

## Whistleblowing in the Victorian Public Sector

### Your speakers:

**John Cain**

Victorian Government Solicitor

**Dallas Mischkulnig**

Director, Investigations  
Ombudsman Victoria

1

## Whistleblowing in the Victorian Public Sector

Dallas Mischkulnig  
30 July 2009

2

# *Overview of the Whistleblower's Protection Act and the role of the Ombudsman's office*

3

## **Purposes of the Act**

- To encourage and facilitate disclosures of improper conduct by public officers and public bodies
- To investigate such matters
- To protect the whistleblower from any detrimental action

4

# The role of the Ombudsman

- issuing of guidelines
- reviewing written procedures established by public bodies
- assessment of disclosures
- investigating disclosures or monitoring those that have been referred to public bodies
- ensure a consistent approach and application of the Act
- monitoring actions taken where improper conduct has occurred
- reporting to parliament as is necessary



5

## Guidelines

- Public body must establish written procedures that facilitate:
  - making disclosures
  - the investigation of disclosures
  - protection of whistleblower from reprisals
- Must reflect Act, Regulations, and the Ombudsman's guidelines

6

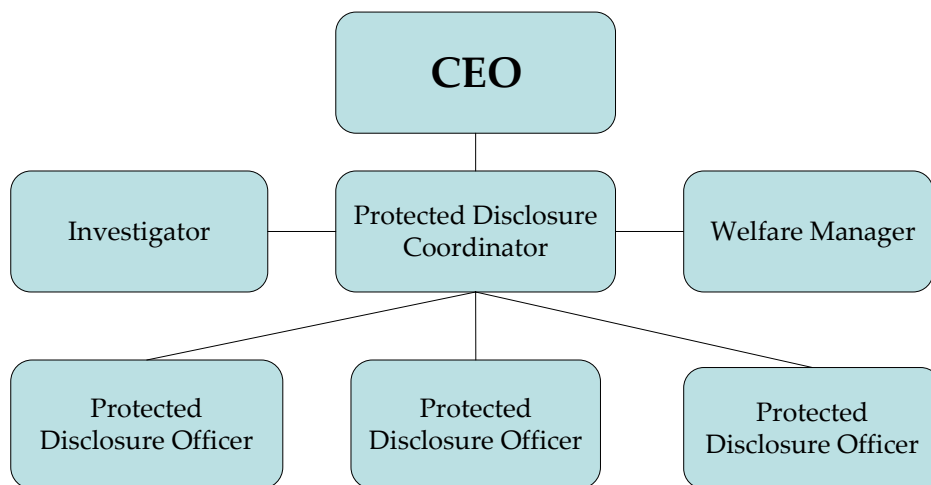
## Broadly the scheme is...

- The receipt of the disclosure and a decision about whether it is a protected disclosure
- Protecting the whistleblower from reprisals
- Assessment of whether the protected disclosure is a public interest disclosure
- Investigation of PIDs by ...
- Prevent the conduct from continuing or recurring



7

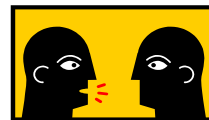
## Model reporting system



8

## What is a protected disclosure?

- A protected disclosure is one which is made by a natural person who has reasonable grounds for the belief that a public officer or public body has engaged in improper conduct in their official capacity
- It can be made:
  - orally or in writing + anonymously or in person.



9

## Protected disclosures

What protection is provided by the Act?

Part 3 of the Act

Offences:

- Detrimental action:
  - 240 penalty units and/or 2 years imprisonment
- Cannot reveal confidential information:
  - 60 penalty units and/or 6 months imprisonment

10

## Actions under the Act

- Right to sue for damages or to stop action in reprisal
- Immunity from liability for breaching confidentiality provisions in other Acts
- Immunity from civil and criminal liability and disciplinary action for making a disclosure
- Ombudsman/Public Body not to reveal identity of whistleblower

11

## The elements

- Natural person
- Belief on reasonable grounds
- Public Officer/Public Body
- In official capacity
- Improper conduct



12

## What are reasonable grounds?

Reasonable grounds for a state of mind requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

13

## What is improper conduct?

- a) corrupt conduct
- b) substantial mismanagement of public resources
- c) conduct involving substantial risk to public health or safety or the environment

which if proved MUST constitute a criminal offence or reasonable grounds for dismissal

14

# Corrupt conduct

## Section 3 - Very broad definition

- conduct affecting the *honest performance* of a public body's/officer's functions
- performance of functions *dishonestly* or with *inappropriate partiality*
- conduct amounting to a *breach of public trust*
- misuse of information or material acquired in course of performing public functions
- conspiring or attempting to do any of the above

15

## Corrupt conduct - examples

- A public officer sells confidential information
- A public officer steals or diverts government property
- Inappropriate use of resources by a public officer such as government vehicles or computer equipment
- A public officer accepts a bribe in carrying out an assessment for public housing favouring a particular person's application



16



## Improper conduct

- a) Substantial mismanagement of public resources
- b) risk to public health and safety
- c) risk to the environment

**NB if proved must constitute a criminal offence or  
reasonable grounds for dismissal**

17

## Next – is it a public interest disclosure?

Does the disclosure shows or tends to show that

- the officer who is the subject of the disclosure has engaged, is engaging or intends to engage in improper conduct in their capacity as a public officer

18

## Assessment of PID

- Must be done within 45 days
- If public body decides that the matter is a PID
  - Refer it to Ombudsman for formal determination.
  - Notify whistleblower
- If the public body concludes that a disclosure is not a PID
  - Notify the person
  - They can request (within 28 days of notice) that the public body refers the matter to the Ombudsman.

19

## Detrimental Action

- A person takes detrimental action in reprisal for a PD if:
  - the person takes or threatens to take the action because a person has made or intends to make a PD
  - or the person believes that a whistleblower has made or intends to make a PD, or
  - the person incites or permits another person to take or threaten to take the action for either of those reasons.
- Does not need to be the only or dominant reason, as long as it is a substantial reason

20

## Determination and investigation

- The Ombudsman makes a formal determination as to whether it is a PID
- The Ombudsman decides who will investigate it if it is a PID - the Ombudsman, the police, the Auditor-General, the VWA, the EPA, the public body itself

21

## Investigations by public body

- Establish terms of reference
- Prepare investigation plan
- Investigate
  - Manage welfare of whistleblower
  - Confidentiality/ natural justice/ records
- Report
  - Progress
  - Outcome
    - Findings/ Action taken

22



Victorian Government  
Solicitor's Office



When in doubt,  
call Ombudsman  
Victoria

23



Victorian Government  
Solicitor's Office

## Whistleblowing in the Victorian Public Sector

Your speaker:  
**John Cain**

24

# Introduction

## Outline

- Scope of Act
- What is a valid complaint
- Managing reports and recommendations
- Protection from reprisals

25

# Scope of the Act

- Ombudsman investigation:
  - Ombudsman Act compared with Whistleblower Act

26

## What is a valid complaint

- A natural person
- Improper conduct
- Belief on reasonable grounds
- Public interest disclosure

27

## Opportunity to be heard

### Section 61

- (1) The Ombudsman must not, in any report under this Part, Part 8 or section 103, make any comment adverse to any person unless that person has been given an opportunity of being heard in the matter and their defence is fairly set out in the report.
- (1A) For the purposes of subsection (1), the Ombudsman must provide the person who is subject to the adverse comment with—
  - (a) details of the adverse comment; and
  - (b) either—
    - (i) a copy of the parts of the report that relate to the adverse comment; or
    - (ii) information about the adverse comment—that would adequately enable the person to put forward any defence that the person may want to be set out in the report.

28

## Notice under Section 64

- Recommendation in a report, the Ombudsman may request a person to notify in a specified time:
  - Steps that have been taken or proposed to be taken;
  - If no action, why not?

29

## Report to Parliament – Section 66

- Insufficient steps taken
- Consider comments from Minister, CEO or Mayor
- Laid before Parliament

30

## Other reports to Parliament

### Section 103

The Ombudsman may at any time cause a report on any matter arising in relation to a disclosed matter to be laid before each House of Parliament

31

## Confidentiality Provisions

### Section 22

Prohibition on disclosure of information obtained in the course of or as a result of a protected disclosure

*Penalty: 60 penalty units or 6 months prison*

Exceptions:

- (a) ...
- (b) Any report or recommendation to be made under this Act;
- (c) Any report under Part 9
- (d) ...
- (e) ...

32



## Qualification on disclosure

- These exceptions are qualified
  - **Sub-section 2:** The Ombudsman or a public body must not in a report or recommendation under this Act or a report referred to in Part 9 disclose particulars likely to lead to the identification of a person who made a protected disclosure.
  - **Sub-section 3:** A public body must not in a report referred to in Part 9 disclose particulars likely to lead to the identification of a person against whom a protected disclosure is made.

33

## Recent Amendment to the Act

### Section 22A

Ombudsman may disclose identity of person against whom protected disclosure is made if in public interest

- Recent examples:
  - Kossmann and Bayside Health
  - Brimbank Council

34

## Protection from Reprisals

### Section 18 –

- (1) A person must not take detrimental action against a person in reprisal for a protected disclosure.  
Penalty: 240 penalty units or 2 years imprisonment or both.
- (2) A person takes detrimental action in reprisal for a protected disclosure if -
  - (a) the person takes or threatens to take the action because -
    - (i) a person has made, or intends to make, a protected disclosure; or
    - (ii) the person believes that a person has made or intends to make the protected disclosure; or
  - (b) the person incites or permits another person to take or threaten to take the action for either of those reasons.
- (3) In determining whether a person takes detrimental action in reprisal it is irrelevant whether or not a reason referred to in subsection (2) is the only or dominant reason as long as it is a substantial reason.

### Section 19(1) –

- (1) A person who takes detrimental action against a person in reprisal for a protected disclosure is liable in damages to that person.

35

# THE END

36