



The Internal Reporting System

**Guidelines for reporting corrupt
conduct within NSW Maritime**

August 2006

TABLE OF CONTENTS

INTRODUCTION	3
1. WHAT IS CORRUPT CONDUCT?	3
1.1 How corrupt conduct can occur	3
1.2 Consequences of corrupt conduct	4
1.3 Reporting Suspected Corrupt Conduct	4
1.4 Responsibilities	5
2. THE INTERNAL REPORTING SYSTEM	7
2.1 Policy Statement	7
2.2 The Internal Reporting System	7
2.3 The Protected Disclosures Act 1994	7
2.4 Definitions	8
2.5 Disclosures that are protected under the Act	9
2.6 Reporting under the Internal Reporting System	9
2.7 Alternative avenues for disclosures	12
2.8 Rights of persons the subject of disclosures	13
2.9 Protection available under the Act	14
2.10 Notification of action taken or proposed	15
2.11 Anonymous disclosures	16
2.12 Victimisation	16
2.13 Flow chart of procedures	17
APPENDIX	18

INTRODUCTION

NSW Maritime has developed a *Code of Conduct and Ethics* to provide guidance to staff about expected standards of behaviour in providing a high level of service to our customers and maintaining an ethical workplace.

There may be times when a person's behaviour falls short of the standard expected and may be of such a serious nature as to be considered corrupt. This must be reported to the Chief Executive who has a legal obligation to report the matter to the Independent Commission Against Corruption (ICAC).

To enable the Chief Executive to comply with his statutory obligation to report suspected corrupt conduct these procedures have been developed.

Section 1 below provides a brief overview of NSW Maritime's Internal Reporting System for reporting suspected corrupt conduct. Section 2 provides more detail about the Internal Reporting System and how it operates.

1. WHAT IS CORRUPT CONDUCT?

"Corrupt conduct" is defined in Section 8 of the *Independent Commission Against Corruption Act 1988* (the ICAC Act) and limitations on the definition are set out in Section 9. The definition used in the ICAC Act is intentionally quite broad to avoid loopholes - corrupt conduct is defined to include the dishonest or partial exercise of official functions by a public official. Conduct of a person who is not a public official, when it adversely affects the impartial or honest exercise of official functions by a public official, also comes within the definition.

Corrupt conduct can take many forms: taking or offering bribes, public officials dishonestly using influence, blackmail, fraud, election bribery and illegal gambling are some examples.

1.1 How corrupt conduct can occur

Corrupt conduct may occur in any of the following circumstances:

- where a public sector employee carries out public duties dishonestly or unfairly;
- where anyone (including a public sector employee) does something that could result in a public sector employee carrying out their public duties dishonestly or unfairly;
- where anyone (including a public sector employee) does something that has a detrimental effect on official functions, and which involves any of a wide range of matters, including (for example) fraud, bribery, official misconduct, violence;
- where a public sector employee (or former public sector employee) breaches public trust; or

- where a public sector employee (or former public sector employee) misuses information or material obtained in the course of duty.

Misuse of your position as a public sector employee can be the subject of complaint and investigation.

1.2 Consequences of corrupt conduct:

In order to constitute "corrupt conduct" within the definition of the ICAC Act, the conduct in question must be conduct which constitutes:

- a criminal offence;
- a disciplinary offence; or
- reasonable grounds to dismiss a public official.

"Corrupt conduct" is not limited to a criminal offence.

1.3 Reporting suspected Corrupt Conduct: the Internal Reporting System

Employees are urged to report suspected corrupt conduct, as well as maladministration and serious and substantial waste of public resources.

NSW Maritime has an Internal Reporting System which provides a mechanism for reporting allegations of corrupt conduct. Details of the Internal Reporting System are provided in this document.

Briefly, the Internal Reporting System provides that if you believe corrupt conduct has occurred, you may report it or discuss it with any of the following nominated officers:

- your manager/supervisor;
- the Manager Human resources;
- your General Manager; or
- the Chief Executive.

External avenues for reporting corrupt conduct are:

- the NSW Ombudsman;
- the Auditor General; or
- the ICAC

as detailed in section 2.7 later in this document.

Employees may make such reports as a Protected Disclosure, under the *Protected Disclosures Act 1994* (referred to as "the Act" in this document). The Act provides certain protections against reprisals for employees who voluntarily report such matters either to the Chief Executive, the nominated internal officers or to one of the three external investigative bodies. (Such protections do not apply in cases of vexatious or frivolous allegations.)

People who report allegations of corrupt conduct under these guidelines will be protected from victimisation.

Details of the Internal Reporting System are provided in Section 2 below.

1.4 Responsibilities

All staff have responsibilities to ensure that corrupt conduct does not occur. They are also responsible for reporting instances where they believe that corrupt conduct may have occurred and/or dealing with reports of alleged corrupt conduct. These responsibilities are outlined in the following section, with details provided in Section 2 later in this document.

Responsibilities of staff

- If you have to make a decision or take action and you are unsure about what to do, you should discuss the matter with your supervisor. It is appropriate for your supervisor to set standards of behaviour.
- Where you consider the matter is serious you should always discuss it with your supervisor.
- If you are unsure whether the behaviour of someone else in NSW Maritime is appropriate you should also discuss this with your supervisor. If it is your supervisor's behaviour that you are unsure about you can approach the Manager Human resources, your General Manager or the Chief Executive.
- If you report a matter to your supervisor, the Manager Human resources, your General Manager or the Chief Executive, confidential advice will be given to you that the matter has been referred to the ICAC where this is appropriate, so that you know that action has been taken on the matter. As far as possible, you will be advised of the outcome of any report of corrupt conduct that you make.

Responsibilities of supervisors and managers

Supervisors and managers are responsible for:

- providing positive guidance to staff on issues of ethical conduct and demonstrating these behaviours at work;
- identifying and responding to instances of suspected corrupt conduct;
- making it known that instances of suspected corrupt conduct will be reported, investigated and where possible, corrected ;
- maintaining confidentiality and in turn reporting any matters made known to them immediately to a General Manager;
- making written notes of an instance of suspected corrupt conduct if an employee does not wish to make a written report; and
- forwarding all reports of suspected corrupt conduct to a General Manager.

Responsibilities of General Managers

General Managers are responsible for:

- being available to hear any reports of suspected corrupt conduct that an employee wants to make;
- making a full assessment of the facts as reported by the employee, to establish if the suspicion of corrupt conduct is reasonable; in so doing, the General Manager must not breach confidentiality or advise the person against whom the allegation has been made or disturb material that could later form evidence;
- making a recommendation to the Chief Executive;
- keeping any report of corrupt conduct confidential;
- providing feedback to anyone who makes a report of suspected corrupt conduct on whether the complaint has been referred to the ICAC;
- informing the reporting person about the findings of any ICAC investigation, where appropriate; and
- putting preventative measures in place to minimise the likelihood of corrupt conduct in the future, should the complaint be proved, for example, implementation of the findings of audit reports or ICAC.

Responsibilities of the Chief Executive

- If, after the matter has been briefly examined, it appears that corrupt conduct has occurred then the Chief Executive will report the matter to the ICAC.

2. THE INTERNAL REPORTING SYSTEM MAKING A PROTECTED DISCLOSURE

2.1 POLICY STATEMENT: SUPPORT FOR PERSONS WHO MAKE DISCLOSURES

NSW Maritime does not tolerate corrupt conduct, maladministration or serious and substantial waste of public money.

NSW Maritime is committed to the aims and objectives of the *Protected Disclosures Act*. It recognises the value and importance of contributions of staff to enhance administrative and management practices and strongly supports disclosures being made by staff who report corrupt conduct, maladministration, or serious and substantial waste of public money.

NSW Maritime will take all reasonable steps to provide protection from victimisation to staff who make such disclosures and from any detrimental action in reprisal for the making of the disclosure. Dealing with allegations of victimisation is the responsibility of everyone who is nominated in section 2.6 of this procedure. The form and nature of that protection will depend on the circumstances of the matter.

2.2 THE INTERNAL REPORTING SYSTEM

This Internal Reporting System provides a system for reporting disclosures of corrupt conduct, maladministration or serious and substantial waste of public money by NSW Maritime or its staff. The system enables such internal disclosures to be made to the Disclosure Co-ordinator, (that is, the Manager Human resources) or to the Nominated Disclosure Officers, (that is, Branch Managers, Regional Managers and General Managers) as an alternative to the Chief Executive.

This system is designed to complement normal communication channels between supervisors and staff. Employees are encouraged to continue to raise appropriate matters at any time with their supervisors, but as an alternative have the option of making a protected disclosure in accordance with this system, which has been designed in accordance with the Act.

2.3 THE PROTECTED DISCLOSURES ACT 1994

The Act commenced operation on 1 March 1995. The purpose of the Act is to ensure that public officials who wish to make disclosures under the legislation receive protection from reprisals, and that the matters raised in the disclosures are properly investigated.

The Act aims to encourage and facilitate the disclosure in the public interest of corrupt conduct, maladministration and serious and substantial waste in the public sector.

2.4 DEFINITIONS

Three key concepts in the internal reporting system are “corrupt conduct”, “maladministration” and “serious and substantial waste of public money”. Definitions of these concepts are outlined below.

(1) Corrupt conduct

“Corrupt conduct” is defined in Section 1: of these guidelines.

(2) Maladministration

“Maladministration” is defined in the *Protected Disclosures Act* as conduct that involves action or inaction of a serious nature that is:

- contrary to law;
- unreasonable;
- unjust;
- oppressive;
- improperly discriminatory; or
- based wholly or partly on improper motives.

A full explanation of these terms is contained in Item 1(A) of the Appendix.

(3) Serious and substantial waste

The term “serious and substantial waste” is not defined in the *Protected Disclosures Act*. The Auditor-General provides the following working definition:

Serious and substantial waste refers to the uneconomical, inefficient or ineffective use of resources, authorised or unauthorised, which results in a loss/wastage of public funds/resources.

In addressing any complaint of serious and substantial waste regard will be had, to the nature and materiality of the waste.

Details of what can constitute serious and substantial waste are contained in Items 1(B) and 1(C) of the Appendix.

2.5 DISCLOSURES THAT ARE PROTECTED UNDER THE ACT

(1) What disclosures are protected?

Disclosures are protected under the Act if they:

- (a) are made:

- in accordance with this Internal Reporting System; or
 - to the Chief Executive of NSW Maritime; or
 - to one of the investigating authorities nominated in the Act; **AND:**
- (b) show or tend to show corrupt conduct, maladministration, or serious and substantial waste of public money by the NSW Maritime or any of its staff;
AND
- (c) are made voluntarily.

More information on "show or tend to show" is contained in Item 2 of the Appendix.

(2) What disclosures are not protected?

A disclosure is not protected under the Act if it is made by a public official in the exercise of a duty imposed by or under an Act.

Protection is also not available for disclosures which:

- are made frivolously or vexatiously;
- primarily question the merits of government policy; or
- are made solely or substantially with the motive of avoiding dismissal or other disciplinary action.

More information on "government policy" is contained in Item 3 of the Appendix.

It is an offence to wilfully make a false or misleading statement when making a disclosure.

The pre-conditions required for a disclosure to be protected are contained in Item 4 of the Appendix.

2.6 REPORTING UNDER THE INTERNAL REPORTING SYSTEM

The persons or positions to whom internal disclosures can be made in accordance with the Internal Reporting System (as shown on the Annexure) are:

- the Disclosure Co-ordinator (Manager, Human resources); or
- a Nominated Disclosure Officer (all Branch Managers, Regional Managers and General Managers).

Where persons contemplating making a disclosure are concerned about publicly approaching the Disclosure Co-ordinator or a Nominated Disclosure Officer (or the Chief Executive), they can ring the relevant officer and request a meeting in a discreet location away from the workplace.

The Internal Reporting System places responsibilities on employees at all levels within NSW Maritime.

(1) Employees

Employees are encouraged to report known or suspected incidences of corrupt conduct, maladministration or serious and substantial waste in accordance with these mechanisms.

All employees have an important role to play in supporting any employee who has made a legitimate disclosure, where they have become aware of that disclosure. Employees must abstain from any activity that is or could be perceived to be victimisation or harassment of another employee who has made a protected disclosure. Further, employees should protect/maintain the confidentiality of another employee they know or believe has made a protected disclosure.

(2) Nominated Disclosure Officers

Nominated Disclosure Officers are responsible for receiving, forwarding and/or acting upon disclosures in accordance with the internal mechanisms. Nominated Disclosure Officers will:

- a) clearly explain to employees making disclosures what will happen in relation to the information received;
- b) when requested, make arrangements to ensure that disclosures can be made privately and discreetly (if necessary away from the workplace);
- c) reduce to writing and date any disclosures received orally (and have the person making the disclosure sign the document);
- d) deal with disclosures impartially;
- e) forward disclosures to the Disclosure Co-ordinator for assessment;
- f) take all necessary and reasonable steps to ensure that the identity of employees who make disclosures, and the persons the subject of disclosures, are kept confidential;
- g) support employees who make disclosures and protect them from victimisation, harassment or any other form of reprisal;
- h) deal with allegations of victimisation that may be made by employees who have made a disclosure;
- i) not divulge that a protected disclosure has been made to any person, other than the Disclosure Coordinator/Chief Executive; and
- j) when a range of issues are raised within a report of corrupt conduct, and some appear grounds for a protected disclosure, the Nominated Disclosure Officer will not seek to separate the matters but will forward the entire report to the Disclosure Coordinator or the Chief Executive.

(3) Disclosure Co-ordinator

The Disclosure Co-ordinator has a pivotal role in the internal reporting system and acts as a clearing house for disclosures. The Disclosure Co-ordinator will:

- (a) provide an alternative internal reporting channel to Nominated Disclosure Officers and to the Chief Executive;
- (b) impartially assess each disclosure to determine:
 - (1) whether the disclosure appears to be a protected disclosure within the meaning of the Act; and
 - (2) the appropriate action to be taken in relation to the disclosure, for example:
 - (a) that no further action should be taken or decline to deal with the disclosure;
 - (b) the appropriate person to take responsibility for dealing with the disclosure;
 - (c) whether a preliminary or informal investigation is required;
 - (d) whether a formal investigation is required;
 - (e) whether prosecution or disciplinary action should be considered;
 - (f) whether referral to an investigating authority for investigation or other action is required; or
 - (g) whether referral to the police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct) is required.
- (c) consult with the Chief Executive;
- (d) be responsible for carrying out or co-ordinating any internal investigation arising out of a disclosure;
- (e) report to the Chief Executive on the findings of any investigation and recommended remedial action;
- (f) take all necessary and reasonable steps to ensure that the identity of employees who make disclosures, and persons the subject of disclosures, are kept confidential;
- (g) support employees who make disclosures and actively protect them from victimisation, harassment or any other form of reprisal;
- (h) deal with allegations of victimisation that may be made by employees who have made a disclosure; and
- (i) report actual or suspected corrupt conduct to the Chief Executive in a timely manner to enable that officer to comply with the reporting requirements in the ICAC Act.

(4) Principal Officer

Disclosures may be made direct to the Chief Executive, rather than by way of this internal reporting mechanisms system. The Chief Executive will:

- (a) impartially assess each disclosure to determine:
 - (i) whether the disclosure appears to be a protected disclosure within the meaning of the Act;
 - (ii) the appropriate action to be taken in relation to the disclosure, for example:
 - that no further action should be taken or decline to deal with the disclosure;
 - the appropriate person to take responsibility for dealing with the disclosure;
 - whether a preliminary or informal investigation is required;
 - whether a formal investigation is required;
 - whether prosecution or disciplinary action should be considered;
 - whether referral to an investigating authority for investigation or other action is appropriate; or
 - whether referral to the police (if a criminal matter) or the ICAC (if the matter concerns corrupt conduct) is appropriate;
- (b) receive reports from the Disclosure Co-ordinator on the findings of any investigation as well as any recommendations for remedial action, and determine what action should be taken;
- (c) take all necessary and reasonable steps to ensure that the identity of employees who make disclosures, and the persons the subject of disclosures, are kept confidential;
- (d) have primary responsibility for protecting employees who make disclosures, or provide information to any internal or external investigation of a disclosure from victimisation, harassment or any other form of reprisal;
- (e) be responsible for implementing organisational reform identified as necessary following investigation of a disclosure; and
- (f) report criminal offences to the Police and actual or suspected corrupt conduct to ICAC (under s.11 of the ICAC Act).

2.7 ALTERNATIVE AVENUES FOR DISCLOSURES

Alternative avenues available to staff for making a protected disclosure under the Act (other than by means of this Internal Reporting System), are as follows:

- to the Chief Executive; or
- to one of the investigating authorities under the Act (that is, the ICAC, Ombudsman, Auditor General, Police Integrity Commission (PIC), or Inspector of the PIC).

Disclosures made to a journalist or a Member of Parliament will **only** be protected **if certain conditions are met** (see Item 5 in the Appendix for full details of these conditions).

2.8 RIGHTS OF PERSONS THE SUBJECT OF DISCLOSURES

The rights of persons the subject of disclosures will also be protected. In this regard:

- (1) the confidentiality of the identity of persons the subject of disclosures will be protected/maintained (where this is possible and reasonable);
- (2) disclosures will be assessed and acted on impartially, fairly and reasonably;
- (3) responsible officers who receive disclosures in accordance with these mechanisms are obliged to:
 - protect/maintain the confidentiality of the identity of persons the subject of the disclosures;
 - assess disclosures impartially; and
 - act fairly to persons the subject of disclosures;
- (4) disclosures will be investigated as discreetly as possible, with a strong emphasis on maintaining confidentiality both as to the identity of persons making disclosures and the persons the subject of disclosures;
- (5) where investigations or other enquiries do not substantiate protected disclosures, the fact the investigation/enquiry has been carried out, the results of the investigation/ enquiry, and the identity of the persons the subject of the disclosures will be kept confidential, unless the persons the subject of the disclosures request otherwise;
- (6) the persons the subject of disclosures (whether protected disclosures under the Act or otherwise) which are investigated by or on behalf of an authority, have the right to:
 - (a) be informed about the substance of the allegations;
 - (b) be informed about the substance of any adverse comment that may be included in a report/memorandum/letter or the like arising out of any such investigation; and
 - (c) be given a reasonable opportunity to put their case (either orally or in writing) to the persons carrying out the investigation for or on behalf of the authority,

before any decision/determination/report/memorandum/letter or the like is made or finalised;
- (7) where the allegations in a disclosure have been investigated by or on behalf of an authority, and the person the subject of the allegations is aware of the substance of the allegations, the substance of any adverse comment, or the fact of the investigation, he or she should be formally advised as to the outcome of the investigation, regardless of the outcome; and

- (8) where the allegations contained in a disclosure are clearly wrong or unsubstantiated, the person the subject of the disclosure is entitled to the support of NSW Maritime and its senior management (the nature of the support that would be reasonable and appropriate would depend on the circumstances of the case, but could include a public statement of support or a letter setting out NSW Maritime's views that the allegations were either clearly wrong or unsubstantiated).

2.9 PROTECTION AVAILABLE UNDER THE ACT

(1) Protection against reprisals

The Act provides protection by imposing penalties on a person who takes "detrimental action" against another person substantially in reprisal for making a protected disclosure. Penalties can be imposed by means of fines and imprisonment. "Detrimental action" means action causing, comprising or involving any of the following:

- injury, damage or loss;
- intimidation or harassment;
- discrimination, disadvantage or adverse treatment in relation to employment;
- dismissal from, or prejudice in, employment; or
- disciplinary proceeding.

Any employee who believes that detrimental action is being taken against them substantially in reprisal for the making of an internal disclosure to the Chief Executive or in accordance with this Internal Reporting System should immediately bring details of the detrimental action to the attention of the Chief Executive.

If an employee who made an **internal disclosure** feels that such reprisals are not being effectively dealt with, they should contact ICAC.

If an external disclosure was made to an investigating authority, that body will either deal with the allegation or provide advice and guidance to the person concerned.

(2) Protection against actions, etc

The Act provides that a person is not subject to any liability for making a protected disclosure and no action, claim or demand may be taken or made of or against the person for making the disclosure. This provision has effect despite any duty of secrecy or confidentiality or any other restriction on disclosure by a public official.

A person who has made a protected disclosure has a defence of absolute privilege in proceedings for defamation.

A person who has made a protected disclosure is taken not to have committed any offence against an Act which imposes a duty to maintain confidentiality with respect to any information disclosed.

(3) Confidentiality

The Act requires investigating authorities, public authorities and public officials to whom protected disclosures are made or referred, not to disclose information that might identify or tend to identify the person who made the disclosure. The exceptions to this requirement are where:

- the person making the protected disclosure consents in writing to the disclosure of that identifying information; or
- it is essential, having regard to the principles of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern; or
- the investigating authority, public authority, officer or public official is of the opinion that disclosure of the identifying information is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

Decisions about natural justice and effective investigation will be made by the Manager Human resources. In all cases the person who made the disclosure will be consulted before such a decision is made.

(4) Freedom of Information exemption

Under the *Freedom of Information Act 1989*, a document is exempt from release if it contains matter the disclosure of which would disclose matters relating to a protected disclosure within the meaning of the *Protected Disclosures Act 1994*.

2.10 NOTIFICATION OF ACTION TAKEN OR PROPOSED

A person who makes a protected disclosure must be notified, within six months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

If a disclosure is made in accordance with these mechanisms, the Disclosure Co-ordinator is responsible for the six month notification to the person who made the disclosure, unless this responsibility has been retained by or allocated to another officer by the Chief Executive.

The notification provided to the person who made the disclosure should contain sufficient information to demonstrate that adequate and appropriate action has been taken, or is proposed to be taken, in respect of the disclosure. This should include a statement of the reasons for the decision made or action taken in response to the disclosure.

The notification should include sufficient information to enable the person who made the disclosure to make an assessment as to whether the circumstances listed in section 19(3)(a)-(c) of the Act (relating to disclosures to members of Parliament and journalists) apply, that is whether:

- (1) a decision was made not to investigate the matter; or
- (2) a decision was made to investigate the matter, but the investigation was not completed within 6 months of the original decision being made; or

- (3) the matter was investigated but no recommendation was made for the taking of any action in respect of the matter.

Without such information it would be difficult for the person to be able to properly assess whether it is appropriate or warranted to make a disclosure to a member of Parliament or journalist.

2.11 Anonymous disclosures

The Act is silent on whether anonymous disclosures are protected. While all efforts will be made to act on anonymous disclosures, significant difficulties arise for NSW Maritime in adequately investigating and acting on these.

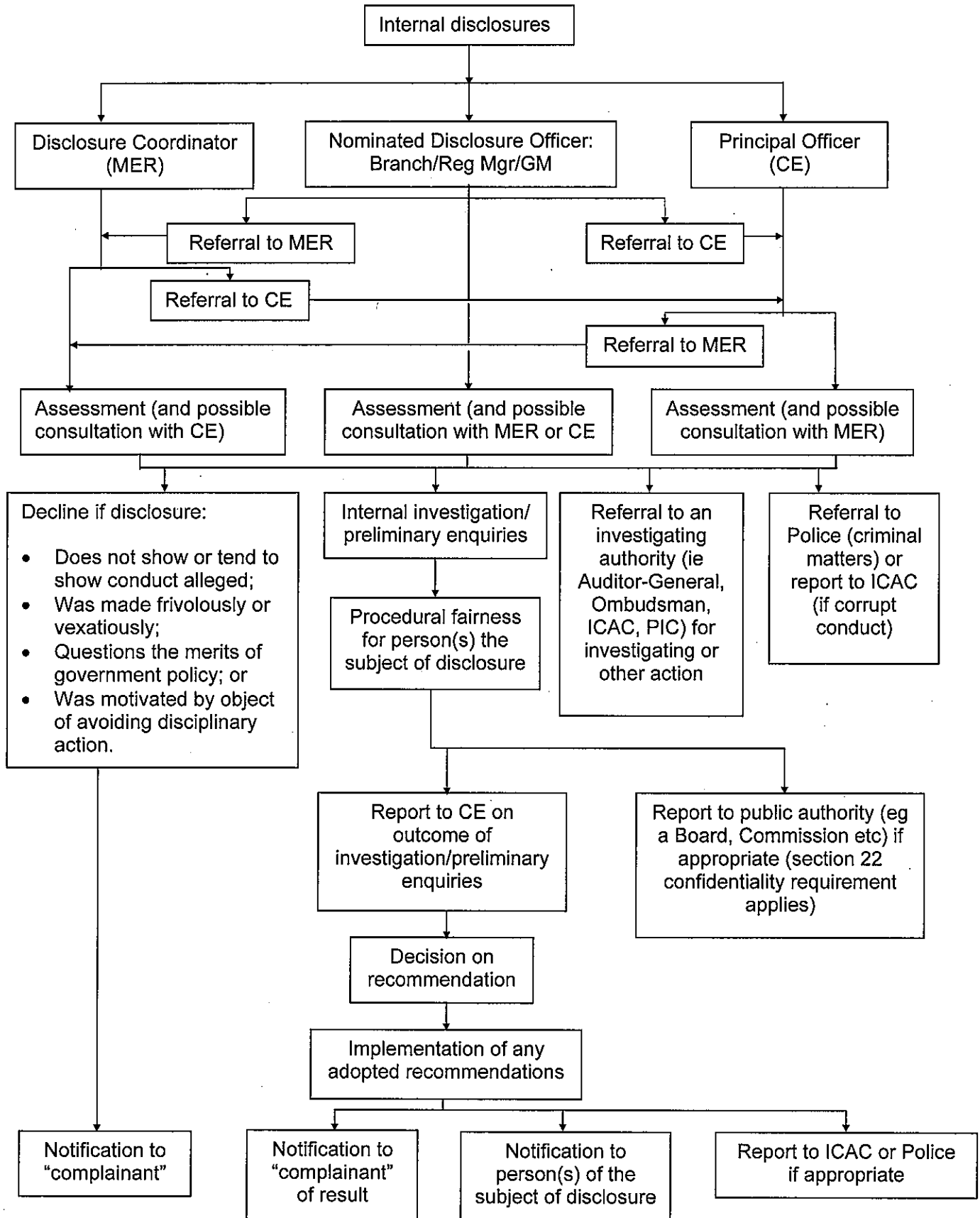
NSW Maritime will attempt to treat anonymous disclosures discreetly, but staff should be aware that it is possible that the identity of a person who made an anonymous disclosure may become known by virtue of the facts of the matter, or a Court will ultimately decide that such disclosures are not protected under the Act. This could have adverse consequences for the person making the anonymous disclosure should their identity become known.

2.12 Victimisation

The Act provides that people who make disclosures under this Act are protected from victimisation.

If you have made a protected disclosure, and you believe that you have been victimised in some way as a consequence of making the disclosure, you should bring the matter to the attention of the person to whom you made the disclosure or to the Disclosure Co-ordinator. It is the responsibility of that person to deal with the matter.

2.13 NSW MARITIME INTERNAL REPORTING MECHANISMS FOR PROTECTED DISCLOSURES



APPENDIX
ADDITIONAL INFORMATION FROM
THE PROTECTED DISCLOSURES ACT 1994
(Summarised from Protected Disclosures Guidelines,
NSW Ombudsman 1996)

1. EXPLANATION OF TERMS

(A) Definitions in the Protected Disclosures Act 1994

contrary to law (s.11(2)(a)) - for example:

- decisions or actions contrary to the law or ultra vires (ie. beyond the power of the law);
- decisions or actions contrary to lawful and reasonable orders from persons or bodies with authority to make or give such orders;
- breach of natural justice/procedural fairness; or
- unauthorised disclosure of confidential information.

unreasonable - (s.11(2)(b)) for example:

- decisions or actions:
 - inconsistent with adopted guidelines or policy;
 - made or taken without obvious relationship to the facts or circumstances;
 - so unreasonable that no reasonable person could so decide or act (i.e. irrational);
- relevant considerations not adequately taken into account or irrelevant considerations taken into account;
- serious delay;
- wrong, inaccurate or misleading advice leading to detriment;
- means used not reasonable proportional to ends to be achieved (i.e. excessive use of authority); or
- failure to rectify identified mistakes, errors, oversights or improprieties.

unjust (s.11(2)(b)) - for example:

- decisions or actions not justified by any evidence, so unreasonable that no reasonable person could so decide or act (i.e. irrational), or unconscionable;
- partial, unfair or inequitable decisions or actions; or
- abuse of power.

oppressive (s.11(2)(b)) - for example:

- unconscionable decisions or actions;
- abuse of power, intimidation or harassment; or
- punitive, harsh, cruel or offensive decisions or actions.

improperly discriminatory (s.11(2)(b)) - for example:

- inconsistent application of laws, policies or practices when there is no reasonable, justifiable or appropriate reason to do so;
- distinctions applied not authorised by law, or failure to make a distinction which is authorised or required by law; or
- failure to perform duties impartially and equitably.

based wholly or partly on improper motives (s.11(2)(c)) - for example:

- decisions or actions for a purpose other than that for which power conferred;
- decisions or actions for personal advantage; or
- bad faith.

(B) Serious and Substantial Waste

The following delineation of the definition of serious and substantial waste may be of assistance to public officials and/or public authority.

Types:

- Absolute -** serious and substantial waste might be regarded in absolute terms where the waste is regarded as significant, for example \$500,000.
- Systemic -** the waste indicates a pattern which results from a system weakness within the public authority.
- Material -** the serious and substantial waste is/was material in terms of the public authority's expenditure or a particular item of expenditure or is/was material to such an extent so as to effect a public authority's capacity to perform its primary functions.

Material By Nature Not Amount - the serious and substantial waste may not be material in financial terms but may be significant by nature. That is, it may be improper or inappropriate [alternatively, this type of waste may constitute "maladministration" as defined in the Protected Disclosures Act].

(C) Examples of Waste

Waste can take many forms, for example:

- misappropriation or misuse of public property;
- the purchase of unnecessary or inadequate goods and services;
- too many personnel being employed in a particular area, incurring costs which might otherwise have been avoided;
- personnel being remunerated for skills that they do not have, but are required to have under the terms or conditions of their employment; or
- programs not achieving their objectives and therefore the costs being clearly ineffective and inefficient.

Waste can result from such things as:

- the absence of appropriate safeguards to prevent the theft or misuse of public property;
- purchasing procedures and practices which fail to ensure that goods and services are necessary and adequate for their intended purpose; and
- purchasing practices where the lowest price is not obtained for comparable goods or services.

2. WHAT DOES "SHOWS OR TENDS TO SHOW" MEAN IN PRACTICE?

To be protected, a disclosure must disclose information which "shows or tends to show" certain things.

The definition of "show" in the Macquarie Dictionary includes:

5. to prove; demonstrate7. to allege, as in a legal document; plead as a reason or cause, 8. to produce, as facts in an affidavit or at a hearing. 9. to make evident by appearance, behaviour, etc.

To comply with this requirement it is most likely that it is necessary to do more than merely allege. Matters must be stated which, if substantiated, amount to the relevant conduct, or intent to do so. It is necessary to assess the supporting material provided with a disclosure to determine its adequacy for the purpose of the Act before a decision is made as to whether it appears that a disclosure is protected.

3. WHAT DOES "GOVERNMENT POLICY" MEAN?

The Act does not provide a definition for this phrase. It is worth noting that the Explanatory Note to the Draft First Print of the *Protected Disclosures Bill* states that under clause 17, a disclosure will not be protected if it "principally involves questioning the merits of a policy decision of Cabinet or of a Minister". Its use in section 17 is, therefore, to exclude from the protection of the Act any "disclosures" which, at their core, criticise the decisions and directives of the executive arm of government - eg Cabinet.

"Government policy" should not be confused with departmental or administrative policy which concerns procedural issues or routine practices of an organisation. Such matters do not set the agenda for the workings of the department or body, but provide the mechanisms for the achievement of the agenda which is set by the elected representatives.

A disclosure may relate to government policy and attract the protection of the Act if the disclosure focuses on the adequacy of the advice given by a public official or public authority and does not principally involve questioning the merits of adopted government policy.

The intent of the Act is to provide protection to allow disclosures to be made concerning corrupt conduct, maladministration, or serious and substantial waste in the public sector. Questions of the relative merit of government policy are more

appropriately dealt with in the political arena, rather than by the investigation authorities.

4. WHAT ARE THE PRECONDITIONS FOR A DISCLOSURE TO BE PROTECTED?

To be protected under the Act, a disclosure must:

- be voluntary:
 - including, but not limited to, disclosures made in accordance with an adopted code of conduct setting out rules and guidelines for reporting corrupt conduct, maladministration, or serious and substantial waste of public money; but
 - **not** including disclosures made in the exercise of a duty imposed on the public official by or under an Act, for example the duty of the principal officer of a public authority to disclose corrupt conduct to the ICAC under section 11 of the ICAC Act, or the duty of police officers to report certain matters under clauses 30 and 31 of the *Police Service Regulation* (section 9);
- be made by a public official, even if the person who made the protected disclosure has since ceased to be a public official (section 8(3));
- be made to one of the authorities or officers specified in the Act; or
- if made to a member of Parliament or to a journalist, comply with certain limitations set out in section 19; and
- be a disclosure of information which shows or tends to show corrupt conduct, maladministration, or serious and substantial waste of public money (sections 10 to 12).

5. DISCLOSURES MADE TO A JOURNALIST OR A MEMBER OF PARLIAMENT

In order to be considered as protected disclosures, disclosures to a journalist or member of Parliament (MP) must meet the following conditions:

- the public official has reasonable grounds for believing that the disclosure is substantially true and the disclosure must in fact be substantially true (a fact the public official would have to be able to prove in the relevant tribunal or court to be able to obtain the protection of the Act or for a successful prosecution for an offence under the Act if detrimental action is taken after a disclosure is made to an MP or a journalist);
- the public official has already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of Part 2 of the Act;
- the investigating authority, public authority or officer to whom the original disclosure was made or, if the matter was referred the investigating authority, public authority or other officer to whom the matter is referred has:
 - (a) decided not to investigate the matter; or
 - (b) decided to investigate the matter but not completed the investigation within six months of the original disclosure being made; or

- (c) investigated the matter but not recommended the taking of any action in respect of the matter; or
- (d) failed to notify the person making the disclosure within six months of the disclosure being made, of whether or not the matter is to be investigated (section 19).

It should be noted that where an investigating authority, or principal officer of or officer constituting a public authority has declined to investigate or discontinues the investigation of any matter raised by a disclosure on the basis of an opinion that the disclosure was made frivolously or vexatiously, the disclosure is not protected by the Act.