure, described above, the Act also authorises what it terms ‘emergency disclosure’ if particular requirements are met.⁴⁹⁴ An emergency disclosure may be made to anyone other than a foreign official. The disclosure must not include intelligence information. In addition, the disclosure must meet the following criteria:

- The discloser has a reasonable belief that it ‘concerns a substantial and imminent danger to the health or safety of one or more persons or to the environment.’
- ‘The extent of the information disclosed is no greater than necessary to alert the recipient to the substantial and imminent danger.’
- That, if an internal disclosure has not previously been made, there are ‘exceptional circumstances’ that justify non-disclosure.
- That if an internal disclosure has been made, there are ‘exceptional circumstances’ justifying the emergency disclosure being made before an investigation of the internal disclosure has been completed.⁴⁹⁵

While heavily qualified, the Commonwealth legislation protects third-tier disclosures made to the media in the two circumstances most commonly identified in submissions to the Committee, in other whistleblowing inquiries and in the academic literature—namely, when an investigation has been inadequate or in an emergency situation.

Australian Capital Territory

The ACT legislation gives arguably the broadest protection to third-tier disclosures in that it allows, under particular conditions, disclosure to a journalist *as a first resort*, even when there is no emergency.⁴⁹⁶

‘Journalist’ means ‘a person who is engaged and active in the publication of news and who may be given information by someone else in the expectation that the information may be published in a news medium.’⁴⁹⁷ ‘News medium’ is defined as ‘a medium for the dissemination to the public or a section of the public, of news and observation on news.’⁴⁹⁸

A public interest disclosure may be made to a journalist or a member of the Legislative Assembly⁴⁹⁹ if a disclosure has already been made in accordance with the Act (for example, to a disclosure officer), and

- there has been a refusal or failure by an investigating entity to investigate the disclosure, or

⁴⁹⁴ *Public Interest Disclosure Act 2013* (Cth) s 26, Item 3.

⁴⁹⁵ *Public Interest Disclosure Act 2013* (Cth) s 26, Item 3.

⁴⁹⁶ *Public Interest Disclosure Act 2012* (ACT) s 27(2)–(3). The Act (s 27(3)(a)) also authorises a disclosure to a member of the Legislative Assembly, but, as noted, the discussion in this report is focused on disclosures to journalists.

⁴⁹⁷ *Public Interest Disclosure Act 2012* (ACT) s 27(5).

⁴⁹⁸ *Public Interest Disclosure Act 2012* (ACT) s 27(5).

⁴⁹⁹ While the *Public Interest Disclosure Act 2012* (ACT) s 27(3)(a) authorises a disclosure to a member of the Legislative Assembly, the discussion in this report is focused on disclosures to journalists.

- the discloser has not been informed within 3 months of the disclosure whether ‘the disclosure will be investigated or dealt with,’ or
- ‘the discloser has been told the disclosure will be investigated but has not been told about the progress of the investigation for a period of more than 3 months,’ or
- there has been an investigation, but, despite ‘clear evidence’ of the disclosable conduct, the discloser has been informed that the investigating agency will take no action regarding it.⁵⁰⁰

In addition, the Act provides protection for a public interest disclosure made to a journalist even if there has been no earlier disclosure in accordance with the Act.⁵⁰¹ Protection is available if making such a disclosure would have exposed the discloser, or anyone else, to ‘significant risk of detrimental action,’ and ‘it would be unreasonable in all the circumstances’ for such a disclosure to be made.⁵⁰²

The Act seeks to reduce the risk of improper disclosures to a journalist—say, for personal gain or to promote a wider political cause⁵⁰³—by restricting the kind of information that may be disclosed. Section 27(4)(a) of the Act provides that a discloser

must disclose sufficient information to show that the conduct is disclosable conduct, *but no more than is reasonably necessary* to show that the conduct is disclosable conduct. [emphasis added]

This condition was criticised in the Lander Review as imprecise and likely to deter most whistleblowers from disclosing to a journalist:

The last requirement would be likely to discourage all but the most determined persons who wish to make a disclosure from approaching the media. It requires a whistleblower to make a judgement with some precision as to what is sufficient information to provide the external recipient, and to hope that judgement might be the same as a court’s assessment, if a proceeding is taken claiming the whistleblower has released more information than was reasonably necessary, and seeking to discipline him or her for it.⁵⁰⁴

However, while there are likely to be challenges in interpreting the condition, it serves a sensible purpose in reducing some of the risks associated with disclosures to the media. These are discussed later in this chapter.

⁵⁰⁰ *Public Interest Disclosure Act 2012* (ACT) s 27.

⁵⁰¹ *Public Interest Disclosure Act 2012* (ACT) s 27(2).

⁵⁰² *Public Interest Disclosure Act 2012* (ACT) s 27(2).

⁵⁰³ Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal for Social Justice* 653, 699.

⁵⁰⁴ Bruce Lander, *A review of the Whistleblowers Protection Act 1993* (SA) (2014) 119.

New South Wales

The *Public Interest Disclosures Act 1994* (NSW) provides protection to third-tier disclosures to a Member of Parliament or a journalist if the disclosure is ‘substantially true,’ the discloser has a reasonable belief that it is and the following conditions are met:

- The discloser has ‘already made substantially the same disclosure to an investigating authority,’ or other relevant body or officer, in compliance with the Act
- The authority to whom the disclosure was made:
 - must have decided not to investigate the matter, or
 - must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or
 - must have investigated the matter but not recommended the taking of any action in respect of the matter, or
 - must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.⁵⁰⁵

Thus, in general terms, a disclosure to a journalist will be protected if an earlier disclosure has been made and the investigative response has been inadequate, provided the disclosure is substantially true and that the discloser has a reasonable belief that it is. ‘Journalist’ is defined as ‘a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media.’⁵⁰⁶

The provision has been criticised for having a threshold that is too high for whistleblowers to meet, in that the disclosure must be substantially true.⁵⁰⁷ In addition, the six-month time limit regarding the carrying out of an investigation has been criticised as arbitrary.⁵⁰⁸ It has been observed that in some cases the period will be insufficient for the completion of a conscientious investigation of a disclosure, while in others, for example in emergencies, it may well be too long.⁵⁰⁹ If there is an emergency, a third-tier disclosure might be made too late to avert serious harm, such as an epidemic or the contamination of a city’s water supply.

South Australia

The *Whistleblowers Protection Act 1993* (SA) does not specifically address third-tier disclosures, but, arguably, the main provision on disclosure is broad enough to allow for them. Section 5(3) of the Act provides as follows:

⁵⁰⁵ *Public Interest Disclosures Act 1994* (NSW) s 19.

⁵⁰⁶ *Public Interest Disclosures Act 1994* (NSW) s 4 (definition of ‘journalist’).

⁵⁰⁷ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 281.

⁵⁰⁸ Brown and Latimer, *Symbols or substance?* 223, 239.

⁵⁰⁹ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 281.

A disclosure is taken to have been made to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure if it is made to an appropriate authority (but this is *not intended to suggest that an appropriate authority is the only person* to whom a disclosure of public interest information may be reasonably and appropriately made). [emphasis added]

While a journalist is not included in the list of appropriate authorities in section 5(4), arguably a disclosure to a journalist may be made under the terms of the rider in section 5(3), emphasised in the quotation above. It should be noted, however, that the Lander Review, states that '[i]t is unlikely that it would be reasonable or appropriate for a person to make a disclosure in the first instance to a journalist.'⁵¹⁰ No evidence is given for this interpretation of the legislation.

Queensland

Under the *Public Interest Disclosure Act 2010* (Qld), a disclosure to a journalist will be protected if an earlier disclosure is made to an authority in accordance with the Act and there has been an inadequate investigative response.⁵¹¹ 'Journalist' is defined as 'a person engaged in the occupation of writing or editing material for publication in the print or electronic news media.'⁵¹²

A discloser may only disclose to a journalist information that is 'substantially the same' as that disclosed earlier.⁵¹³

For an investigative response to be inadequate, the entity receiving the disclosure must have:

- decided not to investigate or deal with the disclosure; or
- investigated the disclosure but did not recommend the taking of any action in relation to the disclosure; or
- did not notify the person, within 6 months after the date the disclosure was made, whether or not the disclosure was to be investigated or dealt with.⁵¹⁴

Western Australia

The *Public Interest Disclosure Act 2003* (WA) provides that a disclosure to a journalist will be protected if an earlier disclosure has been made to a 'proper authority' and their investigative response has been inadequate.⁵¹⁵ The term 'journalist' is defined as

a person engaged in the profession of journalism in connection with the publication of information in a medium for the dissemination to the public or a section of the public of news or observations on news.⁵¹⁶

⁵¹⁰ Bruce Lander, *A review of the Whistleblowers Protection Act 1993* (SA) (2014) 116.

⁵¹¹ *Public Interest Disclosure Act 2010* (Qld) s 20.

⁵¹² *Public Interest Disclosure Act 2010* (Qld) s 20(4).

⁵¹³ *Public Interest Disclosure Act 2010* (Qld) s 20(2).

⁵¹⁴ *Public Interest Disclosure Act 2010* (Qld) s 20(1).

⁵¹⁵ *Public Interest Disclosure Act 2003* (WA) s 7A.

⁵¹⁶ *Public Interest Disclosure Act 2003* (WA) s 7A(1).

An investigative response is inadequate if the proper authority who has received the disclosure

- has refused to investigate, or has discontinued the investigation of, a matter raised by the disclosure; or
- has not completed an investigation of a matter raised by the disclosure within the period ending 6 months after the disclosure was made; or
- has completed an investigation of a matter raised by the disclosure but has not recommended the taking of action in respect of the matter; or
- has not complied with section 10(1) or (4), if applicable, in relation to the disclosure.⁵¹⁷

Section 10(1) of the *Public Interest Disclosure Act 2003* (WA) requires a proper authority who has received a disclosure to notify the discloser within three months of the disclosure being made ‘of the action taken or proposed to be taken in relation to the disclosure.’ Under section 10(4), if an investigation has been completed, upon request the proper authority must provide a final report

stating—

- the outcome of the investigation and any action the proper authority has taken or proposes to take as a result of the investigation; and
- the reason for taking the action that has been taken or that is proposed to be taken.

4.4.5 Concerns over third-tier disclosure

While best-practice principles and a range of evidence support the protection of third-tier disclosures in Victoria, concerns over these kinds of disclosures, especially when made as a first resort, have been raised with the Committee.

A significant concern relates to the discloser’s knowledge, motivations and judgement. The 2009 House of Representative inquiry, for example, expressed concern that a discloser may only have a partial understanding of an issue and may not appreciate the full impact of a disclosure to the media:

Whistleblowers who disclose to the media may not have full information on the alleged misconduct, may not be aware of the potential ramifications of the disclosure, and could potentially put at risk other important aspects of the public interest such as procedural fairness in investigations.⁵¹⁸

Another issue is the limited control that a whistleblower might have over information once it has been disclosed to a media outlet. As the 2009 committee noted:

Even within the print media, standards of publication can vary and whistleblowers essentially have no control over how their information is treated once it is provided. Whistleblowers need to exercise caution in deciding which journalist to approach ...⁵¹⁹

⁵¹⁷ *Public Interest Disclosure Act 2003* (WA) s 7A(2).

⁵¹⁸ Commonwealth, *Whistleblower protection* (2009) 147.

⁵¹⁹ *Ibid* 148.

Further, the Lander Review in South Australia and an inquiry in Tasmania suggested that whistleblowers sometimes make disclosures to the media for the wrong reasons—because, for example, they bear a grudge against someone or want to damage a government in a partisan fashion.⁵²⁰ Ultimately, the Lander Review recommended protecting third-tier disclosures to the media while the Tasmanian inquiry did not.⁵²¹

The Tasmanian inquiry concluded that it would be too difficult, confusing and ‘subjective’ to try to distinguish between justifiable public whistleblowing and ‘leaking ... or some other form of unauthorised disclosure.’⁵²² The Tasmanian inquiry thus opted to maintain the state’s legal status quo, which does not allow third-tier disclosures to the media.⁵²³

Another concern relates to the motivations, quality and judgement of the media. The 2009 House of Representative inquiry noted that, while effective fact-checking, legal review and editorial processes often exist in media outlets, this is not always the case.⁵²⁴ The quality and standards of media organisations vary greatly. This is especially the case given the current pervasive digital environment in which a whole range of commentators operate on blogs and other forms of interactive social media as content creators and publishers, not just consumers.⁵²⁵ Even the established media has long had its eye on ratings and circulation, creating the risk that what is newsworthy, provocative or popular is not necessarily accurate or in the public interest:

The media may be motivated by the self-interest of boosting ratings or circulation rather than the interests of the wider public or those involved with an allegation. ... While the media has capacity to mitigate some of those risks through the ‘filtering’ process ... it should not be assumed that that the filter is consistently applied. A number of witnesses noted the very broad range of activities that could be included in ‘the media’ from established broadsheet newspapers to the publication of ... ‘blogs’ ... by private individuals.⁵²⁶

Finally, the IBAC Commissioner, Mr Stephen O’Bryan QC, has expressed concern over the possible consequences of third-tier disclosures to the media in Victoria. It should be noted that the Commissioner’s evidence did not explicitly address the issues of disclosures to the media following an inadequate investigation or in response to an imminent emergency. The two main concerns identified by the Commissioner were the possible negative impact on investigations of improper conduct and unfair damage to the reputations of people subject to the disclosures:

520 Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 116; Tasmania, *Strengthening trust in government* (2009) 28–9.

521 Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 120; Tasmania, *Strengthening trust in government* (2009) 28–9.

522 Tasmania, *Strengthening trust in government* (2009) 28.

523 *Ibid.* 29.

524 Commonwealth, *Whistleblower protection* (2009) 147–8.

525 *Ibid.*

526 *Ibid.*

Permitting disclosures to the media has the potential to prejudice IBAC investigations, particularly where an investigation is being conducted covertly. It could also result in information being revealed that causes harm to individuals. For example, airing allegations against a person that have already been found to be unsubstantiated could lead to unfair reputational damage.

On balance then, I think leaving the status quo in Victoria is preferable.⁵²⁷

4.4.6 Evaluating the arguments

Best-practice principles require disclosers to be protected at the first, second and third tiers. The possibility of third-tier disclosures to journalists can act as an incentive to first- and second-tier organisations, especially investigating agencies, to deal with disclosures in an effective and timely fashion.⁵²⁸ Third-tier disclosures ought generally to be made as a last resort, except in emergencies in which the lack of an earlier disclosure is excusable—such as when there is an imminent and serious threat to public safety, health or the environment.

Third-tier disclosures to the media have a part to play in the democratic scrutiny of government when combined with the filtering processes of media organisations, including fact-checking, legal reviews and editorial standards.⁵²⁹ The 2009 House of Representatives inquiry concluded that any disclosure regime that did not provide protection for selected disclosures to the media would not be credible.⁵³⁰ The protection of third-tier disclosures to the media is not unusual in Australian jurisdictions. Only the Tasmanian, Victorian and Northern Territory disclosure regimes do not allow it.

The Committee received evidence, however, that raised a number of concerns about third-tier disclosures, including improper disclosures, the commercial interests of media outlets that can displace the public interest, unfair damage to reputations and possible interference with investigations.

In evaluating these arguments, it should be noted that whistleblowers rarely disclose directly to the media. The WWTW study found that ‘less than 1 per cent of initial reports are made to the media.’⁵³¹ The study found that

[i]n statistical terms ... the bulk of whistleblowing in relation to Australian public sector agencies occurs internally. Very little involves disclosure to the media or other third parties, other than in circumstances in which agencies and external integrity agencies have failed to act ...⁵³²

⁵²⁷ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

⁵²⁸ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 117; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 278–82, 286. See also the discussion of best-practice principles and arguments in support of third-tier disclosures in section 4.4 of this chapter.

⁵²⁹ Commonwealth, *Whistleblower protection* (2009) 144–6.

⁵³⁰ *Ibid* 162.

⁵³¹ Marika Donkin, Rodney Smith and A J Brown, 'How do officials report? Internal and external whistleblowing' in Brown, *Whistleblowing in the Australian public sector* 83, 83, 91.

⁵³² A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 278.

The study also found that a whistleblower disclosing to the media was unlikely to match ‘the stereotype of the misfit, disgruntled or organisationally unhappy employee ...’⁵³³ The majority of employees, it concluded, ‘do not wish to pit themselves against the organisation, embarrass their agency or colleagues unnecessarily or seek celebrity.’⁵³⁴

Further, it should be recognised that there is always the possibility that disclosures will be made to the media, anonymously or otherwise, especially in an environment in which electronic platforms and digital media predominate.⁵³⁵ It has been argued, therefore, that disclosures to the media need to be brought within the disclosure regime and regulated, rather than left simply to the judgements of whistleblowers and journalists:

We live in a world where the question of public exposure has to be managed, rather than there being any option of saying that these things will not get into the public domain. It is a question of whether they get into the public domain in a reasonable way and whether they are properly managed in that relatively limited set of circumstances where matters are of a nature or the circumstances are such that they are more likely to get into the public domain.⁵³⁶

Under one possible model (see Box 4.1), strict conditions would be required to ensure that any disclosure is plausible, and would only be authorised in the circumstances of an inadequate response by an investigating agency, or, exceptionally, in an emergency. This model for third-tier disclosures to the media draws directly from a number of provisions in whistleblowing legislation in Australia, particularly New South Wales, Commonwealth and Australian Capital Territory provisions.⁵³⁷

⁵³³ Marika Donkin, Rodney Smith and A J Brown, ‘How do officials report? Internal and external whistleblowing’ in Brown, *Whistleblowing in the Australian public sector* 105.

⁵³⁴ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 278.

⁵³⁵ Commonwealth, *Whistleblower protection* (2009) 149–50.

⁵³⁶ A J Brown quoted in Commonwealth, *Whistleblower protection* (2009) 149–50. See also A J Brown, ‘Privacy and public interest disclosure: when is it reasonable to protect “whistleblowing” to the media?’ (2007) 4(2) *Privacy Law Bulletin* 19, 25–6.

⁵³⁷ *Public Interest Disclosure Act 2013* (Cth) s 26; *Public Interest Disclosure Act 2012* (ACT) s 27; *Public Interest Disclosures Act 1994* (NSW) s 19; *Public Interest Disclosure Act 2010* (Qld) s 20; *Public Interest Disclosure Act 2003* (WA) s 7A.

BOX 4.1: A model for third-tier disclosure in Victoria

Best-practice principles support the protection of third-tier disclosures to the media under particular conditions. If third-tier disclosures are to be protected, they should only be protected under strict conditions—after an inadequate response by an investigating agency or in the case of an emergency.

Disclosure after inadequate response by investigating agency

First, the disclosure must be substantially true.

Second, the discloser must have already made substantially the same disclosure in accordance with the *PD Act 2012* (Vic).

Third, the investigating agency must have given an inadequate response. Namely:

- it has refused or failed to investigate or deal with the disclosure, or
- it has taken an unreasonably long time to complete an investigation, or
- it has not informed a discloser within three months of the disclosure whether it will investigate or deal with a disclosure, or
- it has informed the discloser it will investigate, but for more than three months the discloser has not been informed of the progress of the investigation, or
- it has completed an investigation, but despite clear evidence of the disclosable conduct (improper conduct) it has decided not to take any action in relation to it.

Fourth, there must have been demonstrable efforts by the discloser to follow up their case with the investigating agency.

If the disclosure is substantially true, and the investigating agency has given an inadequate response, a discloser may disclose to a journalist—defined as someone whose occupation is to write or edit news for the public. However, a discloser may only disclose such information as is reasonably necessary to show that the conduct in question is improper conduct.

Disclosure in an emergency

Provided the disclosure is substantially true, a discloser would be able to make an ‘emergency disclosure’ to a journalist as a first resort if the following criteria are met:

- The discloser has a reasonable belief that the disclosure relates to a ‘substantial and imminent danger to the health or safety of one or more persons or to the environment.’
- That there are ‘exceptional circumstances’ that justify the lack of an earlier disclosure in accordance with the usual procedures under the *PD Act 2012* (Vic).
- The discloser discloses no more information than is reasonably necessary to show that the conduct in question is improper conduct.

The disclosure would have to be ‘substantially true,’ and the investigating agency must have unreasonably delayed addressing the disclosure, investigating the disclosure or informing the discloser, or, after completing an investigation, decided not to take any action despite ‘clear evidence’ of improper conduct. In addition, the discloser must have made demonstrable efforts to follow up their case with the investigating agency. Thus, this kind of disclosure may only be made as a last resort. Further, a discloser may disclose to a journalist no more information than is ‘reasonably necessary to show that the conduct’ is improper conduct.

With regard to disclosures in emergencies, the disclosure must be substantially true. It must also be established that there is an imminent and substantial danger to public health, safety or the environment, and that the failure to disclose earlier in accordance with the usual provisions was justifiable. A discloser may disclose no more information than is necessary to show that the conduct in question is improper conduct.

Finally, the category of ‘journalist’ is defined reasonably narrowly as a professional whose occupation is writing and editing news for the public. This will help to ensure that the journalist is familiar with, and subject to, the usual legal, editorial and other professional standards that exist in established media outlets.

Given the arguments and evidence the Committee has received in support of third-tier disclosure, it considers that the Victorian Government should investigate whether there is merit in amending the *PD Act 2012* (Vic) to provide protection to third-tier disclosures to journalists under strict conditions.

However, the Committee has a number of concerns that should be taken into account in the Government’s investigation. First, the Committee notes the IBAC Commissioner’s evidence with regard to the risk that third-tier disclosures might undermine IBAC investigations and unfairly damage people’s reputations. Second, the Committee is concerned about how third-tier disclosure might work in practice. Who would judge, for example, whether an investigative response were inadequate? What would be the role of the courts in relation to third-tier disclosure? Third, the Committee is concerned that media standards vary, and that commercial interests to publish can override the public interest. Finally, with regard to disclosure in an emergency, the Committee notes that it can be difficult to judge the imminence and severity of threats to public health, safety and the environment. Further, in an emergency situation it might be more prudent for a potential discloser to inform the proper authorities, such as the Environment Protection Agency, rather than a journalist.

RECOMMENDATION 11: That the Victorian Government should investigate whether there is merit in amending the *PD Act 2012* (Vic) to protect a disclosure to a journalist after an inadequate response by an investigating agency, or when there is a ‘substantial and imminent danger’ to public health, safety or the environment.

4.5 Assessing and investigating disclosures

4.5.1 Assessing disclosures: IBAC's clearing-house role

Under the present Victorian law, IBAC assesses all disclosures made in accordance with the procedures in the *PD Act 2012* (Vic) as possible protected disclosure complaints.⁵³⁸ This is consistent with one of IBAC's key functions as a whistleblowing clearing house and reflects the special status of protected disclosures. Given the risks of reprisals against whistleblowers, and the varying capacity of first-tier organisations to impartially and effectively assess and investigate disclosures, it makes sense for IBAC to act as an independent, specialised and well-resourced clearing house for protected disclosures.⁵³⁹ Evidence received by the Committee has supported IBAC's role in this regard.⁵⁴⁰ As the Victorian Ombudsman, Ms Deborah Glass OBE, has observed:

... IBAC is the clearing house for protected disclosure complaints, and I consider that this is appropriate and that the interaction between my office and IBAC is generally effective ...

In my view, it is important that there is a single clearing house for assessing protected disclosure complaints. It is appropriate that IBAC has overall responsibility for administration of the PDA [*Protected Disclosure Act 2012* (Vic)], and particularly for determining whether a disclosure is a protected disclosure complaint.⁵⁴¹

IBAC must, as noted earlier, investigate, dismiss or refer a protected disclosure complaint.⁵⁴² It can only investigate a protected disclosure complaint if it is within its jurisdiction—that is, if it reasonably suspects corrupt conduct as defined in the *IBAC Act 2011* (Vic).⁵⁴³ IBAC can only refer a protected disclosure complaint for investigation to Victoria Police, the VI or the Victorian Ombudsman.⁵⁴⁴ A large number of complaints are referred to the Victorian Ombudsman.⁵⁴⁵ Again, this reflects the seriousness with which protected disclosure complaints are treated within the Victorian regime. They are only referred to well-resourced and purpose-built investigative agencies. This helps to

⁵³⁸ *PD Act 2012* (Vic) ss 26, 32; *IBAC Act 2011* (Vic) s 7 and pt 3 div 3; Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 20 March 2017.

⁵³⁹ See, for example, Margaret Mitchell, 'Investigations: improving practice and building capacity' in Brown, *Whistleblowing in the Australian public sector* 181; Peter Roberts, 'Evaluating agency responses: comprehensiveness and the impact of whistleblowing procedures' in Brown, *Whistleblowing in the Australian public sector* 233; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 261; A J Brown and Chris Wheeler, 'Project findings: an agenda for action' in Brown, *Whistleblowing in the Australian public sector* 289; IBAC, *Review of protected disclosure procedures* (December 2014); IBAC, *Audit of Victoria Police complaints handling systems at regional level* (September 2016).

⁵⁴⁰ Mr David Thompson, Protected Disclosure Coordinator, City of Boroondara, Submission, 9 May 2016; Mr John Merritt, Chief Executive Officer, VicRoads, Submission, 3 June 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016.

⁵⁴¹ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016. See also Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016.

⁵⁴² *PD Act 2012* (Vic) s 26; *IBAC Act 2011* (Vic) s 58.

⁵⁴³ *IBAC Act 2011* (Vic) s 60(2).

⁵⁴⁴ *IBAC Act 2011* (Vic) s 73(3).

⁵⁴⁵ Ms Deborah Glass OBE, Victorian Ombudsman, Submission to the DPC consultation, 20 May 2016.

ensure that they are impartially investigated, and that the risk of reprisals—which is self-evidently greater when organisations who are the subjects of a disclosure investigate themselves—is minimised.

Overall, the current Victorian law⁵⁴⁶ meets the majority of best-practice principles⁵⁴⁷ for assessing and investigating protected disclosures. The Committee received strong evidence in support of IBAC's current role as the independent and specialised clearing house for protected disclosures.⁵⁴⁸ However, there have also been important concerns raised in relation to the referral of protected disclosure complaints.

4.5.2 Referral of protected disclosure complaints

Current system of referrals too restrictive?

The Committee has received evidence that the current system of referrals is too restrictive and that protected disclosure complaints might be safely, effectively and efficiently referred to a much wider range of organisations.⁵⁴⁹ For example, IBAC could perhaps refer protected disclosure complaints to organisations to which it can presently only refer ordinary complaints.⁵⁵⁰

The reasons given for expanding the range of organisations protected disclosure complaints can be referred to include

- the advantages of making use of specialist organisations who can more readily investigate a matter within their expertise and experience
- that less serious matters need not be investigated by one of the principal integrity agencies
- that the Victorian Ombudsman is overburdened with protected disclosure complaints, and

⁵⁴⁶ See, for example, *PD Act 2012* (Vic) ss 13, 24, pts 8–10; *IBAC Act 2011* (Vic) s 15.

⁵⁴⁷ See, for example, Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 5 ('A law must create appropriate oversight by an independent whistleblower investigation/complaints authority or tribunal. Their functions might include ... the receipt of disclosures, ensuring compliance with the law, maintenance of data about whistleblowing cases, reporting to parliament, commencing investigations of their own motion or coordinating with other agencies to investigate wrongdoing.'). Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2015) 3; Simon Wolfe et al, *Whistleblower protection rules in G20 countries: the next Action Plan*. Public consultation draft. (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2014) 4.

⁵⁴⁸ Mr David Thompson, Protected Disclosure Coordinator, City of Boroondara, Submission, 9 May 2016; Mr John Merritt, Chief Executive Officer, VicRoads, Submission, 3 June 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016; Mr John Brown, Ombudsman and Governance Advisor, City of Greater Geelong, Submission, 3 May 2016; Hon Lisa Neville, Minister for Water, Department of Environment, Land, Water and Planning, Submission, 17 June 2016.

⁵⁴⁹ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Closed Hearing, Melbourne, 23 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016; Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 24 October 2016; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

⁵⁵⁰ *IBAC Act 2011* (Vic) s 73(2) (referral of ordinary complaints).

- that some matters can be safely referred to organisations who are the subjects of protected disclosure complaints.⁵⁵¹

It is significant that each of the major integrity agencies that deal with protected disclosure complaints has argued that the present system of referrals from IBAC is too restrictive.⁵⁵²

Possible solutions

One solution that has been suggested to the Committee would be to allow *IBAC* to refer protected disclosure complaints to a wider range of organisations for investigation.⁵⁵³ This solution has the virtue of simplicity in that *IBAC* remains the single source of referrals of protected disclosure complaints. If this change were made, *IBAC* could also draw on its power to consult with an organisation that it was considering referring a protected disclosure complaint to.⁵⁵⁴

However, the Victorian Ombudsman has argued that her office should also have a power of referral to pass protected disclosure complaints it has received from *IBAC* to more appropriate bodies for investigation, including, possibly, organisations that are the subjects of the disclosure.⁵⁵⁵

In comparison with the other integrity agencies operating within Victoria's protected disclosure scheme, the Victorian Ombudsman assesses and investigates the largest number of complaints in Victoria.⁵⁵⁶ It has vast experience handling complaints across a wide range of areas of Victorian law, having been engaged in the field since 1973. The Committee is therefore of the view that, instead of expanding the range of organisations *IBAC* can refer to, the *Victorian Ombudsman* should be given power to refer protected disclosure complaints it has received from *IBAC* to a wide range of appropriate complaint-handling bodies, including, in some cases, organisations that are the subjects of disclosures.

To reiterate, *IBAC* would continue to refer protected disclosure complaints only to Victoria Police, the VI and the Victorian Ombudsman. But the Victorian Ombudsman would be given the power to refer protected disclosure complaints it receives to appropriate bodies.

⁵⁵¹ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016; Mr Stephen O'Bryan QC, Commissioner, *IBAC*, Closed Hearing, Melbourne, 24 October 2016; Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Closed Hearing, Melbourne, 21 March 2016.

⁵⁵² Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Closed Hearing, Melbourne, 23 May 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016; Mr Stephen O'Bryan QC, Commissioner, *IBAC*, Closed Hearing, Melbourne, 24 October 2016.

⁵⁵³ Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016; Mr Stephen O'Bryan QC, Commissioner, *IBAC*, Closed Hearing, Melbourne, 24 October 2016.

⁵⁵⁴ *IBAC Act 2011* (Vic) s 76.

⁵⁵⁵ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016.

⁵⁵⁶ Ms Deborah Glass OBE, Victorian Ombudsman, Submission to the DPC Consultation, 20 May 2016.

While IBAC, the VI and Victorian Ombudsman have said that the present system of referrals of protected disclosure complaints is too restrictive, each has nevertheless recognised the special status of protected disclosure complaints and the need for impartial and effective investigations in which disclosers are protected against reprisals.⁵⁵⁷

Thus, the Committee considers that any referral of a protected disclosure complaint to an organisation that is the subject of the disclosure must only be made under strict conditions. It would undermine the rationale of the *PD Act 2012* (Vic) if a whistleblower's disclosures about improper conduct within their own organisation were sent back to that organisation in an unrestricted fashion.⁵⁵⁸

Referrals by the Ombudsman to an organisation that is the subject of a protected disclosure complaint

The Committee believes that the Victorian Ombudsman's recommended power to refer a protected disclosure complaint *to an organisation that is the subject of the disclosure*—which will often be the discloser's own organisation—should only be able to be exercised under the following conditions.

First, the Ombudsman would have to be reasonably satisfied that the organisation can impartially and effectively investigate the protected disclosure complaint.

Second, the Ombudsman would have to be reasonably satisfied that the discloser can be protected against reprisals ('detrimental action'), including, as relevant, the protection of his or her identity. An example of a legal response to this kind of concern can be found in Queensland's *Public Interest Disclosure Act 2010*. Section 31 of this Act provides, in part, that:

- (3) The public sector entity must not refer a public interest disclosure to another public sector entity if it considers there is an unacceptable risk that a reprisal would happen because of the referral.
- (4) In considering whether there would be an unacceptable risk, the public sector entity must, if practicable, consult with the person who made the public interest disclosure.

Third, the discloser would have to be informed in writing of the Ombudsman's intention to refer the protected disclosure complaint back to the organisation that is the subject of the disclosure, and its reasons for doing so, and given the right to object within a set period.

⁵⁵⁷ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 24 October 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 11 May 2016.

⁵⁵⁸ See the discussion, and accompanying references, in section 1.5 in Chapter 1 of this report. See also Ms Karen Burgess, Submission, 27 April 2016; Mr Brian Hood, Submission, 10 February 2017.

Fourth, the Victorian Ombudsman would have monitoring and oversight powers and responsibilities in relation to the investigation carried out by another organisation. These would be similar to IBAC's powers in this regard⁵⁵⁹ and include requirements that the investigating organisation report to the Ombudsman on the progress of the investigation, as well as the ultimate power of the Ombudsman to take over an investigation.⁵⁶⁰

The right of a discloser to be informed of a referral to an organisation has been recognised in a number of Australian jurisdictions.⁵⁶¹ Further, the right of a discloser to object to a planned referral of this nature is, for example, provided in the Northern Territory's *Public Interest Disclosure Act*.⁵⁶²

Under the Northern Territory Act, the Commissioner for Public Interest Disclosure may refer certain public interest disclosures to other bodies for investigation.⁵⁶³ Before making a referral, the Commissioner must give the discloser written notice of the planned referral, to whom it is intended to be referred and the right of the discloser to object.⁵⁶⁴ The discloser can object to any referral, or to the particular body intended to receive the referral.⁵⁶⁵ The Commissioner must, within 14 days of receipt of the objection:

- (a) consider the objection and the reasons for it; and
- (b) decide whether or not to refer the public interest disclosure to the specified referral body; and
- (c) notify the objector, in writing, of the decision.⁵⁶⁶

While the Committee has concluded that the Ombudsman would have the ultimate discretion to refer a matter despite an objection, the objection process would provide for greater accountability, requiring the Ombudsman to put on record, and communicate to the discloser in writing, the reasons why the referral is appropriate. It would also give the Ombudsman the opportunity to rethink a decision on a referral, and, perhaps in light of additional evidence, refer a protected disclosure complaint to a more appropriate body when considered necessary to ensure the protection of the discloser.

FINDING 4: That the power of IBAC to refer protected disclosure complaints under the *IBAC Act 2011* (Vic) does not need to be changed.

⁵⁵⁹ *IBAC Act 2011* (Vic) ss 78–80.

⁵⁶⁰ Cf the procedures in the *Ombudsman Act 1973* (Vic) regarding the Ombudsman's power to refer ordinary complaints: pt IV div 2D.

⁵⁶¹ *Public Interest Disclosure Act 2012* (ACT) ss 19, 23; *Public Interest Disclosures Act 1994* (NSW) s 27; *Public Interest Disclosure Act* (NT) ss 22–3; *Public Interest Disclosures Act 2002* (Tas) ss 43–4; *Public Interest Disclosure Act 2010* (Qld) ss 31–3.

⁵⁶² *Public Interest Disclosure Act* (NT) s 23.

⁵⁶³ *Public Interest Disclosure Act* (NT) s 22.

⁵⁶⁴ *Public Interest Disclosure Act* (NT) s 23(1).

⁵⁶⁵ *Public Interest Disclosure Act* (NT) s 23(2).

⁵⁶⁶ *Public Interest Disclosure Act* (NT) s 23(4).

RECOMMENDATION 12: That the Victorian Government amend the law to provide that the Victorian Ombudsman has the power to refer protected disclosure complaints to other appropriate organisations for investigation under certain conditions. These conditions include:

- that the Ombudsman exercise new monitoring and oversight powers over that investigation, including the power to take over an investigation
- that, in the case of a referral *to an organisation that is the subject of the disclosure*,
 - the Ombudsman be reasonably satisfied that the investigation can be impartial and effective, and that the discloser can be protected against reprisals
 - that the discloser be informed in writing by the Ombudsman of any such planned referral and the reasons for it
 - that the discloser have the right to object to the planned referral and to receive a written response to that objection from the Ombudsman.

4.6 Conclusion

This chapter has considered the law and processes in relation to making a disclosure to the right body, the issue of misdirected disclosures, third-tier disclosures to journalists and the referral of protected disclosure complaints.

Given the complex and prescriptive nature of the requirements under the *PD Act 2012 (Vic)* for the disclosure of information to the correct body, the Committee has recommended improvements to the design of the legislation, simplification of the processes for making a disclosure and better public information to explain the Act. With regard to misdirected disclosures, the Committee recommends that, with some exceptions, IBAC be able to assess as a possible protected disclosure complaint any notification of a disclosure, whatever its source.

Best-practice principles require the protection of third-tier disclosures to journalists under particular conditions. The protection of disclosures to journalists is common in Australian jurisdictions. The Committee received arguments and evidence in support of third-tier disclosure and recommends that the Victorian Government investigate whether there is merit in introducing it in this state. However, the Committee has identified a range of concerns with third-tier disclosure. These include possible negative impacts on investigations and reputations, the varying standards of media reporting and the difficulty of determining when the criteria are satisfied. What role the courts might play in relation to third-tier disclosure is also, in the Committee's view, uncertain. These concerns should be taken into account in any Government investigation into the merits of third-tier disclosure.

While the Victorian disclosure regime meets most of the best-practice principles regarding assessment and investigation, the system for referring protected disclosure complaints is too restrictive. The Committee has thus recommended giving the Victorian Ombudsman, an experienced and expert complaint-handling body, the power to refer protected disclosure complaints to appropriate entities for investigation, provided there are appropriate safeguards to protect disclosers.

The next chapter explores the protection of disclosers further, examining detrimental action, confidentiality and welfare issues.

5

Protecting disclosers

5.1 Introduction

One of the key rationales for the *PD Act 2012* (Vic) is to protect disclosers, and anyone else, from reprisals ('detrimental action') which have been carried out in response to a disclosure, or suspected disclosure, about improper conduct in the public sector.⁵⁶⁷ This not only protects the discloser from harm but also encourages others to report wrongdoing.⁵⁶⁸

The prohibition of reprisals, the preservation of confidentiality and the management of the welfare of disclosers operate in conjunction to protect and support disclosers. Further, as previously discussed,⁵⁶⁹ if disclosers do not think they will be protected against reprisals they are less likely to report improper conduct. Consequently, improper conduct is less likely to be identified and redressed.

The protection of a discloser's identity through confidentiality provisions is the first, and one of the most effective, ways of preventing reprisals against a discloser. If a discloser's identity is kept confidential, they are less likely to be exposed to reprisals and the stressful effects of blowing the whistle can be reduced.

While effective legal protections against unlawful breaches of confidentiality are necessary to safeguard the interests of disclosers, the Committee recognises that these protections must be judiciously balanced against the requirements for the effective assessment, handling and investigation of protected disclosures.

This chapter examines concerns raised with the Committee in submissions and at hearings in relation to detrimental action, confidentiality and the welfare of disclosers.

5.2 Detrimental action

The *PD Act 2012* (Vic) meets most of the relevant best-practice principles relating to detrimental action taken in reprisal for a protected disclosure against the discloser or someone else (for example, someone cooperating with an investigation).⁵⁷⁰ Detrimental action includes threats, intimidation, harassment, discrimination and disadvantage.⁵⁷¹

⁵⁶⁷ *PD Act 2012* (Vic) s 1(b).

⁵⁶⁸ *PD Act 2012* (Vic) s 1(a).

⁵⁶⁹ See the discussion in section 1.5 of Chapter 1.

⁵⁷⁰ *PD Act 2012* (Vic) ss 43, 45.

⁵⁷¹ *PD Act 2012* (Vic) s 3 (definition of 'detrimental action').

The main issue raised with the Committee concerned whether the legal threshold to prove that a reprisal has been carried out in response to a disclosure is too high. Before examining the issue of the legal threshold to establish detrimental action in reprisal, the report examines the mistreatment of whistleblowers, best-practice principles on detrimental action and the current Victorian law.

5.2.1 The mistreatment of whistleblowers

As discussed in Chapter 1, research shows that around one third of whistleblowers in the Australian public sector will experience mistreatment.⁵⁷² Even more will experience significant negative impacts on their health, relationships, finances and employment prospects.⁵⁷³ According to the WWTW study, the most common forms of mistreatment of whistleblowers are:

- ‘threats’
- ‘intimidation’
- ‘torment’
- ‘undermining of authority’
- ‘heavier scrutiny of work’
- ‘questioning of motives’
- ‘unsafe or humiliating work’
- ‘being made to work with wrongdoers.’⁵⁷⁴

The mistreatment can take subtle and varied forms and tends to be cumulative:⁵⁷⁵

[W]hen bad treatment does occur ... it is unlikely to involve a single decisive blow such as a sacking or demotion and more likely to involve a series of smaller blows over time.⁵⁷⁶

The research also demonstrates that managers are more likely than co-workers to mistreat whistleblowers.⁵⁷⁷

⁵⁷² See the discussion in section 1.5.

⁵⁷³ See the discussion in section 1.5 of Chapter 1.

⁵⁷⁴ Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 128.

⁵⁷⁵ Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 111, 128–9, 133, 134–5; ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxvii–xxviii. See also Inez Dussuyer et al, *Preventing victimisation of whistleblowers* (Victoria University, 2016).

⁵⁷⁶ Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 129.

⁵⁷⁷ ‘Summary’ in Brown, *Whistleblowing in the Australian public sector* xxiv–xxv, xxvii, xxix; Rodney Smith and A J Brown, ‘The good, the bad and the ugly: whistleblowing outcomes’ in Brown, *Whistleblowing in the Australian public sector* 125; A J Brown and Jane Olsen, ‘Whistleblower mistreatment: identifying the risks’ in Brown, *Whistleblowing in the Australian public sector* 137, 152.

Other evidence received by the Committee reinforces the conclusions of this research.⁵⁷⁸ One whistleblower, for example, described her experience after reporting wrongdoing as follows:

I was threatened. I was followed. I was harassed. My work performance was not actually criticised until I started to make it clear that I had concerns with how the organisation was operating. ... And then the work performance, and the complaints about my work performance were never validated. They were highly vexatious, and none of them were ever found to be plausible ... I lost my job and my entitlements. I was threatened with costly litigation. I was stalked by members of the organisation.⁵⁷⁹

In similar terms, another whistleblower, who had been the Chief Financial Officer in a private sector organisation, gave evidence to the Committee that

The CEO verbally abused me, used intimidation and harassment in an attempt to silence me, asked me to leave the company, instructed me to ‘back off’ in my investigations and directed me to withhold information from the Board—which I refused to do. Interactions with some colleagues were similarly hostile. ...

Isolation, harassment, intimidation, outright hostility. Verbal abuse. The CEO attempting to interfere with me carrying out my duties. Disempowerment. ...

I was completely exposed after being removed from the organisation, without any legal or any other assistance, and in fact was told in no uncertain terms to keep quiet.

I was badly let down by people who I trusted.

My career has been trashed.

I have suffered financial hardship and disruption and there have been serious adverse effects on my health, wellbeing and family.⁵⁸⁰

The submission from another whistleblower echoed these experiences:

The whole experience had a ruinous impact on my mental health.

While I was at work and under threat from the witch-hunt, I suffered a great deal of stress and anxiety. I resorted to tranquilizers and sleeping pills to get through as best I could. I sought psychological therapy through this time and continue to do so.

When I saw that so relatively little [had] changed ... after the scandal, I felt depressed and still do, but determined to help change things. The battle for justice is the only thing that got me out of bed in the morning.⁵⁸¹

⁵⁷⁸ Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017; Mr Brian Hood, Submission, 10 February 2017; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016; Dr Inez Dussuyer, Professor Anona Armstrong AM, Dr Kumi Heenetigala and Dr Russell Smith, College of Law & Justice, Victoria University, Submission, 27 July 2016; Accountability Round Table, Submission, 4 May 2016. See also Lindy Annakin, *In the public interest or out of desperation? The experience of Australian whistleblowers reporting to accountability agencies* (PhD thesis, Department of Government and International Relations, University of Sydney, March 2011); Inez Dussuyer, Anona Armstrong, Kumi Heenetigala and Russell Smith, *Preventing victimisation of whistle-blowers* (Victoria University, 2016); K Jean Lennane, ‘“Whistleblowing”: a health issue’ (1993) 307 *British Medical Journal* 667; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 45–6.

⁵⁷⁹ Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017.

⁵⁸⁰ Mr Brian Hood, Submission, 10 February 2017.

⁵⁸¹ Submission, name withheld, 23 May 2017.

5.2.2 Best-practice principles

The *PD Act 2012* (Vic) conforms in many respects with the relevant best-practice principles for protections against reprisals distilled by the WWTW study. These principles are listed in Table 5.1.⁵⁸² The table only lists the main provisions from the *PD Act 2012* (Vic). These provisions are, of course, supported by the other relevant principal Acts.⁵⁸³

Table 5.1 Selected WWTW best-practice principles for protecting disclosers

Principle	Description	<i>PD Act 2012</i> (Vic) provisions
Confidentiality	Disclosures should be received and investigated in private to safeguard, to the maximum extent possible within the agency's control, the identity of the discloser. Disclosures should be able to be made confidentially and, where practical, individual disclosures should be handled without disclosing the identity of the discloser or even that a disclosure has been made.	Part 7
Protection of person making disclosure	A discloser should be protected against criminal or civil liability, or other detriment, for making a disclosure to which the legislation applies. For example, the discloser: <ul style="list-style-type: none"> • should not be liable to prosecution for breach of a statutory secrecy provision • should not incur civil liability—for example, for defamation or breach of confidence • should not be subject to discipline or other workplace sanction, such as a reduction in salary or position, or termination of employment • should be entitled to legal redress if they suffer detriment as a result of making the disclosure. 	Sections 3 (definition of 'detrimental action'), 39–41, 43–5, 46–51
Remedial action	When a discloser suffers detriment as a result of a disclosure, the agency (or, failing that, the oversight agency) should take the following action as necessary to prevent or remedy the detriment: <ul style="list-style-type: none"> • stopping the detrimental action and preventing its recurrence, including through an injunction • placing the discloser in the situation they would have been in but for the disclosure—with their informed consent this might include transferring a discloser to another equivalent position • apologising • providing compensation, including monetary and non-monetary compensation, for the detriment suffered • taking disciplinary or criminal action against any person responsible for the detriment. 	Sections 45 (prohibition of reprisals), 49–50 (injunctions and other court orders), 51 (transfer of employee), 46–7 (damages, reinstatement), 48 (vicarious liability of public body) <i>Note:</i> apologies are not referred to in the Act

Source: Adapted, with minor modifications, from A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles,' in A J Brown (ed), *Whistleblowing in the Australian public sector* (ANU E Press, 2008) 261, 282–7.

⁵⁸² For other statements of best-practice principles, see Transparency International, *International principles for whistleblower legislation* (2013) 5–6; G20 Anti-Corruption Action Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (no date) 10–11, 20, 31; Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 2, 4–5; Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G 20 whistleblower protection laws* (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2015); Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016).

⁵⁸³ See, for example, *IBAC Act 2011* (Vic), *VI Act 2011* (Vic) and *Ombudsman Act 1973* (Vic).

5.2.3 Current Victorian law

Purposes of the *PD Act 2012* (Vic)

One of the purposes of the *PD Act 2012* (Vic) is to ‘encourage and facilitate disclosures of ... detrimental action taken in reprisal for a person making a disclosure.’⁵⁸⁴ In addition, the purposes of the Act are to

... provide protection for—

- (i) persons who make those disclosures
- and
- (ii) persons who may suffer detrimental action in reprisal for those disclosures;
- and ...

to provide for the confidentiality of the content of those disclosures and the identity of persons who make those disclosures.⁵⁸⁵

The protections against reprisals are found in Part 6 of the Act and apply from the moment a protected disclosure is made in accordance with its procedures.⁵⁸⁶ They apply regardless of whether or not IBAC has been notified of it by the receiving entity, or whether or not IBAC or the VI has determined that the disclosure is a protected disclosure complaint.⁵⁸⁷ The rationale for these provisions is that a discloser needs protection from the outset.

What is detrimental action in reprisal for a protected disclosure?

Detrimental action is broadly defined in the *PD Act 2012* (Vic). Under section 3 of the Act, it *includes*—

- (a) action causing injury, loss or damage;
- (b) intimidation or harassment;
- (c) discrimination, disadvantage or adverse treatment in relation to a person’s employment, career, profession, trade or business, including the taking of disciplinary action ...⁵⁸⁸

It is an offence to take detrimental action *in reprisal for* the making of a protected disclosure.⁵⁸⁹ It is an offence for a person to take or threaten ‘to take detrimental action against the other person because, or in the belief that—’

... the other person or anyone else had made, or intends to make, the disclosure; or

⁵⁸⁴ *PD Act 2012* (Vic) s 1.

⁵⁸⁵ *PD Act 2012* (Vic) s 1(b)–(c).

⁵⁸⁶ *PD Act 2012* (Vic) ss 3 (definition of ‘protected disclosure’), 38; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28.

⁵⁸⁷ *PD Act 2012* (Vic) s 38; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 28.

⁵⁸⁸ *PD Act 2012* (Vic) s 3 (definition of ‘detrimental action’); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 8.

⁵⁸⁹ *PD Act 2012* (Vic) s 45(1).

... the other person or anyone else has cooperated, or intends to cooperate, with an investigation of the disclosure; or

... for either of those reasons, the person incites or permits someone else to take or threaten to take detrimental action against the other person.⁵⁹⁰

The key features of this offence are as follows.

First, the detrimental action must be in reprisal for the making of a protected disclosure.

Second, the offence includes taking, or threatening to take, detrimental action against *anyone* on the basis that they have made, or intend to make, a disclosure, or that they have cooperated, or intend to cooperate, with an investigation. The victim of the detrimental action need not in fact have made, or intended to make, a disclosure, nor cooperated, or intended to cooperate, with an investigation. It is sufficient if the person taking or threatening the detrimental action *believe* that they have, and acts on that basis.

Third, a person liable for the offence need not have taken the detrimental action directly themselves. It is enough if they have incited or permitted 'someone else to take or threaten to take detrimental action against the other person.'⁵⁹¹

It is important to note that, consistent with the focus of the *PD Act 2012* (Vic), while anyone can disclose information about detrimental action, it must be information about action by *public officers or public bodies*.⁵⁹²

To be protected under the Act, a person must have made a disclosure about improper conduct in the public sector in accordance with the required procedure under Part 2 of the Act.⁵⁹³ They may then disclose information that shows, or tends to show, that a public officer or public body is involved in detrimental action, *or* demonstrate that they have a *reasonable belief* that a public officer or public body is involved.⁵⁹⁴

There are a number of qualifications to the offence as well as specific defences. A person alleging the offence must not have breached section 72 by knowingly disclosing 'false or misleading' information.⁵⁹⁵ Section 72(1) states that

[a] ... person must not provide information under this Act that the person knows is false or misleading in a material particular, intending that the information be acted on as a protected disclosure.

⁵⁹⁰ *PD Act 2012* (Vic) s 43(1).

⁵⁹¹ *PD Act 2012* (Vic) s 43(1)(b).

⁵⁹² *PD Act 2012* (Vic) s 9(1). See also IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 8.

⁵⁹³ *PD Act 2012* (Vic) s 3 (definition of 'assessable disclosure'), 12(1).

⁵⁹⁴ *PD Act 2012* (Vic) s 9(1).

⁵⁹⁵ *PD Act 2012* (Vic) s 43(2).

It is a defence—to put it in general terms—if the public officer or public body accused of the reprisal can show that the protected disclosure was not a ‘substantial reason’ for the detrimental action.⁵⁹⁶ Therefore, the protected disclosure must be a substantial reason for the detrimental action for it to amount to an unlawful reprisal.⁵⁹⁷ It also a defence if IBAC or the VI has determined that a disclosure is not a protected disclosure complaint ‘and, at the time the person took the detrimental action, the person knew of that determination.’⁵⁹⁸

Finally, the Act does not prevent ‘management action’ with respect to employees who have made a protected disclosure provided that the disclosure is ‘not a *substantial* reason for the manager taking the action.’⁵⁹⁹

Remedies

The *PD Act 2012* (Vic) provides the following principal remedies for detrimental action in response to a protected disclosure:

- court order that the offender pay the victim damages⁶⁰⁰
- court order that an offending employer ‘reinstate or re-employ’ the victim in their former position or a comparable position⁶⁰¹
- proceeding to recover damages, or receive another remedy, for the reprisal as a tort (civil wrong)⁶⁰²
- proceeding against a public body (or relevant employee or agent) for vicarious liability for the reprisal⁶⁰³
- court order that the person carrying out the reprisal ‘remedy that action’⁶⁰⁴
- court-ordered injunction in relation to the reprisal⁶⁰⁵
- transfer of an employee victim to a position in another public service body or public entity, or, to a different work division within an organisation.⁶⁰⁶

The provisions relating to compensation, such as damages, will be addressed in the next chapter, which concerns compensation for whistleblowers.

⁵⁹⁶ *PD Act 2012* (Vic) s 45(2).

⁵⁹⁷ *PD Act 2012* (Vic) s 43(3), 44(2), 45(2); IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 8.

⁵⁹⁸ *PD Act 2012* (Vic) s 45(3).

⁵⁹⁹ *PD Act 2012* (Vic) s 44 (emphasis added). See also IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 8, 28–9.

⁶⁰⁰ *PD Act 2012* (Vic) s 46 (‘damages that the court considers appropriate to compensate the person for any injury, loss or damage’).

⁶⁰¹ *PD Act 2012* (Vic) s 46(2).

⁶⁰² *PD Act 2012* (Vic) s 47(1) (‘a person taking detrimental action in reprisal is liable in damages for any injury, loss or damage to that other person’) (2)–(6).

⁶⁰³ *PD Act 2012* (Vic) s 48.

⁶⁰⁴ *PD Act 2012* (Vic) s 49(1). See also *PD Act 2012* (Vic) ss 49(2), 50.

⁶⁰⁵ *PD Act 2012* (Vic) ss 49–50.

⁶⁰⁶ *PD Act 2012* (Vic) s 51.

5.2.4 The threshold for detrimental action in reprisal

To establish that there has been detrimental action in reprisal for a protected disclosure, the protected disclosure must have been ‘a *substantial* reason for the person taking the action.’⁶⁰⁷ A manager is also allowed to take ‘management action that is detrimental action’ in relation to an employee provided that the protected disclosure is ‘not a substantial reason for the manager taking the action.’⁶⁰⁸ In effect, this means that detrimental action can be taken provided the protected disclosure is not the main reason for taking it.

While this threshold is not unusual in Australian jurisdictions,⁶⁰⁹ the Committee has received criticism from a range of people and organisations that it makes it too difficult for disclosers to prove that a reprisal has taken place.⁶¹⁰ This difficulty has also been recognised in statements of best-practice principles and in academic commentary.⁶¹¹

The IBAC Commissioner, Mr Stephen O’Bryan QC, also considered that

there may be merit in removing the requirement that, in order for conduct to be detrimental action in reprisal for a protected disclosure, a reason in s 43(1)(a) [of the *PD Act 2012* (Vic)] be a ‘substantial reason’ for the person taking the action.

Detrimental action can often be difficult to prove and requiring a person to establish that a reason in s 43(1)(a) was a substantial reason for the action may make it more difficult for a victim of detrimental action to avail themselves of protections or remedies under the *PD Act* [2012 (Vic)]. Such a requirement may also send the message that it is acceptable to take action in reprisal for a protected disclosure provided there are additional reasons for taking the action.⁶¹²

Similarly, the Victorian Ombudsman, Ms Deborah Glass OBE, has argued that there is merit in removing the ‘substantial reason’ requirement:

⁶⁰⁷ *PD Act 2012* (Vic) s 43(1)(a), 43(3), 45(2).

⁶⁰⁸ *PD Act 2012* (Vic) s 44(2), 45(2).

⁶⁰⁹ See *Public Interest Disclosures Act 1994* (NSW) s 20(1); *Whistleblowers Protection Act 1993* (SA) s 9(1); *Public Interest Disclosure Act 2010* (Qld) ss 40–41; *Public Interest Disclosures Act 2002* (Tas) s 19(3); *Public Interest Disclosure Act 2003* (WA) s 15(1); *Public Interest Disclosure Act* (NT) s 15(3).

⁶¹⁰ Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Accountability Round Table, Submission, 4 May 2016; A J Brown, *Protected Disclosure Act 2012* (Vic): *ten problems?* (Based on comments to the Victorian Government Protected Disclosure Coordinators Forum, IBAC, 6 March 2015.), tabled with the Committee.

⁶¹¹ See, for example, Brown, *Public interest disclosure legislation in Australia* 36–8; Transparency International, *International principles for whistleblower legislation* (2013) 5; Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2015) 11, 20, 31; Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016); Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date); A J Brown, *Protected Disclosure Act 2012* (Vic): *ten problems?* (Based on comments to the Victorian Government Protected Disclosure Coordinators Forum, IBAC, 6 March 2015.), tabled with the Committee; Lindy Annakin, *In the public interest or out of desperation? The experience of Australian whistleblowers reporting to accountability agencies* (PhD thesis, Department of Government and International Relations, University of Sydney, March 2011) 247; UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 64.

⁶¹² Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

At present, the threshold for detrimental action to be made out under s 43(3) of the PDA [*PD Act 2012* (Vic)] is extremely high. The fact that someone has made a disclosure needs to be ‘a substantial reason for the person taking action’ leaves open a defence that ‘it was one of the reasons we sacked them, but not the main one.’ In practical terms, this is almost impossible to prove.⁶¹³

Given the evidence that the mistreatment of whistleblowers is a significant problem, that perpetrators are more likely to be managers than co-workers and that mistreatment can be disguised as legitimate management action, the Committee believes the threshold to establish detrimental action in reprisal for a protected disclosure should be lowered.

RECOMMENDATION 13: That the Victorian Government amend the *PD Act 2012* (Vic) to remove the ‘substantial reason’ requirement for detrimental action in reprisal for a protected disclosure.

5.3 Confidentiality

Keeping the identity of a discloser and the content of their disclosure confidential is an important way to minimise the risk of reprisal against a whistleblower. The current Victorian law largely meets the relevant best-practice principles in this respect and properly balances the need to protect whistleblowers with the effective assessment, management and investigation of protected disclosures.

However, some concerns have been raised with the Committee that the confidentiality provisions could be made simpler, less demanding and more flexible. Before considering this evidence, the key best-practice principles and the current Victorian law are outlined.

5.3.1 Best-practice principles

As discussed above, the *PD Act 2012* (Vic) largely conforms to the relevant WWTW best-practice principles on confidentiality.⁶¹⁴ Part 7 of the Act provides significant protection of the content of disclosures and the identity of disclosers. The protection of the discloser is judiciously balanced against the need to disclose the identity of a discloser to certain parties when required:

- for ‘the effective investigation of a disclosure’
- to ‘provide procedural fairness’

⁶¹³ Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016.

⁶¹⁴ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown (ed), *Whistleblowing in the Australian public sector* 285. See also UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 48–9; Transparency International, *International principles for whistleblower legislation* (2013) 5; Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016); Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2015) 6; Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 4; G20 Anti-Corruption Action Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (no date) 11.

- to ‘protect a person who has made a disclosure’
- to ‘make a public report on how a disclosure was dealt with.’⁶¹⁵

The Committee notes that some statements of best-practice principles prohibit the disclosure of a whistleblower’s identity unless they have consented to it.⁶¹⁶ However, such an unqualified prohibition does not properly take into account the requirements for effective investigations and does not reflect the law in Australian jurisdictions.⁶¹⁷

5.3.2 Current Victorian law

In Victoria, as in other Australian jurisdictions,⁶¹⁸ there are requirements to preserve the confidentiality of disclosers.⁶¹⁹ These requirements are, however, subject to a range of exceptions.⁶²⁰ Some confidentiality requirements apply to public bodies and public officers receiving information related to a disclosure, while others apply to disclosers themselves.

Prohibitions on disclosure by public bodies or public officers

Subject to a number of exceptions, the *PD Act 2012* (Vic) prohibits the disclosure *by public bodies or public officers* of information regarding the content of a disclosure made in accordance with the Act or the identity of the discloser. The public bodies or public officers may have received a disclosure or been given information about it by an entity investigating it, such as IBAC. It is important to note that *these* prohibitions do *not* apply to disclosers.⁶²¹ The following is an outline of the applicable exemptions for public bodies and public officers.

Prohibition on disclosing the content of a disclosure: exceptions

Information about the content of a disclosure may be disclosed in particular circumstances, including the following:

⁶¹⁵ A J Brown et al, ‘Best-practice whistleblowing legislation for the public sector: the key principles’ in Brown, *Whistleblowing in the Australian public sector* 285; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 25, 30. While there is no specific provision for procedural fairness under the *PD Act 2012* (Vic), it could, arguably, be accommodated within exemptions to the prohibitions on disclosure—see, for example, *PD Act 2012* (Vic) s 54.

⁶¹⁶ Transparency International, *International principles for whistleblower legislation* (2013) 5; Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 4; G20 Anti-Corruption Action Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (no date) 11.

⁶¹⁷ *Public Interest Disclosure Act 2013* (Cth) s 20; *Public Interest Disclosure Act 2012* (ACT) s 44; *Public Interest Disclosures Act 1994* (NSW) s 22 (‘confidentiality guideline’); *Public Interest Disclosure Act* (NT) s 53; *Whistleblowers Protection Act 1993* (SA) s 7; *Public Interest Disclosure Act 2010* (Qld) s 65; *Public Interest Disclosures Act 2002* (Tas) s 23; *Public Interest Disclosure Act 2003* (WA) s 16.

⁶¹⁸ *Public Interest Disclosure Act 2013* (Cth) s 20; *Public Interest Disclosure Act 2012* (ACT) s 44; *Public Interest Disclosures Act 1994* (NSW) s 22; *Public Interest Disclosure Act* (NT) s 53; *Whistleblowers Protection Act 1993* (SA) s 7; *Public Interest Disclosure Act 2010* (Qld) s 65; *Public Interest Disclosures Act 2002* (Tas) s 23; *Public Interest Disclosure Act 2003* (WA) s 16.

⁶¹⁹ *PD Act 2012* (Vic) pt 7.

⁶²⁰ See, for example, *PD Act 2012* (Vic) s 54.

⁶²¹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30 (the rest of this section draws heavily from this source); *PD Act 2012* (Vic) ss 52–4; Mr Stephen O’Byrne QC, Commissioner, IBAC, Correspondence, 24 October 2016 and 28 April 2017.

- to carry out functions under the *PD Act 2012* (Vic)
- to get legal advice or representation
- if IBAC or the VI has determined that the disclosure is not a protected disclosure complaint
- when directed to, or authorised by, an investigating agency
- if necessary to take lawful action, such as a disciplinary action, in response to conduct that is the subject of the disclosure.⁶²²

Prohibition on disclosing the identity of discloser: exceptions

Information that could identify the discloser may be disclosed in particular circumstances, including the following:

- to carry out functions under the *PD Act 2012* (Vic)
- to get legal advice or representation
- if IBAC or the VI has determined that the disclosure is not a protected disclosure complaint
- ‘by an investigating entity after and in accordance with’ the discloser’s consent.⁶²³

Prohibitions applying to disclosers

The following prohibitions on disclosing certain information about the handling of a disclosure apply to disclosers, and others receiving the information, in particular circumstances.⁶²⁴ For example, subject to specific exceptions, a discloser will commit an offence if they reveal that:

- ‘a disclosure has been notified to IBAC for assessment’
- ‘IBAC or the Victorian Inspectorate has determined that a disclosure is a protected disclosure complaint.’⁶²⁵

5.3.3 Concerns over confidentiality

Four main concerns over the confidentiality provisions were raised with the Committee: their complexity, the difficulty of preserving confidentiality, organisations’ reduced control over investigations and the challenge of supporting disclosers.⁶²⁶

⁶²² IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) ss 52(3), 54.

⁶²³ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) ss 53(2), 54.

⁶²⁴ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) s 74.

⁶²⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; *PD Act 2012* (Vic) s 74.

⁶²⁶ See, for example, Mr Stephen O’Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Mr Stephen O’Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 27 July 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Hon Lisa Neville, Minister for Water, Department of Environment, Land, Water and Planning (DELWP), Submission, 17 June 2016.

Complexity of provisions

A number of organisations consider that the provisions are highly complex and difficult to understand.⁶²⁷ It is therefore difficult for public bodies and public officers—and even investigating entities on occasion—to understand the legal requirements. It can be hard for organisations receiving disclosures, or information about them, to know what they may and may not disclose. Specifically, it can be challenging for protected disclosure coordinators and other relevant staff to understand and comply with provisions that, if breached, can amount to an offence. As the Department of Environment, Land, Water and Planning (DELWP) observed:

There are a large number of department officers who can receive disclosures ... As a result there is a reliance on officers' abilities to comprehend and comply with this complex Act [the *PD Act 2012* (Vic)]. Even with the assistance of training and guidance material, there is a risk of inadvertent breach of the confidentiality and secrecy provisions. This in turn exposes individuals to significant penalties prescribed by the Act. It is a challenge for the department to ensure all department officers have access to training and support materials, and ensure that they understand the requirements—although they may never have to deal with a protected disclosure.⁶²⁸

It is noteworthy that IBAC, the VI and the Victorian Ombudsman have all commented on the complexity and inflexibility of the provisions. As the IBAC Commissioner explained,

[T]he operation of the Protected Disclosure Act [2012 (Vic)] could be improved in the following ways: a number of agencies have reported difficulties in understanding the restrictions on disclosing information and advising others, such as people who make disclosures, on the information they cannot disclose. The confidentiality provisions could therefore be simplified and made more flexible, in particular to make clear what can and cannot be divulged.⁶²⁹

If people do not understand the requirements of the confidentiality provisions, they not only risk breaching them but may also refrain from disclosing information they *are* allowed to disclose when such a disclosure might have been helpful to them.⁶³⁰ For example, a discloser might refrain from speaking to a counsellor for support on the mistaken assumption that it is prohibited under the Act.⁶³¹

⁶²⁷ See, for example, Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016; Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016; Mr Robin Brett QC, Victorian Inspector, VI, Submission, 27 July 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Public Hearing, Melbourne, 23 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016.

⁶²⁸ Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016.

⁶²⁹ Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

⁶³⁰ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

⁶³¹ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

The Victorian Inspector agrees with the Commissioner that the confidentiality provisions are ‘difficult and inflexible.’⁶³²

Similarly, the Victorian Ombudsman, Ms Deborah Glass OBE, has said that in her view

much of the PDA [*Protected Disclosure Act 2012 (Vic)*] regime is unnecessarily complicated and inflexible, with overly complex (and occasionally unworkable) confidentiality restrictions ...⁶³³

The difficulty of preserving confidentiality

Even if the requirements of the confidentiality provisions are understood, it is challenging in practice to keep the content of disclosures and the identity of disclosers confidential. It is challenging, for instance, to establish the necessary internal procedures for the secure receipt of information about disclosures and to ensure the protection of a discloser. As DELWP explained in its submission:

The department has set up systems for record keeping and communication which are compliant with the guidelines issued by IBAC in accordance with the Act [*PD Act 2012 (Vic)*]. From an operational perspective, the major challenge posed by the Act is in establishing stringent processes for receiving and handling disclosures which are entirely secure and ensuring that the identity of the discloser is not revealed when making internal enquiries. It is challenging to promote accessibility to disclosures through the use of existing IT systems and ensure that confidentiality is sufficiently protected.⁶³⁴

Reduced control over investigations

Some organisations argued that the confidentiality provisions mean they have reduced control over investigations and are not able to respond as efficiently to alleged wrongdoing within their organisations.⁶³⁵ Once a disclosure is made directly to or notified to IBAC, the autonomy of these organisations to investigate

⁶³² Mr Robin Brett QC, Victorian Inspector, VI, Submission, 27 July 2016. See also Assistant Commissioner Brett Guerin, Professional Standards Command, Victoria Police, Closed Hearing, Melbourne, 11 April 2016.

⁶³³ Ms Deborah Glass OBE, Ombudsman, Victorian Ombudsman, Submission, 17 May 2016.

⁶³⁴ Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016. See also Mr Tony De Fazio, Manager Civic Service, City of Whitehorse, Submission, 18 April 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Mr John Brown, Ombudsman and Governance Advisor, City of Greater Geelong, Submission, 3 May 2016; Mr David Thompson, Protected Disclosure Coordinator, City of Boroondara, 9 May 2016.

⁶³⁵ Mr Tony De Fazio, Manager Civic Service, City of Whitehorse, Submission, 18 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President and Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016; Mr Jeroen Weimar, Acting Chief Operating Officer, Public Transport Victoria, Submission, 28 April 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016; Mr David Thompson, City of Boroondara, Submission, 9 May 2016; Ms Deborah Glass OBE, Victorian Ombudsman, Submission, 17 May 2016; Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016; Mr Stephen O’Byrne QC, Commissioner, IBAC, Closed Hearing, 11 April 2016.

and respond to possibly serious wrongdoing is inevitably reduced.⁶³⁶ The Committee also received evidence from concerned organisations that their reduced role in investigating alleged wrongdoing might mean that critical evidence is lost, that the organisation continues to be harmed by the wrongdoing and that in-house expertise would not be used.⁶³⁷ A concern was also expressed by some organisations that they would not be adequately informed of the progress of an investigation, a disadvantage compounded by any long delays.⁶³⁸

Monash University, for example, expressed many of these concerns to the Committee. The University noted that, before the enactment of the *PD Act 2012* (Vic),

... because the disclosure came to us and we were acting on it we could move immediately to lock down areas to protect evidence ... [W]e can covertly lock down that evidence very quickly. On some cases we have sent expert teams in overnight, often with contracted external sources, to grab copies of hard disks of computers or similar sorts of things. But more importantly we have the expertise to get access to particular work areas where evidence might lie ... [W]e could pull together this complex group of internal entities to support the investigation, which is a necessity. We believe we could do it far more speedily and we have much greater clarity about where a particular investigation is going if we are doing it ourselves.⁶³⁹

The challenge of supporting disclosers

The Committee also received some evidence⁶⁴⁰ that the confidentiality provisions could make it more difficult for organisations to provide adequate support and protection to disclosers. If organisations do not know who the discloser (or the alleged wrongdoer) is, they could find it more difficult to insulate the discloser from harm and connect them with appropriate support services.⁶⁴¹

⁶³⁶ See, for example, Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President and Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016; Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016; Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, 11 April 2016.

⁶³⁷ See, for example, Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President and Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016.

⁶³⁸ See, for example, Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President and Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Ms Joanne Truman, Director Corporate Development, Knox City Council, Submission, 28 April 2016; Mr David Thompson, Protected Disclosure Coordinator, City of Boroondara, Submission, 9 May 2016.

⁶³⁹ Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Closed Hearing, Melbourne, 23 May 2016.

⁶⁴⁰ See, for example, Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President and Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016.

⁶⁴¹ See, for example, Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016; Mr Peter Marshall, Chief Operating Officer and Senior Vice President and Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016; Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria, Submission, 28 April 2016; Hon Lisa Neville, Minister for Water, DELWP, Submission, 17 June 2016.

For instance, Monash University noted that before the *PD Act 2012* (Vic) was introduced,

[o]nce we took the view that we had certainty that we were dealing with a protected disclosure ... we could immediately appoint a person to support the whistleblower and otherwise take steps to protect them. The whistleblower also had certainty that immediately we took the decision they were accorded the protections that they are able to enjoy under the Act.⁶⁴²

5.3.4 Evaluating the concerns

The Committee considers that the confidentiality provisions ought to be simplified and clarified. The provisions in the *PD Act 2012* (Vic) should, for example, more clearly distinguish between prohibitions on disclosure that apply to the original disclosers (whistleblowers) and entities receiving disclosures or information about them (for example, from IBAC). It should also set out more clearly what the exceptions are. A table should be included as a schedule to the Act to make both the prohibitions and the exceptions easier to understand.

The Act should clarify that whistleblowers are not subject to the prohibitions in sections 52 and 53 regarding disclosures revealing the content of a disclosure or the identity of the discloser.⁶⁴³ Thus, they are able to seek medical treatment and/or face to face counselling to discuss issues relating to their whistleblowing experience provided they do not reveal how their disclosure has been treated officially.⁶⁴⁴ Section 74 of the *PD Act 2012* (Vic) prohibits, with some exceptions, a whistleblower from disclosing that their disclosure has been notified to IBAC for assessment or that it has been determined by IBAC or the VI to be a protected disclosure complaint. Section 184 of the *IBAC Act 2011* (Vic) prohibits, with some exceptions, a whistleblower disclosing that IBAC has decided to investigate or refer their protected disclosure complaint.⁶⁴⁵ IBAC explained these provisions as follows:

The PD Act [*PD Act 2012* (Vic)] does not prevent disclosers speaking about the issues or allegations that were the subject of their disclosure, although it does restrict them from revealing details of what has happened with their disclosure, including the fact that it has been notified to IBAC for assessment or that it has been determined to be a protected disclosure complaint (PD Act, s 74). The legislation under which protected disclosures are investigated also imposes confidentiality obligations in relation to other matters, such as the action taken in relation to their disclosure (e.g. *IBAC Act* [2011 (Vic)], s 184).⁶⁴⁶

⁶⁴² Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Closed Hearing, Melbourne, 23 May 2016.

⁶⁴³ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 30; Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

⁶⁴⁴ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

⁶⁴⁵ See also IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 25, 30.

⁶⁴⁶ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

RECOMMENDATION 14: That the Victorian Government simplify and clarify the confidentiality provisions in the *PD Act 2012* (Vic).

RECOMMENDATION 15: That the Victorian Government include a table as a schedule to the *PD Act 2012* (Vic) that clearly lists what disclosers and bodies receiving disclosures (and information about them) may and may not disclose according to the confidentiality provisions.

The Committee recognises that protecting the confidentiality of the content of disclosures and the identity of whistleblowers is difficult.⁶⁴⁷ However, given the critical importance of confidentiality to the protection of whistleblowers,⁶⁴⁸ it is a challenge that organisations receiving information about disclosures must meet as far as practicable. In their efforts to meet this challenge, organisations have the benefit of IBAC's excellent guidelines on handling protected disclosures and managing the welfare of disclosers.⁶⁴⁹ In particular, IBAC has identified the key features of the kinds of internal procedures necessary to help ensure the protection of whistleblowers (see Box 5.1, below).⁶⁵⁰ IBAC may also review procedures,⁶⁵¹ make recommendations about them⁶⁵² and offer guidance to the public sector in relation to protected disclosures more generally.⁶⁵³

IBAC has also produced a range of other helpful material for organisations who receive disclosures, such as checklists, and delivered training for a wide range of people in the public sector, including protected disclosure coordinators.⁶⁵⁴

⁶⁴⁷ See also Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 63–6, 71–2; IBAC, *Protected disclosure procedures: a checklist for entities receiving disclosures* (May 2014) 2; A J Brown and Jane Olsen, 'Internal witness support: the unmet challenge' in Brown, *Whistleblowing in the Australian public sector* 203, 221–2; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown (ed), *Whistleblowing in the Australian public sector* 285; A J Brown and Chris Wheeler, 'Project findings: an agenda for action' in Brown, *Whistleblowing in the Australian public sector* 300–301; Parliament of New South Wales, Committee on the Independent Commission Against Corruption, *Review of the Protected Disclosures Act 1994*. Report no 12/53 (November 2006) 39–40; Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 123; Philip Moss, *Review of the Public Interest Disclosure Act 2013 [Cth]* (2016) 47–8.

⁶⁴⁸ Tasmania, *Strengthening trust in government* (2009) 34 ('Maintaining confidentiality of the identity of the person making the disclosure is also one of the best ways of preventing reprisal action.'). UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 49 ('Confidentiality is normally considered the first line of protection for reporting persons.'). A J Brown and Jane Olsen, 'Internal witness support: the unmet challenge' in Brown, *Whistleblowing in the Australian public sector* 221; Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 63.

⁶⁴⁹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016); IBAC, *Guidelines for protected disclosure welfare management* (October 2016).

⁶⁵⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 10.

⁶⁵¹ *PD Act 2012* (Vic) pt 9 div 1; IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 10. Note: IBAC may not review the Victorian Ombudsman's or the VI's procedures, and there are special provisions with respect to procedures established by Presiding Officers—see *PD Act 2012* (Vic) ss 60, 64–5.

⁶⁵² *PD Act 2012* (Vic) s 61.

⁶⁵³ *PD Act 2012* (Vic) s 66.

⁶⁵⁴ See IBAC's website: <www.ibac.vic.gov.au/publications-and-resources>; IBAC, *Annual report 2015/16* (2016), especially 29–38.

BOX 5.1: Procedures for receiving disclosures

Bodies that can receive disclosures should have:

- secure information management systems for the receipt, storage, assessment and notification of protected disclosures. These systems will include an internal reporting structure and will identify the roles and responsibilities of those in that reporting structure.
- a secure process for receiving disclosures
- a means of identifying a person (or persons) who can receive disclosures (known as a Protected Disclosure Coordinator)
- a secure means of notifying IBAC of assessable disclosures
- education for selected staff in the receipt, handling, assessment and notification of disclosures
- education and training for selected staff in the welfare management of those associated with a protected disclosure
- a way to collect and collate statistics on protected disclosures for annual reporting.

Source: IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 10.

Regarding concerns expressed by some organisations over their loss of control of investigations, the Committee considers that the Victorian law strikes the right balance between the clearing-house role of IBAC and the responsiveness of public bodies to alleged improper conduct. For example, if IBAC determines that a disclosure is a protected disclosure complaint, it may inform the notifying organisation provided that—among other requirements—this would not risk a person’s safety or prejudice an IBAC investigation.⁶⁵⁵ IBAC can also seek information from an organisation, drawing on the organisation’s inside knowledge and expertise.⁶⁵⁶ Similarly, IBAC may consult with an organisation to whom it is considering referring a protected disclosure complaint.⁶⁵⁷ And, as already discussed, there are a number of other circumstances in which public bodies can lawfully disclose information about the content of disclosures and the identity of disclosers.⁶⁵⁸

Finally, the Committee does not believe that the confidentiality provisions prevent an organisation from adequately protecting and supporting whistleblowers. Monash University gave evidence that if it does not know the identity of the whistleblower it might not be able to ‘initiate welfare measures at the early stage’ for their benefit and that its capacity to protect them against reprisals could also be impaired.⁶⁵⁹ This view assumes that the whistleblower is

⁶⁵⁵ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 25; *IBAC Act 2011* (Vic) ss 58, 59(3A)–(4).

⁶⁵⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 25; *PD Act 2012* (Vic) ss 52(3), 53(2), 54; *IBAC Act 2011* (Vic) ss 59D (power to request information).

⁶⁵⁷ *IBAC Act 2011* (Vic) s 76 (see also ss 77–8).

⁶⁵⁸ *PD Act 2012* (Vic) ss 52(3), 53(2), 54.

⁶⁵⁹ Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Closed Hearing, Melbourne, 23 May 2016.

confident that an open report of alleged improper conduct at their organisation is in the whistleblower's interests. However, whistleblowers are usually the best judges of risks to their interests and know that confidentiality is often the best way to protect themselves.⁶⁶⁰ In addition, research has shown that disclosers often blow the whistle after making internal reports without success.⁶⁶¹

Moreover, organisations can provide whistleblowers with effective welfare support in a range of ways that are consistent with the confidentiality provisions. They can, for example:

- provide a safe and healthy workplace⁶⁶²
- produce and implement procedures that comply with IBAC's welfare management guidelines⁶⁶³
- provide high quality information and training about their protected disclosure policies and support services⁶⁶⁴
- offer best-practice, independent employee assistance programs.⁶⁶⁵

5.4 The welfare of disclosers

As discussed, the protection of disclosers and the management of their welfare is partly ensured by the operation of effective legal provisions regarding detrimental action and confidentiality. However, there are broader, less legally oriented, aspects of the welfare of disclosers, including their physical and mental health. This report has recognised the wide range of negative health impacts suffered by a substantial proportion of whistleblowers.⁶⁶⁶ This section outlines the relevant best-practice principles with respect to discloser welfare, describes the current law in Victoria and examines any concerns over welfare raised with the Committee.

⁶⁶⁰ See, for example, Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Submission, 2 May 2016; Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, 10 May 2016; Dr Inez Dussuyer, Professor Anona Armstrong AM, Dr Kumi Heenetigala and Dr Russell Smith, College of Law & Justice, Victoria University, Submission, 27 July 2016.

⁶⁶¹ See, for example, Lindy Annakin, *In the public interest or out of desperation? The experience of Australian whistleblowers reporting to accountability agencies* (PhD thesis, Department of Government and International Relations, University of Sydney, March 2011).

⁶⁶² IBAC, *Guidelines for protected disclosure welfare management* (October 2016) 6, 8; A J Brown and Jane Olsen, 'Internal witness support: the unmet challenge' in Brown, *Whistleblowing in the Australian public sector* 203; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 261.

⁶⁶³ IBAC, *Guidelines for protected disclosure welfare management* (October 2016).

⁶⁶⁴ A J Brown and Chris Wheeler, 'Project findings: an agenda for action' in Brown, *Whistleblowing in the Australian public sector* 306-7; Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 30-31.

⁶⁶⁵ Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 84-5, 87, 89.

⁶⁶⁶ See the discussion in section 1.5 in Chapter 1.

5.4.1 Best-practice principles

The most detailed best-practice principles regarding welfare support for whistleblowers come from the WWTW project.⁶⁶⁷ Table 5.2 lists the key principles.

Table 5.2 WWTW best-practice principles for welfare support

Principle	Description
'Integrated organisational approach' ⁵⁶⁵	'Whistleblower support integrated into human resources, career development and workplace health and safety ... policies.' ⁵⁶⁶
Risk assessment	'Early and continuing assessment of the risks of reprisal, workplace conflict or other adverse outcomes involving whistleblowers or other witnesses.' ⁵⁶⁷
Support strategy	'[S]upport arrangements tailored to identified risks of reprisal, workplace conflict or other adverse outcomes.' ⁵⁶⁸ Includes: appointment of a welfare case manager as well as access to a variety of other support persons such as mentors, peer supporters and confidants. ⁵⁶⁹
Information and advice	'Timely provision of information, advice and feedback, ⁵⁷⁰ consistent with legal obligations, about any actions taken and the reasons for those actions.'
Access to 'professional support,' ⁵⁷¹ both in-house and external as appropriate	'Provision of information, advice and access to ... appropriate professional support services (for example, stress management, counselling, legal, independent career counselling) ...' ⁵⁷²
'Follow-up monitoring of whistleblower welfare' ⁵⁷³	To identify and respond, where appropriate, to any continuing adverse effects on, or concerns of, a whistleblower.

Source: Adapted, with minor modifications, from Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 9–10, 14–15, 16, 74–5, 82–3, 87, 94–7, and *passim*.

5.4.2 The current law in Victoria

Under the *PD Act 2012* (Vic), IBAC has the function of issuing guidelines for the public sector with respect to the sector's procedures for the making and handling of disclosures and the protection of disclosers and other affected persons.⁶⁷⁷ IBAC

⁶⁶⁷ Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011). See also Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G 20 whistleblower protection laws* (Blueprint for Free Speech, The University of Melbourne, Griffith University and Transparency International Australia, 2015) 6; Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date); UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (2015) 47.

⁶⁶⁸ Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 16.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid* 14.

⁶⁷¹ *Ibid* 15.

⁶⁷² Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011) 15.

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid* 16.

⁶⁷⁷ *PD Act 2012* (Vic) s 55(2)(a).

also has the function of producing guidelines ‘for the management of the welfare of persons who make protected disclosures or who are otherwise affected by protected disclosures.’⁶⁷⁸

In effect, these guidelines help set standards for the public sector, including in relation to the management of the welfare of disclosers. IBAC’s advice, monitoring and reviewing roles help the public sector produce, implement and improve effective procedures for protecting and supporting disclosers. Specifically, under the *PD Act 2012* (Vic), IBAC has the power to:

- advise the public sector on the IBAC guidelines⁶⁷⁹
- review the public sector’s mandatory procedures regarding protected disclosures for compliance with the law and IBAC’s guidelines⁶⁸⁰
- review the implementation of those procedures⁶⁸¹
- make recommendations to entities in relation to their procedures⁶⁸²
- inform, consult and educate the public sector about the protected disclosure scheme⁶⁸³
- help ‘the public sector to increase its capacity to comply with the protected disclosure scheme.’⁶⁸⁴

If IBAC considers that an entity has not responded adequately to a recommendation with respect to the entity’s procedures or their implementation, IBAC can send a copy of the recommendation to the relevant minister.⁶⁸⁵

As required by the *PD Act 2012* (Vic), IBAC has produced comprehensive guidelines for the management of the welfare of disclosers, witnesses, persons subject to investigation and other affected persons.⁶⁸⁶ IBAC has summarised the key aspects of welfare support in a table,⁶⁸⁷ reproduced below.

⁶⁷⁸ *PD Act 2012* (Vic) s 55(2)(a)–(b).

⁶⁷⁹ *PD Act 2012* (Vic) s 55(2)(c).

⁶⁸⁰ *PD Act 2012* (Vic) s 55(2)(d), 58–60. There are various exceptions under the *PD Act 2012* (Vic)—see, for example, ss 55(2)(d), 58(2), 60(1)–(2).

⁶⁸¹ *PD Act 2012* (Vic) s 60(2).

⁶⁸² *PD Act 2012* (Vic) s 61.

⁶⁸³ *PD Act 2012* (Vic) s 55(2)(e)(g).

⁶⁸⁴ *PD Act 2012* (Vic) s 55(2)(f).

⁶⁸⁵ *PD Act 2012* (Vic) s 61(2).

⁶⁸⁶ *PD Act 2012* (Vic) s 57(2); IBAC, *Guidelines for protected disclosure welfare management* (October 2016). The guidelines must be readily and widely available to the public and relevant entities: *PD Act 2012* (Vic) s 57(3).

⁶⁸⁷ IBAC, *Guidelines for protected disclosure welfare management* (October 2016) 10, Table 1.

Table 5.3 Welfare support

Inform	At a minimum: <ul style="list-style-type: none"> • Confirm the disclosure has been received. • Outline the legislative or administrative protections available. • Describe the action you propose be taken. • If action has been taken, provide details about the results.
Provide active support	<ul style="list-style-type: none"> • Acknowledge the person for having come forward. • Provide the person with assurance they have done the right thing and the organisation appreciates it. • Make a clear offer of support. • Assure them that all reasonable steps will be taken to protect them. • Give them an undertaking to keep them informed.
Manage expectations	Have an early discussion with them: <ul style="list-style-type: none"> • What outcome do they want? • Are their expectations realistic? • What will the organisation be able to deliver?
Maintain confidentiality	The identity of the discloser and the subject matter of their disclosure need to be kept confidential: <ul style="list-style-type: none"> • Make sure that other staff cannot infer the identity of the discloser or a person cooperating with the investigation from any information they receive. • Remind the discloser not to reveal themselves or give out information that would enable others to identify them as a discloser. • Make sure that hard-copy and electronic files relating to the disclosure are accessible only to those who are involved in managing disclosures and persons affected by them in your organisation.
Assess the risks of detrimental action being taken in reprisal	<ul style="list-style-type: none"> • Be proactive and do not wait for a complaint of victimisation. • Actively monitor the workplace, anticipate problems and deal with them before they develop.
Protect the discloser/cooperator	<ul style="list-style-type: none"> • Examine the immediate welfare and protection needs of the person and foster a supportive work environment. • Listen and respond to any concerns the person may have about harassment, intimidation or victimisation in reprisal for their actions. • Assess whether the concerns the person may have about harassment, intimidation or victimisation might be due to other causes than those related to a protected disclosure.
Manage the impact of any investigation	Prevent the spread of gossip and rumours about an investigation into the disclosure.
Keep records	Keep contemporaneous records of all aspects of the case management of the person, including all contact and follow-up action.

Source: IBAC, *Guidelines for protected disclosure welfare management* (October 2016) 10, Table 1.

5.4.3 Evaluation of concerns

The Committee received substantial evidence regarding the Victorian law on detrimental action and confidentiality. However, there was much less evidence on the legal provisions relating to welfare management other than on the issues of compensation and legal representation, which are addressed in the next chapter.

One whistleblower from the private sector informed the Committee that in his case there were no policies or procedures in place to protect whistleblowers and that he did not receive any welfare support from his organisation.⁶⁸⁸ He argued that the kinds of support that whistleblowers need include the following:

- A clearly defined, confidential process to report some matters internally within the organisation
- For some (more serious) matters—an independent, external anti-corruption body they can confidently trust and turn to
- Access to representation, giving confidence that their disclosure will be thoroughly and properly investigated and that feedback will be progressively given
- Access to justice, legal services ...⁶⁸⁹

These kinds of support generally align well with the requirements of the *PD Act 2012* (Vic) and IBAC's welfare management guidelines. However, the Committee recognises that access to affordable legal assistance and representation can be an issue for some whistleblowers. This issue is addressed in the next chapter.

Victoria University's submission identified the importance of 'management and workplace culture' to the prevention of the victimisation of whistleblowers, including

... the need for workplace policies that are actually implemented and complied with ... as well as more practical welfare support for the whistle-blower and more education in the workplace about whistleblowing procedures and processes.⁶⁹⁰

The Committee recognises the importance of high quality procedures and policies on the welfare of whistleblowers as well as an organisational commitment to provide adequate resources to implement, review and improve them.⁶⁹¹ This is consistent with the best-practice principles already discussed. However, the Committee considers that the provisions in the *PD Act 2012* (Vic) with regard to welfare management are adequate, especially when understood in conjunction with IBAC's comprehensive guidelines.⁶⁹²

FINDING 5: The provisions in the *PD Act 2012* (Vic) with regard to welfare management are adequate, especially when understood in conjunction with IBAC's comprehensive guidelines.

⁶⁸⁸ Mr Brian Hood, Submission, 10 February 2017.

⁶⁸⁹ Mr Brian Hood, Submission, 10 February 2017.

⁶⁹⁰ Dr Inez Dussuyer, Professor Anona Armstrong AM, Dr Kumi Heenetigala and Dr Russell Smith, College of Law and Justice, Victoria University, Submission, 27 July 2016.

⁶⁹¹ See also Peter Roberts, A J Brown and Jane Olsen, *Whistling while they work: a good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU E Press, 2011); IBAC, *Guidelines for protected disclosure welfare management* (October 2016); IBAC, *Protected disclosure procedures: a checklist for entities receiving disclosures* (May 2014) 3.

⁶⁹² IBAC, *Guidelines for protected disclosure welfare management* (October 2016).

5.5 Conclusion

This chapter has examined three main aspects of the protection of disclosers: the prohibition of detrimental action taken in reprisal for a protected disclosure, the preservation of confidentiality and the management of discloser welfare.

With regard to detrimental action, the Committee received evidence that the threshold for establishing detrimental action is too high. The Committee agrees and has recommended that the ‘substantial reason’ requirement in the *PD Act 2012* (Vic) be removed.

The Committee has found that the confidentiality provisions in the *PD Act 2012* (Vic), which are the first line of defence against the risk of reprisals, generally meet the relevant best-practice principles. They also strike the right balance between the need to protect disclosers and the requirements for the effective assessment, handling and investigation of disclosures.

However, the Committee believes that the provisions should be simplified and clarified so that it will be easier for disclosers, and entities receiving information about disclosures, to know, and comply with, their obligations. While it is challenging to protect the confidentiality of disclosures and disclosers, it is essential if the main purposes of the *PD Act 2012* (Vic) are to be fulfilled—namely, the encouragement of the reporting of improper conduct and the protection of those who come forward to do so.

The principal legal means used to manage the welfare of disclosers is the requirement that public entities establish internal procedures that conform to the law and, specifically, to IBAC’s guidelines. The Committee believes that the present provisions in the *PD Act 2012* (Vic) are adequate, especially when read in conjunction with IBAC’s comprehensive guidelines. However, the Committee notes that for some whistleblowers access to affordable legal advice and representation can be an issue. The Committee also recognises there are concerns over the extent and kinds of compensation available to whistleblowers who have suffered harm. These issues are taken up in the next chapter on the compensation of whistleblowers.

6 Compensating disclosers

6.1 Introduction

It is well recognised that a substantial proportion of disclosers suffer a range of harms and losses because they have blown the whistle on improper conduct in the public sector. For instance, a Victoria University study found that many disclosers experienced

significant emotional and psychological impact, including stress, exhaustion, mental health and health-related issues as well as the financial costs (using lawyers, going to court, losing their job) and a negative impact on their careers (not being promoted, moved sideways, not having their contract renewed or, in a number of cases, dismissal).⁶⁹³

This chapter evaluates concerns over whether the present Victorian law provides adequate avenues for compensating disclosers for damage to their careers, financial position and health, as well as for any legal expenses they have incurred. It also assesses the issue of US-style financial rewards for whistleblowers as presently no Australian jurisdiction provides these kinds of rewards.

6.2 Compensating disclosers

6.2.1 Current Victorian law

The basic aim of compensation under the law is to place the victim, so far as money can do so, in the position they would have been in had the injury or other harm not occurred.⁶⁹⁴ Under the *PD Act 2012* (Vic), there are two main compensation remedies: court-ordered damages (and/or reinstatement) and proceedings for damages in tort. In addition, there is the related remedy of transferring a discloser to another workplace or work area.

Court-ordered damages, reinstatement, transfer

Under section 46(1) of the *PD Act 2012* (Vic), if a person is found guilty of a reprisal in response to a protected disclosure, the court may—in addition to imposing the applicable criminal penalty⁶⁹⁵—order the offender to pay damages within a specified time.⁶⁹⁶ The court may order damages that it ‘considers appropriate

⁶⁹³ Dr Inez Dussuyer, Professor Anona Armstrong AM, Dr Kumi Heenetigala and Dr Russell Smith, College of Law & Justice, Victoria University, Melbourne, Submission, 27 July 2016.

⁶⁹⁴ Andrew Clarke, John Devereux and Julia Werren, *Torts: a practical learning approach* (2nd ed, LexisNexis, 2011) 574–5; *Todorovic v Waller* (1981) 150 CLR 402.

⁶⁹⁵ *PD Act 2012* (Vic) s 45.

⁶⁹⁶ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 31–2.

to compensate the person for any injury, loss or damage.⁶⁹⁷ Further, in certain circumstances, a public body can be held vicariously liable for a reprisal taken by one of their employees or agents, and a court can order that the body pay the victim damages in similar terms.⁶⁹⁸

Under section 46(2) of the *PD Act 2012* (Vic), a court may also order that ‘the employer reinstate or re-employ’ the victim of a reprisal ‘in his or her former position or, if that position is not available, in a similar position.’

Further, with their consent, an employee who has been victimised may be transferred to another workplace, or work area, ‘on terms and conditions of employment that are no less favourable overall’ than their present position.⁶⁹⁹

Proceedings for damages under tort law

The *PD Act 2012* (Vic) recognises the right of a victim of reprisal to sue for damages, including exemplary damages, under tort law.⁷⁰⁰ The key feature of this remedy is that a victim may undertake proceedings for damages even if no prosecution has been brought under section 45 (the reprisal offence).⁷⁰¹ Section 47 provides, in part, that

- (1) A person who takes detrimental action against another person in reprisal for a protected disclosure is liable in damages for *any* injury, loss or damage to that other person.
- (2) The damages may be recovered in proceedings as for a tort in any court of competent jurisdiction.
- (3) *Any remedy that may be granted by a court with respect to a tort, including exemplary damages, may be granted by a court in proceedings under this section.*
- (4) The right of a person to bring proceedings for damages does *not* affect any other right or remedy available to the person arising from the detrimental action ... [emphasis added]

6.2.2 Best-practice principles

The *PD Act 2012* (Vic) meets many of the relevant best-practice principles with respect to compensation, as shown in Table 6.1.⁷⁰²

⁶⁹⁷ *PD Act 2012* (Vic) s 46(1).

⁶⁹⁸ *PD Act 2012* (Vic) ss 47, 48(1).

⁶⁹⁹ *PD Act 2012* (Vic) s 51.

⁷⁰⁰ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 31-2; *PD Act 2012* (Vic) s 47. Exemplary damages may be awarded ‘[w]here the defendant’s conduct is so outrageous that the court awards more than compensatory damages in order to punish and deter the defendant (and others) from acting in this manner’: Andrew Clarke, John Devereux and Julia Werren, *Torts: a practical learning approach* (2nd ed, LexisNexis, 2011) 575.

⁷⁰¹ *PD Act 2012* (Vic) s 47.

⁷⁰² See also Simon Wolfe et al, *Breaking the silence: strengths and weaknesses in G20 whistleblower protection laws* (Blueprint for Free Speech, 2015) 6 (‘Comprehensive remedies for retaliation ... Comprehensive and accessible civil and/or employment remedies for whistleblowers who suffer detrimental action e.g. compensation rights, injunctive relief ...’).

Table 6.1 Best-practice principles: compensation

Statement of principles	Description	Coverage under <i>PD Act 2012</i> (Vic)
WWTW	<p>'When a discloser suffers detriment as a result of a disclosure, the agency (or, failing that, the oversight agency) to take the following action as necessary to prevent or remedy the detriment:</p> <ul style="list-style-type: none"> • stopping the detrimental action and preventing its recurrence, including through an injunction • placing the discloser in the situation they would have been in but for the disclosure—with their informed consent this might include transferring a discloser to another equivalent position • apologising • providing compensation, including monetary and non-monetary compensation, for the detriment suffered • taking disciplinary or criminal action against any person responsible for the detriment.'^(a) 	<ul style="list-style-type: none"> • Section 45(1): prohibition of detrimental action in reprisal • Section 46: court-ordered damages, reinstatement • Section 47: claim for damages in tort • Section 48: vicarious liability of public bodies • Section 49: injunction, including interim injunction; order against perpetrator to remedy their reprisal action, including an interim order • Section 51: transfer of victim employee <p><i>Note:</i> apology is not referred to in the Act.</p>
Transparency International	<p>'[Principle] 20 ... a full range of remedies must cover all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole. This includes interim and injunctive relief; attorney and mediation fees, transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering.'^(b)</p>	<ul style="list-style-type: none"> • Sections 45(1), 46–9, 51 (as above) • Note, also, s 47(3)–(4): <ul style="list-style-type: none"> – court may grant any remedy 'with respect to a tort' – other available rights and remedies regarding the reprisal are unaffected.
Blueprint for Free Speech	<p>[Principle] 11: 'A law must have comprehensive and accessible civil and/or employment remedies for a whistleblower who suffers detrimental action. These should include compensation rights, general damages, punitive damages, injunctive relief and other pre-trial relief including protected status (declaratory) as a "whistleblower."^(c)</p>	<ul style="list-style-type: none"> • Sections 45(1), 46–9, 51 (as above) • Parts 6 (protected disclosure status and protection) and 7 (confidentiality)
Government Accountability Project (GAP)	<p>'Compensation with "no loopholes" ... If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment ... The most effective option is personal liability for punitive damages by those found responsible for violations.'^(d)</p>	<ul style="list-style-type: none"> • Sections 45(1), 46–9, 51 (as above) <p><i>Note, in particular,</i> section 48(1)(a): 'the public body and the employee or agent [perpetrator] (as the case may be) are jointly and severally civilly liable for the detrimental action' and may be sued under section 47</p>

- (a) A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 286–7.
- (b) Transparency International, *International principles for whistleblower legislation* (2013) 9.
- (c) Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 5.
- (d) Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016).

6.2.3 Concerns over compensation

The Committee received evidence from whistleblowers, as well as experts and other stakeholders, regarding the common personal costs of making a disclosure, including negative impacts on mental and physical health, career prospects, finances, reputation, relationships and family wellbeing.⁷⁰³ As Mr Brian Hood, a whistleblower in the private sector,⁷⁰⁴ told the Committee:

It knocks your career around, therefore you are financially hit very hard. It does not do your health much good. It does not do your confidence and that sort of thing much good at all ... It is a harrowing process, and it does not have a full stop at the end of it ...⁷⁰⁵

In his submission, Mr Hood observed that:

Currently a potential whistleblower is completely isolated and faces enormous financial, career and reputational risk for themselves and their family. That situation is untenable ...

I have suffered financial hardship and disruption and there have been serious adverse effects on my health, wellbeing and family.⁷⁰⁶

Given these damaging impacts, a number of stakeholders emphasised the importance of adequate and wideranging compensation.⁷⁰⁷ Dr Sulette Dreyfus of the University of Melbourne informed the Committee of the experience of whistleblowing compensation in the United Kingdom, which can be awarded by an employment tribunal.⁷⁰⁸ She argued that the compensation commonly awarded is

⁷⁰³ Mr Brian Hood, Closed Hearing, Melbourne, 21 March 2016; Mr Brian Hood, Submission, 10 February 2017; Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017; Dr Sulette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Ms Cynthia Kardell, Whistleblowers Australia Inc, Public Hearing, Melbourne, 20 June 2016; Accountability Round Table, Submission, 4 May 2016. See also Commonwealth, *In the public interest* (1994) 59, 65–75; Ruth Williams, 'Warning: blowing the whistle could mess up your life' *The Sydney Morning Herald*, 15 June 2013; Dan Nancarrow, 'Patel whistleblower seeks \$400,000 compensation' *Brisbane Times*, 16 December 2011; Andrew Wilkie, 'Talking point: war and peace of mind' *Mercury* 23 July 2016; Adele Ferguson, 'Adele Ferguson on the cost of whistleblowing and the need for a bank royal commission' *Sydney Morning Herald*, 6 May 2016; Adele Ferguson, 'ASIC says whistleblowers need compo' *Sydney Morning Herald*, 7 November 2015; Stephen Easton, 'What the cross-bench whistleblower deal means for the public sector' *The Mandarin*, 23 November 2016; Jean Lennane, 'What happens to whistleblowers, and why' (2012) 6(4) *Social Medicine* 249.

⁷⁰⁴ It should be noted that a number of commentators have emphasised that whistleblower protections and remedies in the Australian private sector have generally been weaker than in the public sector: see, for example, David Lewis, Tom Devine and Paul Harpur, 'The key to protection: civil and employment law remedies' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 350, 367–70.

⁷⁰⁵ Mr Brian Hood, Closed Hearing, Melbourne, 21 March 2016.

⁷⁰⁶ Mr Brian Hood, Submission, 10 February 2017.

⁷⁰⁷ Mr Brian Hood, Closed Hearing, Melbourne, 21 March 2016; Mr Brian Hood, Submission, 10 February 2017; Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017; Dr Sulette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Ms Cynthia Kardell, Whistleblowers Australia Inc, Public Hearing, Melbourne, 20 June 2016; Accountability Round Table, Submission, 5 May 2016.

⁷⁰⁸ Dr Sulette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016. For a detailed account of whistleblowing laws in the United Kingdom, see John Bowers et al, *Whistleblowing: law and practice* (2nd ed, Oxford University Press, 2012). The compensation system in the United Kingdom is also criticised in Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 4–10, 16–17, 76–7, 79.

wholly inadequate to cover ... [whistleblowers'] legal fees often, which are sometimes in excess of £100 000 or £200 000, let alone their real loss of income and the fact they often have to change careers not just change employers. So that is something important to think about—not only what systems you have for remedies but that they are large enough ...⁷⁰⁹

Mr Hood considered that the compensation he received was ‘not a good outcome and the financial costs ... were not commensurate with the “compensation.”’⁷¹⁰ It was, he said, ‘completely outweighed by the years of lost earnings.’⁷¹¹ He told the Committee that there needed to be compensation that would at least put whistleblowers back into a ‘neutral position’:

There must be compensation. If there is some sort of retaliatory action taken by an employer or others against someone for whistleblowing, then there should be some sort of compensation to at least take them back to a neutral position where they are not out of pocket ... I think it comes down to lost earnings. If you are looking at purely financial terms, that is measurable. ... It is, ‘What has the impact been there?’, and squaring the ledger there ...⁷¹²

The Committee also received evidence that the remedies under the *PD Act 2012* (Vic) are ‘restrictive and costly,’⁷¹³ being generally dependent on proof of a reprisal offence or a successful civil suit for damages in tort.⁷¹⁴ It is well recognised that court action can often be drawn-out, costly, uncertain and stressful.⁷¹⁵

The Lander Review of the South Australian *Whistleblowers Protection Act 1993* recognised the limitations of court-ordered remedies given the cost, delays and stress it often involves for a whistleblower. The review concluded that these factors largely explain why it is rare for a whistleblower to pursue a claim in court.⁷¹⁶ The Hon Mr Bruce Lander QC explained:

A number of submissions criticise the remedies that are available under the ... [*Whistleblowers Protection Act 1993* (SA)]. It has been suggested that it is unrealistic to expect a whistleblower who has already suffered detriment as a consequence of making a public interest disclosure to resort to litigation ... which might incur the risk of costs.

I know of no litigation which has gone to judgement [sic] where a whistleblower in South Australia has successfully sued for damages relying upon the statutory tort. The best that can be said of this remedy is that it does not assist whistleblowers in respect of any victimisation that a whistleblower has suffered ...

709 Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016.

710 Mr Brian Hood, Submission, 10 February 2017.

711 Mr Brian Hood, Submission, 10 February 2017.

712 Mr Brian Hood, Closed Hearing, Melbourne, 21 March 2016.

713 Accountability Round Table, Submission, 4 May 2016. See also A J Brown, *Protected Disclosure Act 2012* (Vic): *ten problems?* (Based on comments to the Victorian Government Protected Disclosure Coordinators Forum, IBAC, 6 March 2015.), tabled with the Committee.

714 *PD Act 2012* (Vic) ss 46–8.

715 See, for example, Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Accountability Round Table, Submission, 4 May 2016; Bruce Lander, *A review of the Whistleblowers Protection Act 1993* (SA) (2014) 129–30, 135–7.

716 Bruce Lander, *A review of the Whistleblowers Protection Act 1993* (SA) (2014) 129–30, 135–7.

[S]ome whistleblowers are suffering uncompensated loss as a result of victimisation consequential upon a disclosure, but are judging it better to cope with their loss than to subject themselves to a lengthy and possibly expensive remedy process.⁷¹⁷

The review noted that a whistleblower must take into account not only the uncertainties of litigation but also the risk of paying the other party's costs⁷¹⁸ if their action is unsuccessful:

[A]ny person contemplating litigation must take into account the vagaries of litigation and the risk that costs will be ordered against him or her if he or she is unsuccessful. Moreover, they must have regard to the possibility that they will be asked to provide security for costs during the course of the litigation.⁷¹⁹

Further, the review drew attention to the common 'mismatch' between the power and resources of an individual whistleblower and the organisation they are trying to hold to account:

If there is a mismatch between the power, vulnerabilities and resources of parties to litigation it is unlikely the disempowered, vulnerable and underresourced litigant will proceed. This can be a serious barrier to justice. In employee versus employer litigation such a mismatch often occurs.⁷²⁰

The conclusions of the Lander Review regarding disincentives for whistleblowers to litigate their claim are substantially supported in a range of academic commentary.⁷²¹ The WWTW, for example, has called for more accessible, practical and affordable compensation remedies.⁷²²

6.2.4 Evaluating the concerns

The Committee considers that there are two main concerns over compensation. First, are the compensation and related remedy provisions under the *PD Act 2012* (Vic) and the common law adequate? Do they allow for adequate compensation for whistleblowers, putting them in the position they were in before the reprisal? Do they, as Mr Hood asked, put them in a 'neutral' position?⁷²³ Do the existing remedies adequately address the severity, scale and diversity of harm that whistleblowers often suffer? Second, how effective are these remedies in practice?

⁷¹⁷ Ibid 130–31.

⁷¹⁸ Fitzroy Legal Service Inc., 'Legal Costs': *Law Handbook* <www.lawhandbook.org.au/2016_02_01_06_legal_costs>.

⁷¹⁹ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 136.

⁷²⁰ Ibid.

⁷²¹ 'Summary' in Brown, *Whistleblowing in the Australian public sector* xxxvii; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 271–4; Brown and Latimer, *Symbols or substance?* 241–2; David Lewis, Tom Devine and Paul Harpur, 'The key to protection: civil and employment law remedies' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 363–70; Alexandra McEwan, *The concept of violence: a proposed framework for the study of animal protection law and policy* (PhD thesis, Australian National University, July 2016), 206.

⁷²² 'Summary' in Brown, *Whistleblowing in the Australian public sector* xxxvii; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector*, 271–4.

⁷²³ Mr Brian Hood, Closed Hearing, Melbourne, 21 March 2016.

Regarding the first concern, the Committee believes that, on paper, the *PD Act 2012* (Vic) provides wideranging compensation remedies for disclosers. The remedies are cast in broad, inclusive language.

It is important to recall at the outset that ‘detrimental action’ itself is defined broadly under the Act. It

includes—

- (a) action causing injury, loss or damage;
- (b) intimidation or harassment;
- (c) discrimination, disadvantage or adverse treatment in relation to a person’s employment, career, profession, trade or business, including the taking of disciplinary action ...⁷²⁴

This covers a wide range of reprisals and their consequences for whistleblowers. However, as discussed in Chapter 5, the threshold for establishing that detrimental action has been taken in response to a reprisal is too high and should be lowered.

Moreover, as outlined earlier, the *PD Act 2012* (Vic) provides the following remedies, stated in broad terms:⁷²⁵

- court-ordered damages that the court ‘considers appropriate to compensate the person [victim] for *any* injury, loss or damage’⁷²⁶
- court-ordered reinstatement, re-employment or transfer⁷²⁷
- provision for holding a public body vicariously liable for a reprisal⁷²⁸
- recognition of the right to recover damages in tort ‘for *any* injury, loss or damage’ to the victim (whether or not the alleged perpetrator has been prosecuted)⁷²⁹
- recognition that other rights or remedies available to the victim are unaffected by the Act⁷³⁰
- provision that ‘*[a]ny* remedy that may be granted by a court with respect to a tort, including exemplary damages, may be granted’ under section 47⁷³¹
- provision for a court order that a perpetrator remedy their detrimental action.⁷³²

As noted earlier, together these remedies meet many of the relevant best-practice principles.

⁷²⁴ *PD Act 2012* (Vic) s 3 (definition of ‘detrimental action’).

⁷²⁵ Emphasis has been added.

⁷²⁶ *PD Act 2012* (Vic) s 46(1).

⁷²⁷ *PD Act 2012* (Vic) s 46(2) (reinstatement or re-employment), 51 (transfer).

⁷²⁸ *PD Act 2012* (Vic) s 48.

⁷²⁹ *PD Act 2012* (Vic) s 47.

⁷³⁰ *PD Act 2012* (Vic) s 47(4)

⁷³¹ *PD Act 2012* (Vic) s 47(3).

⁷³² *PD Act 2012* (Vic) s 49(1)(a).

The remedies in practice—meeting the challenges

However, while the remedies are adequate on paper, the Committee acknowledges that they have not been frequently used and that the cost, delays, stressfulness and uncertainty of taking court action can be prohibitive.⁷³³

The Committee believes, however, that these deficiencies must be placed in context. They are not intrinsic defects of the *PD Act 2012* (Vic) but, rather, systemic issues that affect many litigants in civil actions in superior courts. The high cost of legal advice, representation and litigation; the risk of losing a case and being ordered to pay costs; the stressful process—worsened by the financial and emotional impacts of delays—affect a wide range of litigants.⁷³⁴ It is, however, beyond the scope of this Review to consider how these broader issues might be addressed.

Nevertheless, the Committee considers that there are targeted ways to reduce the costs, stress and risk whistleblowers can experience when they choose to litigate their claim.

For instance, greater efforts can be made to provide disclosers with plain-language legal information about their compensation options so they can make a more informed choice about whether to pursue litigation and, if so, of what kind. This kind of information helps disclosers understand the law in a basic sense and assists them to find appropriate legal advice if necessary. The importance of accessible and accurate legal information has recently been recognised in the Victorian Access to Justice Review.⁷³⁵

Further, the Victorian Government should consider the establishment of a professional and community organisation legal website hub to help facilitate access to relevant legal services for whistleblowers. The hub could also consolidate relevant legal information for whistleblowers. These services could be provided through a combination of law firms (pro bono), Victoria Legal Aid, relevant community legal organisations (such as JobWatch and Justice Connect),

⁷³³ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 130–31; Brown and Latimer, *Symbols or substance?* 242; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 273–4; David Lewis, Tom Devine and Paul Harpur, 'The key to protection: civil and employment law remedies' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 365; Terry Morehead Dworkin and A J Brown, 'The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws' (2013) 11(2) *Seattle Journal of Social Justice* 653, 684; Alexandra McEwan, *The concept of violence: a proposed framework for the study of animal protection law and policy* (PhD thesis, Australian National University, July 2016), 206. See also Commonwealth, *Whistleblower protection* (2009) 93.

⁷³⁴ See, for example, 'Executive summary' in Victorian Law Reform Commission, *Civil Justice Review report* (2008) 10–14; Community Law Australia, *Unaffordable and out of reach: the problem of access to the Australian legal system* (July 2012); Victorian Law Reform Commission, *The role of victims of crime in the criminal trial process report* (August 2016) 232 (on seeking compensation from offenders through a civil suit). See also Brown and Latimer, *Symbols or substance?* 242; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 273–4; Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; David Lewis, Tom Devine and Paul Harpur, 'The key to protection: civil and employment law remedies' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 363–70; Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 33–49.

⁷³⁵ Department of Justice and Regulation (Victoria), *Access to Justice Review: Volume 1—Report and recommendations* (August 2016), Chapter 2.

and professional associations, such as the Law Institute of Victoria and the Victorian Bar. If established, this hub could be promoted on consistent, vetted web pages on the sites of the major investigating entities, such as IBAC, so it is readily accessible to members of the public.⁷³⁶ A website hub of this kind might do for disclosers what the state's Victims Assistance Program website and Victims of Crime Helpline have done for victims of crime.⁷³⁷

RECOMMENDATION 16: That the Victorian Government consider establishing a whistleblowing website hub to facilitate the provision of legal information and services to whistleblowers through a range of public, private, community and professional bodies.

In addition, a provision should be introduced to the *PD Act 2012* (Vic) with respect to proceedings to recover damages in tort under section 47. The Act should be amended to provide that, generally, a court would not award costs against a whistleblower provided their claim is not vexatious and they have conducted the litigation reasonably. Suitably modified, Section 18 of the Commonwealth *Public Interest Disclosure Act 2013* provides a useful model for such a provision.⁷³⁸ Section 18 provides, in part, that an applicant for compensation as a victim of reprisal

- (1) ... must not be ordered by the court to pay costs by another party to the proceedings, except in accordance with subsection (2).
- (2) The applicant may be ordered to pay the costs only if:
 - (a) The court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause; or
 - (b) The court is satisfied that the applicant's unreasonable act or omission caused the other party to incur the costs.⁷³⁹

The Lander Review recommended⁷⁴⁰ a similar provision for South Australia, arguing that it would '[go] some way towards alleviating the risk for a whistleblower who by making the public interest disclosure has performed an act in the public interest.'⁷⁴¹

⁷³⁶ For calls for better information, support and legal assistance for whistleblowers, see: Mr Brian Hood, Closed Hearing, Melbourne, 21 March 2016; Mr Brian Hood, Submission, 10 February 2017; Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016.

⁷³⁷ See Victims of Crime: <<http://www.victimsofcrime.vic.gov.au/>> and the discussion in Victorian Law Reform Commission, *The role of victims of crime in the criminal trial process report* (August 2016) xvii ('The Victims Support Agency of the Victorian Department of Justice and Regulation has an overarching function to provide support services to victims, primarily through funding and coordinating the Victims Assistance Program, which is delivered by six community organisations.'). See also Witness Assistance Service, Office of Public Prosecutions, Victoria: <<http://www.opp.vic.gov.au/Witnesses-and-Victims/Getting-Help-from-the-Witness-Assistance-Service>>.

⁷³⁸ David Lewis, Tom Devine and Paul Harpur, 'The key to protection: civil and employment law remedies' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 366.

⁷³⁹ Cf *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) s 337BC.

⁷⁴⁰ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 137.

⁷⁴¹ *Ibid* 136.

RECOMMENDATION 17: That the Victorian Government introduce a provision into the *PD Act 2012 (Vic)* that, generally, costs would not be awarded against a discloser taking proceedings in tort for damages for reprisal under section 47 provided that:

- the claim is not vexatious, and that
- they conducted the litigation reasonably.

The Committee is mindful of the challenge of vexatious litigation in Victoria and considers that this recommendation strikes the right balance.

6.3 Financial assistance for disclosers?

The Committee is of the view that whistleblowers should be compensated for any financial loss they have suffered as the result of a reprisal, rather than rewarded for making a disclosure.

While the Committee considers that the present compensation and related remedies under the *PD Act 2012 (Vic)* should be retained, it believes that the Victorian Government should provide financial assistance to whistleblowers to cover their reasonable career-transition⁷⁴² and legal costs. For example, it should cover at least initial legal advice to help disclosers make an informed choice about their next steps.⁷⁴³ The Committee notes that a discloser may also qualify for compensation for work-related injury or illness under Victoria's WorkCover insurance scheme.⁷⁴⁴

The financial assistance program should be administered by an appropriate government department, with perhaps VCAT jurisdiction to hear appeals against a denial of assistance within its Review and Regulation List.⁷⁴⁵

The Committee received evidence that reprisals and their related impacts, such as reputational damage, mean that sometimes whistleblowers can no longer work in their chosen occupation.⁷⁴⁶ Therefore, the Committee considers that the proposed financial assistance should cover, not only reasonable legal costs, but also the reasonable costs of education, training and advice for transition into a new career

⁷⁴² See, for example, Blueprint for Free Speech in *Protecting whistleblowers in the UK: a new blueprint* (no date) 25.

⁷⁴³ See Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016); Transparency International Australia, *International principles for whistleblower legislation* (2013) 9 ('A fund to provide assistance for legal procedures and support whistleblowers in serious financial need should be considered.').

⁷⁴⁴ WorkSafe Victoria, 'Compensation claims available to injured workers': <www.worksafe.vic.gov.au/claims/compensation>.

⁷⁴⁵ See 'Review and Regulation': <www.vcat.vic.gov.au/case-types/review-and-regulation>.

⁷⁴⁶ See, for example, Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Mr Brian Hood, Submission, 10 February 2017; Transparency International Australia, *International principles for whistleblower legislation* (2013) 9; Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016); Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 5, 7; Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 25–6; Brown and Latimer, *Symbols or substance?* 243; A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* 274, 277.

if necessary.⁷⁴⁷ This is particularly important in relation to older workers who are likely to find both reemployment, and/or a career change, more difficult than younger workers.⁷⁴⁸

If a discloser consents to a transfer to another public body, or another division within their present workplace, any reasonable costs associated with the transfer (including relocation costs) should be covered by the scheme.⁷⁴⁹

RECOMMENDATION 18: That the Victorian Government provide financial assistance to cover the reasonable legal and career-transition costs of whistleblowers who have suffered harm as the result of making a disclosure.

6.4 Rewarding disclosers?

Some academics and disclosers have argued for a system of rewards to complement compensation remedies. The Committee itself received some evidence in support of a system of rewards for whistleblowers in addition to the existing compensation remedies.

Specifically, there was some support for an American-style system. Under the American *False Claims Act*,⁷⁵⁰ whistleblowers are rewarded for information they supply about fraud against the government by receiving a portion of damages recovered against the defendant. Such rewards are paid as an *incentive* to report fraud rather than as compensation for any detriment suffered. In consequence, a whistleblower may receive a reward even if they have not have suffered any detriment.

However, the Committee's view is that, while whistleblowers should be compensated for financial loss they have suffered through making a disclosure, they should not be rewarded for doing so.

⁷⁴⁷ This approach is supported, for example, by Blueprint for Free Speech in *Protecting whistleblowers in the UK: a new blueprint* (no date) 25.

⁷⁴⁸ See, for example, Australian Human Rights Commission, *Working past our 60s: reforming laws and policies for the older worker* (2012).

⁷⁴⁹ See, for example, Transparency International Australia, *International principles for whistleblower legislation* (2013) 9; Tom Devine, *International best practices for whistleblower policies* (Government Accountability Project, 2016).

⁷⁵⁰ 31 USC §3729–3733.

6.4.1 Support for rewarding disclosers

The Committee received some evidence in support of monetary rewards for disclosers in addition to compensation for any detriment they have suffered.⁷⁵¹ There was no support for such a system replacing the existing compensation remedies under the *PD Act 2012* (Vic). The most commonly identified model of rewards was the system under the American *False Claims Act*.⁷⁵²

Emeritus Professor Ronald Francis from Victoria University (Melbourne), argued that:

The protection of individual whistleblowers [under the *PD Act 2012* (Vic)] are not [sic] sufficient. One needs to recognise the penalties incurred by blowing the whistle. They include largely economic ones, thus some form of recompense is needed. Any new [whistleblower protection] Act might consider the US model of rewarding the whistleblower with a percentage of money saved by reduced corruption.⁷⁵³

Dr Suelette Dreyfus from the University of Melbourne expressed qualified support for US-style rewards and bounties for whistleblowers. However, she noted that the US approach, while often seen as effective, has been criticised in a number of other countries, including the United Kingdom:

One thing that is quite contentious is what is sometimes called whistleblower bounties. For example, in the United States that is provided; the SEC [Securities and Exchange Commission] has a whistleblower program. Some countries are comfortable with that; some are not. For example, in the UK I have generally found that with the exception of some financial whistleblowers in the city, London, most whistleblowers are not in favour of it. They feel basically it is counter to the British culture, that allowing whistleblowers to get payment of any sort as a percentage of fines, of money saved, kind of dirties their hands, in a way.⁷⁵⁴

In more general terms, two whistleblowers who gave evidence to the Committee expressed support for a rewards system.⁷⁵⁵ Both emphasised the need for incentives for whistleblowers to come forward and report wrongdoing given the severe impact that blowing the whistle has had on their lives and those of other disclosers. In addition, introducing a system of rewards would be one way to counter the sometimes negative portrayal of whistleblowers. Ms Karen Burgess answered a question from the Committee about the desirability of rewarding whistleblowers financially in the following way:

751 Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016; Mr Brian Hood, Submission, 10 February 2017; Emeritus Professor Ronald D Francis, College of Law & Justice, Victoria University, Submission, 23 April 2016; Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017; Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Submission, Melbourne, 10 May 2016.

752 31 USC §3729–3733.

753 Emeritus Professor Ronald D Francis, College of Law & Justice, Victoria University, Submission, 23 April 2016.

754 Dr Suelette Dreyfus, Research Fellow, Department of Computing and Information Systems, University of Melbourne, Public Hearing, Melbourne, 15 August 2016.

755 Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017; Mr Brian Hood, Submission, 10 February 2017.

I think we need to reward people at this stage because there is such an undercurrent of whistleblowing being a negative part of Australian culture, and especially in the workplace in community services, where people are relying on people for their own safety. We need to change how wrongdoing is addressed and that when staff see it, knowing that is wrong and come forward ...⁷⁵⁶

Mr Brian Hood also supported the need to encourage people to report wrongdoing they have witnessed. In addition, he highlighted the usefulness of rewards given the severe impact of blowing the whistle on many disclosers' lives, including his own:

[There should be an] ... appropriate reward where disclosures of a serious nature have been successfully prosecuted ...

The growing litany of stories of adverse repercussions for whistle-blowers tells us that a reward scheme is needed if potential whistle-blowers are to be encouraged.⁷⁵⁷

Support for rewards in best-practice principles

Support for rewarding whistleblowers can also be found in a number of statements of best-practice principles, although that support is usually qualified.

The UNODC, for example, has observed that

Notwithstanding the fact that incentive systems for whistleblowing are fairly well established in the United States ... they have not been readily adopted in all parts of the world. Critics see the model as a commercial transaction involving communications—more of an information market that is largely independent of the freedom of expression or the public interest. In any event, if a State considers the introduction of a reward system, it should be seen as complementary to ensuring whistleblower protection.⁷⁵⁸

Blueprint for Free Speech has emphasised the need to 'ensure whistleblowers who suffer retaliation or reprisals have the opportunity to be compensated completely for their losses, and [that they] will not suffer permanent damage to their careers and livelihoods.'⁷⁵⁹ While this account emphasises compensation, Blueprint for Free Speech has also suggested that

[in] addition to compensation for retaliation, the law might include (together [with] rather than instead of) pecuniary reward mechanisms to reward whistleblowers that come forward in the public interest. The percentage is to be determined based on local context. An alternative or additional incentive would be to pay a percentage of recoverable monies or fines paid in such an action into a legal whistleblower fund to support future whistleblowing cases.⁷⁶⁰

⁷⁵⁶ Ms Karen Burgess, Closed Hearing, Melbourne, 20 February 2017.

⁷⁵⁷ Mr Brian Hood, Submission, 10 February 2017.

⁷⁵⁸ UNODC, *The United Nations Convention against Corruption resource guide on good practices in the protection of reporting persons* (United Nations, 2015) 67.

⁷⁵⁹ Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 26.

⁷⁶⁰ Blueprint for Free Speech, *Blueprint principles for whistleblower protection* (no date) 7. See also Blueprint for Free Speech, *Protecting whistleblowers in the UK: a new blueprint* (no date) 25–6.

In similar terms, Transparency International has suggested that

if appropriate within the national context, whistleblowers may receive a portion of any funds recovered or fines levied as a result of their disclosure. Other rewards or acknowledgements may include public recognition or awards (if agreeable to the whistleblower), employment promotion, or an official apology for retribution.⁷⁶¹

However, while the Committee has received some evidence supporting the introduction of a US-style rewards system for whistleblowers in Victoria it is only qualified support. This is consistent with the qualified support for such a system in relevant statements of best-practice principles. The main model of rewards that has been alluded to is the US *False Claims Act*⁷⁶² system. Before evaluating the costs and benefits of this system more closely, it is necessary to outline the main features of its operation. A detailed analysis of its provisions and procedures is beyond the scope of this report.

6.4.2 Rewards under the US *False Claims Act*

While the *False Claims Act* is not the only Act authorising rewards for whistleblowers in the United States,⁷⁶³ it is the most important Act.⁷⁶⁴

Whistleblowers can undertake a qui tam suit to pursue a reward. Qui tam suits under the *False Claims Act* are court actions taken by a whistleblower on behalf of the government in relation to alleged fraud against it.⁷⁶⁵ ‘Qui tam’ is a shortened version of a Latin phrase meaning ‘he who, as well as for the king as for himself, sues in the matter.’⁷⁶⁶

While the origins of the qui tam suit lie in the medieval common law of England, it fell into disuse there by the 1950s.⁷⁶⁷ In the United States, it came to life with the enactment of the first false claims Act during the American Civil War—a response to suppliers who were defrauding the government of the day.⁷⁶⁸

Under the present Act, anyone who knows about an alleged fraud perpetrated against the US government by a contractor with the government—for example, a ‘false’ claim for a government payment or a fraudulent failure to pay what is owed

⁷⁶¹ Transparency International Australia, *International principles for whistleblower legislation* (2013) 9.

⁷⁶² 31 USC §3729–3733.

⁷⁶³ There is, for example, the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (Dodd-Frank Act), Pub L No 111-203, 124 Stat 1376, cited in Gerry Ferguson, *Global corruption: law, theory and practice. An open access coursebook on legal regulation of corruption under international conventions and under US, UK and Canadian law* (2nd ed, January 2017) 12-1, 12-25.

⁷⁶⁴ See, for example, Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361.

⁷⁶⁵ Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361, 362.

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Todd Kelly, ‘Sharing is caring: protecting the ability of *qui tam* relators and the government to share information under the False Claims Act’ (2016) 23(5) *George Mason Law Review* 1319, 1322–3; Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361, 361–2; Public Concern at Work, *Rewarding whistleblowers as good citizens: response to the Home Office consultation* (2007) (unpaginated).

⁷⁶⁸ Todd Kelly, ‘Sharing is caring: protecting the ability of *qui tam* relators and the government to share information under the False Claims Act’ (2016) 23(5) *George Mason Law Review* 1319, 1323–4.

to the government—can bring a *qui tam* action on behalf of the government.⁷⁶⁹ In a *qui tam* suit a private individual who sues on behalf of the government (as a ‘relator’) may receive a share of the damages recovered if the suit is successful.⁷⁷⁰ For a more detailed account, see Box 6.1.

BOX 6.1: US *False Claims Act*

The *False Claims Act* (FCA), also known as the ‘Lincoln Law’ (having originally been signed into law by President Lincoln in 1863), imposes liability on persons and companies who defraud government programs. A key feature of the *False Claims Act* is its *qui tam* provisions (these allow people not affiliated with the government (‘relators’) to file actions on behalf of the government and to receive a portion of any recovered damages).

The *qui tam* provisions are intended to encourage citizens with knowledge of fraud against the government to come forward. The government can decide whether to intervene in a case based on a disclosure. If it does intervene, the person who made the disclosure remains a relator to proceedings, and can make a claim for 15 to 25 per cent of any damages recovered. If the government declines to intervene, the relator can proceed alone, and can make a claim for 25 to 30 per cent of recovered damages (although such actions are typically less successful). Relators are protected from retaliation in their employment.

Source: The Treasury, Australian Government, *Review of tax and corporate whistleblower protections in Australia* (20 December 2016) 12.

In 1986, there were major amendments to the *False Claims Act*. They made it easier to make a *qui tam* claim, protected relators against reprisals and increased the size of the reward they could recover.⁷⁷¹ This led to a dramatic increase in the number of *qui tam* claims and the amount of government damages recovered:

In 1987, only 32 *qui tam* suits were filed and they did not result in any recoveries. By 1997, the number of such suits filed reached 533, with [US]\$629.9 million recovered for the government.⁷⁷²

⁷⁶⁹ Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 381–4; John F Carroll, *The False Claims Act: a useful tool in the fight against public corruption* (Center for the Advancement of Public Integrity, Columbia Law School, 2016) 3–4; The Treasury, Australian Government, *Review of tax and corporate whistleblower protections in Australia* (20 December 2016) 12.

⁷⁷⁰ Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 381–4; John F Carroll, *The False Claims Act: a useful tool in the fight against public corruption* (Center for the Advancement of Public Integrity, Columbia Law School, 2016) 2–5; The Treasury, Australian Government, *Review of tax and corporate whistleblower protections in Australia* (20 December 2016) 10–12.

⁷⁷¹ Todd Kelly, ‘Sharing is caring: protecting the ability of *qui tam* relators and the government to share information under the False Claims Act’ (2016) 23(5) *George Mason Law Review* 1319, 1326–7; Christina Orsini Broderick, ‘Qui tam provisions and the public interest: an empirical analysis’ (May 2007) 107 *Columbia Law Review* 949, 954–5; Aaron S Kesselheim and David M Studdert, ‘Whistleblower-initiated enforcement actions against health care fraud and abuse in the United States, 1996 to 2005’ (2008) 149 *Annals of Internal Medicine* 342, 342; Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal of Social Justice* 653, 666–7.

⁷⁷² Christina Orsini Broderick, ‘Qui tam provisions and the public interest: an empirical analysis’ (May 2007) 107 *Columbia Law Review* 949, 955.

The US Department of Justice has reported that in the fiscal year 2016 the Government recovered US\$2.9 billion from qui tam suits.⁷⁷³

As these figures suggest, through qui tam suits the US government has been able to recover large amounts, including the payment of triple damages, and penalties for infringements, from those who have defrauded it.⁷⁷⁴ This has resulted in large rewards being paid to many whistleblowers.⁷⁷⁵ Writing in 2013, Dworkin and Brown concluded that ‘the whistleblower almost always receives over a million dollars, and often much more.’⁷⁷⁶ For example, the individual whistleblowers in cases against medical businesses NuVasive, PharMerica and Endo Pharmaceuticals received, respectively, US\$2.2 million, US\$4.3 million and US\$33.6 million.⁷⁷⁷ One study, albeit with a small sample, found that the successful relators were awarded between US\$100,000 and US\$42 million, with a median reward of US\$3 million.⁷⁷⁸

Arguments for qui tam actions

Proponents of qui tam actions have argued that they bring a number of benefits—to the government, to the whistleblower and to the public at large.

First, they argue that qui tam actions improve the enforcement of anti-fraud laws.⁷⁷⁹ The government can draw on a wide range of insider sources of information, since anyone may bring a qui tam action, and the rewards encourage them to do so.⁷⁸⁰ As one American investigative lawyer put it:

773 The United States Department of Justice, ‘Justice Department recovers over \$[US] 4.7 billion from False Claims Act cases in fiscal year 2016: third highest annual recovery in FCA history,’ 14 December 2016: <www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016>.

774 John F Carroll, *The False Claims Act: a useful tool in the fight against public corruption* (Center for the Advancement of Public Integrity, Columbia Law School, 2016) 3 (‘Under federal law, one who is liable must pay a civil penalty of between \$[US] 5,500 and \$[US] 11,000 for each false claim and treble the amount of the government’s damages.’); Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361, 362–4.

775 Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361, 362–3; Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal of Social Justice* 653, 666–8; John Bowers et al, *Whistleblowing: law and practice* (2nd ed, Oxford University Press, 2012) 368–9.

776 Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal of Social Justice* 653, 667. However, more modest amounts have also been awarded—see Public Concern at Work, *Rewarding whistleblowers as good citizens: response to the Home Office consultation* (2007) (unpaginated).

777 Gerry Ferguson, *Global corruption: law, theory and practice. An open access coursebook on legal regulation of corruption under international conventions and under US, UK and Canadian law* (2nd ed, January 2017) 12–24.

778 Aaron S Kesselheim, David M Studdert and Michelle M Mello, ‘Whistle-blowers’ experiences in fraud litigation against pharmaceutical companies’ (2010) 362(19) *New England Journal of Medicine* 1832, 1836.

779 Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 381–2, 384, 398–9; Thomas Faunce, ‘Sing for your supper: why Australia should reward corporate informants’ (July 2011) 67 *The Whistle* 6, 7; Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361; Kim Sawyer, ‘Lincoln’s law: an analysis of an Australian false claims Act’ [September 2011] *SSRN Electronic Journal* 1, 13–15.

780 Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 382–4; Thomas Faunce, ‘Sing for your supper: why Australia should reward corporate informants’ (July 2011) 67 *The Whistle* 6, 7; Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361; Kim Sawyer, ‘Lincoln’s law: an analysis of an Australian false claims Act’ [September 2011] *SSRN Electronic Journal* 1, 1–9, 19–21; Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal of Social Justice* 653, 667–8.

Relators are force multipliers. The use of relators puts eyes and ears on the factory floors and in the boardrooms of every government contractor. FCA [*False Claims Act*] financial incentives encourage relators to come forward with information about fraud where otherwise there would be no incentive to do so. Relators who reveal false claims to the government stand to receive substantial rewards.⁷⁸¹

Second, they argue that the use of relators—and the option of investigative and litigation partnerships between whistleblowers, their law firms and government agencies—reduces costs and makes the recovery of losses from fraud more efficient.⁷⁸² It has been argued that this ‘enforcement partnership has proven extremely cost-effective, recouping US\$15 for every US\$1 spent on *qui tam* investigations and litigation.’⁷⁸³

Third, proponents claim that the rewards from a successful *qui tam* action not only give whistleblowers an incentive to come forward but also provide them with financial security should blowing the whistle irreparably damage their careers.⁷⁸⁴ This is ensured by the generally large rewards they are entitled to:

The rewards are ... seen as a way to stop wrongdoing, while also giving the whistleblowers sufficient monetary protection for the risk of a lost job, lack of a future in the organization or even the profession, and other possible consequences of whistleblowing.⁷⁸⁵

Fourth, proponents highlight the overall public good in recovering large losses due to fraud.⁷⁸⁶ This is not only beneficial to the government and the taxpayer but also deters fraud and improves corporations’ standards of governance.⁷⁸⁷

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- 781 John F Carroll, *The False Claims Act: a useful tool in the fight against public corruption* (Center for the Advancement of Public Integrity, Columbia Law School, 2016) 4.
- 782 Thomas A Faunce, Gregor Urbas and Lesley Skillen, ‘Implementing US-style anti-fraud laws in the Australian pharmaceutical and health care industries’ (2011) 194(9) *Medical Journal of Australia* 474, 476; Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 394, 398–9; Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361; Christina Orsini Broderick, ‘Qui tam provisions and the public interest: an empirical analysis’ (May 2007) 107 *Columbia Law Review* 949; Kim Sawyer, ‘Lincoln’s law: an analysis of an Australian false claims Act’ [September 2011] *SSRN Electronic Journal* 1, 6–7, 12–16.
- 783 Thomas A Faunce, Gregor Urbas and Lesley Skillen, ‘Implementing US-style anti-fraud laws in the Australian pharmaceutical and health care industries’ (2011) 194(9) *Medical Journal of Australia* 474, 476.
- 784 Thomas Faunce, ‘Sing for your supper: why Australia should reward corporate informants’ (July 2011) 67 *The Whistle* 6, 7; Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 384, 397–8; Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal of Social Justice* 653, 668.
- 785 Terry Morehead Dworkin and A J Brown, ‘The money or the media? Lessons from contrasting developments in US and Australian whistleblowing laws’ (2013) 11(2) *Seattle Journal of Social Justice* 653, 668.
- 786 Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 395–7, 398–9; Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361; Kim Sawyer, ‘Lincoln’s law: an analysis of an Australian false claims Act’ [September 2011] *SSRN Electronic Journal* 1, 13–15.
- 787 Tom Faunce et al, ‘Because they have evidence: globalizing financial incentives for corporate whistleblowers’ in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 395–7, 398–9; Thomas L Carson, Mary Ellen Verdu and Richard E Wokutch, ‘Whistle-blowing for profit: an ethical analysis of the Federal False Claims Act’ (2008) 77 *Journal of Business Ethics* 361, 371–3; Thomas Faunce, ‘Sing for your supper: why Australia should reward corporate informants’ (July 2011) 67 *The Whistle* 6, 7; Kim Sawyer, ‘Lincoln’s law: an analysis of an Australian false claims Act’ [September 2011] *SSRN Electronic Journal* 1, 21–2. But on deterrence, see, contra, Christina Orsini Broderick, ‘Qui tam provisions and the public interest: an empirical analysis’ (May 2007) 107 *Columbia Law Review* 949, 980.

Evaluating the arguments

The first criticism of *qui tam* actions concerns their moral and cultural underpinnings.⁷⁸⁸ The Committee believes that there is a risk that an upfront monetary incentive to make a disclosure about improper conduct would encourage self-interested rather than public-spirited reporting. Instead, the Committee endorses the value of reporting improper conduct because it is the right thing to do, while ensuring that those who do so are adequately protected and, if not, properly *compensated* for any harm they have suffered. This approach is consistent with IBAC's efforts to improve the integrity culture in the Victorian public sector. As the IBAC Commissioner, Mr Stephen O'Bryan, told the Committee:

IBAC does not support the introduction of mechanisms like the scheme operated by the US Securities and Exchange Commission's Office of the Whistleblower, which establishes ... monetary award schemes for whistleblowers.

If there is a need to further encourage whistleblowing, it may be preferable to consider programs directed at developing a culture in which whistleblowing is valued and persons thinking of making a disclosure can be confident they will be able to access the protections available under the Act.⁷⁸⁹

For similar reasons, no official inquiry in Australia has recommended adding US-style rewards and *qui tam* actions to Australian public sector whistleblower protection schemes (see Table 6. 2, below). With regard to *corporate* whistleblowers, however, the Senate Economics References Committee has recommended that 'the government explore options for reward-based incentives ... including *qui tam* arrangements.'⁷⁹⁰

Under the *PD Act 2012* (Vic) anyone may make a disclosure about improper conduct in the public sector.⁷⁹¹ This includes public servants. A number of commentators have highlighted the ethical and legal obligations of public servants to report wrongdoing and the risk that the commitment to these obligations could be undermined by whistleblowing for reward.⁷⁹² For example, the South Australian Lander Review observed that

[a]nother important consideration in relation to rewards to public officers for reporting wrongdoing in public administration is the potential effect of such a scheme on public sector values. People who work in the public sector are expected to have, as their ultimate goal, serving the public good according to the will of the government of the day ... The evidence indicates that a majority of public officers

⁷⁸⁸ See, for example, Dr Simon Longstaff AO, Executive Director, The Ethics Centre, Sydney, Submission to the Commonwealth Joint Parliamentary Committee on Corporations and Financial Services's Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors, 10 February 2017.

⁷⁸⁹ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

⁷⁹⁰ Senate Economic References Committee, *Performance of the Australian Securities and Investments Commission* (June 2014) 225. See also Commonwealth, *Corporate whistleblowing in Australia* (2016) 30–31.

⁷⁹¹ *PD Act 2012* (Vic) s 9(1).

⁷⁹² Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 153; Mr Phil Clarke, Ombudsman, Queensland Ombudsman, Submission to the Commonwealth Joint Parliamentary Committee on Corporations and Financial Services's Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors, 8 February 2017.

already feel obliged to speak out about serious public sector wrongdoing of which they are aware ... It would not be appropriate to reward public officers for performing a duty which they are already bound to perform.⁷⁹³

Table 6.2 Australian inquiries: US-style whistleblower rewards

Who	Report or issues paper	Year	Support for US-style rewards?
House of Representatives Standing Committee on Legal and Constitutional Affairs	<i>Fair shares for all: insider trading in Australia</i> ^(a)	1989	No
Senate Select Committee on Public Interest Whistleblowing	<i>In the public interest—report of the Senate Select Committee on Public Interest Whistleblowing</i> ^(b)	1994	No
House of Representatives Standing Committee on Legal and Constitutional Affairs	<i>Whistleblower protection: a comprehensive scheme for the Commonwealth public sector</i> ^(c)	2009	No
Hon Bruce Lander QC	<i>A review of the Whistleblowers Protection Act 1993 (SA)</i> ^(d)	2014	No
Senate Economics References Committee	<i>Performance of the Australian Securities and Investments Commission</i> ^(e)	2014	Explore it as an option
Senate Economics References Committee	<i>Issues paper: corporate whistleblowing in Australia—ending corporate Australia's cultures of silence</i> ^(f)	2016	Discuss it further as an option

(a) House of Representatives Standing Committee on Legal and Constitutional Affairs, *Fair shares for all: insider trading in Australia* (1989) 45.

(b) Commonwealth, *In the public interest* (1994) 226–8.

(c) Commonwealth, *Whistleblower protection* (2009) 86.

(d) Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 153–4.

(e) Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission* (2014) 224–5.

(f) Commonwealth, *Corporate whistleblowing in Australia* (2016) 30–31.

The Queensland Ombudsman, Mr Phil Clarke, came to the same conclusion in a recent submission to a federal parliamentary inquiry into whistleblowing:

There is an obligation on public sector employees to report wrongdoing consistent with their duties and obligations as public servants ...

It is submitted that it is not consistent with the duties and responsibilities of a public servant to receive a reward for disclosing information about wrongdoing. The reporting of wrongdoing is integral to the ethical obligations of persons in public sector employment.⁷⁹⁴

⁷⁹³ Bruce Lander, *A review of the Whistleblowers Protection Act 1993 (SA)* (2014) 153.

⁷⁹⁴ Mr Phil Clarke, Ombudsman, Queensland Ombudsman, Submission to the Commonwealth Joint Parliamentary Committee on Corporations and Financial Services's Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors, 8 February 2017.

However, the Ombudsman rightly distinguished compensation from rewards:

A reward for disclosing information about wrongdoing should be distinguished from compensation for detriment or reprisal experienced by a whistleblower as a consequence of making a disclosure of information about wrongdoing. While a public officer should not receive a benefit from being a whistleblower, neither should they experience a detriment ...

[They should be] afforded protection from reprisal or detriment for reporting wrongdoing.⁷⁹⁵

On similar grounds, the United Kingdom has also resisted the introduction of US-style rewards. Whistleblowing law experts there have noted the ‘concern ... that requiring financial incentives is not consistent with the aim of fostering a culture where concerns are raised because it is right to do so.’⁷⁹⁶ Indeed, the *Public Interest Disclosure Act 1998* (UK) prohibits the making of a disclosure ‘for personal gain.’⁷⁹⁷ The longstanding British whistleblowing charity and advocacy organisation Public Concern at Work (PCAW) has also concluded that the evidence does not support the introduction of a US-style rewards system.⁷⁹⁸ In a 2013 report based on wideranging research and consultation, PCAW concluded that

[t]he majority of respondents to our consultation (including whistleblowers) were not in favour of rewards. The reasons given were multiple and in summary were as follows:

- a) inconsistent with the culture and philosophy in the UK
- b) undermines the moral stance of a genuine whistleblower
- c) could lead to false or delayed reporting
- d) could undermine credibility of witnesses in future criminal or civil proceedings
- e) could result in the negative portrayal of whistleblowers
- f) would be inconsistent with the current compensatory regime in the UK.⁷⁹⁹

⁷⁹⁵ Mr Phil Clarke, Ombudsman, Queensland Ombudsman, Submission to the Commonwealth Joint Parliamentary Committee on Corporations and Financial Services’s Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors, 8 February 2017.

⁷⁹⁶ John Bowers et al, *Whistleblowing: law and practice* (2nd ed, Oxford University Press, 2012) 370.

⁷⁹⁷ *Public Interest Disclosure Act 1998* (UK) s 43G(1)(c).

⁷⁹⁸ PCAW, *Rewarding whistleblowers as good citizens: response to Home Office consultation* (30 November 2007); PCAW, *The Whistleblowing Commission, Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK* (November 2013).

⁷⁹⁹ PCAW, *The Whistleblowing Commission, Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK* (November 2013) 14.

Second, as a matter of practice, qui tam actions might encourage frivolous or cynical claims for reward. While some scholars have argued that there are sufficient safeguards under the US *False Claims Act* against frivolous claims,⁸⁰⁰ one large-scale study found that there were a high number of frivolous qui tam claims,⁸⁰¹ estimating that '78% of all qui tam actions are without merit.'⁸⁰²

The Committee also notes the risk of an increase in cynical disclosures. For example, given the large financial rewards, a whistleblower might wait until a fraud matures and becomes more rewarding before reporting it. As a number of legal experts have observed,

One obvious criticism of system of rewards for blowing the whistle is that in light of a potentially large-scale fraud, a whistleblower might wait until the fraud has occurred before disclosing the wrongdoing to increase the sum from which s/he will receive a percentage—especially where any damages are tripled.⁸⁰³

While some commentators have doubted whether this is a substantial risk,⁸⁰⁴ a whistleblower might at least wait until there is sufficient evidence of a fraud that can be litigated.⁸⁰⁵ Either of these actions by the whistleblower are contrary to the early detection and addressing of the risks of fraud.⁸⁰⁶ This has been recognised recently by the Australian Treasury:

While introducing a reward system may encourage more whistleblowing, individuals may only be willing to raise a concern when there is empirical proof of a breach and a monetary reward is available (which could reduce the opportunity to detect malpractice early and prevent harm).⁸⁰⁷

Third, proponents of qui tam actions often preface their arguments with criticism of the negative impacts of taking court action for remedies under the *PD Act 2012* (Vic). However, it is less common for the proponents to examine the negative impacts of qui tam actions, which are also a form of litigation.

⁸⁰⁰ Tom Faunce et al, 'Because they have evidence: globalizing financial incentives for corporate whistleblowers' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 393–4. Aaron S Kesselheim, David M Studdert and Michelle M Mello, 'Whistle-blowers' experiences in fraud litigation against pharmaceutical companies' (2010) 362(19) *New England Journal of Medicine* 1832, 1834 ('Reported motivations [in their study] coalesced around four non-mutually exclusive themes: integrity, altruism or public safety, justice and self-preservation ...').

⁸⁰¹ Christina Orsini Broderick, 'Qui tam provisions and the public interest: an empirical analysis' (May 2007) 107 *Columbia Law Review* 949, 964–5, 971–2, 977, 997, 1000.

⁸⁰² Ibid 971. See also Mr Nicholas Mavrakis, Partner, and Ms Katrina Hogan, Lawyer, Clayton Utz, Submission to the Commonwealth Joint Parliamentary Committee on Corporations and Financial Services's Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors, 10 February 2017; PCAW, *The Whistleblowing Commission, Report on the effectiveness of existing arrangements for workplace whistleblowing in the UK* (November 2013) 14.

⁸⁰³ John Bowers et al, *Whistleblowing: law and practice* (2nd ed, Oxford University Press, 2012) 369.

⁸⁰⁴ Aaron S Kesselheim, David M Studdert and Michelle M Mello, 'Whistle-blowers' experiences in fraud litigation against pharmaceutical companies' (2010) 362(19) *New England Journal of Medicine* 1832, 1834; Tom Faunce et al, 'Because they have evidence: globalizing financial incentives for corporate whistleblowers' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 393.

⁸⁰⁵ The Treasury, *Review of tax and corporate whistleblower protections in Australia* (20 December 2016) 27; Tom Faunce et al, 'Because they have evidence: globalizing financial incentives for corporate whistleblowers' in A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014) 381, 393.

⁸⁰⁶ The Treasury, *Review of tax and corporate whistleblower protections in Australia* (20 December 2016) 27.

⁸⁰⁷ Ibid 27.

One study of whistleblowers who had taken qui tam actions against pharmaceutical companies found that their experience was often negative.⁸⁰⁸ They struggled with a heavy ‘workload and pressure,’⁸⁰⁹ endured long delays and suffered stress, ill-health and personal and relationship difficulties.⁸¹⁰ The whistleblowers’ qui tam actions took, on average, almost five years to be finalised.⁸¹¹ The study also found that protections against reprisals were ‘not fully effective.’⁸¹² In sum, it observed that

many whistleblowers suggested a need to mentally prepare for a process more protracted, stressful and conflict-ridden, and less financially rewarding, than prospective whistle-blowers might expect.⁸¹³

It concluded that a majority of the whistleblowers in the study ‘perceived their net recovery to be small relative to the time they spent on the case and the disruption and damage to their careers.’⁸¹⁴

Fourth, the qui tam system is intimately connected with *American* laws, procedures and institutions, and is focused on private-sector fraud against government. It is unclear how such a system might work in Victoria, where whistleblower protection laws are focused on improper conduct in the *public* sector, supported by a dedicated anti-corruption body in IBAC.

While some academic commentators have urged the introduction of qui tam suits in Australia, none of them have provided a detailed framework for how they might work within the Australian, and specifically Victorian, legal systems.⁸¹⁵ They have not identified in any detailed fashion, for example, how qui tam suits would interact with existing criminal and civil laws and procedures and key whistleblower protection legislation such as the *PD Act 2012* (Vic).

The Committee therefore believes that a system of US-style rewards for whistleblowers together with qui tam actions should not be introduced in Victoria. Instead, efforts should be made to improve the existing system for the protection and compensation of whistleblowers.

FINDING 6: US-style rewards, including qui tam actions, should not be introduced into Victoria’s whistleblower protection scheme.

⁸⁰⁸ Aaron S Kesselheim, David M Studdert and Michelle M Mello, ‘Whistle-blowers’ experiences in fraud litigation against pharmaceutical companies’ (2010) 362(19) *New England Journal of Medicine* 1832.

⁸⁰⁹ Ibid 1836.

⁸¹⁰ Ibid 1835–8.

⁸¹¹ ‘[An] average of 4.9 years ... from filing to closure’—ibid 1834.

⁸¹² Ibid 1838.

⁸¹³ Aaron S Kesselheim, David M Studdert and Michelle M Mello, ‘Whistle-blowers’ experiences in fraud litigation against pharmaceutical companies’ (2010) 362(19) *New England Journal of Medicine* 1832, 1836.

⁸¹⁴ Ibid 1836.

⁸¹⁵ For sketches of the possible introduction of qui tam actions into Australia, see Thomas Faunce, ‘Sing for your supper: why Australia should reward corporate informants’ (July 2011) 67 *The Whistle* 6; Thomas A Faunce, Gregor Urbas and Lesley Skillen, ‘Implementing US-style anti-fraud laws in the Australian pharmaceutical and health care industries’ (2011) 194(9) *Medical Journal of Australia* 474; Kim Sawyer, ‘Lincoln’s law: an analysis of an Australian false claims Act’ [September 2011] *SSRN Electronic Journal* 1; Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, ‘Bounty hunters, whistleblowers and a new regulatory system’ (2013) 41 *Australian Business Law Review* 292, 305 (‘Making a case for whistleblowing in the abstract is one thing. Any potential success of a bounty model will depend on the way in which it is incorporated into the current legal framework.’).

6.5 Conclusion

The Committee recognises that disclosers often suffer significant harm as a result of making a disclosure. This includes impacts on their finances, health and career prospects. Concerns were raised with the Committee regarding the adequacy of the current compensation provisions of the *PD Act 2012* (Vic).

The present remedies include court-ordered damages and the right to sue in tort for damages, as well as reinstatement, re-employment or transfer of the discloser. On paper, the wideranging remedies available to disclosers largely meet best-practice principles. However, the Committee recognises that suing for damages often involves—like any other litigation—stress, cost, uncertainty and long delays. Lack of access to affordable legal advice and representation can also be a problem. There is also the risk that a whistleblower will have to pay the costs of the other side if their action is unsuccessful.

To address these issues, the Committee has recommended that the *PD Act 2012* (Vic) be amended to provide that, generally, costs not be awarded against a discloser provided that their suit is not vexatious and that they have conducted their case reasonably. In addition, to increase access to affordable legal advice and representation, the Committee has recommended the establishment of a professional and community organisation website hub to help facilitate access to legal information and services for whistleblowers.

Recognising the cost and stress of litigation, the Committee has further recommended that the Victorian Government provide financial assistance to whistleblowers to cover their reasonable career-transition and legal costs. This should be administered by an appropriate government department with, perhaps, the possibility of VCAT review under particular conditions.

The Committee received some evidence lending qualified support to US-style rewards systems, especially qui tam actions under the *False Claims Act*. There is presently no rewards system for disclosers in Victoria or in any other Australian jurisdiction. Further, no official inquiry has recommended the introduction of US-style rewards systems in public-oriented whistleblower protection schemes.

While the *False Claims Act* has made an effective contribution to the recovery of losses due to fraud against US governments, the Committee has concluded that it should not be introduced in Victoria. Such a system would risk undermining an integrity-based culture in which disclosers, while not expected to be saints, disclose because it is the right thing to do. The introduction of US-style rewards may also increase the number of frivolous and cynical claims, as it has in the USA. In addition, qui tam litigation is likely to be no less stressful for whistleblowers than any other litigation.

Finally, the proponents of qui tam actions have not demonstrated how such suits would work within Victoria's criminal and civil law systems and, in particular, how they would interact with the *PD Act 2012* (Vic) and other relevant legislation.

While qui tam actions have undoubtedly made a significant contribution to fraud recovery in the US, they have also been subject to criticism. Further, the Committee notes that a system that works effectively in the US might not be appropriate in Victoria given the important cultural and legal differences between the jurisdictions.

The Committee considers that efforts should be made to improve the existing system of compensating disclosers rather than introduce a rewards system intimately connected with distinctive American laws, institutions and procedures.

The next chapter concludes the review of the *PD Act 2012* (Vic), outlining, in summary, how it might be reformed and improved.

7 Conclusion: improving Victoria's whistleblowing protection regime—reform and education

7.1 Introduction

From the early stages of the Committee's review, the issue arose of not only whether, but if so *how*, the *PD Act 2012* (Vic) should be amended and improved. Concerns were raised with the Committee in relation to the complexity of the terminology and processes of the Act as well as whether it fell short of the relevant best-practice principles.

Issues were also raised about the interaction of the *PD Act 2012* (Vic) with other legislation. Specifically, concern was expressed that the number of external cross-references to other legislation—including the *IBAC Act 2011* (Vic), the *VI Act 2011* (Vic) and the *Ombudsman Act 1973* (Vic)—made the *PD Act 2012* (Vic) even more difficult to understand and navigate.

In addition, the Committee's attention was drawn to the question of whether the title of the *PD Act 2012* (Vic) needed to be changed to better reflect its purposes and make it more accessible to the public, and potential disclosers in particular.

This chapter addresses these key concerns before drawing together in a general way the Committee's recommendations for improving the *PD Act 2012* (Vic). The Committee recognises that, in addition to changes to the law, improvements can be made so that the public and the public sector are better informed and educated about how Victoria's whistleblowing protection regime operates.

7.2 How should any reforms to the *PD Act 2012* (Vic) be carried out?

The Committee received evidence that raised questions about different aspects of the processes for making, assessing, investigating and referring disclosures and of the provisions for protecting, supporting and compensating disclosers. One of the themes of the evidence was the complexity of the Act.

Professor A J Brown considered that the problems with the *PD Act 2012* (Vic) might necessitate its repeal and replacement with new legislation:

[I]t becomes a real question in my mind ... whether it would be better to do major surgery on the Protected Disclosure Act [2012 (Vic)] in order to address most or all of those [problems] or whether you would be better off looking at a fresh start and then designing the new legislation ... [to address them].⁸¹⁶

The Accountability Round Table argued that the *PD Act 2012 (Vic)* should be repealed and replaced with a new Act using the Australian Capital Territory's *Public Interest Disclosure Act 2012 (Vic)* as the template.⁸¹⁷

However, these positions were not representative of the evidence received by the Committee.

Monash University criticised the complexity of the *PD Act 2012 (Vic)* and its interactions with other relevant legislation, arguing that it compared unfavourably to the preceding *Whistleblowers Protection Act 2001 (Vic)*. However, the university was not entirely critical of the new scheme. It told the Committee that

The University's experience of the new regime of an investigation led by the Ombudsman or IBAC has been favourable. Officers liaising with the University have been professional and appropriate in their dealings with the University, providing satisfactory information and guidance on how the University can support their investigation, and not adopting an adversarial approach which has been an issue for the University in the past.⁸¹⁸

The university also reported that '[t]here is no doubt that we are very grateful or strongly support that there are often circumstances where an external agency such as [the] Ombudsman or IBAC would have superior capacity to carry out an investigation.'⁸¹⁹

The main criticism was that the whistleblowing protection scheme in Victoria had become more complex because, in order to understand the laws, you have to consult a number of Acts, such as the *PD Act 2012 (Vic)* and the legislation for IBAC and the VI.⁸²⁰ As Ms Glenda Beecher, Monash University's Deputy General Counsel, told the Committee at a hearing:

There are three completely separate pieces of legislation. To understand one of the pieces of the legislation, you need to read the other pieces of legislation—the definition of one type of misconduct in one piece and the other type of misconduct in the other piece. You have to read together all of this stuff, whereas we previously had this very compact little Act [the *Whistleblowers Protection Act 2001 (Vic)*], which was obviously much more easy for a lawyer to traverse, but I suggest to you that whistleblowers would find this extraordinarily difficult, and that just puts another

⁸¹⁶ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

⁸¹⁷ Accountability Round Table, Submission, 4 May 2016.

⁸¹⁸ Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016.

⁸¹⁹ Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University, Submission, 27 April 2016.

⁸²⁰ Mr Peter Marshall, Chief Operating Officer and Senior Vice President, and Ms Glenda Beecher, Deputy General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016.

hurdle in their way, which I would have said is not really a welcome outcome for a person who is trying to bring forward corruption, if they have to navigate a process that is more complex for them.

So that is why we say the regime is much more complex than it used to be, and we have not really understood the justification for the increasing complexity. The need for the change we absolutely do see, and it has been very welcome, and we have had a positive experience of the change, I think, subject to the complexity ...

[W]e would really like the legislation consolidated and simplified into one Act, so you do not have to go to three different bits to understand it ...⁸²¹

While the complexity of the *PD Act 2012* (Vic) was a theme in evidence provided to the Committee, Monash University was the only stakeholder to argue for the consolidation of that Act with relevant integrity legislation.

After reviewing the evidence, the Committee identified three ways to reform the *PD Act 2012* (Vic):

- Repeal the *PD Act 2012* (Vic) and replace it with new legislation.
- Consolidate all the provisions relating to the protected disclosure scheme in a single Act.
- Amend selected provisions in the *PD Act 2012* (Vic) and associated legislation.

7.2.1 Repeal the *PD Act 2012* (Vic) and replace it with new legislation?

The Committee recognises that the *PD Act 2012* (Vic) is complex. This complexity is not unusual in Australian whistleblower protection legislation. As Professor A J Brown has noted, 'most Australian public interest disclosure legislation has been relatively complicated ... and technical.'⁸²² The Victorian Act is no more complex than those of New South Wales, Western Australia and Tasmania,⁸²³ for example. However, the *PD Act 2012* (Vic) is denser, less well-structured and harder to navigate than, for example, the *Public Interest Disclosure Act 2012* (ACT), *Public Interest Disclosure Act 2013* (Cth), the *Public Interest Disclosure Act 2010* (Qld) and the *Public Interest Disclosure Act* (NT). The Committee believes that the complexities of the *PD Act 2012* (Vic) can be lessened in two ways: fine-tuning the Act by applying some practical plain-language principles and improving information that explains it.

The Committee does not believe repealing the *PD Act 2012* (Vic) and replacing it with new legislation is warranted. This report has demonstrated that in many respects the legislation meets best-practice principles. Moreover, the Act was only introduced recently and was subject to significant amendment in 2016. It

⁸²¹ Ms Glenda Beecher, Deputy General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016.

⁸²² A J Brown et al, 'Best-practice whistleblowing legislation for the public sector: the key principles' in Brown, *Whistleblowing in the Australian public sector* (ANU E Press, 2008) 303.

⁸²³ *Public Interest Disclosures Act 1994* (NSW), *Public Interest Disclosure Act 2003* (WA), *Public Interest Disclosures Act 2002* (Tas).

takes time for public sector bodies and investigating agencies to become familiar with the legislation. IBAC, the Victorian Ombudsman and Victorian Public Sector Commission have made considerable efforts, and invested substantial resources, to produce information for the public and the public sector about the Act.⁸²⁴ IBAC has also helped to train protected disclosure coordinators operating in organisations subject to the Act.⁸²⁵ It would be disruptive and costly to repeal the Act when these bodies are becoming more familiar with it. For example, IBAC has reported that there has been a steady improvement in the quality of protected disclosure procedures produced by organisations subject to the Act.⁸²⁶ As the IBAC Commissioner, Mr Stephen O'Bryan QC, told the Committee:

The Protected Disclosure Act [2012 (Vic)] is still relatively new legislation with which all stakeholders are becoming more familiar through our implementation of it. While there are certainly issues that need to be addressed through amendment, ... given the public resources that have been invested in the development and implementation of this legislation to date, IBAC considers there would need to be strong evidence that it is not meeting the principal objects and in keeping with current best practice in other jurisdictions before consideration should be given to creating a whole new Act.⁸²⁷

The Committee agrees with the Commissioner and considers that any deficiencies in the Act can be addressed through selected amendments.

FINDING 7: The *PD Act 2012* (Vic) should not be repealed.

Improving the design of the *PD Act 2012* (Vic)

Without altering the legal content of the *PD Act 2012* (Vic), the Committee believes that its design could be improved to make it easier to navigate. For example, clearer and more useful headings could be used, as illustrated in Table 7.1. These are simply illustrations that emphasise the point that headings can be concise and accessible. Of course, care would need to be taken to ensure that they are sufficiently precise as well.

Table 7.1 Selected headings in the *PD Act 2012* (Vic)

Present heading	Suggested heading
Part 1—Preliminary	Part 1—Definitions
Part 2—Disclosures	Part 2—Disclosures
Division 1—Information that may be disclosed in accordance with this Part	Division 1—Who may make a disclosure? What can be disclosed?
Part 2, Division 2—How and to whom a disclosure may be made under this Part	Part 2, Division 2—How can you make a disclosure? Who can you make a disclosure to?

⁸²⁴ See, for example, IBAC, *What is a protected disclosure?* <www.ibac.vic.gov.au/reporting-corruption/what-is-a-protected-disclosure>; Victorian Ombudsman, *For whistleblowers* <www.ombudsman.vic.gov.au/Fact-Sheets/For-Whistleblowers>; Victorian Public Sector Commission, *Protected disclosures procedures* <vpssc.vic.gov.au/about-vpssc/protected-disclosures-procedures>.

⁸²⁵ IBAC, *Annual report 2015/2016* (2016) 29–38.

⁸²⁶ *Ibid* 34.

⁸²⁷ Mr Stephen O'Bryan QC, Commissioner, IBAC, Closed Hearing, Melbourne, 11 April 2016.

Further, the Act could use simplified outlines of divisions in text boxes as does the *Public Interest Disclosure Act 2013* (Cth). These give an accessible summary of what the division covers. An example is the text-box outline from section 9 of the *Public Interest Disclosure Act 2013* (Cth):⁸²⁸

The following is a simplified outline of this Division:

An individual is not subject to any civil, criminal or administrative liability for making a public interest disclosure.

It is an offence to take a reprisal, or to threaten to take a reprisal, against a person because of a public interest disclosure (including a proposed or a suspected public interest disclosure).

The Federal Court or Federal Circuit Court may make orders for civil remedies (including compensation, injunctions and reinstatement of employment) if a reprisal is taken against a person because of a public interest disclosure (including a proposed or suspected public interest disclosure).

It is an offence to disclose the identity of an individual who makes a public interest disclosure.

The *PD Act 2012* (Vic) could employ notes and examples more effectively to make the legislation more accessible. The *Public Interest Disclosure Act 2012* (ACT) makes effective use of examples, some of which approximate case studies to help readers understand provisions and how they might work in practice. An illustration can be found in section 16 of the *Public Interest Disclosure Act 2012* (ACT):⁸²⁹

16 How may a public interest disclosure be made?

- (1) A public interest disclosure may be made—
 - (a) orally or in writing; and
 - (b) anonymously; and
 - (c) without the discloser asserting that the disclosure is made under the Act.

Examples—par (c)

- 1 Tranh comments to her supervisor during a coffee break that she believes there are number of significant irregularities in the ordering of office supplies for her business unit. Tranh does not ask or infer that the irregularities should be investigated.
- 2 Cheryl is a senior human resources manager and is attending a training course with Beverly, who is an employee in another directorate. Beverly tells Cheryl about employment practices of a manager in Beverly's directorate that Cheryl believes involves substantial noncompliance with territory law. Beverly is unaware that those practices are noncompliant.

The IBAC Commissioner, Mr Stephen O'Bryan QC, has recognised that using a range of these kinds of tools would make it easier for people to navigate, read and understand the legislation:

⁸²⁸ The notes in this legislative provision have not been included.

⁸²⁹ The notes in this legislative provision have not been included.

The PD Act is, in some places, complex and difficult to understand. Additional information such as notes, examples and outlines undoubtedly would be of assistance in interpreting the legislation and may help to increase compliance by public officers and members of the public.⁸³⁰

Finally, given that many users will be reading digital versions of the *PD Act (Vic)*, including a PDF file, all entries in the Act's Table of Provisions should be hyperlinked. This will enable the reader to go directly to a particular provision. Hyperlinks could also be considered for terms in the legislation that are defined in the definitions section of the Act (section 3). The effective use of hyperlinks, as used in a number of other Australian jurisdictions, would make the Act easier to navigate.

In making any of these changes to the Act, it would be prudent for Parliamentary Counsel to consult with in-house and external plain-language experts.

RECOMMENDATION 19: That the Victorian Government improve the design of the *PD Act 2012 (Vic)* so that it is easier to use and navigate. This should include better use of headings, notes, examples and tables, as well as useful hyperlinks in digital versions of the Act.

Informing and educating the public and the public sector about the *PD Act 2012 (Vic)*

While the Committee considers that further efforts should be made to improve the design of the Act to make it easier to understand and navigate, it recognises that most members of the public, and many organisations subject to the Act, will rely more heavily on information explaining its operation.⁸³¹

The *PD Act 2012 (Vic)* recognises this itself by, for example, requiring that entities who may receive disclosures under the Act establish

procedures—

(a) to facilitate the making of those disclosures;

and

(b) for the handling of those disclosures to the IBAC ...⁸³²

Public bodies are also required to establish procedures for the protection of persons from reprisals.⁸³³

⁸³⁰ Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 24 October 2016.

⁸³¹ See, further, recommended improvements to the Parliament of Victoria's information for the public regarding disclosures about MPs in section 3.4.1 of Chapter 3 in this report.

⁸³² *PD Act 2012 (Vic)* s 58(1).

⁸³³ *PD Act 2012 (Vic)* s 58(5).

As noted earlier in the report, IBAC is authorised to review the content of these procedures and their implementation and make recommendations for the improvement of those procedures.⁸³⁴ In reviewing the content and form of procedures produced by organisations subject to the Act it has found that they generally meet the requirements.⁸³⁵

The *PD Act 2012* (Vic) also requires IBAC to issue guidelines for these procedures regarding the facilitation of disclosures, the handling and notification of disclosures and the protection of persons from reprisals.⁸³⁶ IBAC is further required to issue guidelines for managing the welfare of anyone who makes a protected disclosure as well as

any person affected by a protected disclosure whether as a witness in the investigation of the disclosure or as a person who is a subject of that investigation.⁸³⁷

IBAC has produced excellent plain-language guidelines on the making and handling of protected disclosures and on welfare management, which are readily available as downloadable PDFs.⁸³⁸ They make good use of tables, diagrams and examples and are reviewed and updated to ensure that they are accurate. These guidelines are mainly directed at organisations with obligations under the *PD Act 2012* (Vic).⁸³⁹

IBAC has complemented this legislatively required information with a wide range plain-language factsheets available on its website, which are designed for use by the general public.⁸⁴⁰ Much of the information in these factsheets can also be read in html format on IBAC's website. IBAC also has well-resourced research, prevention, education and communications divisions which reach out to the public and public sector alike.⁸⁴¹ For example, as mentioned, IBAC provides training to protected disclosure coordinators and conducts public information campaigns through traditional and online media.⁸⁴² There are a number of legislative provisions that underpin IBAC's activities in these areas.⁸⁴³ For example, section 55 of the *PD Act 2012* (Vic) provides, in part, that IBAC has the function of providing 'information and education about the protected disclosure scheme.'⁸⁴⁴

⁸³⁴ *PD Act 2012* (Vic) ss 60–61.

⁸³⁵ IBAC, *Review of protected disclosure procedures progress report* (January 2016); IBAC, *Annual report 2015/2016* (2016) 34.

⁸³⁶ *PD Act 2012* (Vic) s 57(1).

⁸³⁷ *PD Act 2012* (Vic) s 57(2).

⁸³⁸ IBAC, *Guidelines for making and handling protected disclosures* (October 2016); IBAC, *Guidelines for protected disclosure welfare management* (October 2016).

⁸³⁹ IBAC, *Guidelines for making and handling protected disclosures* (October 2016) 3; IBAC, *Guidelines for protected disclosure welfare management* (October 2016) 1.

⁸⁴⁰ IBAC, *Publications and resources*: <www.ibac.vic.gov.au/publications-and-resources>.

⁸⁴¹ See IBAC, *Annual report 2015/2016* (2016) 29–38.

⁸⁴² Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016; IBAC, *Annual report 2015/2016* (2016) 6–7, 29–38.

⁸⁴³ See, for example, *PD Act 2012* (Vic) s 55.

⁸⁴⁴ *PD Act 2012* (Vic) s 55(2)(e).

Although IBAC has produced a range of excellent materials on the *PD Act 2012* (Vic) for a variety of audiences, it has recognised that increasing the public's awareness of the organisation as well as of their rights, obligations and protections under the Act remains a challenge.⁸⁴⁵ One way IBAC has responded to this challenge is by undertaking a public awareness campaign about what corruption is, where and how to report it and what protections disclosers can receive under the *PD Act 2012* (Vic):

We are ... working on a campaign ... which is really about raising awareness about corruption and why it is important to report it, take action, to speak up ... [T]he primary aim is to make sure that people understand what corruption is, what the impacts of it are and why it is important to speak up, whether ... you are a public servant, speaking to your manager or someone else that you trust or knowing that IBAC is also there, and it is important to be able to report to us and to feel confident that you know what the protections are. The protected disclosures regime, for example, ensures that if you do make a complaint, it will be taken seriously, it will be assessed, and there are potentially those sorts of protections available. So it is about creating a reporting culture.⁸⁴⁶

In December 2016, IBAC launched an ongoing anti-corruption education campaign for the public across a range of media platforms.⁸⁴⁷ The 'When something's not right. Report it.' campaign aimed to educate Victorians to spot corruption and encourage them to report it.⁸⁴⁸ The campaign included a quiz and a short video about corruption.⁸⁴⁹

IBAC has recognised that terms like 'whistleblower' and 'whistleblowing' are much more familiar to the general public than terms like 'protected disclosure.'⁸⁵⁰ People are also much more likely to 'Google' for variants of 'whistleblowing' than 'protected disclosure.'⁸⁵¹ As Ms Christine Howlett, Director Prevention and Communication at IBAC, observed:

['Googling'] is how most people in this day and age would be accessing information. They would be, as you say, using a search engine. We are really conscious of that as well in terms of our digital strategy; that we have to make sure that we are maximising the hits ... [F]rom a communication perspective we have found it challenging ... ['Protected disclosure'] ... does not roll off the tongue and it is not, as you say, easily understood by the average person.⁸⁵²

⁸⁴⁵ Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016.

⁸⁴⁶ Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016.

⁸⁴⁷ IBAC, *Victorian anti-corruption community campaign continues* (6 February 2017) <www.ibac.vic.gov.au/media-releases/article/victorian-anti-corruption-community-campaign-continues>.

⁸⁴⁸ *Ibid.*

⁸⁴⁹ IBAC, *Corruption within the public service hurts everyone. Which one of these is corrupt?* (quiz) <www.ibac.vic.gov.au>; *Corruption* (video) <www.ibac.vic.gov.au/?banner=video>.

⁸⁵⁰ Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016.

⁸⁵¹ Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016.

⁸⁵² Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016.

The Committee recognises the importance of people being able to readily find accessible, accurate and authoritative online information about the protected disclosure regime. One way to further this aim is to ensure that public bodies and integrity agencies have effective websites that capture internet search traffic relating to whistleblowing. In addition, users need to be able to find material about protected disclosures by entering terms such as 'whistleblower,' 'whistleblowing,' 'whistleblower protection' and so forth. This requires an up-to-date digital strategy and the effective use of SEO ('search engine optimisation') and other tools. Both the Victorian Access to Justice report and the Victorian Legal Assistance Forum (VLAF) guidelines for online legal information provide useful resources and guidance on improving the effectiveness of organisations' websites.⁸⁵³

Finally, while IBAC and the Victorian Ombudsman provide good examples of the effective provision of online information about protected disclosures, they could both, perhaps, make greater use of other digital forms of communication, such as short videos. Consumer Affairs Victoria and the Energy and Water Ombudsman Victoria use these forms of communication effectively to explain complex laws and processes.⁸⁵⁴

RECOMMENDATION 20: That investigating agencies, such as IBAC and the Victorian Ombudsman, make greater use of a range of digital forms of communication, such as online videos, to explain the protected disclosure regime to the public service and the public generally.

7.2.2 Consolidate the protected disclosure provisions in a single Act?

Monash University argued that all the provisions related to protected disclosures in legislation—such as the *IBAC Act 2011* (Vic), *Victorian Inspectorate Act 2011* (Vic), *Victoria Police Act 2013* (Vic) and the *Ombudsman Act 1973* (Vic)—should be consolidated in the *PD Act 2012* (Vic).⁸⁵⁵ The University submitted that, before the introduction of the *PD Act 2012* (Vic), they only had to deal with one 'very compact little Act,' the *Whistleblowers Protection Act 2001* (Vic).⁸⁵⁶ However, even when the *Whistleblowers Protection Act 2001* (Vic) was in force the University would have had to at least understand the *Ombudsman Act 1973* (Vic) as well.

⁸⁵³ Department of Justice and Regulation (Victoria), *Access to Justice Review: Volume 1 report and recommendations* (August 2016), Chapter 2; VLAF, VLAF Online Legal Information Guidelines <www.victorialawfoundation.org.au/vlaf-online-legal-information-guidelines>.

⁸⁵⁴ See, for example, Consumer Affairs Victoria, *Consumer scams: Stevie's scam school* <www.consumer.vic.gov.au/resources-and-education/scams/consumer-scams>; Energy and Water Ombudsman Victoria, *Trouble paying a bill?* <www.ewov.com.au/resources/videos>.

⁸⁵⁵ Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016.

⁸⁵⁶ Ms Glenda Beecher, Deputy General Counsel, Office of the General Counsel, Monash University, Closed Hearing, Melbourne, 23 May 2016.

This illustrates that it is not at all unusual in Australia to have different pieces of legislation governing integrity, investigative and oversight agencies together with a whistleblower protection Act.⁸⁵⁷

In part this is because the objectives, functions and investigative and oversight powers of such bodies are not only concerned with whistleblower disclosures. A comparison may be made with the criminal law in which different Acts establish courts, provide for offences and sentencing, and prescribe the relevant procedures. It would be an unusual step to try to incorporate all of the provisions relating to protected disclosures in the one Act, and it would make the *PD Act 2012* (Vic) a much larger volume. No other Australian jurisdiction has done this and the Committee received evidence from only one stakeholder to do so.

FINDING 8: That all the legislative provisions relating to the protected disclosure scheme should not be consolidated into a single Act.

However, while the Committee does not believe that there should be wholesale consolidation of all the provisions relating to the *PD Act 2012* (Vic), efforts should be made to reduce the number of internal and external cross-references within it.

An internal cross-reference is a reference in one section of the *PD Act 2012* (Vic) to another section of the Act. In some cases, it would be better to simply reproduce the substance of the cross-referenced section in the relevant provision. For example, in the definitions section (section 3) of the *PD Act 2012* (Vic), readers are told that ‘police complaint disclosure has the meaning given by section 5.’ The reader then has to go to section 5 to find out what it means.

External cross-references are references in provisions of the *PD Act 2012* (Vic) to *other* legislation. The definition of ‘public body’ in the *PD Act 2012* (Vic) is an example of the complexities that can arise through external cross-references. Section 6 of the *PD Act 2012* (Vic) provides, in part, that ‘a public body means ... a public body within the meaning of section 6 of the Independent Broad-based Anti-corruption Commission Act 2011...’ Section 6(1) of the *IBAC Act 2011* (Vic) provides, in part, that public body ‘means ... (a) a public sector body within the meaning of section 4(1) of the *Public Administration Act 2004*.’ The reader has thus already consulted three pieces of legislation and the journey to find out the meaning of ‘public body’ is not yet over. Therefore, in this instance it would be preferable if the meaning of ‘public body’ were relevantly laid-out in section 6 of the *PD Act 2012* (Vic).

Reducing the number of internal and external cross-references in the *PD Act 2012* (Vic) would make the Act less difficult to understand and navigate, though it would require the careful attention of parliamentary counsel to achieve the best outcome.

⁸⁵⁷ See, for example, selected legislation in the following jurisdictions: Commonwealth: *Public Interest Disclosure Act 2013*, *Ombudsman Act 1976*; Australian Capital Territory: *Public Interest Disclosure Act 2012*, *Ombudsman Act 1989*; New South Wales: *Public Interest Disclosures Act 1994*, *Independent Commission Against Corruption Act 1988*, *Ombudsman Act 1974*; South Australia: *Whistleblowers Protection Act 1993*, *Independent Commissioner Against Corruption Act 2012*; Queensland: *Public Interest Disclosure Act 2010*, *Crime and Corruption Act 2001*, *Ombudsman Act 2001*; Western Australia: *Public Interest Disclosure Act 2003*, *Corruption, Crime and Misconduct Act 2003*.

RECOMMENDATION 21: That the Victorian Government consult with the Office of the Chief Parliamentary Counsel in order to reduce, where practicable, the number of internal and external legislative cross-references in the *PD Act 2012* (Vic).

7.2.3 Amend the *PD Act 2012* (Vic)?

As demonstrated throughout this report, the Committee considers that the best approach is to selectively amend the *PD Act 2012* (Vic) to correct any weaknesses and meet relevant best-practice principles. While the Act meets many of the relevant best-practice principles for whistleblowing protection legislation, the Committee has identified some ways in which can be improved.

Regarding the coverage of the *PD Act 2012* (Vic), the Committee has recommended that bodies who receive substantial public funding be defined under the law as public bodies about which disclosures may be made. This will ensure that people who disclose about such bodies will not be artificially excluded from protection as long as they meet the other requirements of the *PD Act 2012* (Vic). It will also help meet the aims of accounting for the use of public funds, addressing wrongdoing and protecting whistleblowers in a complex environment in which there are overlaps between the public and private sectors.

The Committee received evidence that the *PD Act 2012* (Vic) is sometimes complex and difficult to navigate. In particular, the Committee recognised that the process of making a disclosure of information to the correct body could be difficult. To address this issue, the Committee has recommended improvements to the design of the legislation and simplification of the processes for making a disclosure. In relation to misdirected disclosures, the Committee has also recommended that, with some exceptions, IBAC be authorised to assess as a possible protected disclosure complaint any notification of a disclosure, whatever its source.

With regard to the system of the referral of protected disclosure complaints for investigation, the Committee considers that it is too restrictive. In response, the Committee has recommended that the Victorian Ombudsman, an experienced complaints-handling body, be authorised to refer protected disclosure complaints to other, more appropriate, bodies for investigation provided the discloser is protected from reprisals and it monitors and oversees the investigation.

One of the key purposes of the *PD Act 2012* (Vic) is the protection of whistleblowers against the harm of reprisals in response to their disclosures, or suspected disclosures. Presently the discloser must prove that their disclosure was a 'substantial reason' for any detrimental action they have suffered. The Committee received evidence, including from the IBAC Commissioner and the Victorian Ombudsman, that this threshold is too high. The Committee agrees and has recommended that the 'substantial reason' requirement be removed from the Act.

Another key objective of the *PD Act 2012* (Vic) is 'to provide for the confidentiality of the content of ... disclosures and the identity of persons who make those disclosures (s 1).' While the Committee found that the confidentiality provisions

generally meet the relevant best-practice principles, and strike the right balance between the protection of disclosers and investigative requirements, they are complex at times. This has been recognised by the IBAC Commissioner, Mr Stephen O'Bryan QC:

A number of the confidentiality provisions employ language that is difficult to understand. Many of the provisions are also written in a way that requires cross-referencing of other provisions to determine whether a particular restriction or exception applies. This makes the legislation difficult to follow, particularly for lay persons. Simplifying the language, or including notes and examples, may help address some of these issues.⁸⁵⁸

Taking this evidence into account, the Committee has therefore recommended that the confidentiality provisions be simplified and clarified so that it will be easier to understand and comply with.

Given that many whistleblowers will be mistreated as a result of making a disclosure, the Committee recognises the need for adequate compensation. While on paper the compensation remedies under the *PD Act 2012 (Vic)* meet best-practice principles, the Committee recognises that taking legal action can be costly and uncertain. The Committee also understands that access to affordable legal advice and representation can be an issue for some whistleblowers. The Committee has therefore recommended that the *PD Act 2012 (Vic)* be amended to provide that, generally, a court would not award costs against a whistleblower taking an action in tort for compensation provided their claim is not vexatious and they have conducted the litigation reasonably.

In addition to the existing compensation remedies, the Committee has recommended that the Victorian Government provide financial assistance to whistleblowers to cover their reasonable legal and career-transition costs. Covering reasonable career-transition costs, such as appropriate education and training, will help whistleblowers who can no longer work in their chosen career.

The Committee believes that making the recommended amendments—along with enhancements to the design of the legislation and better information for the public to explain it—will improve the content and operation of the *PD Act 2012 (Vic)* for disclosers, the public sector and investigating agencies.

7.3 A new title for the *PD Act 2012 (Vic)*?

The Committee received some evidence in support of changing the title of the *PD Act 2012 (Vic)* so that it includes an explicit reference to the 'public interest.' Another issue the Committee has considered is whether the title should make reference to 'whistleblower protection' or similar terms.

858 Mr Stephen O'Bryan QC, Commissioner, IBAC, Correspondence, 28 April 2017.

7.3.1 Replace 'Protected Disclosure' with 'Public Interest Disclosure' in the title?

The title of an Act, while it does not have any legal effect, plays a role in communicating clearly to the public what the Act is about as well as its purposes. It can also help a member of the public find the Act, typically when using an internet search engine.

Professor A J Brown recommended the title *Public Interest Disclosure Act* on the basis that it better communicates the 'public interest component' of the legislation than 'protected disclosure' does:

There are ways that the legislation can strike the balance in terms of the articulation of what types of wrongdoing amount to public interest disclosure, and that is why 'public interest disclosure' is a better term than 'protected disclosure' for a start.⁸⁵⁹

Similarly, the Accountability Round Table submitted that the *Public Interest Disclosure Act* would better reflect 'the primary purpose ... [of] supporting disclosures made in the public sector and ensuring that public officers who discharge their fiduciary duties by raising concerns about maladministration and misconduct are not discouraged and receive due compensation ...'⁸⁶⁰ This view was largely supported by Whistleblowers Australia:

At the heart of all whistleblowing is the public interest. That is why whistleblowers are propelled to do it ... And increasingly, across many, many jurisdictions 'public interest whistleblowing' is being harnessed as a term to describe what those legislated systems are all about, although 'whistleblowing' will always be the generic term.⁸⁶¹

Most whistleblower protection Acts in Australian jurisdictions have 'public interest' in their titles (see Table 7.2)

Table 7.2 Titles of whistleblower protection legislation in Australian jurisdictions

Jurisdiction	Title of Act
Commonwealth	<i>Public Interest Disclosure Act 2013</i> (Cth)
Australian Capital Territory	<i>Public Interest Disclosure Act 2012</i> (ACT)
New South Wales	<i>Public Interest Disclosures Act 1994</i> (NSW)
Northern Territory	<i>Public Interest Disclosure Act</i> (NT)
South Australia	<i>Whistleblowers Protection Act 1993</i> (SA)
Queensland	<i>Public Interest Disclosure Act 2010</i> (Qld)
Tasmania	<i>Public Interest Disclosures Act 2002</i> (Tas)
Victoria	<i>Protected Disclosure Act 2012</i> (Vic)
Western Australia	<i>Public Interest Disclosure Act 2003</i> (WA)

⁸⁵⁹ Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University, Closed Hearing, Melbourne, 21 March 2016.

⁸⁶⁰ Accountability Round Table, Submission, 4 May 2016.

⁸⁶¹ Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Closed Hearing, Melbourne, 20 June 2016.

However, the Committee considers that it is essential to understand the legislative context of jurisdictions where the phrase 'public interest' is used in the title of an Act. With the exception of Tasmania, these jurisdictions have 'objects' or 'purposes' and/or definitional sections which include the public interest. Further, 'public interest disclosure' is used in these jurisdictions as the term for a disclosure that is protected under the Act.⁸⁶²

In contrast, throughout the *PD Act 2012* (Vic) the terms 'protected disclosure' and 'protected disclosure complaint'—not 'public interest disclosure'—are used. The phrase 'public interest' is not used in the 'Purposes' section of the Act, nor in the 'Definitions' section of it. Of course, self-evidently, lawful disclosures that expose improper conduct in Victoria's public sector are in the public interest. This is reflected in section 1 of the *PD Act 2012* (Vic), which provides, in part, that

The purposes of this Act are—

- (a) to encourage and facilitate disclosures of—
 - (i) improper conduct by public officers, public bodies and other persons; and
 - (ii) detrimental action taken in reprisal for a person making a disclosure under this Act ...

Moreover, the approach of the *PD Act 2012* (Vic) is consistent with the Victorian Government's emphasis on the importance of protecting whistleblowers when it introduced the Protected Disclosure Bill 2012 (Vic) into parliament. In his second-reading speech, the Minister responsible for establishing IBAC stated that:

The coalition government's sweeping reform of Victoria's integrity system includes a new scheme for protecting people who make disclosures about improper conduct in the public sector—the Protected Disclosure Bill 2012 ... It is vital that those who out wrongdoers are protected, and are encouraged to do so, bolstered with the knowledge that there is legislative protection against reprisal and immunity from liability.⁸⁶³

Given that the *PD Act 2012* (Vic), the *Protected Disclosure Regulations 2013* (Vic), and indeed all the procedures, guidelines and public information about the scheme use the term 'protected disclosure,' it would be confusing to change the title of the Act to the *Public Interest Disclosure Act*. It would risk causing confusion among public sector bodies and the general public who are becoming increasingly familiar with the current terminology in the Act.

FINDING 9: The *Protected Disclosure Act 2012* (Vic) should not be changed to include the words 'public interest.'

⁸⁶² See *Public Interest Disclosure Act 2013* (Cth) ss 6–8; *Public Interest Disclosure Act 2012* (ACT) ss 6–7; *Public Interest Disclosures Act 1994* (NSW) s 3; *Public Interest Disclosure Act* (NT) ss 3–4; *Public Interest Disclosure Act 2010* (Qld) ss 3, 11; *Public Interest Disclosure Act 2003* (WA) ss 3, 5. In contrast, the *Public Interest Disclosures Act 2002* (Tas) uses both 'protected disclosure' and 'public interest disclosure'—see, for example, sections 14 ('protected disclosure') and 30 ('Determination by the Ombudsman of disclosure as a public interest disclosure').

⁸⁶³ Victoria, *Parliamentary Debates*, Legislative Assembly, 14 November 2012, Volume 506, 4984 (Andrew McIntosh, Minister for Responsible for the Establishment of an Anti-corruption Commission).

7.3.2 Include a reference to 'whistleblower protection' in the title?

The Committee has received evidence that there is much greater recognition by the public of the terms 'whistleblower,' 'whistleblowing' and 'whistleblower protection' than there is of technical legal terms like 'disclosure' and 'protected disclosure.'⁸⁶⁴ But the Committee also notes the issue of whether the term 'whistleblower' and similar terms have negative connotations associated with 'dobbing,' disloyalty and being a 'troublemaker.'

In 1994, a Senate committee concluded that 'a fundamental shift in Australian values and ethics is necessary to overcome the stigma and trauma associated with whistleblowing.'⁸⁶⁵ However, progress has been made since then. While negative connotations persist to some degree, there has been much progress in how Australian society perceives whistleblowers. The WWTW study, for example, demonstrates that there is considerable support for whistleblowers and that they are usually loyal and conscientious employees.⁸⁶⁶ The WWTW study reported that the attitudes towards whistleblowers have become more positive within the public sector:

The survey data reveal, however, that the role of whistleblowing has already achieved widespread acceptance in basic ways in most agencies and for most case-handlers and managers ... The assumption that whistleblowing has positive effects in bringing wrongdoing to light ... is borne out in much of the attitudinal and opinion data collected in the surveys ...

According to the employee survey, far from being rejected as 'dobbing' or an act of peer or corporate disloyalty, the reporting of wrongdoing by staff appears to be highly valued by the bulk of employees.⁸⁶⁷

Similarly, Dr Suelette Dreyfus of the University of Melbourne told the Committee some of the results of a large survey study she and her colleagues completed:

A large majority of Australians (81%) consider it more important to support whistleblowers for revealing serious wrongdoing in organisations, even if they reveal inside information, than to punish them for revealing the information (9%), with 10% unable to say ...

A similar large majority (82%) consider it fairly or highly acceptable for someone to blow the whistle on people in charge of an organisation ...⁸⁶⁸

⁸⁶⁴ Ms Cynthia Kardell, National President, Whistleblowers Australia Inc, Closed Hearing, Melbourne, 20 June 2016; Ms Christine Howlett, Director Prevention and Communication, IBAC, Closed Hearing, Melbourne, 24 October 2016.

⁸⁶⁵ Commonwealth, *In the public interest* (1994) xiii.

⁸⁶⁶ 'Summary' in Brown, *Whistleblowing in the Australian public sector* xxiii–xxiv.

⁸⁶⁷ A J Brown, Evalynn Mazurski and Jane Olsen, 'The incidence and significance of whistleblowing' in Brown, *Whistleblowing in the Australian public sector* (ANU E Press, 2008) 25, 41–2.

⁸⁶⁸ Dr Suelette Dreyfus, Lecturer, Department of Computer and Information Systems, University of Melbourne, Submission, 2 May 2016, citing the World Online Whistleblowing Survey Stage 1 Results Release (University of Melbourne, Griffith University and Newspoll, 6 June 2012). See also 'UK public attitudes to whistleblowing' (University of Greenwich and ComRes, 15 November 2012).

Dr Dreyfus told the Committee that

The public's support for protection of whistleblowers is strong. This is not only true in Australia but other countries as well, particularly places that Australia might look to for comparison such as the UK ...⁸⁶⁹

The Committee also notes that the terms 'whistleblowing' and 'whistleblower' are widely used in the academic literature⁸⁷⁰ and, more importantly, by the leading NGOs and advocacy organisations that have contributed to the development of best-practice principles and debates about how to effectively protect people who expose wrongdoing. For instance, Public Concern at Work, Transparency International, Blueprint for Free Speech, the Government Accountability Project (GAP) and Whistleblowers Australia all use these terms.⁸⁷¹ International organisations such as the UN and intergovernmental organisations such as the G20 also use them.⁸⁷²

Since terms such as 'whistleblower' are much more familiar to the general public than terms such as 'protected disclosure,' the Committee believes it would be beneficial to include a reference to whistleblowing in the title of the *PD Act 2012* (Vic). Negative connotations associated with whistleblowing are lessening, and the inclusion of a reference to whistleblowing in the Act will not only better communicate to members of public what the legislation is about, but will also help challenge any remaining prejudices.

An additional benefit of including a reference to whistleblowing in the Act is that the legislation will be better known and much easier to find using internet search engines. For example, when you 'Google' for 'whistleblower northern territory' the result at the top of the page is 'The Office of the Commissioner for Public Interest Disclosures.' Inventively, the url for the Commissioner is 'blowthewhistle.gov.au.'

Therefore, given these benefits, the Committee believes the title of the *PD Act 2012* (Vic) should be changed to include a reference to whistleblowing protection.

RECOMMENDATION 22: That the title of Victoria's protected disclosure legislation be changed to the *Protected Disclosure (Whistleblower Protection) Act 2012* (Vic).

⁸⁶⁹ Dr Sulette Dreyfus, Lecturer, Department of Computer and Information Systems, University of Melbourne, Submission, 2 May 2016.

⁸⁷⁰ See, for example, Brown, *Whistleblowing in the Australian public sector*; A J Brown et al (eds), *International handbook on whistleblowing research* (Edward Elgar, 2014); J Bowers et al, *Whistleblowing: law and practice* (2nd ed, Oxford University Press, 2012).

⁸⁷¹ See Public Concern at Work <www.pcaw.org.uk>; Transparency International, *Alternative to silence: whistleblowing practice in 10 European countries* (2009) <www.transparency.org/whatwedo/publication/alternative_to_silence_whistleblower_protection_in_10_european_countries>; Blueprint for Free Speech <blueprintforfreespeech.net>; Government Accountability Project <www.whistleblower.org>.

⁸⁷² UN Ethics Office, *Protection against retaliation: protecting the whistleblower* <www.un.org/en/ethics/protection.shtml>; G20 Anti-corruption Action Plan, *Protection of whistleblowers: study on whistleblower protection frameworks. Compendium of best practices and guiding principles for legislation* (no date).

7.4 Concluding remarks

The Committee has received evidence from a wide range of experts and stakeholders, including heads of investigating agencies such as IBAC, the Victorian Ombudsman and the VI, as well as public sector bodies and whistleblowers. This evidence has reinforced the importance of whistleblowers to an effective democracy and to ensuring honest, accountable and efficient public administration.

The evidence has shown that a substantial proportion of whistleblowers suffer mistreatment as the result of making a disclosure. The *PD Act 2012* (Vic) recognises that protecting disclosers is vital, both to prevent harm and loss and to help to ensure that people have the confidence to report wrongdoing in the public sector in the first place.

This Review of the *PD Act 2012* (Vic) has found that while in many respects it meets relevant best-practice principles it falls short in some areas. For example, the threshold for proving a reprisal is too high, the meaning of 'public body' needs to be clarified, the issue of misdirected disclosures needs to be addressed and selected provisions should be clarified and simplified.

However, the Committee does not consider that the *PD Act 2012* (Vic) needs to be repealed and replaced with new legislation. Judicious amendment of the Act will improve it significantly. The Committee also recognises that the design of the Act can be enhanced to make it easier to understand and navigate.

Moreover, the Committee understands that many people and bodies will depend more on information and education explaining the Act than on the Act itself. IBAC, the Victorian Ombudsman and a range of other public sector bodies have already produced excellent plain-language resources for the public. There is scope, however, to enhance digital resources that explain the legislation.

The *PD Act 2012* (Vic) plays an essential part in encouraging Victorians to come forward to report improper conduct in the public sector. The Committee is confident that the Act can be fine-tuned to further encourage lawful disclosures about improper conduct in the public sector and to protect, compensate and support those who do so.

**Adopted by the Independent Broad-based Anti-corruption Commission
Committee**

**55 St Andrews Place
East Melbourne 3002
24 May 2017**

Appendix 1

List of submissions

Submission no.	Name	Date received
1	Mr Tony De Fazio, Manager Civic Service, City of Whitehorse	18 April 2016
2	Emeritus Professor Ronald D Francis, College of Law & Justice, Victoria University	23 April 2016
3	Ms Karen Burgess	27 April 2016
4	Mr Max Jackson and Ms Margaret Ryan, JacksonRyan Partners	27 April 2016
5	Mr Peter Marshall, Chief Operating Officer and Senior Vice President, Monash University	27 April 2016
6	Mr Hugh Mosley, Partner, Risk Advisory, Deloitte Touche Tohmatsu	27 April 2016
7	Mr Jeroen Weimar, Acting Chief Executive Officer, Public Transport Victoria	28 April 2016
8	Ms Joanne Truman, Director Corporate Development, Knox City Council	28 April 2016
9	Dr Suelette Dreyfus, Lecturer, Department of Computing and Information Systems, School of Engineering, University of Melbourne	2 May 2016
10	Mr John Brown, Ombudsman and Governance Advisor, City of Greater Geelong	3 May 2016
11	Accountability Round Table	4 May 2016
12	Mr David Thompson, Protected Disclosure Coordinator, City of Boroondara	9 May 2016
13	Ms Cynthia Kardell, National President, Whistleblowers Australia Inc	10 May 2016
14	Mr Robin Brett QC, Victorian Inspector, Victorian Inspectorate	11 May 2016
15	Ms Deborah Glass OBE, Victorian Ombudsman	17 May 2016
16	Hon Jill Hennessy, Minister for Health, Minister for Ambulance Services, Department of Health and Human Services	19 May 2016
17	Hon James Merlino, Minister for Education, Department of Education and Training	19 May 2016
18	Mr John Merritt, Chief Executive Officer, VicRoads	3 June 2016
19	Hon Lisa Neville, Minister for Water, Department of Environment, Land, Water and Planning	17 June 2016
20	Dr Inez Dussuyer, Prof Anona Armstrong AM, Dr Kumi Heenetigala and Dr Russell Smith, College of Law & Justice, Victoria University	27 July 2016
21	Mr Brian Hood	10 February 2017
22	Ms Karen Burgess (second submission)	20 February 2017
23	Confidential submission	3 May 2017
24	Name withheld	23 May 2017

Appendix 2

List of witnesses appearing at closed and public hearings in Melbourne

21 March 2016—Melbourne: closed hearing

Name	Position	Organisation
Professor A J Brown	Professor of Public Policy and Law, Centre for Governance and Public Policy	Griffith University

11 April 2016—Melbourne: closed hearings

Name	Position	Organisation
Mr Stephen O'Bryan QC	Commissioner	Independent Broad-based Anti-corruption Commission
Dr John Lynch	General Counsel	
Assistant Commissioner Brett Guerin	Professional Standards Command	Victoria Police
Acting Inspector James Mulholland	IBAC Liaison Officer	

23 May 2016—Melbourne: closed hearings

Name	Position	Organisation
Mr Peter Marshall	Chief Operating Officer and Senior Vice President	Monash University
Ms Glenda Beecher	Deputy General Counsel, Office of the General Counsel	
Ms Deborah Glass OBE	Ombudsman	Victorian Ombudsman
Mr Evan Westmore	Assistant Director, Strategic Investigations	
Mr Robin Brett QC	Victorian Inspector	

20 June 2016—Melbourne: public hearings

Name	Position	Organisation
Ms Cynthia Kardell	National President	Whistleblowers Australia Inc (via teleconference)
Mr Rob Spence	Chief Executive Officer	Municipal Association of Victoria
Ms Alison Lyon	General Counsel and Corporate Secretary	

15 August 2016—Melbourne: public hearing

Name	Position	Organisation
Dr Suelette Dreyfus	Research Fellow, Department of Computing and Information Systems	University of Melbourne

24 October 2016—Melbourne: closed hearing

Name	Position	Organisation
Mr Stephen O'Bryan QC	Commissioner	Independent Broad-based Anti-corruption Commission
Mr Alistair Maclean	Chief Executive Officer	
Ms Christine Howlett	Director, Prevention and Communication	

6 February 2017—Melbourne: closed hearing

Name	Position	Organisation
Mr Brian Hood		

20 February 2017—Melbourne: closed hearing

Name	Position	Organisation
Ms Karen Burgess		

Appendix 3

List of witnesses appearing at closed hearings in Sydney

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16 May 2016—Sydney

Name	Position	Organisation
Hon Megan Latham	Commissioner	Independent Commission Against Corruption
Mr Roy Waldon	Solicitor to the Commission	
Prof John McMillan AO	Acting Ombudsman	New South Wales Ombudsman
Mr Chris Wheeler	Deputy Ombudsman, Public Administration Division	
Mr Michael Gleeson	Deputy Ombudsman, Police and Compliance Division	
Ms Prem Aleema	Executive Officer	

Appendix 4

List of informal meetings conducted during overseas study trip 2016

19 September 2016—Vienna, Austria

Name	Position	Organisation
Mr Dimitri Vlassis	Chief, Corruption and Economic Crime Branch	United Nations Office on Drugs and Crime (UNODC)
Ms Brigitte Strobel-Shaw	Chief, Conference Support Section, Corruption and Economic Crime Branch	
Ms Candice Welsh	Chief, Implementation Support Section, Corruption and Economic Crime Branch	

21 September 2016—Paris, France

Name	Position	Organisation
Ms France Chain	Senior Legal Analyst, Anti-corruption Division	Organisation for Economic Cooperation and Development (OECD)

23 September 2016—London, United Kingdom

Name	Position	Organisation
Mr Jack Mitchell	Barrister	

29 September 2016—Riga, Latvia

Name	Position	Organisation
Mr Miklos Marschall	Deputy Managing Director (Berlin)	Transparency International
Mr Janis Volberts	Executive Director (Latvia)	
Mr Valdis Liepiņš	Chairman of the Board (Latvia)	
Ms Liene Gātere	Deputy Director (Latvia)	

5 October 2016—Hong Kong, China

Name	Position	Organisation
Mr Eric W T Tong	Assistant Director	
Mr Ken Ho	Assistant Director, Administration	
Mr Chris Lai	Senior Liaison Officer, International and Mainland (Operational) Liaison Section	Independent Commission Against Corruption (ICAC)
Ms Joey To	Principal Investigator, Internal Investigation & Monitoring Group	

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Extract of proceedings

The Committee divided on the following questions during consideration of this report. Questions agreed to without division are not recorded in these extracts.

Committee Meeting – 8 May 2017

Chapter 3, page 79

Motion: That Finding 3 as amended stand part of the Executive Summary.

FINDING 3: That the Victorian Parliament’s system for handling disclosures in accordance with the *PD Act 2012* (Vic) should be amended so that a protected disclosure regarding an MP can be made directly to IBAC.

Moved: Mr Hibbins

The Committee divided.

Ayes 1	Noes 5
Mr Hibbins	Mr Wells
	Ms Thomson
	Mr Ramsay
	Mr Richardson
	Ms Symes

Defeated.

Motion: That Finding 3 stand part of the Executive Summary.

FINDING 3: That the Victorian Parliament’s system for handling disclosures in accordance with the *PD Act 2012* (Vic) should remain as it is. In particular, the present discretion of a Presiding Officer to notify a possible protected disclosure to IBAC does not need to be changed.

Moved: Ms Thomson

The Committee divided.

Ayes 5	Noes 1
Mr Wells	Mr Hibbins
Ms Thomson	
Mr Ramsay	
Mr Richardson	
Ms Symes	

Carried.

Minority Report

Minority Report

As outlined in Chapter 3, under Victoria's *Protected Disclosure Act 2012*, Members of Parliament are treated differently from other public officials.

I note the evidence the Committee received in support of changing the *Protected Disclosure Act 2012 (Vic)* so complaints regarding Members of Parliament made directly to IBAC can be assessed as a possible protected disclosure.

I note the Law Institute of Victoria (LIV) have consistently taken this position when making submissions regarding Victoria's anti-corruption system.

In LIV's Submission to the Attorney-General regarding the *Integrity Legislation Amendment Bill 2014 (Vic)*, dated 13 October 2014, LIV stated:

... under the Protected Disclosure Act, disclosures about Members of Parliament, including Ministers, must be made to either the Speaker of the Legislative Assembly or the President of the Legislative Council for the protected disclosure scheme to apply (under s 19). It is at the discretion of those Presiding Officers as to whether they refer the disclosures to the IBAC for determination as to whether the disclosure is a protected disclosure complaint (s 21(3)). This contrasts with the mandatory requirement for other organisations receiving disclosures to notify IBAC (s 21(2)). It is therefore possible that protected disclosures about improper conduct by Members of Parliament will be handled only by Parliament, where they are not otherwise made to IBAC. This can be contrasted with all other entities to which the protected disclosure regime applies, where disclosures can be made to IBAC in addition to the relevant entity (depending on which of ss 14 – 18 of the Protected Disclosure Act applies).

The Bill as it stands does not address this issue. It is the LIV's opinion that the government's aim to establish an anti-corruption commission applying to a broad range of public officials is significantly undermined by this discretion.

The LIV calls for s 19 of the Protected Disclosure Act to be amended to allow disclosures relating to members of the Legislative Assembly and Legislative Council to be made to IBAC (p.6).

Comment

Section 19 of the *Protected Disclosure Act 2012 (Vic)* acts as a barrier for whistleblowers to come forward with complaints regarding Members of Parliament and weakens Victoria's integrity regime.

Recommendation

The *Protected Disclosure Act 2012 (Vic)* be changed so complaints against Members of Parliament made directly to IBAC can be assessed as protected disclosures.



Sam Hibbins MP

Member for Prahran

