

WHISTLEBLOWERS PROTECTION BILL 2002

CLAUSE NOTES

This Bill promotes accountability within government agencies and organisations by facilitating the disclosure of public interest information involving misconduct, offences, misuse of public resources or risks to public health or safety. The legislation will protect whistleblowers who make public interest disclosures to appropriate authorities. Agencies will be required to investigate disclosures, take any necessary action, keep the whistleblower informed regarding the progress and outcome of the investigation and report to the Commissioner for Public Sector Standards. The Commissioner will report annually to Parliament.

1. Short Title

Citation of the Act.

2. Commencement

Clause 2 makes provision for the commencement of the Act, on a date or dates to be set by proclamation.

3. Interpretation

Clause 3 defines the terms used in the Bill. Of particular note are the following terms:

“public authority”— The definition of public authorities is defined by reference to specific entities including: public sector departments; SES organisations (such as TAFE Colleges, the Disability Services Commission, Government Employees Superannuation Board, and the Fire and Emergency Services Board); non SES organizations (such as the Building and Construction Industry Training Board). This list can be added to by regulation.

“public interest information” — The Bill provides for the disclosure of public interest information. This is information which tends to show that a public authority, public officer or public sector contractor is, has been, or proposes to be involved in: improper conduct; an offence; a risk to public health, public safety or the environment; or a matter of administration that can be investigated by the Parliamentary Commissioner under section 14 of the *Parliamentary Commissioner Act 1971*.

Section 14 of that Act provides that the Parliamentary Commissioner shall investigate any decision, recommendation or act that relates to matters of administration which affects any person or body by a Department or authority to which the *Parliamentary Commissioner Act 1971* applies in the exercise of any power or function.

A disclosure of public interest information can be made relating to circumstances which occurred before or after the commencement of the Bill.

“public officer” —The definition of public officer is defined by reference to specific positions and includes Members of Parliaments, judicial officers, public service officers and police officers.

“public sector contractor” — The definition of public sector contractor includes subcontractors or employees of a contractor.

Public interest disclosures (which relate to the performance of a public function) can be made in relation to contractors who contract to provide goods or services to or on behalf of the State, or perform a public function.

4. Application to the Crown

This clause indicates this legislation will bind the State.

5. Public Interest Disclosures

Any person, not only public officers, may make a public interest disclosure to a proper authority. This clause indicates how a whistleblower may make a public interest disclosure.

To assist whistleblowers, the clause lists the agencies to which a whistleblower can make a public interest disclosure and designates specific agencies depending upon the nature of the public interest disclosure.

To make an appropriate disclosure, which will receive protection under the Bill, the whistleblower must believe on reasonable grounds that the disclosure is true or may be true. This is an objective test.

Sub-clause 5(3) provides that public interest disclosures should be made to authorities who have responsibility for investigating particular types of disclosures (Police, Anti-Corruption Commission, Auditor General, Parliamentary Commissioner, Commissioner for Public Sector Standards) or who have responsibility for the officer or the subject matter of the disclosure.

The Ombudsman or the Commissioner of Public Sector Standards will be a proper authority to receive public interest disclosures in relation to most public officers, except a Member of Parliament, a Minister of the Crown, a judicial officer or an officer referred to in Schedule 1 of the *Parliamentary Commissioner Act 1971*. Schedule 1 of that Act includes such offices as the Anti-Corruption Commission, Commissioner for Public Sector Standards, the Director of Public Prosecutions, Information Commissioner, Parliamentary Commissioner, and the Solicitor General. Disclosures relating to staff within these offices will be able to be investigated by the office concerned, the Commissioner for Public Sector Standards or the Parliamentary Commissioner.

Sub-clause 5(3) provides for whistleblowers to make disclosures to the Commissioner for Public Sector Standards or Parliamentary Commissioner. Such disclosure might be made where the responsible agency refuses to, or does not adequately, investigate the matter, or where the disclosure might otherwise go to a person who is the subject of the allegation.

6. Liability of person disclosing unaffected

This clause provides that a whistleblower remains liable in relation to matters to which interest disclosure relates. For example, if the whistleblower was involved in improper conduct which is the subject of the disclosure, the making of the disclosure does not affect the whistleblower's liability.

Division 2 — Obligations of a person to whom a disclosure is made

7. Interpretation

This clause indicates that the proper authority to whom a disclosure was made is bound by the obligations in clauses 8, 9 and 10. However, the Chief Justice and the Presiding Officers of Parliament are exempt from these obligations to investigate disclosures, to take action where a person may have been involved in a matter that may be the subject of a disclosure, or to notify the informant of the action taken.

8. Obligation to carry out investigation

This clause requires proper authorities to investigate information disclosed to it, if it relates to the authority, a public officer or public sector contractor of the authority or a matter that the authority has a function or power to investigate. However, it does not impose an obligation on independent authorities such as the Ombudsman or the Commissioner for Public Sector Standards, in circumstances where they would not otherwise have an obligation to investigate the matter.

The Bill does not provide agencies, including independent authorities, with any additional powers to investigate public interest disclosures.

This clause allows agencies to refuse to investigate matters where the disclosure lacks substance, is not a matter of public interest, relates to a matter where there is no reasonable prospect of obtaining sufficient evidence due to the elapse of time or involves multiple disclosures to more than one agency.

This clause requires whistleblowers to be informed by the proper authority of the reason for not investigating a public interest disclosure.

9. Action by proper authority

This clause requires proper authorities to take appropriate action to prevent the continuation or re-occurrence of matters which are the subject of a public interest disclosure.

The clause gives the person the subject of the public interest disclosure an opportunity to respond to the matter.

10. Informant to be notified of action taken

This clause provides that within three months of making a public interest disclosure, the whistleblower must be notified of the action taken or to be taken in relation to that disclosure. Such notification can include whether or not the proper authority intends to investigate the matter and progress reports on the investigation. Also, on completion of the investigation there must be a final report on the outcome of the investigation, any action taken or to be taken by the proper authority, and the reasons for the action.

11. Limitation on notification of informant

This clause provides that when notifying the whistleblower pursuant to clause 10, the proper authority is not to provide information if it would adversely affect any persons safety, the investigation of offences or confidentiality of another whistleblowers identity.

Information which cannot be published under section 54 of the *Anti-Corruption Commission Act 1988* cannot be provided to a whistleblower under this Bill. Section 54 of that Act provides that a person is not to publish or cause to be published the fact that the ACC has received or initiated, or any details of, any information or allegation received by the Commissioner in accordance with its Act.

12. Obligations under this Act of certain persons limited

This clause ensures that progress reports will be made to whistleblowers pursuant to clause 10. However, where other legislation provides for progress reports to be provided to whistleblowers, this Bill does not override those Acts.

This clause exempts the ACC and the Ombudsman from having to comply with obligations in clauses 8, 9 and 10 of the Bill, relating to requirements to investigate, take action and notifying the whistleblower, if these offices are already required to investigate these matters.

This clause provides that if a disclosure is made under this Bill to the ACC, section 25 of the *Anti-Corruption Commission Act 1988* applies as if the disclosure were the making of an allegation under that Act. Section 25 of that Act provides that the ACC may inform a person who has made an allegation as to the outcome or further action carried out by the Commission or an appropriate authority if the person requests the information, and the ACC considers it reasonable in the circumstances to give the information.

Similarly, if a disclosure is made under this Bill to the Parliamentary Commissioner, section 26 of the *Parliamentary Commissioner Act 1971* applies as if the disclosure were the making of a complaint under that Act. Section 26 provides that where the Commissioner conducts an investigation, the Commissioner shall inform the complainant of the results of the investigation, the progress made in the investigation, recommendations made and any comments the Commissioner thinks proper.

Additionally, where a person is declared by Regulations under this Bill to be a proper authority, and the disclosure relates to a matter which the declared person has a function to investigate, obligations under this Bill relating to carrying out an investigation and taking action, do not apply. If the declared person has an obligation under another Act to make a progress report that report is to be made in accordance with that other law. Otherwise, the progress report must be made under clause 10.

Part 3 — Protection

13. Immunity for appropriate disclosure of public interest information

This clause provides immunity from civil, criminal or disciplinary action to whistleblowers who make a public interest disclosure in accordance with the Bill.

14. Reprisal an offence

This clause creates an offence of taking detrimental action against a person because a public interest disclosure has been, or will be, made with a maximum fine of \$24,000 or imprisonment for 2 years.

Attempting to take reprisal action, or inciting another person to do so, is also an offence with the same penalty.

15. Remedies for acts of victimisation

This clause creates an action in tort for taking or threatening to take detrimental action because a person has made, or intends to make, a disclosure under this legislation. Civil proceedings may be commenced against the person who took the detrimental action or their employer.

This clause provides specific defences for employers in victimization proceedings.

The person who is the subject of the alleged victimization may choose to commence proceedings in a court or have the matter dealt with by a complaint under section 67 of the *Equal Opportunity Act 1984* (WA).

Section 67 of that Act provides that it is unlawful for a person to subject or threaten another person to any detriment on the ground that:

- the person victimized proposes to take actions under that Act (such as making a complaint, bringing proceedings against a victimiser, proposing to furnish information, making an allegation that someone has done an act that is unlawful under that Act); or
- the victimiser believes that the person victimised has done or proposes to take one of these actions.

A person cannot commence proceedings in both a court and by way of a complaint under the *Equal Opportunity Act 1984*.

The Commissioner for Equal Opportunity need not act on a victimization complaint, if the Commissioner believes the complaint has already been adequately dealt with.

Proceeding under clause 15(1) may only be commenced in relation to victimization which occurs after the commencement of the Act.

16. Confidentiality

This clause protects whistleblowers by creating an offence of disclosing their identity with a maximum penalty of a \$24,000 fine or imprisonment for 2 years. There are some specific exceptions including where the *Anti-Corruption Commission Act 1988* places

an obligation on the ACC or other authorities to make a disclosure. Relevant obligations of that Act are:

- Section 12 which provides that the ACC is for example, to consult, co-operate and exchange information with other agencies, furnish evidence to independent agencies and authorities.
- Section 22 which provides that the ACC should refer allegations by forwarding a report where it believes further action should be taken by another agency or authority.
- Part II Division 6 which deals with disclosures to Parliament or Ministers on specific matters.
- Sections 14 and 15 which place obligations on certain authorities to report corrupt conduct, criminal conduct, criminal involvement or serious improper conduct to the ACC.

There are some circumstances where the whistleblower's identity can be disclosed for the purposes of natural justice or effective investigation, however, before releasing information that might identify the whistleblower, the authority must take reasonable steps to advise the whistleblower of that release and the reasons for such release.

Also, this clause protects the person who is the subject of the disclosure. It does so by creating an offence of disclosing their identity with a maximum penalty of a \$24,000 fine or imprisonment for 2 years. There are some specific exceptions. For example, where the *Anti-Corruption Commission Act 1988* places an obligation on the ACC or other authorities to make a disclosure. The relevant sections of that Act are set out above.

17. Loss of protection of the Act

This clause indicates the circumstances in which a whistleblower will no longer retain the protection provided by section 13 of the Bill. Those circumstances involve the whistleblower failing to assist in the investigation or disclosing information contained in the public interest disclosure outside the provisions of the Bill. This could, for example, involve disclosing information to the media.

Part 4 — Role of Commissioner for Public Sector Standards

18. Interpretation

This clause indicates that for the purposes of Part 4 the Chief Justice and the Presiding Officers of Parliament are not proper authorities.

19. Promoting compliance with this Act

The clause makes the Commissioner for Public Sector Standards responsible for monitoring compliance with the Bill and Code, and assisting agencies to comply with the Bill and Code.

20. Code

This clause provides that the Commissioner for Public Sector Standards must establish a Code setting out minimum standards of conduct and integrity to be complied with by agencies. In developing the Code, the Commissioner for Public Sector Standards is to

take into account the statutory independence of authorities, such as the Auditor General or ACC.

Section 42 of the *Interpretation Act 1984* (which relates to the laying of rules, local laws and by-laws before Parliament, and disallowance), applies as if the Code were regulations. An amendment, or repeal and replacement, of a Code is also subject to section 42 of that Act.

21. Guidelines

This clause requires the Commissioner for Public Sector Standards to prepare guidelines to be complied with in relation to the functions of proper authorities. These guidelines can deal with matters such as processes for dealing with referrals, record keeping, referral between authorities, and joint action by authorities.

22. Annual report and other reports to Parliament

The Commissioner for Public Sector Standards must report annually to Parliament on the Commissioner's obligations and on agencies' compliance with the Bill and Code. Public authorities must, under clause 23(1)(f), supply this information annually to the Commissioner. Therefore, the Commissioner for Public Sector Standards will be able to provide a comprehensive report to Parliament. In addition, the Commissioner for Public Sector Standards will be able to report to Parliament at any time.

23. Obligations of principal executive officers of public authorities

The clause places obligations on principal executive officers of public authorities to ensure that public authorities comply with the Bill and Code. For example, there is an obligation to provide protection to whistleblowers from detrimental action.

Also, there is an obligation on principal executive officers' to appoint one or more persons to receive disclosures. This does not prevent the principal executive officers of Boards or authorities nominating themselves.

Additionally, principal executive officers must report annually to the Commissioner for Public Sector Standards in relation to disclosures.

24. Offence to make false or misleading disclosure

This clause creates an offence of knowingly making a false or misleading disclosure with a maximum penalty of a \$12,000 fine or one year imprisonment.

25. Other laws not excluded

This clause provides that the protection given by this Bill is in addition to, and does not derogate from, existing privileges, protection or immunities.

26. Regulations

This clause enables the Governor to make regulations.

27. Consequential and miscellaneous amendments

This clause provides for the Acts specified in Schedule 1 to be amended.

Schedule 1 — Consequential and miscellaneous amendments

1. Amendment of *Freedom of Information Act 1992*

This provision will ensure that public interest disclosures made under the Bill are exempt under the *Freedom of Information Act 1992* (WA) where the disclosure identifies the whistleblower or the subject of the disclosure.

2. Amendment of *Prisons Act 1981*

This provision amends section 98(1) of the *Prisons Act 1981* (WA) by creating a disciplinary offence of committing an act of victimisation under the Bill.

3. Amendment of *Public Sector Management Act 1994*

This provision amends section 80 of the *Public Sector Management Act 1994* (WA) by making committing an act of victimisation under the Bill a breach of discipline.