WHISTLEBLOWERS PROTECTION BILL 1994

EXPLANATORY NOTE

GENERAL OUTLINE

Objectives of the legislation

The objective of the Whistleblowers Protection Bill is to enhance the legal protections for public officers and, in certain circumstances other persons, who expose wrongdoing.

Reasons why the proposed legislation is necessary

In 1989 the Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report) recommended that legal protection be given to honest public officials who expose wrongdoing. The Fitzgerald Report proposed that the Electoral and Administrative Review Commission (EARC) undertake a review of possible whistleblower protection legislation in Queensland.

EARC presented its Report on Protection of Whistleblowers (Serial No 91/R4) in October 1991. EARC re-affirmed the conclusion of the Fitzgerald Report that the public interest requires special protection for public officials who expose wrongdoing in the workplace. The EARC report recommended that comprehensive whistleblower protection legislation be enacted to improve the protections available to whistleblowers in Queensland.

General description of proposed Whistleblowers Protection Scheme

The Whistleblowers Protection Bill 1994 (the Bill) protects whistleblower disclosures by public officers and, in certain circumstances,

by other persons including private sector employees. This Note examines firstly how the Bill applies to public officers and then explains how the legislation applies to private sector employees.

1. Application of the scheme to public officers

Types of public interest disclosures that can be made by public officers

The Bill protects a public officer who makes a disclosure (described in the Bill as a "public interest disclosure") of information about:

- official misconduct (clause15); or
- maladministration by a public sector entity which adversely affects a person's interests in a substantial and specific way (clause 16). ("Maladministration" is defined as administrative action that is unlawful, or arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose); or
- negligent or improper management by a public officer, public sector entity or a government contractor resulting or likely to result in a substantial waste of public funds (clause 17); or
- conduct by another public officer, or by anyone, causing a substantial and specific danger to public health or safety or to the environment (clause 18).

As defined in the Bill's Dictionary , the term "public officer" covers a wide range of public officials. "Public officer" means any constituent member or employee (whether permanent or temporary) of a public sector entity in Queensland. "Public sector entity" (defined in Schedule 5) includes:

- a Parliamentary committee;
- the Parliamentary Service Commission;
- a court, tribunal or commission of inquiry;
- the administrative offices of courts and tribunals;
- the Executive Council;
- statutory authorities, instrumentalities and commissions (this includes the Queensland Police Service, the Parliamentary Commissioner for Administrative Investigations (Ombudsman),

the Queensland Audit Office, the Criminal Justice Commission (CJC), the Corrective Services Commission, the Public Sector Management Commission, a Regional Health Authority, and the Queensland Heritage Council);

- all departments;
- universities, TAFE colleges and agricultural colleges; and
- local authorities.

Disclosures can be made to any appropriate authority

The Bill gives a public officer the legal right to make a public interest disclosure to any public sector entity that is an "appropriate entity" to receive the disclosure under clause 26. Under the Bill, a public sector entity is an "appropriate entity" if:

- the disclosure concerns the conduct of the entity or its staff; or
- the entity otherwise has authority to investigate the disclosure; or
- the person making the disclosure has an honest belief that the entity is an appropriate entity to receive the disclosure.

If a public sector entity receives a disclosure which concerns conduct that another public sector entity may investigate, the public sector entity is given a discretion to refer the disclosure to the other authority (clause 28). A disclosure referred from one entity to another entity in this way continues to receive the protections of the Act.

The Bill does not require public sector entities to establish special procedures for receiving disclosures, however, the whistleblower is required to use any reasonable procedures that are established by the entity (sub clause 27(2)).

Internal disclosures by Public officers

Where a public officer has information about wrongdoing within his or her own public sector entity of a kind mentioned in clauses 15-20, clause 26 permits the officer to disclose the information to their own public sector entity, if the disclosure concerns the conduct of the entity or that of its staff. The officer can also disclose the information to any external public sector entity empowered to investigate or remedy the conduct. Depending on the

conduct, such external authority could include a Parliamentary committee, the CJC, the Queensland Police, the Queensland Audit Office, the Ombudsman, a Regional Health Authority, the Queensland Heritage Council and a range of other investigatory bodies.

For those officers who choose to use external channels, the Bill does not require them to first disclose their concerns internally. Clearly, it is in the interests of good management to encourage staff to use internal reporting procedures where appropriate and, to reinforce this, the Bill places a duty on public sector entities to protect their staff who make complaints to them. However, the protections in the legislation for external disclosures are not dependent on the whistleblower having first used, or attempted to use, internal channels. (An exception is made in the case of statutory GOCs where the legislation protects employee disclosures made to management but not to external authorities other than the CJC. See section of Explanatory Note below dealing with how the Bill affects GOCs).

Where a public officer discloses information internally, sub clause 27(3) ensures that the officer always has a right, notwithstanding any disclosure procedures that might be established by the entity, to disclose the information to:

- a supervising officer; or
- the chief executive officer; or
- another officer of the entity with authority to receive or take action on the information disclosed (for example, the internal auditor if the disclosure is about mismanagement of funds).

The following examples illustrate how the legislation would protect internal and external disclosures by public officers by reference to a hypothetical case involving a hospital finance clerk who discloses financial mismanagement by the hospital:

> Example 1
>
> A finance clerk in a public hospital (“Ms A”) has information about negligent management practices by the hospital resulting in substantial loss of public funds. Ms A discloses the information to her supervisor, the hospital’s chief accountant. Ms A’s internal disclosure is protected as the disclosure is about the conduct of the hospital and Ms A has a right to make the disclosure to any supervising officer.

Example 2

Ms A has information about negligent management practices by the hospital resulting in substantial loss of public funds. Ms A discloses the information to the regional director of the regional health authority. Ms A's internal disclosure to the regional director is protected as the disclosure is about the conduct of the hospital (which is under the control of the regional health authority) and Ms A has a right to make the disclosure to the regional director as the chief executive officer.

Example 3

Ms A has information about negligent management practices by the hospital resulting in substantial loss of public funds. Ms A discloses the wrongdoing to the external auditor from the Queensland Audit Office (QAO). Ms A's external disclosure to the QAO is protected as it concerns conduct which may be investigated by the QAO which is an appropriate entity to receive disclosures of this type.

Example 4

Hospital management and Ms A are called to appear before the Parliamentary Public Accounts Committee (PAC) which is inquiring into findings of mismanagement by the hospital made in a report of the Auditor-General. In the course of the public hearings, Ms A discloses negligent management practices by the hospital which have resulted in a substantial waste of public funds. Ms A's external disclosure is protected as it concerns conduct which may be investigated by the PAC which is an appropriate entity to receive disclosures of this type.

Example 5

Ms A has information about improper management practices by the hospital resulting in substantial loss of public funds. Ms A chooses to take the information directly to the CJC as the improper conduct involves official misconduct. Ms A's external disclosure is protected as it concerns conduct which may be investigated by the CJC which is an appropriate entity to receive disclosures of this type.

Confidentiality obligations

The Bill does not confer statutory protection on public interest disclosures made to the media. The intention of the legislation is to ensure that disclosures are made to agencies that can take appropriate action on the information disclosed. Disclosures to the media would not necessarily further this objective and could engender unwarranted damage to reputations of persons named or implicated in disclosures.

By their nature, whistleblower disclosures tend to reflect adversely on the reputations of others. Under the Bill, to qualify for protection the whistleblower will have to demonstrate that they had a honest belief on reasonable grounds that the information they disclosed showed the wrongdoing in question (sub clause 14(2)). However, it will not be necessary to show that the disclosure was objectively true. This may mean that information unfairly damaging to reputations may be disclosed by a whistleblower who has a reasonable belief that the information was accurate but which, on investigation, turns out to be inaccurate. Provided that the information was made honestly on reasonable grounds, individuals named or referred to in the disclosure will have no recourse through defamation proceedings or other legal action which could otherwise be taken against the whistleblower.

The legislation endeavours to minimise unwarranted public damage to reputations by requiring disclosures to be made to entities with the power to investigate the complaint in accordance with established Parliamentary, legal or administrative process. Secondly, it imposes a duty on the investigating authority not to disclose confidential information received in a disclosure, including the identity of the whistleblower and the identity of a person against whom the disclosure has been made (clause 55).

However, the appropriate entity is authorised to disclose confidential information for the purpose of carrying out a lawful function, including investigation of the disclosure, and to disclose the information to a court or tribunal, e.g. for the purpose of criminal or disciplinary proceedings (sub clause 55(3)).

Where required by the rules of natural justice, the entity may advise the person or persons against whom the disclosure was made of the contents of a disclosure. The identity of the whistleblower cannot be revealed to such persons unless it is essential to do so in accordance with the law of natural justice and it is unlikely that the whistleblower will be victimised as a result (sub clauses 55 (4)-(5)).

Application of confidentiality obligations to disclosures made publicly to appropriate entities

The Bill recognises that from time to time public interest disclosures are made in public proceedings of a Parliamentary committee, a commission of inquiry, the CJC, a court or tribunal, or other public authority authorised to take evidence in public proceedings. Such public disclosures are protected by the legislation.

In respect of such disclosures, the obligation to preserve confidentiality will not apply except where further disclosure of the information is prohibited by the entity in accordance with its lawful powers and obligations (sub clause 55(7)). For example, the CJC has lawful authority to prohibit publication of evidence given to the Commission on the grounds that publication would be unfair to a person or contrary to the public interest. These powers are provided not to "cover up" wrongdoing but to ensure that the rights of all persons affected by allegations of wrongdoing are properly protected during investigations.

Protections for public officers who make disclosures

The Bill provides a very wide range of legal protections, sanctions and remedies to safeguard public officers who make public interest disclosures under the Act. These are listed and discussed below.

Limitation of Action (clauses 39-40)

A public officer will incur no civil or criminal liability for making a public interest disclosure and will have absolute privilege in defamation proceedings and immunity from prosecution for breach of secrecy obligations.

Unlawful Reprisal (clause 41)

The Bill makes it unlawful for a person to cause detriment to another person because, or in the belief that, the person has made or may make a public interest disclosure. The Bill's Dictionary defines "detriment" as:

(a) personal injury or prejudice to safety; and

(b) property damage or loss, and

(c) intimidation or harassment; and

(d) adverse discrimination, disadvantage or adverse treatment about

career, profession, employment, trade or business; and

(e) threats of detriment; and

(f) financial loss from detriment.

Under clause 41 a person who causes detriment in retaliation for whistleblowing is considered to have taken an unlawful "reprisal".

The Bill recognises that, particularly in the employment context, action detrimental to a person may be taken for more than one reason. The Bill provides that the action is a reprisal (and therefore unlawful) if the retaliation for whistleblowing played a substantial part in the action. However, it will not be necessary to prove that the reprisal resulted solely from a desire to retaliate against the whistleblower for making a disclosure.

The proposed test for a reprisal will apply to all proceedings under the Whistleblowers Protection Act where it is relevant to prove that a reprisal has occurred or is likely to occur. In respect of proceedings for the proposed criminal offence of reprisal (see below), it would necessary to apply the normal criminal standard—that is it would necessary to prove beyond reasonable doubt that retaliation for whistleblowing was a substantial ground for the detrimental action. In order to establish a cause of action for damages or for injunctive relief (see below), it would be necessary to prove on the balance of probabilities that retaliation for whistleblowing was or is a substantial ground for the detriment or likely detriment—ie. the normal civil standard of proof would apply.

Criminal Offence of Reprisal (clause 42)

The Bill establishes that a public officer who takes a reprisal commits a criminal offence attracting a maximum penalty of $10,020 or 2 years imprisonment (clause 42) and is also guilty of misconduct and may be dismissed from office or otherwise disciplined (clause 57).

The commission of the criminal offence of reprisal, and the disciplinary offence of reprisal sufficient to warrant an officer's dismissal, would constitute "official misconduct" within the meaning of s.32 of the Criminal Justice Act. Under the Criminal Justice Act, principal officers of public sector entities who are covered by that Act will therefore have an obligation to refer complaints of reprisal to the CJC (subject to any procedures established by the Commission for referral of suspected official misconduct).

To facilitate investigation of reprisals, the Bill contains a public interest

disclosure category designed to protect public officers who disclose reprisals against them or other persons (clause 20). Under clause 26 such disclosures may be made to any public sector entity where:

- the disclosure concerns the conduct of the entity or its staff; or
- the entity otherwise has authority to investigate the disclosure; or
- the disclosure concerns an alleged reprisal resulting from an initial public interest disclosure made to the entity; or
- the person making the disclosure has an honest belief that the entity is an appropriate entity to receive the disclosure.

A public officer will therefore have the choice of disclosing the conduct to his or own agency (if the disclosure concerns the conduct of the agency or its staff or the agency can otherwise investigate the complaint) or to an appropriate external body including the CJC.

Damages Entitlement (clause 43)

The Bill provides that a public officer who suffers a reprisal will have a right to apply to a civil court for damages including damages for pain and suffering. (This right will be separate and additional to the whistleblower's right to seek compensation for loss of income from the Industrial Relations Commission if they are dismissed for whistleblowing—see below).

A limitation on this right is that the Bill requires that if a claim for damages goes to trial it must be decided by a judge without a jury. Judges are likely to be better placed to determine the public interest in assessing the extent of liability, including the effect on employers should excessive damages claims be upheld. However, the Bill places no statutory limitation on any amount that may be awarded by a trial judge.

Employee Appeals (clause 45)

Certain public officers have rights of appeal to an independent review body where they suffer detriment as a result of certain forms of personnel action, for example the promotion of another person to a position for which the officer was also an applicant, or the taking of disciplinary action against the officer.

The Bill clarifies that where there is a right of appeal in relation to disciplinary action, or a promotion of another officer, or a transfer, or unfair treatment, a public officer may appeal to have the action set aside on the additional ground that the action constituted a reprisal.

The Bill does not give separate authority under the Whistleblowers Protection Act for a review body to direct remedial action other than to set aside the action complained against. To do so could prove difficult in the case of promotion appeals. As appointments to appealable public sector positions are made on the relative merits of the applicants, it would be inappropriate for a review body to direct the appointment of the appellant to the position in question if the only ground considered or substantiated in the appeal was a reprisal for whistleblowing. However, clause 45 would enable the original appointment to be set aside and for the selection process to be recommenced.

Principally, clause 45 is intended to assist:

- Public Servants and certain other employees who have rights of appeal to the Commissioner for Public Sector Equity under the *Public Sector Management Commission Act 1990*;
- Police officers who have rights of appeal to the Commissioner for Police Service Reviews under the *Police Service Administration Act 1990*;
- Members of the Police Service and certain other persons who, under the Criminal Justice Act, have right of appeal to a Misconduct Tribunal in respect of disciplinary charges of misconduct made against them;
- local government employees who have rights of appeal to a local authority appeals tribunal under the *Local Government Act 1993;* and
- officers and employees of the Parliamentary Service who have rights of appeal to the Parliamentary Service Commission under the *Parliamentary Service Act 1988*.

Sub clause 45(3) clarifies that where the appeal is to a review body having recommendatory not determinative powers, the officer may seek a recommendation from the review body that an action constituting reprisal be set aside. An example of such a review body is the Commissioner for Police Service Reviews whose powers are limited to making recommendations to the Police Commissioner in respect of appeals made by Police officers.

Relocation of a Public Sector Employee (clause 46)

Where it is likely that a reprisal will be taken against a public servant or

other employee of a department, and the only practical way to remove the danger is to relocate the person, the Bill gives the person the right to appeal to the independent Commissioner for Public Sector Equity. An appeal may also be made on the person's behalf by his or her chief executive.

Where the Commissioner upholds the appeal, the Commissioner is empowered to recommend to the Governor in Council that the person be moved to another location within the person's same department or to another department and, if the person is a public servant, that the person's position be transferred with them. If the officer is a member of the Senior Executive Service, the officer may also be transferred to another location within the public sector.

The Bill gives the Governor in Council necessary powers to give effect to the Commissioner's recommendation including authority to abolish the officer's position and recreate it at no less a classification in another department.

Importantly, a person cannot be relocated under this section without his or her consent. Also, where it is proposed to transfer a person to another department, the consent of the chief executive of that department must also be obtained. It would not be in the best interests of an employee to be relocated to another agency where the chief executive was opposed to the transfer.

Protection Against Unfair Dismissal (Schedule 4)

The Bill amends the *Industrial Relations Act 1990* to make it unlawful to dismiss a public officer for making a public interest disclosure under the *Whistleblowers Protection Act 1994*.

The effect of this is to give an employee dismissed for making a public interest disclosure the clear right to seek remedy from the Industrial Relations Commission under the unfair dismissal provisions of the Industrial Relations Act. Under that Act, if the Commission is satisfied that the employee was dismissed unlawfully the Commission is empowered to reinstate the employee or to award compensation.

Injunctive Relief (clauses 47-54)

The Bill enables an injunction to be sought from the Industrial Relations Commission to restrain a reprisal contemplated or taken against a public officer for making a public interest disclosure under the Whistleblowers Protection Act, where the reprisal involves a breach of employment

conditions established under the Industrial Relations Act. The injunction may be sought by the public officer, or by a relevant union on the officer's behalf, or by the CJC if the reprisal involves conduct that the CJC can investigate (i.e. official misconduct or misconduct by a member of the Police Service).

Where an unlawful reprisal does not fall within the jurisdiction of the Industrial Relations Commission, the Bill enables an injunction to be sought from the Supreme Court. The injunction may be sought by the officer, or by the CJC if the reprisal involves conduct that the CJC can investigate.

The Bill authorises the Industrial Relations Commission and the Supreme Court to direct that an application for injunctive relief be heard in chambers rather than in open court, and also to order that any proceedings for an injunction not be published. The direction may be given where the Commission or the Court considers that disclosure of the proceedings would not be in the public interest, or that persons other than parties to the application do not have sufficient reason to be informed of the proceedings. This discretionary power is provided primarily to safeguard the legitimate interests of the whistleblower where, in proceedings for injunctive relief, he or she may be, or has been, subject to unsubstantiated attacks on their reputation from a party against whom the injunction is being, or has been, sought.

The Bill also allows the Supreme Court or the Industrial Relations Commission to hear an application for an injunction ex parte (that is without the other parties being heard) if considered necessary by the Court or the Commission, for example, because of the urgency of the situation (see Re Griffiths 1991 2 Qd R 29).

2. Application of the Scheme to Private Sector Employees

In its Report on Protection of Whistleblowers, EARC recommended that private employees should be protected for disclosing activities by private sector employers involving danger to public health and safety or the environment. The Government does not agree with such a broad approach which could impose additional costs for small business arising from the procedural requirements of whistleblower protection, and the possibility that small firms could face litigation over claims arising from relatively trivial disclosures.

Nevertheless, the Government considers that improved statutory

protection is warranted for both private and public sector employees who disclose information in the following categories:

(a) **information given to any appropriate entity about substantial and specific danger to the health or safety of a person with a disability.** Sub clause 19(1)(a) covers any person who makes such disclosures.

This disclosure category is especially intended to protect employees of disability services managed by the State or by private institutions who expose practices undertaken by these services which substantially threaten the safety and well being of their clients. In light of recent investigations by the CJC, there is a recognised need to protect the interests of intellectually disabled persons in institutional care who are particularly vulnerable to potential abuse. However, the definition of disability is not confined only to intellectual disability;

(b) **complaints made to the Health Rights Commission about health services.** The *Health Rights Commission Act 1991* already provides a range of protections for persons making complaints to the Health Rights Commission who are entitled to do so under that Act; however, amendments to the Act in Schedule 4 of the Bill are designed to strengthen these protections generally consistent with those available under the Whistleblowers Protection Act; and

(c) **information given to any appropriate entity about the commission of a prescribed offence where the commission of such an offence constitutes a substantial and specific danger to the environment.** Sub clause 19(1)(b) covers any person making such disclosures.

Sub clause 19(1)(b) has to be read in conjunction with Schedule 2 of the Bill which lists the prescribed offences to which this disclosure category relates. The offences include unlawful release, discharge, and carriage of toxic and otherwise dangerous goods and substances; serious contamination of land; unlawful clearing of trees by Crown lessees; activities involving danger to protected plants, animals and fish; and danger to heritage sites and items of the Queensland estate. In many cases, the offences carry significant maximum penalties. It is considered that whistleblower protection for private employees will facilitate the

reporting and investigation of such offences in the interests of effective enforcement of legislation designed to protect the Queensland environment.

Under sub clause 19(1)(c) protection is also given to any person who discloses failure by mining companies to comply with conditions of mining leases or mineral development licenses (including requirements relating to rehabilitation of mine sites) where non compliance constitutes a substantial and specific danger to the environment. The references in Schedule 2 to sections 6.15, 6.27 and 7.33 of the *Mineral Resources Act 1989* are inserted for this purpose.

Protections for private sector employees who make disclosures

Any person including a private sector employee, who makes a disclosure under clause 19 of the Bill will have the following protections under the Whistleblowers Protection Act:

- immunity from civil and criminal proceedings (clauses 39-40);
- damages entitlement (clause 43); and
- a right to seek injunctive relief from the Industrial Relations Commission or from the Supreme Court. The injunction may be sought by the employee or by his or her union (clauses 47-54).

The unfair dismissal provisions of the Industrial Relations Act will also apply to any person making a public interest disclosure under clause 19 of the Bill (see amendments to Industrial Relations Act in Schedule 4).

The Bill also applies the above protections to anyone, including a private sector employee, who makes a disclosure under clauses 20 and 26(3) to an appropriate entity about an alleged unlawful reprisal taken against them or anyone else for making a public interest disclosure.

Protections for complainants to the Health Rights Commission

Persons who are complainants to the Health Rights Commission will also be afforded increased protections. These protections will be provided by the Health Rights Commission Act (rather than the Whistleblowers Protection Act) which will remain the primary statutory protection regime for complainants to the Health Rights Commission.

The Health Rights Commission Act already provides complainants with immunity from civil and criminal proceedings and contains an offence of unlawful reprisal for victimising a complainant. The Bill (Schedule 4) proposes amendments to the Act which increase the maximum penalty for unlawful reprisal under the Health Rights Commission Act to $10,200 or 2 years imprisonment and provide a damages entitlement.

Further, the Bill amends the Industrial Relations Act to make it unlawful to dismiss a complainant for making a complaint to the HRC.

3. Position of GOC employees under the legislation

The Bill treats company GOCs and statutory GOCs differently, reflecting their different commercial and legal status.

Company GOCs

As company GOCs operate as fully commercial entities within a competitive framework, they are treated under the Whistleblowers Protection Act in the same manner as private sector companies. This is achieved by excluding them from the definition of "public sector entity" in Schedule 5, the effect of which is that protection is not given to an employee of a company GOC who makes a disclosure except where the disclosure can be made by anyone under the Bill i.e under clause 19 or 20.

Statutory GOCs

The legislation recognises that statutory GOCs are not fully akin to private sector companies in that they are not incorporated as companies under the Corporations Law. However, statutory GOCs are required to operate in a commercially competitive framework and, should opportunities be available to expose poor management practices by GOCs that are not available within the private sector, the commercially competitive activities of statutory GOCs could be damaged.

Acknowledging this, the Bill (clause 37) strikes a compromise position on whistleblower protection for statutory GOC employees by allowing employees to make internal disclosures to their GOC under clauses 15,16,17 or 18. That is, the legislation protects employees of statutory GOCs who make disclosures to the GOC itself about official misconduct,

maladministration, waste of public funds or danger to public health and safety, where the wrongdoing in question concerns the conduct of the GOC or its staff. However, protection is not given to such staff who wish to make disclosures to outside authorities except:

- where an employee discloses official misconduct by an officer of the GOC to the CJC under clause 15 (the CJC has jurisdiction to investigate official misconduct by officers of statutory GOCs but not company GOCs); and
- where an employee makes a disclosure that anyone can make under clause 19 or 20 to an appropriate entity.

4. Investigation of public interest disclosures

The Bill gives a right to public officers and other persons in specified circumstances to make disclosures to public sector entities which have requisite authority to take action on them. However, the legislation will not create additional obligations on public sector entities to investigate disclosures received. Considered as a whole, public sector agencies already have numerous obligations, powers and discretions to investigate allegations of wrongdoing made to them. These include substantial powers available to the Ombudsman and the Queensland Police Service, as well as to the range of independent review bodies established since the commencement of the Fitzgerald Inquiry, including the Queensland Audit Office, the Health Rights Commission, the Criminal Justice Commission and a range of existing and proposed Parliamentary scrutiny committees.

Nevertheless, the Bill requires public sector entities to publicly account for their handling of disclosures received. Clause 30 requires public sector entities to report annually on the number of public interest disclosures received and the number of disclosures substantiated following investigation. As well, clause 32 imposes a duty on public sector entities to give whistleblowers who have made disclosures to them reasonable information about action taken on disclosures received.

5. Confidential counselling for whistleblowers

A confidential advisory service for whistleblowers has been established under administrative arrangements. Advice will be provided by a professional unit within the Public Sector Management Commission. This

unit will also provide advice to employees, management and other persons on the application of ethical standards under the *Public Sector Ethics Act 1994*.

The CJC has established a specialist Whistleblowers Support Program to assist persons who give evidence to, or otherwise assist, the CJC.

It is important to note that persons contemplating whistleblowing under the Whistleblowers Protection Act and who seek counselling from the PSMC, the CJC, a private legal adviser, or from any other source, would be protected by clause 41 of the Bill dealing with unlawful reprisal. Clause 41 makes it unlawful to take a reprisal against a person in the belief that they have made or may make a public interest disclosure. Therefore, if an employer learns that an employee has sought counselling from the PSMC, the CJC or from anyone and victimises them in belief that they are contemplating making (or have made) a disclosure the employer would be in breach of the Act.

Estimated Cost of Implementing the Legislation

It is difficult to estimate the long term financial impact of the scheme on the public sector. There may be some administrative costs for entities of the public sector in complying with the procedural requirements of the Act, principally the requirement to keep basic records of disclosures received and report to Parliament on the handling of disclosures.

Major investigating authorities such as the CJC, the Ombudsman, the Health Rights Commission already have established procedures for recording disclosures made to them.

The *Public Sector Ethics Act 1994* will impose a requirement on various public authorities to provide training for staff on fundamental ethical obligations for public officials established by that Act. It would entail little extra cost for these authorities to include a training component on the Whistleblowers Protection Act.

The Public Sector Management Commission has budgeted $135,000 for 1994/95 to provide central training, assistance and advice to public sector agencies and employees on the implications of the Public Sector Ethics Act and the Whistleblowers Protection Act.

Consultation

In the course of their reviews, EARC and the Parliamentary Committee for Electoral and Administrative Review consulted widely within the public and private sector.

EARC received 48 submissions which are listed in Appendix C of its Report. Organisations and persons making submissions included various local authorities, Government departments, the Aboriginal and Torres Strait Islander Commission, the Catholic Justice and Peace Commission, the Criminal Justice Commission, the Auditor-General, the Institute of Municipal Management, Victims of Corruption, Queensland Advocacy Incorporated, Queensland Watchdog Committee, Australian Journalists Association (Qld Branch), the Australian Press Council, Dr W De Maria, Mr N Powell and Mr Kevin Lindeberg.

The Parliamentary Committee received 14 submissions which are listed in Appendix B of its Report. Organisations and persons making submissions included the Queensland State Service Union, the Queensland Law Society, Mr R Osmak and Mr Kevin Lindeberg.

EARC also conducted a public seminar which included contributions from Professor Paul Finn of the A.N.U., Mr Ian Temby QC of the I.C.A.C., Sir Max Bingham QC Chair Criminal Justice Commission, Ms Janine Walker of the Queensland State Service Union, Mr Jack Waterford of the Canberra Times, Dr Glyn Davis Commissioner for Public Sector Equity, Mr Gil Muir of the Queensland Confederation of Industry, and Mr Peter Short President Queensland Law Society.

In considering EARC's recommendations, the Government consulted with all departments, the Litigation Reform Commission, the Auditor-General, the Health Rights Commission, the CJC and the Parliamentary Commissioner for Administrative Investigations.

NOTES ON CLAUSES

PART 1—PRELIMINARY

Clause 1 provides the Act's short title.

Clause 2 provides for the Act to commence on a date to be fixed by proclamation made by the Governor in Council.

Clause 3 declares the Act's legislative objective.

Clause 4 indicates that certain terms used in the Bill are defined in the Bill's Dictionary in Schedule 6 with certain definitions provided in section form in Schedule 5.

Clause 5 indicates that the Act binds the State.

Clause 6 establishes that the legislation does not limit protections to whistleblowers that might otherwise be available to them under another law. For example the Bill does not alter the protections available to anyone under sections 104 and 131 the Criminal Justice Act (inserted by the *Whistleblowers (Interim) Protection and Miscellaneous Amendments Act 1990)* who assists the CJC.

Also, the Bill does not abolish or prejudice any existing protections available in common law and statutory law that may be available to persons who make disclosures to or through the media.

PART 2—GENERAL EXPLANATION OF SCHEME AND CERTAIN DEFINITIONS

Clauses 7-12 provides an overview of the whistleblower protection scheme established by Parts 3-6 of the Bill.

PART 3—DISCLOSURES THAT MAY BE MADE

Clause 13 indicates that purpose of Part 3 is to outline the types of "whistleblower" disclosures that may be made under the legislation.

Clause 14 indicates that the types of public interest disclosures that may be made are specified in clauses 15-20.

Clause 14 also clarifies the meaning of "information" for the purpose of the disclosure categories.

Sub clause 14(2) establishes a test concerning the degree of accuracy required of disclosures and the state of mind of the whistleblower. A disclosure of information made under clauses 15-20 must be made on the basis that the person making the disclosure honestly believes on reasonable grounds that the information tends to show conduct referred to in the relevant disclosure category. For example, a person purporting to make a disclosure under clause 17 would be protected if it could be demonstrated that he or she honestly believed on reasonable grounds that the information disclosed tended to show negligent or improper management resulting in a substantial waste of public funds.

The legislation does not require that the information disclosed be objectively accurate but does require that it be objectively capable of giving rise to a belief that the information provided evidence of a matter falling within a public interest disclosure category.

This "reasonable" test, recommended by EARC, is intended to discourage purely speculative allegations while also recognising that in making a disclosure a whistleblower may not be aware of all facts relevant to the allegation made and that the disclosure may be based on less than perfect knowledge and information.

Sub clauses 14(3) and (4) establish that a public interest disclosure can be made about past, present or future events.

Sub clause 14(5) provides that information contained in a disclosure need not in a form that would be admissable in court (this is subject to clause 35(2)(b) which requires that information contained in disclosures made to a court or tribunal in proceedings must be relevant and admissable).

Clause 15 allows a public officer to make disclosures to appropriate public sector entities (including the CJC) about official misconduct as

defined in the Bill's Dictionary (see note under Dictionary).

Clause 16 allows a public officer to make disclosures to appropriate sector entities (including the Ombudsman) about maladministration affecting someone's interests in a substantial and specific way.

Clause 17 allows public officers to make disclosures to appropriate public sector entities concerning negligent or improper management resulting or likely to result in a substantial waste of public funds. (Under clause 26, an appropriate entity could include the Queensland Audit Office and the Parliamentary Public Accounts Committee). It should be noted that:

- the alleged waste should be as a direct or indirect result of negligent or improper management of public funds;
- the alleged waste would have to be "substantial". Should a person claim protection under clause 17, it would be matter for the court or the appeal authority to determine whether the disclosure tended to show substantial waste of public funds in the context of the information disclosed and the circumstances of the case;
- the alleged mismanagement may be on the part of a public officer, public sector entity, or a private sector contractor providing goods and services with public funds;
- disclosures under clause 17 are not protected if they concern mere disagreements over the policy priority to be given to expenditures. The disclosure category is intended to be confined to waste caused by mismanagement of government programs not disagreement over program objectives.

Clause 18 allows public officers to make disclosures to appropriate public sector entities about anything which constitutes a substantial danger to the health and safety of the public or to the environment.

This is a very broad category and is designed to facilitate disclosures by public officers about any conduct within the public or private sector which poses a substantial and specific danger to public health, safety or the environment. The Bill's Dictionary establishes that danger to the "public" includes danger to persons under lawful care or control (e.g. a prisoner under the control of a prison officer).

Clause 18 is qualified by the requirement that the danger to public health or safety or the environment be "substantial" and "specific". EARC indicated that a qualification of this kind is warranted to make it clear that

this disclosure category is not intended to be a vehicle for general ideological criticism of, for instance, the priorities determined by government policy or managerial decisions in the area of environmental protection. However, disclosures which showed that management practices were posing a substantial and specific danger to health, safety or the environment would be protected.

Clause 19 allows any person (including private sector employees) to make a disclosure to an appropriate public sector entity concerning prescribed environmental offences and danger to disabled persons. The reasons for this disclosure category are discussed in the General Outline of this Note.

Clause 20 allows any person (including private sector employees) to disclose information to an appropriate public sector entity showing that an unlawful reprisal has been taken against a person for making a public interest disclosure under the Act.

Clause 21 clarifies that public interest disclosures can be made even if the whistleblower is unable to identify a particular person which the disclosure concerns.

Clause 22 ensures that protection is given to public interest disclosures made under lawful compulsion, for example disclosures made in information that is required to be given to the Criminal Justice Commission under sections 37 and 94 of the Criminal Justice Act.

Clause 23 clarifies that public interest disclosures made after the Act's commencement which concern wrongdoing that occurred before the Act commenced are protected. However, the protections in the Bill do not apply to disclosures made prior to the commencment of the Whistleblowers Protection Act.

PART 4—DISCLOSURE PROCESS

Clause 24 outlines the purpose of Part 4.

Clause 25 provides that a public interest disclosure must be made to a public sector entity that is an "appropriate entity" to receive the disclosure under the terms of clause 26.

Clause 26 establishes when a public sector entity is an appropriate entity to receive a disclosure. The meaning of "appropriate entity" is discussed in the General Outline of this Note.

In Schedule 3, examples are given of appropriate entities that are able to receive disclosures under clause 26 because the disclosure is about the conduct of their staff, or the entity's conduct, or because the entity has a power to investigate or remedy the complaint.

Sub clause 26(3) clarifies that a person who suffers a reprisal for making a disclosure to a particular entity may inform the entity of the reprisal, even if it does not have authority to investigate the conduct. Although the entity may not be able to investigate the conduct, it would be able to refer the complaint to an appropriate entity such as the CJC under clause 28.

Clause 27 establishes how disclosures can be made to appropriate entities:

- a disclosure can be made in any way, including anonymously, subject to any reasonable requirements for making disclosures established by a particular entity;
- disclosures may always be made to the chief executive officer and certain other officers of public sector entities specified in sub clause 27(3) (see under General Outline above);
- the Act does not override other procedures required under law for making a public interest disclosure. For example, the Act does not affect the duty of principal officers of public sector entities to report official misconduct to the Complaints Section of the CJC under the requirements of s.37 of the Criminal Justice Act, or the requirement of members of the Police Service to report misconduct to the Complaints Section of the Commission under section 7.2(2) (c) of the Police Service Administration Act;
- disclosures that are properly made under the Act to a public sector entity are deemed to have been received by the entity. This provision ensures that such disclosures are protected, even if the entity refuses to receive the disclosure or has lawful grounds for declining to take further action on the information received.

Clause 28 enables an appropriate entity to refer a public interest disclosure to another entity if the disclosure concerns the conduct of the other entity or that of its staff or is otherwise a matter that the entity can

investigate. A disclosure referred from one entity to another entity in this way continues to be protected.

Sub clause 28(2) provides that the referring entity may still investigate a disclosure (if it has authority to do so) notwithstanding that it is referred to another entity.

Sub clauses 28(3)-(5) require appropriate entities not to refer a disclosure to another appropriate entity if there is an unacceptable risk of a reprisal being taken against the whistleblower or any other person. To determine whether such a risk exists, the entity must, as far as practicable, consult with the person who made the disclosure.

Clause 28 does not affect any other lawful procedure by which a public interest disclosure must be referred. For example, the Act does not affect the duty of principal officers of public sector entities to report official misconduct to the CJC under the requirements of the Criminal Justice Act and the requirement of members of the Police Service to report misconduct to the CJC under the Police Service Administration Act.

Clause 29 requires public sector entities to keep proper records of disclosures received. This is primarily to enable public sector entities to be able to substantiate claims that particular disclosures had been made to them for the purpose of applying the Act's protections. If proper records of disclosures are not kept by entities, in certain cases difficulties could arise for whistleblowers who wish to substantiate that they had made disclosures (particularly if disclosures are not made in writing). Similarly, a public sector entity may consider that a purported disclosure received by the entity did not meet the requirements of the Act but may have difficulty establishing this without proper records.

Records kept under clause 29 are subject to the confidentiality requirements of clause 55.

Clause 30 requires public sector entities to include in their annual reports statistical information on:

- the number of disclosures received during the year; and
- the number of disclosures substantially verified during the year.

Statutory GOCs are excluded from the annual reporting requirement as public reporting of disclosures made to them by staff could put them in a commercially disadvantageous position vis-a-vis private sector competitors.

Clause 31 requires the Minister responsible for administering the Act to report annually on the operation of the Act. The purpose of this is to enable the Minister to provide Parliament with an overview on how the Act is being implemented across public sector entities and to raise any issues concerning the Act's administration.

For this purpose, sub clause 31(3) requires public sector entities to provide reasonable assistance to the Minister's department in preparing the report.

Clause 32 imposes a duty on appropriate entities to provide to the whistleblower (or to a public sector entity which referred a disclosure) reasonable information about action taken on the disclosure and the results, where such information is requested.

The entity is not required to give the discloser information if it would be impractical to do so, or if the discloser has previously been given the information, or if the request is vexatious. Also information must not be disclosed to the discloser if it would prejudice the safety of anyone (an example could be a Police or CJC officer operating undercover) or necessary confidentiality about an informant.

Sub clause 32(5) exempts the CJC from the requirements of clause 32 as s.33 of the Criminal Justice Act already requires the CJC to inform its complainants of action taken on complaints made to the CJC that it has investigated.

Clauses 33-35 provide special arrangements for the making of disclosures about judges, magistrates and other judicial officers in recognition of judicial independence and clarify when disclosures made in court proceedings are public interest disclosures.

Clause 34 requires that any disclosure under clause 15 concerning official misconduct by a judicial officer can only be made to the officer's chief judicial officer (e.g. the Chief Justice in the case of a Supreme Court judge) or to the CJC. Other disclosures under clauses 16-19 may only be made to the chief judicial officer, however, the chief judicial officer may, at his or her discretion, refer the disclosure to another appropriate entity.

Sub clause 34(5) enables a disclosure about a reprisal taken against a person (for making a disclosure about a judicial officer) to be made to the chief judicial officer, or to the CJC if the reprisal is official misconduct.

Clause 35 clarifies that where a disclosure that can be made to an

appropriate entity under the Bill is made to a court or tribunal in a proceeding, the disclosure is a public interest disclosure and is therefore protected by the Act, provided that the information disclosed is relevant to the proceeding and is admissable.

Clauses 36-37 indicate how the Act applies to statutory GOCs and their staff (see under General Outline above).

PART 5—PRIVILEGE, PROTECTION AND COMPENSATION

Clause 38 sets out the purpose of Part 5 which establishes the protections available to persons who make public interest disclosures. The protections are discussed in the General Outline of this Note.

Clause 39 provides a person with immunity from civil or criminal action for making a public interest disclosure, including absolute privilege in defamation proceedings and immunity from prosecution for breach of any secrecy obligations.

Clause 40 clarifies that if a person commits a criminal or other offence (or does some other wrongdoing for which he or she is liable in law, or under an administration process) and reveals their misconduct in a public interest disclosure, the fact that they made the disclosure does not give them immunity from prosecution or other lawful action that might be taken against them in respect of their own misconduct.

Clause 41 establishes that it is unlawful for anyone to take a reprisal against a person for making a public interest disclosure under the Act and establishes a test for determining when unlawful reprisal has taken place. This test applies to all proceedings under the Act where it is relevant to prove that a reprisal has occurred (for example in proceedings for the criminal offence of reprisal under clause 42). This test is discussed in the General Outline of this Note.

Clause 42 establishes that a public officer who takes an unlawful reprisal against anyone for making a disclosure to a public sector entity commits a criminal offence. Sub clause 42(3) also imposes criminal responsibility on any other person, whether or not a public officer, who assists, counsels or

procures the public officer to commit the offence.

Clause 43 enables any person who suffers reprisal for making a public interest disclosure to sue for damages (see General Outline of this Note).

Clause 44 establishes a duty on all public sector entities to establish reasonable procedures for protecting staff who make public interest disclosures.

Clause 45 allows public officers with existing employee appeal rights to make an appeal on the additional ground of reprisal for whistleblowing (see General Outline of this Note).

Clause 46 in certain circumstances, enables public servants, departmental employees and SES staff who are likely to be victimised for making, or having made, a disclosure to be re-located (see General Outline of this Note).

Clauses 47-54 allow injunctive relief to be sought from the Industrial Relations Commission or from the Supreme Court for any person entitled to make a public interest disclosure and who may suffer, or has suffered, unlawful reprisal for doing so. The injunction may be sought by the:

- whistleblower; or
- his or her relevant union (if relief is being sought from the Industrial Relations Commission); or
- the CJC if the whistleblower is a public officer and the reprisal involves conduct that CJC can investigate.

See explanation under General Outline above.

PART 6—GENERAL

Clause 55 establishes an obligation on public sector entities to respect the confidentiality of disclosures (see General Outline of this Note).

Clause 56 makes it an offence for the whistleblower to knowingly give false or misleading information in a disclosure.

Clause 57 establishes that a public officer may be dismissed or otherwise disciplined for misconduct for breaching sections 42,55 or 56.

For serious breaches, an officer could expect to face a double penalty—dismissal or other disciplinary action plus prosecution for the relevant offence. In less serious cases, disciplinary action may be sufficient. A decision whether to prosecute an officer would be a matter for the Director of Prosecutions taking into account the results of any investigation conducted by the CJC.

Sub clause 57(2) is inserted to make it clear that, under the Criminal Justice Act, the CJC may investigate a contravention of clauses 42, 55 or 56 involving official misconduct or misconduct by a member of the Police Service.

Clauses 58-60 deal with how indictable offences under the Bill may be dealt with summarily. These are interim provisions pending the introduction of new procedures under the proposed new Criminal Code and Summary Offences Act.

Clause 61 provides a regulation-making power under the Act.

Clause 62 provides for the Acts specified in Schedule 4 to be amended as set out in the Schedule.

SCHEDULE 1—CHIEF EXECUTIVE OFFICERS

Identifies officers of certain public sector entities who are deemed to be "chief executive officers" for the purpose of receiving disclosures. The purpose of the Schedule is discussed in the General Outline of this Note (see also note under Schedule 5).

SCHEDULE 2—OFFENCES ENDANGERING THE ENVIRONMENT

Prescribes environmental offences for the purpose of disclosures made under sub clauses 19(1)(b) or (c) of the Bill.

SCHEDULE 3—EXAMPLES OF APPROPRIATE ENTITIES IN PARTICULAR CIRCUMSTANCES

Provides examples of appropriate entities that may receive disclosures under clause 26(1)(a) or (b) because the disclosure is about their own conduct or that of their officers, or about a matter that the entity may investigate or remedy.

SCHEDULE 4—AMENDMENTS

FREEDOM OF INFORMATION ACT 1992

Clause 1 ensures that confidential information relating to public interest disclosures obtained by a public sector entity as defined by sub clause 55(1) cannot be accessed by anyone under the *Freedom of Information Act 1992* unless its disclosure is required for a compelling reason in the public interest.

HEALTH RIGHTS COMMISSION ACT 1991

Clauses 1-8 increase protections provided under the *Health Rights Commission Act 1991* for complainants to the Health Rights Commission (see under General Outline of this Note) and make certain other changes consistent with the proposed Whistleblowers Protection Act.

INDUSTRIAL RELATIONS ACT 1990

Clauses 1-3 amend the *Industrial Relations Act 1990* to make it unlawful to dismiss any person for making a public interest disclosure under the Whistleblowers Protection Act or for making a complaint to the Health Rights Commission (see under General Outline of this Note).

PUBLIC SECTOR MANAGEMENT COMMISSION ACT 1990

Clauses 1-2 make amendments to the *Public Sector Management Commission Act 1990* consequential to clauses 45 and 46 dealing with appeals.

SCHEDULE 5—SECTIONAL DEFINITIONS

Clause 1 in conjunction with Schedule 1 defines "chief executive officer" of an appropriate entity for the purpose of sub clause 27(3) which establishes that in addition to the other officers specified, a public interest disclosure may be made to the chief executive officer of an appropriate entity.

Schedule 1 identifies officers of certain public sector entities who are deemed to be "chief executive officers" for the purpose of receiving disclosures. This is to make it easier to identify who the chief executive officer is in the case of some public sector entities where this might not be readily apparent. It also allows certain other senior executives of particular entities to be deemed as chief executive officers for the purpose of receiving disclosures. For example, in the case of a Regional Health Authority, Schedule 1 establishes that the chairperson of the authority, the regional director and the chief executive of the Department of Health are all deemed to be a chief executive officers for the purpose of receiving disclosures relevant to the authority.

Clause 2 defines "public sector entity" for the purpose of:

- identifying the public authorities to which public interest disclosures may be made under clauses 15-20 (provided the authority is an appropriate entity to receive the disclosure under clause 26);
- establishing an obligation on public sector entities to establish reasonable procedures for protecting their staff who make public interest disclosures to them (clause 44), to maintain records of disclosures received (clause 29), and to report on action taken (clause 30); and
- establishing protections under Part 5 for employees of public sector entities ("public officers") who make disclosures.

SCHEDULE 6—DICTIONARY

Defines certain terms used in the Bill.