

## **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

### Overview of Bill

The object of this Bill is to amend the *Protected Disclosures Act 1994* (the **principal Act**) to implement recommendations of the report by the Joint Committee on the Independent Commission Against Corruption entitled *Protection of public sector whistleblower employees* published in November 2009.

The Bill amends the principal Act as follows:

(a) to provide that persons engaged under contract to provide services to or on behalf of a public authority are public officials for the purposes of the principal Act,

(b) to provide that a disclosure is protected if the person making the disclosure honestly believes, on reasonable grounds, that the disclosure shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct, maladministration, serious and substantial waste of public money or a contravention of government information laws,

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(c) to further protect persons making protected disclosures by:

(i) increasing the penalty for the offence of taking detrimental action in reprisal against a person who made a protected disclosure, and

(ii) making a person who takes such action liable in damages for any loss suffered by the person who made the disclosure, and

(iii) enabling the Supreme Court to grant injunctions restraining a person from engaging in such action,

(d) to establish the Public Interest Disclosures Steering Committee (the **Steering Committee**) which will be chaired by the Ombudsman and provide advice to the Minister on the operation of and recommendations for reform of the principal Act and on oversight and special reports of the Ombudsman,

(e) to confer functions on the Ombudsman in relation to the operation of the principal Act, including promoting public awareness of the principal Act, assisting agencies and monitoring and auditing compliance with the principal Act,

(f) to require public authorities to have a policy relating to procedures for dealing with protected disclosures and to prepare annual reports about their obligations under the principal Act to be tabled in Parliament,

(g) to repeal a provision that removes protection for disclosures considered to be frivolous or vexatious,

(h) to limit protection for a disclosure that is misdirected to the wrong investigating authority by requiring that the disclosure must have been made in the honest belief that the investigating authority was the appropriate body to deal with the matter, and to extend that protection to cover cases where the disclosure is not referred on to another investigating authority because the original investigating authority has power to investigate the matter,

(i) to provide that taking detrimental action in reprisal against a person who made a protected disclosure constitutes misconduct for disciplinary action purposes,

(j) to create a further exception to the requirement that authorities keep the identity of a person who has made a protected disclosure confidential so that the requirement will not apply if the person's identity has become public because the person has voluntarily identified himself or herself, and to require public authorities to establish procedures that will extend the requirement for confidentiality to the person who makes the protected disclosure,

(k) to require an investigating authority or public authority that has evidence of an offence of taking detrimental action against a person for making a protected disclosure to refer the evidence to the DPP (or to the Attorney General if the offence involves conduct of the DPP),

(l) to require consultation with the Steering Committee on any proposed regulation to be made under the principal Act,

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(m) to require public authorities to provide an annual report on their obligations under the principal Act and to require those reports to be tabled in Parliament,

(n) to enable the Ombudsman to make a special report to Parliament on matters arising under the principal Act,

(o) to replace the existing requirement for biennial review of the principal Act with a requirement for a review in 5 years and to broaden the scope of the review,

(p) to make other miscellaneous amendments and saving and transitional provisions.

Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

### **Schedule 1 Amendment of Protected Disclosures**

#### **Act 1994 No 92**

#### **Protected disclosures**

**Schedule 1 [18]** amends provisions that limit protected disclosures to disclosures that reveal corrupt conduct, maladministration or serious and substantial waste of public money so that a disclosure will be protected when the person making the disclosure honestly believes, on reasonable grounds, that the disclosure reveals corrupt conduct, maladministration or serious and substantial waste of public money. The amendment also reflects the recent addition of government information contravention (a failure to exercise functions in accordance with the *Government Information (Public Access) Act 2009*) as a ground for a protected disclosure. The amendments made by **Schedule 1 [2], [4], [14], [16], [20], [21], [22], [32], [34] and [42]** are consequential on government information contravention being grounds for a protected disclosure.

**Schedule 1 [17]** provides that for the purposes of determining whether a disclosure is a protected disclosure, an assertion by a public official about what the public official believes in connection with a disclosure is evidence of the belief asserted and that the belief is an honest belief.

#### **Public officials and public authorities**

For a disclosure to be protected by the principal Act, it must be made by a public official to an investigating authority, an officer of a public authority, a member of Parliament or a journalist. Protected disclosures may be made about conduct by public authorities and public officials. **Schedule 1 [12]** extends the definition of **public official** to include a person who is engaged under contract to provide services to or on behalf of a public authority. The amendment also provides that members of

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Parliament and persons employed by the President of the Legislative Council or the Speaker of the Legislative Assembly are public officials. **Schedule 1 [8]** is a consequential amendment. **Schedule 1 [7]** clarifies the definition of **public authority**. **Schedule 1 [15]** provides that a disclosure by a public official may be made to the

Clerk of the Legislative Assembly, the Clerk of the Parliaments or the Executive Manager of the Department of Parliamentary Services if the disclosure concerns the conduct of a member of Parliament and is made in accordance with official established procedures. **Schedule 1 [23]** provides that for such a disclosure to be protected it must be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by a member of Parliament.

**Schedule 1 [36]** establishes a transitional arrangement that enables disclosures to continue to be made to the principal officer of a public authority that becomes a separate office within another public authority (rather than to the principal officer of that other public authority). This transitional arrangement continues until a new procedure is established for, or an existing procedure is amended or confirmed to apply to, the making of protected disclosures by officers of that separate office.

#### **Protection against reprisals**

**Schedule 1 [26]** increases the penalty for the offence of taking detrimental action against a person in reprisal for the person making a protected disclosure from 50 penalty units or 12 months imprisonment (or both) to 100 penalty units or 2 years imprisonment (or both). **Schedule 1 [27]** provides that a public official who commits such an offence is guilty of engaging in misconduct and that the misconduct justifies disciplinary action being taken against the public official. **Schedule 1 [27]** also makes it clear that the section covers reprisal action taken on the basis of a belief or suspicion that a protected disclosure has been made or may have been made even if the disclosure was not made. **Schedule 1 [28]** requires an investigating authority or public authority to refer any evidence of such an offence to the Director of Public Prosecutions or to the Attorney General if the evidence relates to conduct of the Director of Public Prosecutions.

**Schedule 1 [29]** (proposed section 20A) provides that a person who takes detrimental action against a person in reprisal for the other person making a protected disclosure is liable in damages (other than exemplary, punitive or aggravated damages) for any loss that the other person suffers as a result of the detrimental action. The section also covers reprisal action taken on the basis of a belief or suspicion that a protected disclosure has been made or may have been made even if the disclosure was not made.

**Schedule 1 [29]** (proposed section 20B) enables an investigating authority and, with the approval of the Attorney General, a public authority to apply to the Supreme Court for an injunction to prevent a person from taking detrimental action against another person that is in reprisal for the other person making a protected disclosure.

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The Court may grant an injunction restraining the person from engaging in such conduct and may also require the person to take action to remedy the detriment.

#### **Misdirected disclosures**

**Schedule 1 [24]** amends an existing provision that protects a disclosure when it is misdirected to the wrong investigating authority and then referred on to the appropriate investigating authority, public official or public authority. The amendment limits protection to cases where the disclosure is made in the honest belief that the investigating authority to which the disclosure was made was the appropriate body to deal with the matter. The amendment also extends the protection to cases where the misdirected disclosure is made in the honest belief that the investigating authority was the appropriate body to deal with the matter and the disclosure is not referred on because the investigating authority has power to investigate the matter. **Schedule 1 [33]** and **[35]** make it clear that the referral of a

protected disclosure under the existing provisions for the referral of disclosures does not affect the protected status of the disclosure.

#### **Confidentiality**

**Schedule 1 [30]** creates a further exception to the prohibition against the disclosure of information revealing the identity of a person who has made a protected disclosure, so that the prohibition will not apply if the information is generally available as a result of the person who made the protected disclosure voluntarily identifying himself or herself as having made the protected disclosure.

**Schedule 1 [31]** requires a public authority to establish procedures for ensuring that public officials of the authority maintain confidentiality in connection with protected disclosures made by those public officials.

#### **Public Interest Disclosures Steering Committee**

**Schedule 1 [13]** (proposed section 6A) establishes the Public Interest Disclosures Steering Committee. The Steering Committee is to provide advice to the Minister on the operation of the principal Act and suggestions for reform and to receive, consider and provide advice to the Minister on reports by the Ombudsman under the principal Act.

The Steering Committee is to consist of the following members:

- (a) the Ombudsman (who will chair the Committee),
- (b) the Director-General of the Department of Premier and Cabinet,
- (c) the Auditor-General,
- (d) the Commissioner for the Independent Commission Against Corruption,
- (e) the Commissioner for the Police Integrity Commission,
- (f) the Director-General under the *Local Government Act 1993*,
- (g) the Commissioner of Police,
- (h) such other members as are prescribed by the regulations.

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**Schedule 1 [37]** requires the Minister to consult with the Steering Committee about a proposed regulation under the principal Act before the Minister recommends the making of the regulation. **Schedule 1 [38]** (proposed section 31B) requires the Steering Committee to review any Commonwealth legislation enacted in response to the 2009 report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* of the House of Representatives Standing Committee on Legal and Constitutional Affairs. **Schedule 1 [10]** is a consequential amendment.

#### **Functions of Ombudsman**

**Schedule 1 [13]** (proposed section 6B) confers functions on the Ombudsman in connection with the operation of the principal Act, including the following:

- (a) to promote public awareness and understanding of the principal Act,
- (b) to provide information and assistance to public authorities, investigating authorities and public officials on any matters relevant to the principal Act (including by issuing guidelines and publications),
- (c) to monitor, audit and report on the exercise by public authorities of functions under, and compliance with, the principal Act,
- (d) to make reports and provide recommendations to the Minister about proposals for legislative and administrative changes to further the object of the principal Act.

**Schedule 1 [13]** (proposed section 6C) gives the Ombudsman power to require the provision of information and documents by public authorities for the purposes of an audit under proposed section 6B.

**Schedule 1 [38]** (proposed section 31A) enables the Ombudsman to make a special report under the *Ombudsman Act 1974* on any matter arising in connection with the exercise of the Ombudsman's functions under the principal Act, including systemic

or other problems identified with the operation of the principal Act and proposals for legislative change.

**Public authorities to have protected disclosure policy and to prepare annual reports**

**Schedule 1 [13]** (proposed section 6D) requires all public authorities to have a policy that provides for procedures for receiving, assessing and dealing with protected disclosures. A public authority must have regard to any guidelines adopted by the Ombudsman in formulating such a policy.

**Schedule 1 [38]** (proposed section 31) requires each public authority to prepare an annual report on the authority's obligations under the principal Act that will be tabled in Parliament. The report is to be submitted to the Minister responsible for the public authority and a copy is to be given to the Ombudsman.

**Review of principal Act**

**Schedule 1 [39]** amends the requirements relating to reviews of the principal Act so that a review of the principal Act by a joint committee of members of Parliament will

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be required to be undertaken after 5 years from the date of assent to the proposed Act, and not every 2 years as is currently the case. The review will be required to consider the effectiveness of the amendments made by the proposed Act, whether the structures in place to support the operation and future direction of the protected disclosures scheme remain appropriate and the need for further review of the principal Act. The joint committee conducting the review is to consult with the members of the Steering Committee, who may assist and advise on the review.

**Name of Act**

**Schedule 1 [1]** changes the name of the principal Act to the *Public Interest Disclosures Act 1994*.

**Other amendments**

**Schedule 1 [25]** repeals a provision that operated to remove protection for a disclosure when an investigating authority or public authority declined or discontinued investigation of the disclosure on the basis that it was frivolous or vexatious.

**Schedule 1 [5], [6], [9] and [19]** replace references to the Director-General of the Department of Local Government with a reference to the Director-General under section 429A of the *Local Government Act 1993* (to be known in the principal Act as a **local government investigating authority**) as a consequence of recent departmental amalgamations.

**Schedule 1 [3]** omits an obsolete definition.

**Schedule 1 [11]** makes a consequential amendment.

**Savings and transitional provisions**

**Schedule 1 [40]** enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act.

**Schedule 1 [41]** inserts savings and transitional provisions.

**Schedule 2 Amendment of other Acts**

**Schedule 2** amends other Acts as a consequence of the proposed change of name of the principal Act.