

South Australia

Public Interest Disclosure Act 2018

An Act 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 such disclosures; to make related amendments to the *Local Government Act 1999* and the *Public Sector Act 2009*; to repeal the *Whistleblowers Protection Act 1993*; and for other purposes.

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Part 1—Related Amendments

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The Parliament of South Australia enacts as follows:

1—Short title

This Act may be cited as the *Public Interest Disclosure Act 2018*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Objects

The objects of this Act are—

- (a) to encourage and facilitate the disclosure, in the public interest, of information about substantial risks to public health or safety, or to the environment, and about corruption, misconduct and maladministration in public administration—
 - (i) by ensuring that proper procedures are in place for the making of such disclosures and for dealing with such disclosures; and
 - (ii) by providing appropriate protections for those who make such disclosures; and
- (b) to ensure that there is appropriate oversight of public interest disclosures about corruption, misconduct and maladministration in public administration.

4—Interpretation

In this Act, unless the contrary intention appears—

appropriate disclosure—

- (a) in relation to environmental and health information—see section 5(3); and
- (b) in relation to public administration information—see section 5(4); and
- (c) in any case—see section 6;

Commissioner means the person holding or acting in the office of the Independent Commissioner Against Corruption;

corruption in public administration has the same meaning as in the *Independent Commissioner Against Corruption Act 2012*;

environmental and health information means information that raises a potential issue of a substantial risk to the environment or to the health or safety of the public generally or a significant section of the public (whether occurring before or after the commencement of this Act);

informant means a person who makes an appropriate disclosure of public interest information;

journalist means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium;

judicial officer has the same meaning as in the *Judicial Conduct Commissioner Act 2015*;

liability includes a liability to disciplinary action;

maladministration in public administration has the same meaning as in the *Independent Commissioner Against Corruption Act 2012*;

misconduct in public administration has the same meaning as in the *Independent Commissioner Against Corruption Act 2012*;

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news;

OPI means the Office for Public Integrity established under the *Independent Commissioner Against Corruption Act 2012*;

principal officer of a public sector agency or of a council means—

- (a) in the case of a public sector agency—
 - (i) if the agency consists of an unincorporated board or committee—the presiding officer; or
 - (ii) in any other case—
 - (A) the chief executive officer of the agency; or
 - (B) if there is no chief executive officer of the agency—a person designated as principal officer of the agency for the purposes of this definition by the responsible Minister for the public sector agency; and
- (b) in the case of a council—the chief executive officer of the council;

public administration has the same meaning as in the *Independent Commissioner Against Corruption Act 2012*;

public administration information means information that raises a potential issue of corruption, misconduct or maladministration in public administration (whether occurring before or after the commencement of this Act);

public interest information means—

- (a) environmental and health information; or
- (b) public administration information;

public officer has the same meaning as in the *Independent Commissioner Against Corruption Act 2012*;

public sector agency has the same meaning as in the *Public Sector Act 2009*;

public sector employee has the same meaning as in the *Public Sector Act 2009*;

relevant authority—see section 5(5);

responsible Minister in relation to a public sector agency means the Minister responsible for administration of the agency or the legislative instrument under which it is established and, if there is no such Minister, a Minister designated by the regulations as the responsible Minister or, in the absence of such a designation, the Minister responsible for the administration of this Act;

responsible officer means a person designated as a responsible officer under section 12.

5—Immunity for appropriate disclosure of public interest information

- (1) If—
 - (a) a person makes an appropriate disclosure of environmental and health information; or
 - (b) a public officer makes an appropriate disclosure of public administration information,the person is not subject to any liability as a result of that disclosure.
- (2) This section has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure (whether or not imposed by an Act) applicable to the person.
- (3) A person makes an *appropriate disclosure* of environmental and health information for the purposes of this Act if the disclosure is made to a relevant authority and the person—
 - (a) believes on reasonable grounds that the information is true; or
 - (b) is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated.
- (4) A public officer makes an *appropriate disclosure* of public administration information for the purposes of this Act if the disclosure is made to a relevant authority and the public officer reasonably suspects that the information raises a potential issue of corruption, misconduct or maladministration in public administration.
- (5) A disclosure of public interest information is made to a *relevant authority* if it is made to—
 - (a) where the information relates to a public officer—
 - (i) a person who is, in accordance with any guidelines prepared under section 14, designated as a person who is taken to be responsible for the management or supervision of the public officer or to the relevant responsible officer; or
 - (ii) a person who is, in fact, responsible for the management or supervision of the public officer or to the relevant responsible officer; or
 - (b) where the information relates to a public sector agency or public sector employee—
 - (i) the Commissioner for Public Sector Employment; or
 - (ii) the responsible officer for the relevant public sector agency; or
 - (c) where the information relates to an agency to which the *Ombudsman Act 1972* applies—the Ombudsman; or

- (d) where the information relates to a location within the area of a particular council established under the *Local Government Act 1999*—a member, officer or employee of that council; or
- (e) where the information relates to a risk to the environment—the Environment Protection Authority; or
- (f) where the information relates to an irregular and unauthorised use of public money or substantial mismanagement of public resources—the Auditor-General; or
- (g) where the information relates to the commission, or suspected commission, of any offence—a member of the police force; or
- (h) where the information relates to a judicial officer—the Judicial Conduct Commissioner; or
- (i) where the information relates to a member of Parliament—the Presiding Officer of the House of Parliament to which the member belongs; or
- (j) where the information relates to a person or a matter of a prescribed class—an authority declared by the regulations to be a relevant authority in relation to such information; or
- (k) a Minister of the Crown; or
- (l) OPI; or
- (m) any other prescribed person or person of a prescribed class.

6—Disclosure to journalist or member of Parliament

A person makes an *appropriate disclosure* of public interest information for the purposes of this Act (other than section 7) if—

- (a) the person discloses the information to a journalist or a member of Parliament other than a Minister of the Crown; and
- (b) the person—
 - (i) has already made an appropriate disclosure of substantially the same information in accordance with section 5; and
 - (ii) made their identity known to the person to whom that disclosure was made; and
 - (iii) either—
 - (A) has not received notification in accordance with section 7(1)(b) within 30 days after making that disclosure; or
 - (B) has not received notification in accordance with section 7(3)(a) within 90 days after making that disclosure (or such longer period as may be specified by written notice given, within that period of 90 days, by the person required to give such notification); and
 - (iv) believes on reasonable grounds that the information is true.

7—Duty to act in relation to appropriate disclosure

- (1) A person to whom an appropriate disclosure of public interest information is made must assess the information as soon as practicable after the disclosure is made and, following such assessment—
 - (a) must (unless subsection (2) applies) take action in relation to the information in accordance with any applicable guidelines prepared under section 14 or, if no applicable guidelines exist, take such action as is appropriate in the circumstances; and
 - (b) must take reasonable steps to notify the informant (if the informant's identity is known) that an assessment of the information has been made and to advise the informant—
 - (i) of the action being taken in relation to the information; or
 - (ii) if, in accordance with subsection (2), no action is being taken in relation to the information—of the reasons why no action is being taken in relation to the information; and
 - (c) must provide OPI with information relating to the disclosure in accordance with any applicable guidelines prepared under section 14.
- (2) No action need be taken in relation to an appropriate disclosure of public interest information if—
 - (a) the information disclosed does not justify the taking of further action; or
 - (b) the information disclosed relates to a matter that has already been investigated or acted upon by a relevant authority and there is no reason to re-examine the matter or there is other good reason why no action should be taken in respect of the matter.
- (3) A person who takes action referred to in subsection (1)(a) in relation to public interest information or, if such action consists of referring the disclosure of public interest information to another person, the person to whom it is referred—
 - (a) must take reasonable steps to notify the informant (if the informant's identity is known) of the outcome of that action; and
 - (b) must provide OPI with information relating to the outcome of that action in accordance with any applicable guidelines prepared under section 14.
- (4) Subject to subsection (5), this section does not apply where an appropriate disclosure of public interest information is made to a journalist or a member of Parliament.
- (5) If an appropriate disclosure of public interest information is made to a Minister of the Crown, the following provisions apply:
 - (a) the Minister must, as soon as practicable, refer the disclosure to a relevant authority; and
 - (b) the relevant authority—
 - (i) must deal with the information in accordance with this section (as if the disclosure had been made to the relevant authority); and
 - (ii) must ensure that the Minister is notified of the action taken under this section in relation to the information and the outcome of such action.

8—Identity of informant to be kept confidential

- (1) A person to whom an appropriate disclosure of public interest information is made, or a person to whom such a disclosure is referred or who otherwise knows that such a disclosure has been made, must not, without the consent of the informant, knowingly divulge the identity of the informant except—
 - (a) so far as may be necessary to ensure that the matters to which the information relates are properly investigated; or
 - (b) in accordance with any applicable guidelines prepared under section 14.Maximum penalty: \$20 000 or imprisonment for 2 years.
- (2) The obligation to maintain confidentiality imposed by this section applies despite any other statutory provision, or a common law rule, to the contrary.

9—Victimisation

- (1) A person who causes detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure of public interest information commits an act of victimisation.
- (2) An act of victimisation under this Act may be dealt with—
 - (a) as a tort; or
 - (b) as if it were an act of victimisation under the *Equal Opportunity Act 1984*, but, if the victim commences proceedings in a court seeking a remedy in tort, the victim cannot subsequently lodge a complaint under the *Equal Opportunity Act 1984* and, conversely, if the victim lodges a complaint under that Act, the victim cannot subsequently commence proceedings in a court seeking a remedy in tort.
- (3) If a complaint alleging an act of victimisation under this Act has been lodged with the Commissioner for Equal Opportunity and the Commissioner for Equal Opportunity is of the opinion that the subject matter of the complaint has already been adequately dealt with by a competent authority, the Commissioner for Equal Opportunity may decline to act on the complaint or to proceed further with action on the complaint.
- (4) In proceedings against a person seeking a remedy in tort for an act of victimisation committed by an employee or agent of the person, it is a defence to prove that the person exercised all reasonable diligence to ensure that the employee or agent would not commit an act of victimisation.
- (5) A person who personally commits an act of victimisation under this Act is guilty of an offence.
Maximum penalty: \$20 000 or imprisonment for 2 years.
- (6) Proceedings for an offence against subsection (5) may only be commenced by a police officer or a person approved by either the Commissioner of Police or the Director of Public Prosecutions.
- (7) In this section—

detriment includes—

 - (a) loss or damage (including damage to reputation); or
 - (b) injury or harm (including psychological harm); or

- (c) intimidation or harassment; or
 - (d) discrimination, disadvantage or adverse treatment in relation to a person's employment; or
 - (e) threats of reprisal.
- (8) For the purposes of this section, a *threat* of reprisal may be—
- (a) express or implied; or
 - (b) conditional or unconditional,

and in any proceedings dealing with an act of victimisation (including proceedings for an offence against subsection (5)) it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

10—False or misleading disclosures

- (1) A person must not make a disclosure of public interest information knowing that it is false or misleading in a material particular (whether by reason of the inclusion or omission of a particular).
- Maximum penalty: \$20 000 or imprisonment for 2 years.
- (2) A person who makes a disclosure of public interest information in contravention of subsection (1) is not protected by this Act.

11—Preventing or hindering disclosure

A person must not—

- (a) prevent another person from making an appropriate disclosure of public interest information under this Act; or
- (b) hinder or obstruct another person in making such a disclosure.

Maximum penalty: \$20 000 or imprisonment for 2 years.

12—Duties of principal officers

- (1) The principal officer of a public sector agency or council must ensure that 1 or more officers or employees of the agency or council are designated as responsible officers of the agency or council for the purposes of this Act.
- (2) The regulations may prescribe qualifications for persons designated as responsible officers for the purposes of this Act.
- (3) The principal officer of a public sector agency or council must ensure that the name and contact details of each responsible officer of the agency or council are made available to officers and employees of the agency or council.
- (4) The principal officer of a public sector agency must ensure that a document setting out procedures—
- (a) for a person who wants to make an appropriate disclosure of public interest information to the agency; and
 - (b) for officers and employees of the agency dealing with such a disclosure,
- is prepared and maintained in accordance with any applicable guidelines prepared under section 14.

- (5) The document required under subsection (4) must—
- (a) without limiting that subsection, include—
 - (i) clear obligations on the public sector agency and its officers and employees to take action to protect informants; and
 - (ii) risk management steps for assessing and minimising—
 - (A) detrimental action against people because of public interest disclosures; and
 - (B) detriment to people against whom allegations are made in a disclosure; and
 - (b) be made available free of charge on the Internet, and at premises determined by the responsible Minister, for inspection by members of the public.
- (6) This section does not apply to—
- (a) a public sector agency consisting only of a single person; or
 - (b) a public sector agency that has been granted an exemption, in writing, by the Commissioner.

13—Duties of responsible officers

A person designated as a responsible officer of a public sector agency or council for the purposes of this Act must—

- (a) receive appropriate disclosures of public interest information relating to the agency or council and ensure compliance with this Act in relation to such disclosures; and
- (b) make appropriate recommendations to the principal officer of the agency or council in relation to dealing with such disclosures; and
- (c) provide advice to officers and employees of the agency or council in relation to the administration of this Act,

and may carry out any other functions relating to this Act.

14—Guidelines

- (1) The Commissioner may publish guidelines for the purposes of this Act.
- (2) The guidelines must be made available free of charge on the Internet, and at premises determined by the Commissioner, for inspection by members of the public.

15—Non-derogation

This Act is in addition to, and does not derogate from, any privilege, protection or immunity existing apart from this Act under which information may be disclosed without civil or criminal liability.

16—Regulations

- (1) The Governor may make such regulations as are contemplated by this Act, or as are necessary or expedient for the purposes of this Act.

- (2) Without limiting the generality of subsection (1), the regulations may—
- (a) prescribe fines (not exceeding \$5 000) for offences against the regulations; and
 - (b) be of general application or vary in their application according to prescribed factors; and
 - (c) provide that a matter or thing in respect of which regulations may be made is to be determined according to the discretion of the Commissioner or another specified person.

Schedule 1—Related amendments, repeals and transitional provisions

Part 1—Related Amendments

Division 1—Related amendment to *Local Government Act 1999*

1—Repeal of section 302B

Section 302B—delete the section

Division 2—Related amendments to *Public Sector Act 2009*

2—Repeal of section 7

Section 7—delete the section

3—Amendment of section 14—Functions of Commissioner

Section 14(1)(g)—delete "*Whistleblowers Protection Act 1993*" and substitute:

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Part 2—Repeal

4—Repeal of *Whistleblowers Protection Act 1993*

The *Whistleblowers Protection Act 1993* is repealed.

Part 3—Transitional provisions

5—Disclosures under repealed Act

This Act (other than section 7) applies to an appropriate disclosure of public interest information under section 5 of the *Whistleblowers Protection Act 1993* as if it were an appropriate disclosure of public interest information under section 5 of this Act.

6—Designation of responsible officers

The principal officer of a public sector agency or council in existence at the commencement of this Act must ensure that section 12 is complied with within 3 months after that commencement.