

# PROTECTED DISCLOSURES ACT 1994 No. 92

NEW SOUTH WALES



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SCHEDULE 1—AMENDMENT OF ACTS

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**PROTECTED DISCLOSURES ACT 1994 No. 92**

NEW SOUTH WALES



**Act No. 92, 1994**

An Act to provide protection for public officials disclosing corrupt conduct, maladministration and waste in the public sector; and for related purposes. [Assented to 12 December 1994]

**The Legislature of New South Wales enacts:****PART I—PRELIMINARY****Short title**

1. This Act may be cited as the Protected Disclosures Act 1994.

**Commencement**

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

**Object**

3. (1) The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious 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.

(2) Nothing in this Act is intended to affect the proper administration and management of an investigating authority or public authority (including action that may or is required to be taken in respect of the salary, wages, conditions of employment or discipline of a public official), subject to the following:

- (a) detrimental action is not to be taken against a person if to do so would be in contravention of this Act; and
- (b) beneficial treatment is not to be given in favour of a person if the purpose (or one of the purposes) for doing so is to influence the person to make, to refrain from making, or to withdraw a disclosure.

**Definitions**

4. In this Act:

“**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 20;

**“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;

**“investigate”** includes inquire or audit;

**“investigating authority”** means:

- (a) the Auditor-General; or
- (b) the Commission; or
- (c) the Ombudsman;

**“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;

**“journalist”** means a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media;

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

**“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 a person employed under the Public Sector Management Act 1988, an employee of a local government authority or any other individual having public official functions or acting in a public official capacity, whose conduct and activities may be investigated by an investigating authority;

**“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**

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.

(3) Nothing in this Act (except section 13 (2) and (4)) authorises an investigating authority to investigate any complaint that it is not authorised to investigate under the relevant investigation Act.

#### **Act binds the Crown**

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.

#### **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
- (b) to the principal officer of a public authority or investigating authority or officer who constitutes a public authority; or
- (c) to another officer of the public authority or investigating 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 serious and substantial waste of public money by the authority or any of its officers; or
- (d) to a member of Parliament or to a journalist.

(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.

(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**

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

(2) A disclosure is not made voluntarily 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) A disclosure is made voluntarily for the purposes of this section if it is made by a public official in accordance with a code of conduct (however described) adopted by an investigating authority or public authority and setting out rules or guidelines to be observed by public officials for reporting corrupt conduct, maladministration or serious and substantial waste of public money by investigating authorities, public authorities or public officials.

#### **Disclosure to Commission concerning corrupt conduct**

**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
- (b) be a disclosure of information that 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**

**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
- (b) be a disclosure of information that shows or tends to show that, in the exercise of a function relating to a matter of administration conferred or imposed on a 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.

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

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

**Disclosure to Auditor-General concerning serious and substantial waste**

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

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

**(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 about investigating authorities**

**13. (1)** Despite section 10, a disclosure by a public official to the Commission that shows or tends to show that, in the exercise of a function relating to a matter of administration conferred or imposed on the Ombudsman, the Ombudsman or an officer of the Ombudsman has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration is protected by this Act.

**(2)** The Commission may investigate, and report, in accordance with the Independent Commission Against Corruption Act 1988 on any matter raised by a disclosure made to it that is of a kind referred to in subsection (1).

**(3)** Despite section 11, a disclosure by a public official to the Ombudsman that shows or tends to show:

- (a) that the Commission or an officer of the Commission has engaged, is engaged, or proposes to engage, in corrupt conduct; or
- (b) in the exercise of a function relating to a matter of administration conferred or imposed on the Commission, the Commission or an officer of the Commission has engaged, is engaged, or proposes to engage, in conduct of a kind that amounts to maladministration; or
- (c) that the Auditor-General or a member of the staff of the Auditor-General has seriously and substantially wasted public money,

is protected by this Act.

**(4)** The Ombudsman may investigate, and report, in accordance with the Ombudsman Act 1974 on any matter raised by a disclosure made to it that is of a kind referred to in subsection (3). For the purposes of such an



investigation the Ombudsman may engage consultants or other persons for the purpose of getting expert assistance.

(5) An investigating authority may decline to investigate or may discontinue the investigation of any matter referred to in this section.

(6) A disclosure referred to in this section is protected by this Act only if it satisfies all other applicable requirements of this Part.

### **Disclosures to public officials**

14. (1) To be protected by this Act, a disclosure by a public official to the principal officer of, or officer who constitutes, a public authority must be a disclosure of information that shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by the authority or any of its officers.

(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 serious and substantial waste of public money by the authority or any of its officers must be a disclosure of information that shows or tends to show such corrupt conduct, maladministration or serious and substantial waste.

(3) In this section:

“public authority” includes an investigating authority.

### **Referred disclosures protected**

15. (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.

### **Disclosures made on frivolous or other grounds**

16. (1) An investigating authority, or principal officer of or officer constituting a public authority, may decline to investigate or may discontinue the investigation of any matter raised by a disclosure made to the authority or officer of a kind referred to in this Part if the

investigating authority or officer is of the opinion that the disclosure was made frivolously or vexatiously.

(2) A disclosure is not (despite any other provision of this Part) protected by this Act if an investigating authority or officer declines to investigate or discontinues the investigation of a matter under this section.

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

#### **Disclosures concerning merits of government policy**

17. A disclosure made by a public official that principally involves questioning the merits of government policy is not (despite any other provision of this Part) protected by this Act.

#### **Disclosures motivated by object of avoiding disciplinary action**

18. A disclosure that is made solely or substantially with the motive of avoiding dismissal or other disciplinary action, not being disciplinary action taken in reprisal for the making of a protected disclosure, is not (despite any other provision of this Part) a protected disclosure.

#### **Disclosure to a member of Parliament or journalist**

19. (1) A disclosure by a public official to a member of Parliament, or to a journalist, is protected by this Act if the following subsections apply.

(2) The public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of this Part.

(3) The investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred:

- (a) must have decided not to investigate the matter; or
- (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made; or
- (c) must have investigated the matter but not recommended the taking of any action in respect of the matter; or
- (d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.

(4) The public official must have reasonable grounds for believing that the disclosure is substantially true.

(5) The disclosure must be substantially true.

### **PART 3—PROTECTIONS**

#### **Protection against reprisals**

**20. (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;
- (d) dismissal from, or prejudice in, employment;
- (e) disciplinary proceeding.

#### **Protection against actions etc.**

**21. (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.

(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 persons who make protected disclosures. A person who has made a protected disclosure:

- has a defence of absolute privilege in respect of the publication to the relevant investigating authority, public authority, public official, member of Parliament or journalist 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

- 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
- is not liable to disciplinary action because of the disclosure.

**Confidentiality guideline**

**22.** An investigating authority or public authority (or officer of an investigating authority or 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:

- (a) the person consents in writing to the disclosure of that information; or
- (b) 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
- (c) 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.

**Rights and privileges of Parliament**

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

**Other protection preserved**

**24.** 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 disclosures by investigating authorities**

**25. (1)** An investigating authority may refer any disclosure concerning an allegation of corrupt conduct, maladministration or serious and substantial waste that is made to it by a public official to another investigating authority or to a public official or public authority 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
  - (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 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 the investigation (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.

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

### **Referral of disclosures by public officials**

**26. (1)** A public official may refer any disclosure concerning an allegation of corrupt conduct, maladministration or serious and 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.

(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.

**Notification to person making disclosure**

27. The investigating authority, public authority or officer to whom a disclosure is made under this Act or, if the disclosure is referred, the investigating authority, public authority or officer to whom the disclosure is referred must notify the person who made the disclosure, within 6 months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

**False or misleading disclosures**

28. A public official must not, in making a disclosure to an investigating authority, public authority or public official, wilfully make any false statement to, or mislead or attempt to mislead, the investigating authority, public authority or public official.

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

**Proceedings for offences**

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

**Regulations**

30. 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 Acts**

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

**Review**

32. (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.

(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. 31)

**Defamation Act 1974 No. 18**

Sections 17Q, 17QA:

After section 17P, insert:

**Matters arising under the Public Finance and Audit Act 1983**

17Q. 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 Protected Disclosures Act 1994**

17QA. 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 Protected Disclosures Act 1994 of a disclosure made to the public official or public authority in relation to an allegation of corrupt conduct, maladministration or serious and substantial waste of public money if the publication is for the purpose of investigating that allegation.

**Freedom of Information Act 1989 No. 5**Schedule 1 (**Exempt documents**):

At the end of clause 20, insert:

; or

(d) matter relating to a protected disclosure within the meaning of the Protected Disclosures Act 1994.

**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 Protected Disclosures Act 1994.

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:

(1 A) A public official within the meaning of the Protected Disclosures Act 1994 may complain to the Auditor-General (whether orally or in writing) that public money has been seriously and 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.

**Public Sector Management Act 1988 No. 33****Section 66 (Breaches of discipline):**

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

; or

- (g) takes any detrimental action (within the meaning of the Protected Disclosures Act 1994) 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.

(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.