

Protected Disclosures Amendment (Public Interest Disclosures) Act 2010 No 84

[2010-84]



New South Wales

Status Information

Currency of version

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Note**

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Authorisation

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Protected Disclosures Amendment (Public Interest Disclosures) Act 2010 No 84



New South Wales

An Act to amend the *Protected Disclosures Act 1994* to make further provision for protecting public officials who make disclosures to which the Act applies; and for other purposes.

1 Name of Act

This Act is the *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010*.

2 Commencement

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

Schedule 1 Amendment of *Protected Disclosures Act 1994* No 92

[1]-[6] (Repealed)

[7] Section 4, definition of “principal officer”

Insert in alphabetical order:

principal officer of a public authority includes:

- (a) for the Department of the Legislative Assembly—the Clerk of the Legislative Assembly and the Speaker of the Legislative Assembly, and
- (b) for the Department of the Legislative Council—the Clerk of the Parliaments and the President of the Legislative Council, and
- (c) for the Department of Parliamentary Services—the Speaker of the Legislative Assembly, the President of the Legislative Council and the Executive Manager of the Department.

[8] Section 4, definition of “public authority”

Omit the definition. Insert instead:

public authority means any public authority whose conduct or activities may be investigated by an investigating authority, and includes (without limitation) each of the following:

- (a) a Division of the Government Service,
- (b) a State owned corporation and any subsidiary of a State owned corporation,
- (c) a local government authority,
- (d) the Police Force, PIC and PIC Inspector,
- (e) the Department of Parliamentary Services, the Department of the Legislative Assembly and the Department of the Legislative Council.

[9] Section 4, definition of “public official”

Omit the definition. Insert instead:

public official—see section 4A.

[10]-[12] (Repealed)

[13] Section 4A

Insert after section 4:

4A Public officials

- (1) In this Act, **public official** means an individual who is an employee of or otherwise in the service of a public authority, and includes (without limitation) each of the following:
- (a) a person employed under the *Public Sector Employment and Management Act 2002*,
 - (b) a member of Parliament, but not for the purposes of a disclosure made by the member,
 - (c) a person employed by either or both of the President of the Legislative Council or the Speaker of the Legislative Assembly,
 - (d) 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,
 - (e) an individual in the service of the Crown,

- (f) an individual who is engaged by a public authority under a contract to provide services to or on behalf of the public authority (referred to in this section as an ***independent contractor*** to the public authority).
- (2) An individual who is a public official because he or she is an independent contractor to the public authority is taken to belong to the public authority for the purposes of this Act.

[14] Sections 6A-6D

Insert after section 6:

6A Steering Committee

- (1) There is established by this Act a Public Interest Disclosures Steering Committee consisting of the following members:
 - (a) the Ombudsman, who is to be the chairperson of the Steering Committee,
 - (b) the Director-General of the Department of Premier and Cabinet,
 - (c) the Auditor-General,
 - (d) the Commissioner for the Independent Commission Against Corruption,
 - (e) the Commissioner for the PIC,
 - (f) the local government investigating authority,
 - (g) the Commissioner of Police,
 - (h) such other members as may be prescribed by the regulations.
- (2) The functions of the Steering Committee are:
 - (a) to provide advice to the Minister on the operation of this Act and recommendations for reform, and
 - (b) to receive, consider and provide advice to the Minister on any reports provided by the Ombudsman in the exercise of functions under section 6B or as referred to in section 31A.
- (3) A member of the Steering Committee may appoint a nominee to act in the place of the member (either generally or for a particular purpose) and may revoke any such appointment. While acting in the place of a member, the member's nominee has all the functions of the member (including the functions of chairperson in the case of the Ombudsman's nominee) and is taken to be a member.

- (4) The quorum for a meeting of the Steering Committee is 3 members of the Committee of whom 2 must be the Ombudsman and the Director-General of the Department of Premier and Cabinet (or their nominees).
- (5) The Steering Committee is to determine its own procedures.
- (6) The Ombudsman (as chairperson of the Steering Committee) is to prepare an annual report of the Steering Committee's activities and any recommendations made to the Minister during the reporting period of 12 months ending on 30 June in each year.
- (7) The annual report is to be prepared and provided to the Minister as soon as practicable after the end of the reporting period and is to be tabled by the Minister in each House of Parliament as soon as practicable after the Minister receives it.

6B Oversight of Act by Ombudsman

- (1) The Ombudsman has the following functions in connection with the operation of this Act:
 - (a) to promote public awareness and understanding of this Act and to promote the object of this Act,
 - (b) to provide information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to this Act,
 - (c) to issue guidelines and other publications for the assistance of public authorities and investigating authorities in connection with their functions under this Act,
 - (d) to issue guidelines and other publications for the assistance of public officials in connection with the protections afforded to them under this Act,
 - (e) to monitor and provide reports (**monitoring reports**) to Parliament on the exercise of functions under this Act and compliance with this Act by public authorities (other than investigating authorities in respect of their functions as investigating authorities),
 - (f) to audit and provide reports (**audit reports**) to Parliament on the exercise of functions under this Act and compliance with this Act by public authorities (other than investigating authorities in respect of their functions as investigating authorities),
 - (g) to provide reports and recommendations to the Minister about proposals for legislative and administrative changes to further the object of this Act.

Note—

The Ombudsman is also chairperson of the Steering Committee.

- (2) A monitoring report is to be provided once every 12 months. An audit report is to be provided whenever the Ombudsman considers it desirable to do so and at least once every 12 months.
- (3) The Ombudsman must, as soon as practicable after 30 June in each year, prepare and provide a report to Parliament on the Ombudsman's activities under this section for the preceding 12 months.
- (4) A report to Parliament under this section can be provided by being included in the Ombudsman's annual report under section 30 of the *Ombudsman Act 1974* or can be provided as a separate report and provided to the Presiding Officer of each House of Parliament.
- (5) Section 31AA of the *Ombudsman Act 1974* applies to a report to Parliament under this section as if the report were a report made or furnished under Part 4 of that Act.

6C Provision of information to Ombudsman for audit purposes

- (1) For the purposes of an audit under section 6B, the Ombudsman may require the principal officer of or who constitutes a public authority:
 - (a) to give the Ombudsman a statement of information, or
 - (b) to produce to the Ombudsman any document or other thing under the person's control, or the production of which the person may, in an official capacity, reasonably require, or
 - (c) to give the Ombudsman a copy of any such document.
- (2) This section does not apply to the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council.
- (3) A requirement under this section must be in writing, must specify or describe the information, document or thing required, and must fix a time and specify a place for compliance.
- (4) It is the duty of the principal officer of or who constitutes a public authority to comply with any requirement of the Ombudsman under this section.
- (5) A provision of any Act or law that prevents or restricts access to records or disclosure of information (other than section 22 or 23 of this Act) does not prevent a person from complying, or affect the person's duty to comply, with a

requirement of the Ombudsman under this section.

- (6) Anything done by a person in compliance with a requirement of the Ombudsman under this section:
- (a) does not constitute a breach of professional etiquette or ethics or a departure from accepted standards of professional conduct, and
 - (b) does not give rise to any liability for defamation or other civil liability.

6D Public interest disclosures policies and guidelines

- (1) Each public authority must have a policy that provides for its procedures for receiving, assessing and dealing with protected disclosures.
- (2) The Ombudsman may adopt guidelines for the procedures of public authorities for receiving, assessing and dealing with protected disclosures. The guidelines may include a model policy that provides for those procedures.
- (3) A public authority must have regard to (but is not bound by) the Ombudsman's guidelines in formulating a policy for the purposes of this section.

[15] (Repealed)

[16] Section 8 (1) (c1)

Insert after section 8 (1) (c):

- (c1) to the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council about the conduct of a member of Parliament, or

[17] (Repealed)

[18] Section 9A

Insert after section 9:

9A Presumptions about beliefs on which disclosures are based

- (1) For the purposes of determining whether a disclosure by a public official is protected by this Act, an assertion by the public official as to what the public official believes in connection with the disclosure is, in the absence of evidence to the contrary, evidence of the belief asserted and that the belief is an honest belief.
- (2) Such an assertion need not be express and can be inferred from the nature or content of the disclosure.

[19] Sections 10, 11, 12, 12A, 12B, 12C, 13 and 14

Omit “that shows or tends to show” wherever occurring.

Insert instead “that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show”.

[20] (Repealed)

[21] Section 12D Disclosure to Information Commissioner

Omit section 12D (b). Insert instead:

- (b) be disclosure of information that the person making the disclosure honestly believes, 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 government information contravention.

[22], [23] (Repealed)

[24] Section 14 (2A)

Insert after section 14 (2):

(2A) To be protected by this Act, a disclosure by a public official to the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council about the conduct of a member of Parliament must:

- (a) be made in accordance with any official procedure established for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by a member of Parliament, and
- (b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by a member of Parliament.

[25] (Repealed)

[26] Section 16 Disclosures made on frivolous or other grounds

Omit the section.

[27] Section 20 Protection against reprisals

Omit the penalty from section 20 (1). Insert instead:

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

[28] Section 20 (1B) and (1C)

Insert after section 20 (1A):

(1B) A public official who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is guilty of engaging in conduct that constitutes misconduct in the performance of his or her duties as a public official and that justifies the taking of disciplinary action against the public official, including disciplinary action provided for:

(a) by or under an Act that regulates the employment or service of the public official, or

(b) by or under a contract of employment or contract for services that governs the employment or engagement of the public official.

(1C) This section extends to a case where the person who takes the detrimental action does so because the person believes or suspects that the other person made or may have made a protected disclosure even if the other person did not in fact make a protected disclosure.

[29] Section 20 (4)

Insert after section 20 (3):

(4) An investigating authority or public authority must refer any evidence of an offence under this section to the Director of Public Prosecutions or (if the alleged offence relates to conduct of the Director of Public Prosecutions) the Attorney General.

[30] Sections 20A and 20B

Insert after section 20:

20A Compensation for reprisals

(1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a protected disclosure is liable in damages for any loss that the other person suffers as a result of that detrimental action.

(2) This section extends to a case where the person who takes the detrimental action does so because the person believes or suspects that the other person made or may have made a protected disclosure even if the other person did not in fact make a protected disclosure.

- (3) Damages recoverable under this section do not include exemplary or punitive damages or damages in the nature of aggravated damages.
- (4) An entitlement to damages arising under this section does not constitute redress in relation to detrimental action comprising dismissal from employment, for the purposes of section 90 (Effect of availability of other remedies) of the *Industrial Relations Act 1996* or any other law.

20B Injunctions to prevent reprisals

- (1) An investigating authority, or any other public authority with the approval of the Attorney General, may apply to the Supreme Court for an injunction to prevent a contravention of section 20 (Protection against reprisals).
- (2) The Supreme Court may, on application under this section, grant an injunction restraining a person from engaging in conduct in which the person has engaged, is engaged or is proposing to engage and that constituted, constitutes or would constitute a contravention of section 20, and, if in the opinion of the Supreme Court it is desirable to do so, requiring that person to do any act or thing to remedy such a contravention.
- (3) The Court may grant an interim injunction pending determination of an application under this section if the Court thinks it is desirable to do so.
- (4) The Court may discharge or vary an injunction granted under this section.
- (5) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind, and
 - (b) whether or not the person has previously engaged in conduct of that kind, and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (6) The Court must not require an applicant for an injunction under this section or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.

[31] Section 22 Confidentiality guidelines

Omit section 22 (a). Insert instead:

- (a) the person consents in writing to the disclosure of that information, or it is generally

known that the person has made the protected disclosure as a result of the person having voluntarily identified themselves (otherwise than by making the protected disclosure) as the person who made the protected disclosure, or

[32] Section 22 (2)

Insert at the end of section 22:

- (2) As part of its procedures for receiving, assessing and dealing with protected disclosures, a public authority must establish procedures for ensuring that a public official who belongs to the public authority maintains confidentiality in connection with a protected disclosure made by the public official.

Note—

These procedures are required to be the subject of a policy of the public authority under section 6D.

[33]-[38] (Repealed)

[39] Sections 31-31B

Insert after section 30:

31 Reports to Parliament by public authorities

- (1) Each public authority must, within 4 months after the end of each reporting year, prepare an annual report on the public authority's obligations under this Act for submission to the Minister responsible for the public authority. A copy of the report is to be provided to the Ombudsman.
- (2) An annual report under this section must be tabled in each House of Parliament by the relevant Minister as soon as practicable after it is prepared unless it is included in an annual report prepared for the purposes of the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1984*.
- (3) The regulations may make provision for or with respect to:
 - (a) the information to be included in annual reports, and
 - (b) the form in which annual reports are to be prepared.
- (4) In this section, a reference to the reporting year of a public authority is a reference to:
 - (a) the financial year of the public authority for the purposes of the *Annual Reports (Departments) Act 1985* or the *Annual Reports (Statutory Bodies) Act 1984*, or
 - (b) if the public authority does not have a financial year for the purposes of

either of those Acts, the year ending 30 June.

31A Special report by Ombudsman

- (1) The power of the Ombudsman to make a special report under section 31 (Special report to Parliament) of the *Ombudsman Act 1974* extends to the making of a special report on any matter arising in connection with the discharge of the Ombudsman's functions under or in connection with the operation of this Act, including systemic or other problems identified by the Ombudsman in connection with the operation of this Act.
- (2) A special report can include proposals for legislative change.
- (3) The Minister must table in each House of Parliament a response to any special report of the Ombudsman made pursuant to this section. The Minister's response to a special report must address each proposal for legislative change included in the report.

Note—

The requirements of the *Ombudsman Act 1974* apply in respect of a special report under section 31 of that Act on matters arising under this Act.

31B Review of Commonwealth legislation

- (1) The Steering Committee is to review any legislation of the Commonwealth that is enacted in response to the 2009 report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* of the House of Representatives Standing Committee on Legal and Constitutional Affairs.
- (2) The review is to be conducted within 6 months after the enactment of the Commonwealth legislation (or within 6 months after the commencement of this section if the Commonwealth legislation is enacted before the commencement of this section).
- (3) The Steering Committee is to provide the Minister with a report on the outcome of the review and any recommendations for reform of this Act arising from the review.
- (4) A copy of the Steering Committee's report is to be tabled in each House of Parliament as soon as practicable after the report is provided to the Minister.

[40]-[43] (Repealed)

Schedule 2 (Repealed)