

Act 1994 No. 92

PROTECTED DISCLOSURES BILL 1994*

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 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.

The Independent Commission Against Corruption Act 1988 and the Ombudsman Act 1974 confer wide powers on the Independent Commission Against Corruption (“the ICAC”) 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 serious and 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 serious and substantial waste made by public officials to the principal officers of public authorities and investigating authorities or officers constituting such authorities and to officers of public authorities and investigating authorities in accordance with internal procedures established by the authorities for reporting such matters.

* Amended in committee—see table at end of volume.

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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 and makes it clear that nothing in the Act is intended to affect any action taken in connection with the proper administration or management of any investigating authority or public authority.

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. The proposed Act only affects the operation of the investigation Acts to the extent that it provides further protections for public officials making disclosures to be protected by the proposed Act. The proposed Act does not (except as provided by clause 13 (2) and (4)) 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 7–15 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 serious and substantial waste
- made to the principal officer of a public authority or officer who constitutes a public authority concerning an allegation of corrupt conduct, maladministration or serious and 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 an internal procedure established within the authority for reporting such matters.

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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 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 ICAC under section 11 of the Independent Commission Against Corruption Act 1988 is not a voluntary disclosure.

A disclosure is voluntary if it is made in accordance with a code of conduct for reporting corrupt conduct, maladministration or serious and substantial waste of money by investigating authorities, public authorities or public officials.

Clauses 10–12 specify that the ICAC is the appropriate investigating authority for disclosures concerning corrupt conduct, the Ombudsman for disclosures concerning maladministration and the Auditor-General for disclosures concerning serious and 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 13 makes additional provision for disclosures concerning corrupt conduct, maladministration or serious and substantial waste by investigating authorities. The ICAC is authorised to investigate and report on disclosures alleging that the Ombudsman or an officer of the Ombudsman has engaged in conduct involving maladministration. The Ombudsman is authorised to investigate and report on disclosures alleging that the ICAC or an officer of the ICAC has engaged in corrupt conduct or conduct involving maladministration or serious and substantial waste. The Ombudsman is also authorised to investigate and report on disclosures alleging that the Auditor-General or a member of staff of the Auditor-General has seriously and substantially wasted public money.

Clause 16 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 or vexatiously. 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.

Clause 17 provides that a disclosure will not be protected by the proposed Act if it principally involves questioning the merits of a policy decision of Cabinet or of a Minister.

Clause 18 provides that a disclosure will not be protected by the proposed Act if it is solely or substantially motivated by a desire to avoid dismissal or other disciplinary action.

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PART 3—PROTECTIONS

The proposed Part describes the ways in which public officials who make protected disclosures will be protected by the proposed Act.

Clause 19 protects a person making a protected disclosure 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 person or take disciplinary action against such a person.

Clause 20 protects a person 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 21 requires investigating authorities to which protected disclosures are made or referred under the proposed Act to maintain the confidentiality of the identity of the persons making the disclosures except in certain circumstances.

Clause 22 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 23 preserves the protection a person making a protected disclosure 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.

PART 4—MISCELLANEOUS

Clause 24 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 25 makes similar provision in relation to public officials to whom disclosures are made.

Clause 26 requires the officer or authority to whom a disclosure is made or referred to 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.

Clause 27 makes it an offence to wilfully make any false statement, or mislead or attempt to mislead the officer or authority concerned, when making a disclosure.

Clauses 28–31 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 person making a protected disclosure
 - to enable public officials to complain to the Auditor-General that an authority (which may be a person) has seriously and 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 and 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 to or by a public official or public authority of a disclosure under the proposed Act if the publication is for the purposes of investigating allegations made in the disclosure
 - to make it a breach of discipline under the Public Sector Management Act 1988 to take reprisals against persons making disclosures.
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