



New South Wales

Protected Disclosures Amendment Bill 1999

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*, so as to enhance the rights of persons (“whistleblowers”) making protected disclosures under the Act, by:

- (a) reducing the difficulty of proving that an action taken against a whistleblower may properly be characterised as a prohibited reprisal, and
- (b) requiring an investigating authority, employer or official who discloses the identity of a whistleblower to bear the onus of proof in justifying the disclosure on public interest grounds, and
- (c) enabling a whistleblower against whom reprisals have been taken, or whose identity has been unlawfully disclosed, to take legal action against the person responsible and, in a case where a public official was responsible, against the public authority that is the official’s employer.

The Bill proposes other amendments of a minor character. These are explained in detail later in this note.

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 proclaimed.

Clause 3 is a formal provision giving effect to the amendments to the *Protected Disclosures Act 1994* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Independent Commission Against Corruption Act 1988* set out in Schedule 2.

Schedule 1 Amendment of Protected Disclosures Act 1994

Object of Act

Schedule 1 [1] amends section 3 of the Act so as to state that the intent of the Act is to require promptness in the handling of matters that are the subject of a protected disclosure under the Act.

Protection against reprisals for making protected disclosure

Schedule 1 [2] amends section 20 of the Act, so as to provide that, for a court to find that an action taken to the detriment of an officer by another officer is a prohibited reprisal, it is only necessary for the court to be satisfied on the balance of probabilities that this is so. The penalty for such reprisals is also increased from 50 to 100 penalty units (current value \$11,000).

Confidentiality of disclosures

Schedule 1 [3] and **[4]** amend section 22 of the Act so as to provide that, if an officer to whom a protected disclosure is made discloses the identity of the whistleblower to some third party, the onus lies on that officer to justify the disclosure by reference to public interest.

Damages for failure to protect whistleblower or for breach of confidentiality

Schedule 1 [5] inserts a new section 22A which enables a whistleblower to take legal action if he or she has suffered loss or damage as a result of a reprisal or of the disclosure of his or her identity. The action lies against the public authority that employs a public official responsible for the breach, or against the Crown if the official is employed by the Crown, as well as against the person who actually took the prohibited action.

Notification of action taken in respect of complaint

Schedule 1 [6] amends section 27 of the Act so as to require a whistleblower to be notified without delay of the action intended to be taken in respect of the matter complained of. (The section currently requires such notice to be given within 6 months after the protected disclosure is made.)

Contracting out of the Act

Schedule 1 [7] inserts a new section 32A which prohibits contracting out of the Act. An agreement that limits the rights of a person to “blow the whistle” is, to the requisite extent, of no effect. This principle applies to an agreement to settle a litigious matter as well as to any other kind of agreement.

Schedule 2 Consequential amendment of Independent Commission Against Corruption Act 1988

Schedule 2 [1] and **[2]** amend section 8 of the Act so as to provide that a reprisal action against a whistleblower constitutes corrupt conduct, in the form of dishonesty or partiality in the exercise by an officer of his or her functions.

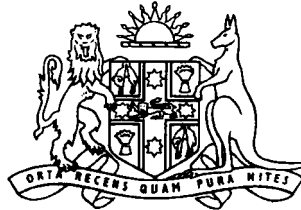


New South Wales

Protected Disclosures Amendment Bill 1999

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Protected Disclosures Act 1994 No 92	2
4 Amendment of Independent Commission Against Corruption Act 1988 No 35	2
Schedules	
1 Amendment of Protected Disclosures Act 1994	3
2 Consequential amendment of Independent Commission Against Corruption Act 1988	6



New South Wales

Protected Disclosures Amendment Bill 1999

No. , 1999

A Bill for

An Act to amend the *Protected Disclosures Act 1994* to make further provision with respect to safeguarding the rights of persons making disclosures that are protected under that Act; and to amend the *Independent Commission Against Corruption Act 1988* consequentially.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Protected Disclosures Amendment Act 1999</i> .	3
2 Commencement	4
This Act commences on a day or days to be appointed by proclamation.	5 6
3 Amendment of Protected Disclosures Act 1994 No 92	7
The <i>Protected Disclosures Act 1994</i> is amended as set out in Schedule 1.	8 9
4 Amendment of Independent Commission Against Corruption Act 1988 No 35	10 11
The <i>Independent Commission Against Corruption Act 1988</i> is amended as set out in Schedule 2.	12 13

Schedule 1	Amendment of Protected Disclosures Act	1
	1994	2
		3
	(Section 3)	4
[1]	Section 3 Object	5
	Insert “expeditiously” before “dealt with” in section 3 (1) (c).	6
		7
[2]	Section 20 Protection against reprisals	8
	Omit section 20 (1). Insert instead:	9
	(1) A person who takes detrimental action against another person	10
	is guilty of an offence if it is found, on the balance of	11
	probabilities, that the action was substantially in reprisal for a	12
	protected disclosure made by the other person.	13
		14
	Maximum penalty: 100 penalty units or imprisonment for 12	15
	months, or both.	16
[3]	Section 22 Confidentiality of disclosures	17
	Omit section 22 (c).	18
		19
[4]	Section 22	20
	Insert at the end of the section:	21
		22
	Maximum penalty: 100 penalty units or imprisonment for 12	23
	months, or both.	24
	(2) A disclosure of information in contravention of this section	25
	constitutes no offence if the authority, officer or official who	26
	made the disclosure satisfies the court that:	27
	(a) the disclosure was reasonably necessary to the effective	28
	investigation of the matter that was the subject of the	29
	protected disclosure, or was otherwise in the public	30
	interest, and	31
	(b) that the authority, officer or official took all reasonable	32
	steps to prevent further disclosure, by any person, of the	33
	information concerned.	34

[5] Section 22A	1
Insert after section 22:	2 3
22A Damages for breach of section 20 or 22	4
(1) The provisions of sections 20 and 22 impose a duty on every person to comply with those provisions for the protection of any person making a protected disclosure and of any other person who might suffer loss or damage from a contravention of those provisions, and a breach of that duty is actionable as a civil wrong.	5 6 7 8 9 10
(2) A public authority that is the employer of a public official who is guilty of a breach of duty referred to in subsection (1) is jointly and severally liable with the official concerned to answer for that breach of duty, and liable to action accordingly.	11 12 13 14
(3) An action may be brought under this section even though no prosecution has been instituted for an offence under section 20 or 22 in respect of the matter concerned.	15 16 17
(4) If, in an action under this section arising out of a breach of section 20, the damages awarded include:	18 19
(a) damages for loss of earnings in consequence of a dismissal from employment, or	20 21
(b) damages for injury, damage or loss in consequence of an assault or other actionable wrong,	22 23
the damages so awarded are to be reduced by any amount recovered, under the <i>Industrial Relations Act 1991</i> or any other Act or law, in respect of the same loss of earnings or other injury, loss or damage.	24 25 26 27
[6] Section 27 Notification to person making disclosure	28
Omit “, within 6 months of the disclosure being made,”.	29 30
Insert instead “without delay”.	31

[7] Section 32A	1
Insert after section 32:	2 3
32A No contracting out of this Act	4
(1) An agreement is void to the extent that it purports to preclude a person from:	5 6
(a) making a protected disclosure, or	7
(b) exercising any other right, or obtaining any protection or benefit, under this Act, or	8 9
(c) instituting or continuing any proceedings, claim or remedy arising from a contravention of this Act.	10 11
(2) A reference in this section to an agreement includes a reference to an agreement in settlement or compromise of any proceedings, whether brought under this or any other Act or otherwise.	12 13 14 15

Schedule 2	Consequential amendment of Independent Commission Against Corruption Act 1988	1
		2
		3
	(Section 4)	4
[1]	Section 8 General nature of corrupt conduct	5
	Insert “or of any amendment of this section” after “subsection” in section 8 (3).	6 7 8
[2]	Section 8	9
	Insert after section 8 (6):	10 11
	(7) Detrimental action, within the meaning of the <i>Protected Disclosures Act 1994</i> , taken by a public official is conduct of the kind referred to in subsection (1) (b).	12 13 14