

FIRST PRINT

WHISTLEBLOWERS PROTECTION BILL 1992

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters; and
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of disclosures of such matters; and
- (c) providing that disclosures of such matters are properly investigated and dealt with.

The Independent Commission Against Corruption Act 1988 and the Ombudsman Act 1974 confer wide powers on the Independent Commission Against Corruption and the Ombudsman to investigate possible corruption and action and inaction relating to matters of administration, respectively. The proposed Act will protect disclosures of corrupt conduct and maladministration concerning public authorities and public officials made to the ICAC and the Ombudsman by public officials in accordance with those Acts. It will also protect disclosures of substantial waste made to the Auditor-General in accordance with a new provision relating to special audit that the proposed Act will insert in the Public Finance and Audit Act 1983.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

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

Clause 3 states the object of the proposed Act.

Clause 4 defines expressions used in the proposed Act. These include:

- "investigating authority" (defined to include the ICAC, the Ombudsman and the Auditor-General)

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- "investigation Act" (defined so as to describe the Acts referred to above)
- "public authority" (defined so that it may include, for example, a government department or administrative body, a local government authority and the Police Service)
- "public official" (defined so that it may include, for example, the Governor, a public servant or a Minister of the Crown).

Clause 5 describes the relationship of the proposed Act to the investigation and other Acts. It makes it clear that it only affects the operation of the investigation Acts to the extent that it provides further protections for whistleblowers and sets out confidentiality guidelines for the investigating authorities in relation to the exercise of their functions in investigating such disclosures under those Acts.

Clause 6 states that the proposed Act binds the Crown.

PART 2—PROTECTED DISCLOSURES

Clauses 7–10 describe the disclosures that will be protected by the proposed Act. To be protected, a disclosure must be a voluntary disclosure by a public official:

- made to the appropriate investigating authority
- referred by an investigating authority to another investigating authority or to some other person or body considered by the investigating authority to be the appropriate body to deal with the matter.

A disclosure is not voluntary if it is made by a public official in the exercise of a function imposed on the official by or under an Act. For example, a disclosure made by an officer under a duty to report to the Commission under section 11 of the Independent Commission Against Corruption Act 1988 is not a voluntary disclosure.

The ICAC is specified as the appropriate authority for disclosures concerning corrupt conduct, the Ombudsman for disclosures concerning maladministration and the Auditor-General for disclosures concerning substantial waste of public money. The disclosure must be made to the authority in accordance with the procedures set out in the relevant investigating Act.

Clause 11 confirms the power of an investigating authority to decline to investigate, or discontinue the investigation, of any matter disclosed to it.

PART 3—WHISTLEBLOWER PROTECTIONS

The proposed Part describes the ways in which whistleblowers will be protected by the proposed Act.

Clause 12 protects a whistleblower against reprisals. It will be an offence to take detrimental action against a person who makes a protected disclosure in good faith if the action is substantially in reprisal for the disclosure. The provision will make it an offence, for example, to intimidate or harass such a whistleblower or take disciplinary action against the whistleblower.

Clause 13 protects a whistleblower against liability for making a protected disclosure. No action, claim or demand will be able to be made or taken against a person for making a protected disclosure. It also makes it clear that such a disclosure will be protected despite any duty of secrecy or other restriction on disclosure applicable to the

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person. This will apply to such a restriction whether or not imposed by an Act. For example, a person will not be guilty of an offence against an Act imposing a duty to maintain confidentiality on the person if the person makes a protected disclosure. Similarly, a person will not be liable in respect of any breach of a duty of confidence imposed otherwise than by an Act.

Clause 14 requires investigating authorities to maintain the confidentiality of the identity of whistleblowers as far as possible.

Clause 15 authorises investigating authorities to give directions prohibiting the publication of information disclosed by a whistleblower or indicating that a disclosure has been made.

Clause 16 preserves the protection a whistleblower may have under any other Act or law. The proposed provisions will not, for example, affect the existing defence of absolute privilege in respect of the publication of disclosures made to the ICAC in proceedings for defamation.

PART 4—MISCELLANEOUS

Clause 17 authorises an investigating authority to which a protected disclosure is made to refer the matter to another investigating authority or to any other person or body it considers appropriate.

Clauses 18–21 contain provisions relating to proceedings for offences, authorising the making of regulations, giving effect to the Schedule of amendments and providing for review of the proposed Act.

SCHEDULE 1—AMENDMENT OF OTHER ACTS

The Schedule contains amendments for the following purposes:

- to provide a right of appeal under the Government and Related Employees Appeal Tribunal Act 1980 against a decision made in reprisal against a whistleblower
 - to confer on the Auditor-General the power to conduct a special audit under the Public Finance and Audit Act 1983 of an authority (which may include a person) if a whistleblower complains that it has substantially wasted public money
 - to provide a related defence of absolute privilege under the Defamation Act 1974 for a publication made for that purpose
 - to make it a breach of discipline under the Public Sector Management Act 1988 to take reprisals against whistleblowers.
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SCHEDULE 1—AMENDMENT OF OTHER ACTS

WHISTLEBLOWERS PROTECTION BILL 1992

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No. , 1992

A BILL FOR

An Act to provide protection for whistleblowers disclosing corrupt conduct, maladministration and substantial waste in the public sector; and for related purposes.

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The Legislature of New South Wales enacts:

PART 1—PRELIMINARY

Short title

1. This Act may be cited as the Whistleblowers Protection Act 1992.

5 Commencement

2. This Act commences on a day or days to be appointed by proclamation.

Object

3. The object of this Act is to facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and substantial waste in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters; and
- 15 (b) protecting persons from reprisals that might otherwise be inflicted on them because of disclosures of such matters; and
- (c) providing that disclosures of such matters are properly investigated and dealt with.

Definitions

4. (1) In this Act:
- 20 “**Commission**” means the Independent Commission Against Corruption;
 - “**corrupt conduct**” has the meaning given to it by the Independent Commission Against Corruption Act 1988;
 - 25 “**disciplinary proceeding**” includes a disciplinary inquiry within the meaning of the Public Sector Management Act 1988;
 - “**investigate**” includes:
 - (a) inquire; and
 - (b) conduct an audit;
 - “**investigating authority**” means:
 - 30 (a) the Auditor-General; or
 - (b) the Commission; or
 - (c) the Ombudsman; or
 - (d) any other authority prescribed for the purposes of this definition;

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“investigation Act” means the Act (other than this Act) which authorises an investigating authority to carry out an investigation or take any other action in relation to a complaint or disclosure made to it;

“maladministration” is defined in section 9 (2); 5

“protected disclosure” means a disclosure made to an investigating authority in accordance with Part 2;

“public authority” means any public authority whose conduct or activities may be investigated by an investigating authority;

“public official” means any public official whose conduct and activities may be investigated by an investigating authority. 10

(2) In this Act:

(a) a reference to a function includes a reference to a power, authority and duty; and

(b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty. 15

Relationship of this Act and other Acts

5. This Act prevails, to the extent of any inconsistency, over the provisions of any investigation Act. However, nothing in this Act otherwise limits or affects the operation of any Act or the exercise of the functions conferred or imposed on an investigating authority or any other person or body under it. 20

Act binds the Crown

6. This Act binds the Crown in right of New South Wales.

PART 2—PROTECTED DISCLOSURES 25

Effect of Part

7. (1) A disclosure is protected by this Act only if it is voluntarily made by a public official:

(a) to the appropriate investigating authority specified in this Part in connection with a complaint made in accordance with the relevant investigation Act; or 30

(b) to an investigating authority and is referred by it to another investigating authority or some other person or body under Part 4.

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(2) A disclosure is not voluntarily made by a public official for the purposes of this section if it is made by the public official in the exercise of any function imposed on the public official by or under an Act.

5 (3) A disclosure is protected by this Act whether made about conduct or activities engaged in, or about matters arising, before or after the commencement of this section.

(4) A disclosure made about the conduct of a person while the person was a public official is protected by this Act even if the person involved is no longer a public official.

10 (5) In this Act, a disclosure of a kind referred to in this section is called a "**protected disclosure**".

Disclosure to ICAC concerning corrupt conduct

8. A disclosure of information that a public official suspects on reasonable grounds tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct is protected by this Act if it is made to the Commission.

Disclosure to Ombudsman concerning maladministration

9. (1) A disclosure of information that a public official suspects on reasonable grounds tends to show that in the exercise of any function relating to a matter of administration imposed on the public authority or another public official the public authority or public official has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration is protected by this Act if it is made to the Ombudsman.

25 (2) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction that is:

- (a) contrary to law; or
- (b) unreasonable, unjust, oppressive or improperly discriminatory; or
- (c) based wholly or partly on improper motives.

30 **Disclosure to Auditor-General concerning substantial waste**

10. (1) A disclosure of information that a public official suspects on reasonable grounds tends to show that an authority or officer of an authority has substantially wasted public money is protected by this Act if it is made to the Auditor-General.

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(2) In this section, “**authority**” and “**officer of an authority**” have the meanings given to those expressions in the Public Finance and Audit Act 1983.

Investigation of frivolous etc. disclosures

11. (1) An investigating authority may decline to investigate or discontinue the investigation of any matter raised by a disclosure made to it of a kind referred to in this Part if the investigating authority is of the opinion that the disclosure was made frivolously, vexatiously or not in good faith. If the investigating authority does so, the disclosure is not protected by this Act. 5
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(2) Nothing in this section limits any power the investigating authority has to investigate or discontinue the investigation of the matter under the relevant investigation Act.

PART 3—WHISTLEBLOWER PROTECTIONS

Protection against reprisals 15

12. (1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making in good faith a protected disclosure is guilty of an offence.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both. 20

(2) In this section, “**detrimental action**” includes the following:

- (a) injury, damage or loss;
- (b) intimidation or harassment;
- (c) discrimination, disadvantage or adverse treatment in relation to employment; 25
- (d) dismissal from, or prejudice in, employment;
- (e) disciplinary proceeding.

Protection against actions etc.

13. (1) 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. 30

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(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.

5 (3) The following are examples of the ways in which this section protects a whistleblower. A person who has made a protected disclosure:

- has a defence of absolute privilege in respect of the publication to the investigating authority of the disclosure in proceedings for defamation
- 10 • on whom a provision of an Act (other than this Act) imposes a duty to maintain confidentiality with respect to any information disclosed is taken not to have committed an offence against the Act
- who is subject to an obligation by way of oath, rule of law or practice to maintain confidentiality with respect to the disclosure is taken not to have breached the oath, rule of law or practice or a law
- 15 relevant to the oath, rule or practice
- is not liable to disciplinary action because of the disclosure.

(4) Nothing in this section affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

20 **Confidentiality guideline**

14. An investigating authority is not to disclose information that might identify or tend to identify a person who has made a protected disclosure unless:

- 25 (a) it is essential, having regard to rules of natural justice, that the identifying information be disclosed to a person whom the information provided by the disclosure may concern; or
- (b) the investigating authority is of the opinion that it is in the public interest to do so.

Publication of information etc.

30 15. (1) An investigating authority may direct that the following matter is not to be published or is not to be published except in such manner, and to such persons, as the investigating authority specifies:

- any information provided by a protected disclosure made to the investigating authority
- 35 • the fact that a public official has made a protected disclosure to the investigating authority.

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(2) A person is not to make a publication in contravention of a direction given under this section.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

Other protection preserved

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16. This Act does not limit the protection given by any other Act or law to a person who makes disclosures of any kind.

PART 4—MISCELLANEOUS

Referral of protected disclosure to other investigating authorities, persons and bodies

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17. (1) An investigating authority may, before or after investigating any matter as a result of a protected disclosure (whether or not the investigation is completed and whether or not it has made any findings), refer the matter for investigation or other action to another investigating authority, or any other person or body, considered by the authority to be appropriate in the circumstances.

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(2) The investigating authority referring the matter may communicate to the other authority, person or body any information the investigating authority has obtained during the investigation.

(3) The investigating authority may, when referring a matter, recommend what action should be taken by the authority, person or body concerned.

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(4) An investigating authority is not to refer a matter to another investigating authority, person or body, except after taking into consideration the views of the authority, person or body.

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(5) An investigating authority referring a matter to another investigating authority may enter into arrangements with the other authority:

(a) to avoid duplication of action; and

(b) to allow the resources of both authorities to be efficiently and economically used to take action; and

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(c) to ensure that action is taken in a manner providing the most effective result.

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Proceedings for offences

18. Proceedings for an offence against this Act are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

Regulations

- 5 19. The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Amendment of other Acts

- 10 20. The Acts specified in Schedule 1 are amended as set out in that Schedule.

Review

- 15 21. (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.

(3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

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SCHEDULE 1—AMENDMENT OF OTHER ACTS

(Sec. 20)

Defamation Act 1974 No. 18

Section 17O:

After section 17N, insert:

Matters arising under the Public Finance and Audit Act 1983

17O. There is a defence of absolute privilege for a publication to or by the Auditor-General or a member of the Auditor-General's Office as such a member of a disclosure made in relation to a complaint under section 38B (1A) of the Public Finance and Audit Act 1983.

Government and Related Employees Appeal Tribunal Act 1980 No. 39

Section 24 (**Right of appeal**):

At the end of section 24, insert:

(2) Such an appeal may be made on the ground that the decision appealed against was made substantially in reprisal for a protected disclosure within the meaning of the Whistleblowers Protection Act 1992.

Public Finance and Audit Act 1983 No. 152

Section 38B (**Special audit by Auditor-General**):

After section 38B (1), insert:

(1A) The Auditor-General may also conduct such an audit when any public official within the meaning of the Whistleblowers Protection Act 1992 complains to the Auditor-General (whether orally or in writing) that public money has been substantially wasted by an authority or an officer of an authority.

Public Sector Management Act 1988 No. 33

Section 66 (**Breaches of discipline**):

(a) After section 66 (f), insert:

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SCHEDULE 1—AMENDMENT OF OTHER ACTS—*continued*

; or

5 (g) takes any detrimental action (within the meaning of the Whistleblowers Protection Act 1992) against a person that is substantially in reprisal for the person making a protected disclosure within the meaning of that Act; or

(h) takes any disciplinary proceedings or disciplinary action against another officer that is substantially in reprisal for an internal disclosure made by that officer.

10 (b) At the end of section 66, insert:

(2) In this section, “**internal disclosure**” means a disclosure made by an officer to the appropriate Department Head regarding an alleged breach of discipline by another officer belonging to the same Department or Administrative Office as that to which the officer belongs.
