

FIRST PRINT

WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

NEW SOUTH WALES



EXPLANATORY NOTE

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

The object of this Bill is to encourage and 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 those disclosures; and
- (c) providing for those disclosures to be 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 audits that the proposed Act will insert in the Public Finance and Audit Act 1983.

The proposed Act will also protect disclosures of corrupt conduct, maladministration and substantial waste made by public officials to the principal officers of public authorities or officers constituting public authorities and to officers of public authorities in accordance with internal procedures established by the authorities for reporting such matters.

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.

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Clause 3 states the object of the proposed Act.

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

- "investigation Act" (defined to mean the Independent Commission Against Corruption Act 1988, the Ombudsman Act 1974 or the Public Finance and Audit Act 1983)
- "investigating authority" (defined to mean the ICAC, the Ombudsman or the Auditor-General)
- "maladministration" (defined to include conduct of some of the kinds that may be investigated by investigating authorities such as the Ombudsman)
- "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)
- "relevant investigation Act" (defined so as to describe the Acts referred to above).

Clause 5 describes the relationship of the proposed Act to the investigation Acts 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. The proposed Act does not authorise an investigating authority to investigate a complaint that it is not authorised to investigate under the relevant investigation Act.

Clause 6 states that the proposed Act binds the Crown.

PART 2—PROTECTED DISCLOSURES

Clauses 7–14 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 an appropriate investigating authority in connection with a complaint concerning corrupt conduct, maladministration or substantial waste
- made to the principal officer of a public authority or officer who constitutes a public authority and concern an allegation of corrupt conduct, maladministration or substantial waste by the authority or any of its officers
- made to another officer of the public authority to which the public official belongs in accordance with any internal procedure established within the authority for reporting such matters.

A disclosure will also be protected by the proposed Act if it is referred by an investigating authority or public official to whom it is made to an investigating authority or to a public official or public authority considered by the investigating authority or public official to be the appropriate person or authority to deal with the matter.

A disclosure must be made in good faith to be protected by the proposed Act.

A disclosure is not voluntary if it is made by a public official in the exercise of a duty 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

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Commission Against Corruption Act 1988 is not a voluntary disclosure.

The ICAC is specified as the appropriate investigating 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 investigation Act.

Clause 15 provides that a disclosure will not be protected by the proposed Act if the investigating authority to which it is made declines to investigate the matter or discontinues an investigation on the ground that the disclosure was made frivolously, vexatiously or not in good faith. It does not remove the protection if the authority decides not to investigate or to discontinue an investigation for some other reason (for example, a disclosure would not lose the protection if the Ombudsman decided to discontinue an investigation under section 13 (4) (b) (ii) of the Ombudsman Act 1974 on the ground that the matter was trivial or too remote in time). The clause also 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 16 protects a whistleblower against reprisals. It will be an offence to take detrimental action against a person who makes a protected disclosure 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 17 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 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 on the person to maintain confidentiality 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 18 requires investigating authorities to which protected disclosures are made or referred under the proposed Act to maintain the confidentiality of the identity of whistleblowers as far as possible.

Clause 19 makes it clear that nothing in the proposed Act affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

Clause 20 preserves the protection a whistleblower may have under any other Act or law. The provisions of the proposed Act 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.

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PART 4—MISCELLANEOUS

Clause 21 authorises an investigating authority to which a disclosure is made to refer the matter to another investigating authority or to a public official or public authority it considers appropriate. It requires the authority to do so if it is not authorised to investigate the matter under the relevant investigation Act and it is of the opinion that another investigating authority or a public official or public authority could appropriately deal with it.

Clause 22 makes similar provision in relation to public officials to whom disclosures are made.

Clauses 23–26 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 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 enable public officials to complain to the Auditor-General that an authority (which may be a person) has substantially wasted public money
 - to confer on the Auditor-General the power to conduct a special audit under the Public Finance and Audit Act 1983 of an authority if such a complaint is made
 - to provide a related defence of absolute privilege under the Defamation Act 1974 for a publication made for that purpose
 - to provide a defence of absolute privilege under the Defamation Act 1974 for a publication for the purposes of investigating a complaint made by a whistleblower to the principal officer of a public authority, an officer who constitutes a public authority or to another officer under an internal complaints procedure
 - 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 ACTS

WHISTLEBLOWERS PROTECTION BILL 1992 (No. 2)

NEW SOUTH WALES



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.

Whistleblowers Protection 1992 (No. 2)

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 encourage and facilitate the disclosure,
10 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 those disclosures; and
- (c) providing for those disclosures to be properly investigated and dealt with.

Definitions

4. 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;
 - “**detrimental action**” is defined in section 16;
 - 25 “**disciplinary proceeding**” includes a disciplinary inquiry within the meaning of the Public Sector Management Act 1988;
 - “**exercise**” of a function includes, where the function is a duty, the performance of the duty;
 - “**function**” includes power, authority or duty;
 - 30 “**investigate**” includes inquire or audit;
 - “**investigating authority**” means:
 - (a) the Auditor-General; or
 - (b) the Commission; or
 - (c) the Ombudsman;

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“investigation Act” means:

- (a) the Independent Commission Against Corruption Act 1988; or
- (b) the Ombudsman Act 1974; or
- (c) the Public Finance and Audit Act 1983;

“maladministration” is defined in section 11 (2);

5

“protected disclosure” means a disclosure satisfying the applicable requirements of Part 2;

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

“public official” means any individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority;

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“relevant investigation Act”, in relation to an investigating authority, means the Act that appoints or constitutes the investigating authority.

Relationship of this Act and other Acts

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5. (1) This Act prevails, to the extent of any inconsistency, over the provisions of any investigation Act.

(2) 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

(3) Nothing in this Act authorises an investigating authority to investigate any complaint that it is not authorised to investigate under the relevant investigation Act.

Act binds the Crown

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

PART 2—PROTECTED DISCLOSURES

Effect of Part

7. A disclosure is protected by this Act if it satisfies the applicable requirements of this Part.

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Disclosures must be made by public officials

8. (1) To be protected by this Act, a disclosure must be made by a public official:

- (a) to an investigating authority; or

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(b) to the principal officer of a public authority or officer who constitutes a public authority; or

5 (c) to another officer of the public authority to which the public official belongs in accordance with an internal procedure established by the authority for the reporting of allegations of corrupt conduct, maladministration or substantial waste of public money by the authority or any of its officers.

10 (2) A disclosure is protected by this Act even if it is made about conduct or activities engaged in, or about matters arising, before the commencement of this section.

(3) A disclosure made while a person was a public official is protected by this Act even if the person who made it is no longer a public official.

15 (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 is no longer a public official.

Disclosures must be made voluntarily and in good faith

9. (1) To be protected by this Act, a disclosure must be made voluntarily.

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

(3) To be protected by this Act, a disclosure must be made in good faith.

Disclosure to ICAC concerning corrupt conduct

25 10. To be protected by this Act, a disclosure by a public official to the Commission must:

(a) be made in accordance with the Independent Commission Against Corruption Act 1988; and

30 (b) be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.

Disclosure to Ombudsman concerning maladministration

35 11. (1) To be protected by this Act, a disclosure by a public official to the Ombudsman must:

(a) be made in accordance with the Ombudsman Act 1974; and

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(b) be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show that, in the exercise of a function relating to a matter of administration conferred or 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. 5

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

- (a) contrary to law; or 10
- (b) unreasonable, unjust, oppressive or improperly discriminatory; or
- (c) based wholly or partly on improper motives.

Disclosure to Auditor-General concerning substantial waste

12. (1) To be protected by this Act, a disclosure by a public official to the Auditor-General must: 15

- (a) be made in accordance with the Public Finance and Audit Act 1983; and
- (b) be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show that an authority or officer of an authority has substantially wasted public money. 20

(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.

Disclosures to public officials

13. (1) To be protected by this Act, a disclosure by a public official to the principal officer of a public authority or officer who constitutes a public authority must be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show corrupt conduct, maladministration or substantial waste of public money by the authority or any of its officers. 25 30

(2) To be protected by this Act, a disclosure by a public official to another officer of the public authority to which the public official belongs in accordance with an internal procedure established by the authority for the reporting of allegations of corrupt conduct, maladministration or substantial waste of public money by the authority or any of its officers must be a disclosure of information that the public official suspects on reasonable grounds shows or tends to show corrupt conduct, maladministration or substantial waste. 35

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Referred disclosures protected

14. (1) A disclosure is protected by this Act if it is made by a public official to an investigating authority and is referred (whether because it is not authorised to investigate the matter under the relevant investigation Act or otherwise) by the investigating authority under Part 4 to another investigating authority or to a public official or public authority.

(2) A disclosure is protected by this Act if it is made by a public official to another public official in accordance with section 8 (1) (b) or (c) and is referred under Part 4 by the other public official to an investigating authority or to another public official or public authority.

Frivolous and other disclosures

15. (1) An investigating authority may decline to investigate or may 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 (despite any other provision of this Part) protected by this Act.

(2) Nothing in this section limits any discretion the investigating authority has to decline to investigate or to discontinue the investigation of the matter under the relevant investigation Act.

PART 3—WHISTLEBLOWER PROTECTIONS

Protection against reprisals

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

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

(2) In this Act, “**detrimental action**” means action causing, comprising or involving any of the following:

- (a) injury, damage or loss;
- (b) intimidation or harassment;
- (c) discrimination, disadvantage or adverse treatment in relation to employment;

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- (d) dismissal from, or prejudice in, employment;
- (e) disciplinary proceeding.

Protection against actions etc.

17. (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. 5

(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) The following are examples of the ways in which this section protects a whistleblower. A person who has made a protected disclosure: 10

- has a defence of absolute privilege in respect of the publication to the investigating authority or public authority or public official concerned of the disclosure in proceedings for defamation
- 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 15
- 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 relevant to the oath, rule or practice 20
- is not liable to disciplinary action because of the disclosure.

Confidentiality guideline

18. An investigating authority, public authority or public official to whom a protected disclosure is made or referred is not to disclose information that might identify or tend to identify a person who has made the protected disclosure unless: 25

- (a) 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 30
- (b) the investigating authority, public authority or public official is of the opinion that it is necessary to investigate the matter effectively or it is otherwise in the public interest to do so.

Rights and privileges of Parliament

19. Nothing in this Act affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament. 35

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Other protection preserved

20. 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

5 Referral of disclosures by investigating authorities

21. (1) An investigating authority may refer any disclosure concerning an allegation of corrupt conduct, maladministration or substantial waste that is made to it by a public official to another investigating authority or to a public official or public authority
10 considered by the authority to be appropriate in the circumstances, for investigation or other action.

(2) The investigating authority must refer such a disclosure if:

(a) it is not authorised to investigate the matter concerned under the relevant investigation Act; and

15 (b) it is of the opinion that another investigating authority or some public official or public authority may appropriately deal with the matter concerned.

(3) A disclosure may be referred before or after the matter concerned has been investigated and whether or not any investigation of the matter
20 is complete or any findings have been made by the investigating authority.

(4) The investigating authority may communicate to the other investigating authority or to the public official or public authority any information the investigating authority has obtained during investigation
25 (if any) of the matter concerned.

(5) The investigating authority may recommend what action should be taken by the other investigating authority or the public official or public authority.

30 (6) The investigating authority is not to refer the disclosure to another investigating authority, or to a public official or public authority, except after taking into consideration the views of the authority, public official or public authority.

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

(a) to avoid duplication of action; and

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- (b) to allow the resources of both authorities to be efficiently and economically used to take action; and
- (c) to ensure that action is taken in a manner providing the most effective result.

Referral of disclosures by public officials 5

22. (1) A public official may refer any disclosure concerning an allegation of corrupt conduct, maladministration or substantial waste made to the public official under Part 2 to an investigating authority or to another public official or a public authority considered by the public official to be appropriate in the circumstances, for investigation or other action. 10

(2) The public official may communicate to the investigating authority, the other public official or the public authority any information the public official has obtained during investigation (if any) of the matter concerned.

Proceedings for offences 15

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

Regulations

24. 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. 20

Amendment of Acts

25. The Acts specified in Schedule 1 are amended as set out in that Schedule. 25

Review

26. (1) A joint committee of members of Parliament is to review this Act.

(2) The review is to be undertaken as soon as practicable after the expiration of one year after the date of assent to this Act, and after the expiration of each following period of 2 years. 30

(3) The committee is to report to both Houses of Parliament as soon as practicable after the completion of each review.

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SCHEDULE 1—AMENDMENT OF ACTS

(Sec. 25)

Defamation Act 1974 No. 18

Sections 17P, 17Q:

5 Before section 18, insert:

Matters arising under the Public Finance and Audit Act 1983

10 17P. 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.

Matters relating to the Whistleblowers Protection Act 1992

15 17Q. There is a defence of absolute privilege for a publication to or by a public official or public authority referred to in section 8 (1) (b) or (c) of the Whistleblowers Protection Act 1992 of a disclosure made to the public official or public authority in relation to an allegation of corrupt conduct, maladministration or substantial waste of public money if the publication is for the purpose of
20 investigating that allegation.

**Government and Related Employees Appeal Tribunal Act 1980
No. 39**

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

At the end of section 24, insert:

30 (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.

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SCHEDULE 1—AMENDMENT OF ACTS—*continued*

Public Finance and Audit Act 1983 No. 152

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

After section 38B (1), insert:

(1A) A public official within the meaning of the Whistleblowers Protection Act 1992 may complain 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. When a public official makes such a complaint the Auditor-General may conduct an audit under this section. 5
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Public Sector Management Act 1988 No. 33

At the end of section 66 (Breaches of discipline):

(a) At the end of section 66 (f), insert:

; or 15

(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. 20

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

(2) In this section, “internal disclosure” means a disclosure made by an officer regarding an alleged breach of discipline by another officer belonging to the same Department as that to which the officer belongs. 25
