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LAWYERS

The *Public Interest Disclosure Act 2018* - a cohesive public integrity framework

On 15 November 2018, the *Public Interest Disclosure Act 2018* ("the Act") received assent.

The Act is to encourage and facilitate disclosures of certain information in the public interest, by ensuring that proper procedures are in place for making and dealing with such disclosures, and by providing protection for persons making a disclosure.

Upon commencement, the Act will repeal the *Whistleblowers Protection Act 1993.*

While we await a commencement date, it is useful to set out the material differences under the new statutory regime.

"*Public Interest Information*"

The Act provides for "*public interest information*" disclosures under two (2) categories:

- "*environmental and health information*"; and
- "*public administration information*".

Importantly, only public officers (as defined under the *ICAC Act 2012*) may make a disclosure under the "*public administration information*" category.

Of course, council employees and Elected Members are defined are "*public officers*" under Schedule 1 of the ICAC Act.

"*Appropriate Disclosure*"

Section 5(1) of the Act has the effect of granting immunity to an informant who makes an "*appropriate*" disclosure of "*public interest information*" to a "*relevant authority*" for the purposes of the Act.

While a similar provision can be found at section 5 of the *Whistleblowers Protection Act 1993*, the Act extends the protection and expressly provides for immunity despite any duty of secrecy or confidentiality.

Accordingly, irrespective of any obligation of confidentiality or secrecy (for example, as may apply to an employee or Elected Member to not disclose confidential information to which there is an order of council in effect under sections 90 and 91 of the LG Act), an informant will not be subject to any liability in making an "*appropriate disclosure*".

An informant makes an "*appropriate disclosure*" of "*environmental and health information*" to a "*relevant authority*" when they **believe** on reasonable grounds that the information is true; or if they are not in a position to form a belief on reasonable grounds about the truth of the information, they **believe** on reasonable grounds that the information *may* be true, and it is of sufficient significance to justify its disclosure so it may be investigated.

"*Environmental and health information*" is defined as information that raises a potential issue of a substantial risk to the environment, or to the health and safety of the public generally, or a significant section of the public.

Conversely, a disclosure under the "*public administration information*" category will be an "*appropriate disclosure*" when it is made to a "*relevant authority*" and the informant (being a public officer) **reasonably suspects** the information raises a potential issue of corruption, misconduct or maladministration in public administration (as those terms are defined under the ICAC Act).

It is important to note then that a disclosure with regards to "*environmental and health information*" requires an informant to have a reasonable belief the information is true (or believe on reasonable grounds that the information may be true) whereas a disclosure under the "*public administration information*" category only requires a reasonable "*suspicion*", which is, of course, a lower threshold to meet.

A "*disclosure of public interest information*" is made to a "*relevant authority*" if it is made to one of the persons set out under section 5(5) of the Act.

Under the *Whistleblowers Protection Act 1993* there is an obligation on informants to assist in the investigation of information that they are responsible for disclosing, however, a corresponding obligation **has not** been included in the Act.

While an informant **is not** required to make their identity known when making an "*appropriate disclosure",* failing to do so will have the effect of not being notified of certain matters in relation to action taken, and the protections under the Act will not follow in the event that a disclosure is made to a journalist or member of Parliament. We will return to this shortly.

Councils and "*Responsible Officers*"

Section 12 requires the CEO of a council to ensure the council has one (1) or more designated "*responsible officers*", as well as a procedure for the receipt of a disclosure of public interest information in place, within **3 months** of the commencement of the Act.

A "*responsible officer*" is required to receive "*appropriate disclosures of public interest information*" relating to the council, make appropriate recommendations to the CEO in relation to dealing with the disclosure, and provide advice to officers and employees of the council in relation to the administration of the Act.

Whilst no regulations are available at this time, the Act provides that regulations may prescribe the qualifications that a "*responsible officer*" is required to have. Some councils may be disadvantaged if there is no person in the councils employ with the required qualifications.

Action on Receipt of a Disclosure

Upon receipt of a "*public information disclosure*", a "*relevant authority*" must act in accordance with section 7, and adhere to any Guidelines prepared by the ICAC under section 14.

Under the new framework the "*relevant authority*" will be required to provide the Office for Public Integrity ("OPI") with information relating to a disclosure in accordance with the Guidelines. This will ensure the OPI is kept informed in relation to public integrity matters raised with relevant authorities.

The only instances in which no further action is required to be taken in relation to an "*appropriate disclosure*" is when the information does not justify the taking of further action **or**

the information relates to a matter that has already been investigated, or otherwise acted upon, and the information does not give rise to a need to re-examine the matter, or there is other good reason why no action should be taken.

In the event that a "*relevant authority*" has not taken appropriate action in the timeframes prescribed under section 6(b) of the Act, an informant can make their disclosure known to either a journalist or a Member of Parliament (other than a Minister). In doing so, and to ensure they are afforded the protections under the Act, they must have made their identity known to the person to whom the disclosure was made at the first instance.

Offence Provisions

The Act prescribes a number of criminal offences.

The identity of an informant is to be kept confidential under section 8, except as may be necessary to ensure matters are properly investigated or in accordance with any Guidelines prepared by the ICAC. The penalty for a breach of this provision is a maximum fine of $20,000 or imprisonment for 2 years. While there is an obligation under the *Whistleblowers Protection Act 1993* to keep an informant's identity confidential, it is not an offence provision.

A person who causes detriment to another on the ground, or substantially on the ground, that the person has made (or intends to make) an "*appropriate disclosure of public interest information*", commits an act of "*victimisation*" under section 9.

A person who personally commits an act of "*victimisation*" will be guilty of an offence, which carries a maximum fine of $20,000 fine and imprisonment for 2 years. Otherwise, an act of "*victimisation*" may be dealt with as a tort, or as if it were an act of victimisation under the *Equal Opportunity Act 1984*.

Under the *Whistleblowers Protection Act 1993, "victimisation"* is only dealt with as a as a tort or an act of victimisation under the *Equal Opportunity Act 1984*.

Section 10 of the Act provides that a person must not make a "*disclosure of public interest information knowing that it is false or misleading*". The maximum fine for this offending is $20,000 or imprisonment for 2 years. An informant who makes such disclosures in contravention of this section **will not** be protected by the Act.

While a similar offence provision appears in the *Whistleblowers Protection Act 1993,* the maximum penalty is only $8,000 or imprisonment for 2 years.

Section 11 provides that it is a criminal offence to prevent or hinder a person from making an "*appropriate disclosure*", carrying a maximum fine of $20,000 or imprisonment for 2 years. There is not corresponding provision under the *Whistleblowers Protection Act 1993*.

Conclusion

The Act has been drafted in such a manner that it compliments the existing public integrity legislative schemes in South Australia, and supports the reforms made by the Government in its move towards a more accountable and transparent public administration.

If you would like to arrange a training session for employees and/or Elected Members in relation to their responsibilities under the Act, or otherwise would like assistance in preparing a

procedure for receiving and managing public interest information disclosures in accordance with section 12 of the Act, please contact Michael Kelledy on 8113 7103 or mkelledy@kelledyjones.com.au or Tracy Riddle on 8113 7106 or tracyriddle@kelledyjones.com.au