

Public Interest Disclosure Bill 2010

Explanatory Notes

Short title

The short title of the Bill is the Public Interest Disclosure Bill 2010.

Objectives of the Bill

The Bill implements the next stage of the Integrity Reforms and will replace the existing *Whistleblowers Protection Act 1994*.

Reasons for the Bill

On 6 August 2009, the Government released the discussion paper, *Integrity and Accountability in Queensland* (the Discussion Paper), to prompt public discussion on integrity and accountability issues and seek public input on proposals for integrity reform.

Following consideration of public submissions and the advice of a round table of experts on proposals for reform, the Government released the *Response to Integrity and Accountability in Queensland* (the Integrity Response) on 10 November 2009. The Integrity Response committed to reforming the *Whistleblowers Protection Act 1994* to ensure that Queensland legislation and practices are informed by present day best practice and are of the highest standard. The proposed reforms were also to take account of the recommendations of the *Whistling While They Work* project and consider the establishment of a centralised system to ensure consistency in the handling of public interest disclosures.

The first stage of the reforms was implemented from 1 January 2010 with the commencement of the *Integrity Act 2009*.

The next stage of the reforms are being implemented through three Bills (collectively referred to as the Integrity Reform Bills), comprising of the Ministerial and Other Officer Holder Staff Bill 2010, the Integrity Reform (Miscellaneous Amendments) Bill 2010 and the Public Interest Disclosure Bill 2010.

Achievement of the Objectives

The Bill builds upon the framework established by the *Whistleblowers Protection Act 1994*. The Bill:

- focuses on promoting the public interest by facilitating disclosures of wrongdoing in the public sector;
- ensures that public interest disclosures are properly assessed, and where necessary, properly investigated and actioned;
- protects public interest disclosures made to journalists in certain circumstances;
- ensures that a person making a public interest disclosure is afforded protection against reprisals; and
- establishes an external oversight system to ensure public sector entities manage public interest disclosures and disclosers to a consistent and suitable standard.

Alternative Ways of Achieving Objectives

An alternative option to the Bill would be to amend the existing *Whistleblowers Protection Act 1994*. Given the extent of the proposed amendments and an emphasis on the management of public interest disclosures, as well as protection of disclosers, a new Bill to implement the reforms was considered desirable.

Estimated Cost for Government Implementation

The cost to agencies is expected to be minimal and met from existing budgets. There will be increased costs to the Public Service Commission to fulfil its oversight role.

Consistency with Fundamental Legislative Principles

The Bill is generally consistent with fundamental legislative principles. The Bill restricts a person's remedies for reprisals taken against the person for making a public interest disclosure. The Bill gives a person a right to bring proceedings for damages for a reprisal and also provides that a reprisal may also be dealt with as if it were an alleged contravention of the *Anti-Discrimination Act 1991*. However, a person can bring a claim for damages or an action under the *Anti-Discrimination Act 1991*, not both. A

person may not seek an injunction from the Supreme Court or the industrial commission in relation to a reprisal if the person has made a complaint under the *Anti-Discrimination Act 1991* (in this instance, remedies under the *Anti-Discrimination Act 1991* will be available). Given that a person's remedies are not prohibited, only restricted, the proposal is considered reasonable in the circumstances.

The Bill may also have an effect on a person's right to privacy as it allows confidential information gained because of a person's involvement in the administration of the Act to be disclosed if the consent of the person to whom the information relates can not be reasonably obtained; it is unlikely that person's interests will be harmed by the disclosure; and it is reasonable in the circumstances. This means that confidential information about someone could be disclosed without a person's consent. However, the requirement that the person's interests will not be harmed and that the disclosure is reasonable in the circumstances are safeguards and the clause gives effect to a recommendation from the Whistling While They Work report.

Consultation

Over 200 submissions on the Discussion Paper were accepted by the Department of the Premier and Cabinet and non-confidential submissions have been published on the Department's website. In addition to written submissions, the Government considered feedback received at regional forums. The Integrity and Accountability round table considered summaries of the results of consultation and made recommendations to government on a number integrity issues including reform of the *Whistleblower Protection Act 1994*.

All government departments were consulted on the Bill. In addition, consultation was undertaken with the following unions - the Queensland Public Service Union, the Australian Workers Union, the Queensland Council of Unions, the Queensland Nurses Union and the Queensland Teachers Union.

Consultation was also undertaken with integrity agencies - the Crime and Misconduct Commission, the Queensland Ombudsman, the Auditor General, the Integrity Commissioner and the Information Commissioner.

Consultation with local government was undertaken through the Local Government Association and the Chief Executive, Local Government Managers Association.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland, and the extent to which it is uniform with or complementary to the Commonwealth or another state is not relevant in this context. However, legislation of other jurisdictions were taken into consideration in the development of the Bill.

Notes on Provisions

Chapter 1 Preliminary

Part 1 Introduction

Clause 1 provides the Act's short title.

Clause 2 provides for the commencement of the Bill on a day to be fixed by proclamation.

Part 2 Main objects

Clause 3 provides the main objects of the Act. The objects provide a balanced focus on promoting the public interest, ensuring disclosures are properly investigated and dealt with, considering the interests of people who are the subject of a disclosure and affording protection to people who make disclosures.

Part 3 Interpretation

Clause 4 refers to a dictionary in schedule 4 for definitions used in the Act.

Clause 5 defines the term ‘proper authority’.

Clause 6 defines the term ‘public sector entity’. A public sector entity includes a committee of the Legislative Assembly; the parliamentary service; a court or tribunal; the administrative office attached to a court or tribunal; the Executive Council; a department (which includes the Queensland Ambulance Service, the Queensland Fire and Rescue Service and the Queensland Police Service); a local government; a university, university college, TAFE institute or statutory TAFE institute; an agricultural college; an entity established under an Act or under State or local government authorisation, and an entity prescribed by regulation that is assisted by public funds. It is not intended that corporations established under *Commonwealth Corporations Act 2001* will fall within the definition of public sector entity. Certain bodies under the *Education (General Provisions) Act 2006* are expressly excluded. The drafters note refers to an amendment to the *Corrective Services Act 2006* which applies this Act to an engaged service provider as if it were a public sector entity.

The clause provides that the Act does not include either a corporate entity under the *Local Government Act 2009* or *City of Brisbane Act 2010*, or a government owned corporation or subsidiary, except as provided by the Act.

Clause 7 defines ‘public officer’ to be an employee, member or officer of a public sector entity. The clause clarifies that the Minister responsible for the administration of a department is a public officer of the department and a member of a school council is a public officer of the department administering the *Education (General Provisions) Act 2006*. In addition, a Ministerial staff member is a public officer of each department administered by the Minister and a Ministerial staff member employed in the office a Parliamentary Secretary is a public officer of each department for which the Parliamentary Secretary is given responsibility under his or her functions.

Clause 8 provides that a “chief executive officer” of a public sector entity includes those persons listed in schedule 1. A regulation may prescribe a person who is to be treated as a chief executive officer.

Part 4 Operation of Act

Clause 9 provides that the Act binds all persons including the State.

Clause 10 makes it clear that the Bill will not limit or affect a protection or remedy available under any other law to people who make any type of disclosure. It also provides in the event of a inconsistency between this Act and such a law, the other law prevails to the extent of the inconsistency.

Chapter 2 Public interest disclosures

Part 1 Interpretation

Clause 11 provides that a public interest disclosure is a disclosure of information made under chapter 2. It includes all information and help given by the discloser to a proper authority for the disclosure.

Part 2 General public interest disclosures

Division 1 Information that may be disclosed and who may disclose it

Clause 12 provides details about the matters which any person can make a public interest disclosure about. These remain consistent with previous categories of disclosures under the *Whistleblower Protection Act 1994*. The disclosure can be made to a proper authority as set out in clause 17.

Subsection (3) provides an objective and subjective test in relation to disclosures. Either of these test need to be satisfied. This subsection

provides that a person has information about the conduct of another person under this section if the person either honestly believes on reasonable grounds that the information tends to show the conduct or other matter; or the information tends to show the conduct or other matter regardless of what the person believes. The inclusion of the objective test is designed to guard against the possibility of defamation protection failing because the discloser not to have had the required level of belief or understanding that the information was a public interest disclosure. In addition, it places the emphasis on the information that is being disclosed rather than the state of mind of the person making the disclosure.

Clause 13 provides details about the matters which a public officer can make a public interest disclosure about. These remain consistent with previous categories of disclosures under the *Whistleblower Protection Act 1994*. The disclosure can be made to a proper authority under clause 17, and the test is the same as under clause 12 – an objective or a subjective test.

Division 2 To whom disclosure may be made

Clause 14 provides that a member of the legislative assembly is a proper authority to whom a person can make a public interest disclosure under section 12 and 13. However, a member of the Legislative Assembly is not a proper authority to receive a public interest disclosure about a judicial officer.

Clause 15 provides that a public sector entity is a proper authority to which a person may make a public interest disclosure under section 12 or 13 if the information relates to the conduct of the entity or any of its public officers, anything that the entity has power to investigate, or a reprisal against a person for making a previous disclosure to a proper authority. An entity is also a proper authority if the discloser honestly believes that the information relates to any of these matters. However, this clause does not apply to a disclosure about a judicial officer.

Clause 16 provides for specific provisions for disclosures about judicial officers in recognition of the independence of the courts. It applies to disclosures made about judicial officers, other than disclosures to a court or tribunal under section 23. The clause provides that a disclosure concerning official misconduct or a reprisal by a judicial officer can only be made to

the officer's chief judicial officer (eg the Chief Justice in the case of a Supreme Court judge) or to the Crime and Misconduct Commission. Other disclosures about the conduct of a judicial officer can only be made to the chief judicial officer of the court or tribunal. A chief judicial officer of a court or tribunal may only receive a public interest disclosure if it is about the conduct of another judicial officer of the court or tribunal. The chief judicial officer may refer a disclosure made about another judicial officer to a proper authority that is a public sector entity.

Division 3 How disclosure may be made

Clause 17 provides that a public interest disclosure can be made in any way to a proper authority, including anonymously. If a proper authority has a reasonable procedure for making a public interest disclosure, that procedure must be used. If the proper authority is a public sector entity, a public interest disclosure can also be made by the discloser to its chief executive officer, for a department – to its responsible Minister, if the entity has a governing body - to a member of its governing body, or if the person is an officer of an entity – to anyone who directly or indirectly supervises or manages the person. It can also be made to an officer who has the role of receiving or taking action on the type of information disclosed.

Part 3 Specific public interest disclosures – corporate entities and GOCs

Clause 18 permits a public interest disclosure to be made by an employee of a corporate entity as defined under the *Local Government Act 2009* or the *City of Brisbane Act 2010*.

An employee of a corporate entity can make a public interest disclosure about the conduct of the corporate entity or another employee of the corporate entity which, if proved, could be any of maladministration that adversely affects a person's interests in substantial and specific way, a substantial misuse of public resources, or a substantial and specific danger to public health or safety or to the environment. An employee can also

make a public interest disclosure about behaviour of another employee that, if proved, could be official misconduct, or by any person that, if proved, could be a reprisal that relates to a previous disclosure by an employee of the corporate entity. The test for whether a person has information is a subjective or objective test which is the same as set out in sections 12 and 13.

Public interest disclosures can be made to the corporate entity or, for disclosures about official misconduct or a reprisal, to the Crime and Misconduct Commission. The employee can make the disclosure any way including anonymously, but if the corporate entity has a reasonable procedure for making a public interest disclosure, the employee must use that procedure. If a public interest disclosure is properly made to a corporate entity, the corporate entity is taken to have received the disclosure for the purposes of the Act. If a disclosure is made to the Crime and Misconduct Commission, section 17(5) operates to provide that the disclosure is received for the purposes of the Act.

This section does not effect the making of a disclosure by any person under section 12 or the making of a complaint to the Crime and Misconduct Commission. This section also does not effect a referral under section 31 from a corporate entity to a public sector entity under this section or from a public sector entity to a corporate entity under section 15.

Clause 19 provides that an employee of a government owned corporation or a subsidiary may make a public interest disclosure in relation to official misconduct by another employee of the corporation or a reprisal relating to a previous disclosure by the employee. The disclosure can be made to the government owned corporation or to the Crime and Misconduct Commission.

The test for whether a person has the information is either a subjective or objective test. The employee can make the disclosure any way including anonymously, but if the government owned corporation has a reasonable procedure for making a public interest disclosure, the employee must use that procedure. This section does not effect the making of a disclosure by any person under section 12 or the making of a complaint to the Crime and Misconduct Commission. This section also does not effect a referral under section 31 from a government owned corporation to a public sector entity under this section or from a public sector entity to a government owned corporation under section 15.

Clause 20 provides for public interest disclosures to journalists. The ability for a person to make a disclosure to a journalist is an avenue of last resort. This section only applies if a person has already made a public interest disclosure under Chapter 2 and the entity which received the disclosure, either directly or by referral under sections 31 or 34, either decided not to investigate or deal with the disclosure; investigated the disclosure but did not recommend any action be taken in relation to the disclosure; or failed to notify the person within 6 months of the date of the disclosure whether or not the disclosure was to be investigated or dealt with. The person may then make a disclosure of substantially the same information that was the subject of the initial public interest disclosure to a journalist. Subsection (3) clarifies that a disclosure under this section is a public interest disclosure. This ensures that the protection from defamation action in section 38 will apply to a person who has made the disclosure. In addition, subsection (3) clarifies that sections 64 (protection from liability) and 65 (preservation of confidentiality) do not apply to journalists to whom information is disclosed under this section.

Part 4 Miscellaneous provisions

Clause 21 provides that a public interest disclosure can be made even if the person making the disclosure can not identify a person to whom the information relates.

Clause 22 provides that a person may make a public interest disclosure even though it is made under a legal requirement to do so. For example, where an employee of the Queensland Police Service reports suspected misconduct as required by the *Police Service Administration Act 1990*, the disclosure can constitute a public interest disclosure.

Clause 23 provides that where a public interest disclosure that can be made to proper authority is made to a court or tribunal in a proceeding, is relevant to the proceedings and is admissible, the disclosure is a public interest disclosure and is therefore protected by the Act. The court is a proper authority for the purposes of the Bill. The referral provisions of the Bill apply as if the court were a public sector entity.

Clause 24 provides that a person may make a public interest disclosure about past, present or future events.

Clause 25 provides that making a public interest disclosure under one provision of the Act, does not prevent a person also making the disclosure under another provision of the Act to the same or another proper authority.

Chapter 3 Obligations of entities to whom disclosures may be made

Part 1 Preliminary

Clause 26 provides that in this chapter, a reference to a public sector entity includes a corporate entity and a government owned corporation (including its subsidiaries).

Clause 27 provides for the purpose of chapter 3 which is to state the obligations of public sector entities which a disclosure may be made to and members of the Legislative Assembly who may receive public interest disclosures.

Part 2 Public Sector Entities

Clause 28 provides for the establishment of reasonable procedures by the chief executive of a public sector entity. The reasonable procedures must ensure that public officers of the entity who make public interest disclosures are given appropriate support and afforded protection against reprisals; that public interest disclosures are properly assessed and where appropriate, properly investigated and dealt with; that appropriate action is taken in relation to any wrongdoing identified by a public interest disclosure; and that a management program for public interest disclosures for the entity consistent with the standard issued under section 60 is implemented. The chief executive must ensure that the procedures are

published on the entity's website and are reasonably accessible to the public as soon as practicable after being made.

Clause 29 provides that the chief executive officer of a public entity must keep a proper record of disclosures. This includes where a public interest disclosure, or a purported public interest disclosure, is made to the entity or referred by another entity or by a member of the Legislative Assembly. The information recorded must include the name of the person making the disclosure (if known), the information disclosed, and any action taken with respect to the disclosure. Where disclosures are referred to the entity, the name of the entity or member referring the disclosure must also be recorded. There is no obligation on the Executive Council, courts and tribunals or members of the Legislative Assembly receiving public interest disclosures to keep records. Records must also be kept of any other information required by a standard issued under section 60.

Clause 30 provides details of the circumstances in which an entity may decide not to investigate or deal with a public interest disclosure. The circumstances are if the substance of the disclosure has already been investigated or dealt with by another process, the entity reasonably considers that the disclosure should be dealt by another process, the age of the disclosure makes it impractical to investigate, or if the entity considers the matter too trivial to warrant investigation and dealing with it would substantially and unreasonably divert resources of the entity. An entity is also not required to investigate or deal with a disclosure if another entity that has jurisdiction to investigate the disclosure considers it is not warranted. If the entity decides not to investigate or deal with a public interest disclosure, it must give written reasons of its decision to the discloser. This person may apply to the chief executive of the entity for a review of this decision within 28 days of receipt of the written reasons. The person may additionally seek a review of the decision by the chief executive using other existing mechanisms, such as judicial review or Queensland Ombudsman.

Clause 31 enables a public sector entity to refer a disclosure to another entity if the disclosure concerns the conduct of the other entity or one of its public officers, or is otherwise a matter that the entity can investigate. The power of a public sector entity to investigate a disclosure is not limited by a referral of the disclosure under this section.

However, an entity must not refer a disclosure if there is an unacceptable risk of a reprisal being taken. To determine whether such a risk exists, the

entity must, if practicable, consult with the person who made the disclosure.

This section does not affect another law under which a public sector entity must refer a report, complaint, information or evidence to another entity. For example, the Act does not affect the duty of a chief executive officer to report official misconduct, and of the Police Commissioner to report allegations of police misconduct, to the Crime and Misconduct Commission.

Clause 32 imposes a duty on public sector entities to provide to the discloser reasonable information about action taken on the disclosure and the results. There is an obligation on the entity to provide the information irrespective of whether the discloser makes a request for it. The minimum information to be provided is confirmation of receipt of the disclosure, a description of action taken or to be taken in relation to the disclosure, and the outcome of any action.

Information need not be disclosed to the discloser if it would prejudice the safety of any person (an example could be a police officer operating undercover), the investigation of an offence or possible offence, or necessary confidentiality about an informant's existence or identity.

Clause 33 provides that the chief executive office of a public sector entity may be required to provide disclosure information that is contained in a standard, which is made under section 60. The standard may also provide for the way in which and the period within which the information is to be given.

Part 3 **Members of Legislative Assembly**

Clause 34 provides that a public interest disclosure or purported public interest disclosure made to a member of the Legislative Assembly, may be referred to a public sector entity if the member considers the entity has power to investigate or remedy the subject of the disclosure. The clause also clarifies that a member who receives a public interest disclosure or purported public interest disclosure has no role in investigating the matters raised in the disclosure.

Clause 35 clarifies that the operation of the Act is not to limit the immunities, powers, privileges and rights of the Legislative Assembly and its members to deal with public interest disclosures made to members. Therefore section 67 (Misconduct by breach of Act) will not apply to matters in relation to disclosures made to a member raised within the confines of Parliamentary privilege.

Chapter 4 Protection

Part 1 General

Clause 36 provides an exemption from either civil or criminal liability, or liability arising from administrative action, to a person for making a public interest disclosure.

Clause 37 clarifies section 36 by providing that a person who makes a public interest disclosure will have immunity from prosecution or other legal proceedings for breach of the confidentiality requirements under an Act. The clause also provides that a person who makes a public interest disclosure does not by doing so breach an obligation by way of oath or rule of law or under an agreement restricting the disclosure of information.

Clause 38 provides that a person who makes a public interest disclosure will have absolute privilege in defamation actions arising from the making of the disclosure.

Clause 39 clarifies that a person's liability for their own conduct is not affected by their disclosure of that conduct under the Act. This includes civil or criminal liability, or any liability arising by way of administrative process, including disciplinary action.

Clause 40 provides that a person must not cause, or attempt or conspire to cause, detriment to another in the belief that the other person has made, or intends to make, a public interest disclosure; or the person or someone else is, has been, or intends to be involved in proceedings under the Act. An attempt to cause detriment includes an attempt to induce a person to cause detriment. A contravention of this provision is a reprisal or the taking of a

reprisal, and any of these reasons for taking the reprisal is an unlawful ground. For a contravention to be established, it is sufficient if the unlawful ground is a substantial reason, even if there is another ground for the act or omission.

Clause 41 provides that it is an indictable offence for a person to take a reprisal. A maximum penalty of 167 penalty units or 2 years imprisonment applies.

Clause 42 provides that a reprisal is a tort and a person may be liable in damages to any person who suffers detriment as a result of the reprisal. Any appropriate remedy, including exemplary damages, may be granted by a court. If the claim goes to trial in the Supreme Court or District Court, it is heard by a judge sitting without a jury. The clause makes it clear that this will be an additional right to any other avenue open to the discloser. Proceedings can be brought even if a prosecution has not, or can not, be brought under section 41.

The new subsection (6) is intended to ensure that a claim will not fail because it fails to comply with procedural requirements of the *Workers' Compensation and Rehabilitation Act 2003*.

Clause 43 provides that if an employee of a public sector entity contravenes section 40 in the course of her or his work, both the entity and the employee are jointly and severally liable and a proceeding under section 42 may be taken against either or both. A defence is available to the entity if it proves, on the balance of probabilities, that it took reasonable steps to prevent the employee contravening section 40. The reference to public sector entity in this section includes reference to a corporate entity and a government owned corporation.

This clause is intended to ensure that a claim in damages, including an entity's vicarious liability, may be brought against a public sector entity, and will not fail on the basis that it is a tort and must be directly committed by the entity.

Clause 44 creates a new low cost remedy for a person who has suffered a reprisal. It enables the person to make a complaint under the *Anti-Discrimination Act 1991* and the complaint can be dealt with under chapters 6 and 7 of the *Anti-Discrimination 1991* as if the complaint were about an alleged contravention of that Act. If a person commences proceedings in a court under section 42, they can not then subsequently make a complaint in relation to the reprisal under the *Anti-Discrimination Act 1994* and vice versa, if a person makes a complaint in relation to a

reprisal under the *Anti-Discrimination Act 1991*, they can not subsequently commence proceedings under section 42 in relation to the reprisal.

Clause 45 clarifies that nothing in Part 1 of Chapter 4 is intended to prevent a manager from taking reasonable management action in relation to an employee who has made a public interest disclosure. It also clarifies that the manager may take reasonable management action in relation to an employee who has made a public interest disclosure, only if the manager's reasons for taking the action does not include the fact that the employee made the disclosure.

Reasonable management action is defined to include a reasonable appraisal by a manager of the employee's work performance; a reasonable requirement that the employee undertake counselling; a reasonable suspension of the employee; reasonable action to discipline, transfer, or deploy the employee; a reasonable action to end the employee's employment by redundancy or retrenchment, or in relation to the employee's failure to obtain a promotion, reclassification, transfer or retain a benefit.

Part 2 Administrative action

Clause 46 applies to public officers who, under an Act, can appeal against or apply for a review of disciplinary action, the appointment or transfer of the officer to another position or unfair treatment of the officer. The clause provides that where there is a right of appeal in relation to these actions for an officer, the officer may also appeal to have the action set aside on the grounds that the action constituted a reprisal.

Clause 47 gives a right to an employee to apply to the appeals officer of the Public Service Commission for relocation where it is likely that a reprisal will be taken against the employee, and the only practical way to remove the danger is to relocate the person. If the appeals officer upholds the appeal, the appeals officer can direct that the employee be relocated in the employee's department or another department. However, the appeals officer can not direct that the employee be relocated without the agreement of the employee and if the relocation is to another department, the department's chief executive.

This clause does not replace action, including relocation, which can be taken by an entity in supporting and affording protection to a discloser against a possible reprisal. Rather, it provides a formal avenue for disclosers where a request to the relevant entity for relocation has not been acted upon.

Part 3 Injunctions

Clause 48 enables an injunction to be sought from the Industrial Commission to restrain a reprisal contemplated against an officer where the reprisal has caused, or may cause, detriment to an employee under the *Industrial Relations Act 1999*, or involves or may involve a breach of the *Industrial Relations Act 1999* or an industrial instrument under that Act. The action can be brought by the employee or the relevant union, or by the Crime and Misconduct Commission if the reprisal involves conduct the Crime and Misconduct Commission can investigate. If the Industrial Commission has jurisdiction to grant the injunction, the jurisdiction is exclusive of the jurisdiction of any other court or tribunal.

Clause 49 provides for where a reprisal does not fall within the jurisdiction of the Industrial Commission. The clause enables an injunction to be sought from the Supreme Court. The application may be made by the person or by the Crime and Misconduct Commission acting in the person's interests if the reprisal involves an act or omission the Crime and Misconduct Commission may investigate.

Clause 50 provides that a person may not apply for an injunction under sections 48 or 49 if the person has made a complaint under the *Anti-Discrimination Act 1991* about a reprisal. Procedures are available under the *Anti-Discrimination Act 1991* for a complainant to make an application for an order protecting their interests.

Clause 51 provides that the Industrial Commission or Supreme Court may grant an injunction if it is satisfied a person has engaged, is engaging or proposing to engage in conduct amounting to a reprisal; aiding, abetting counselling or procuring a person to take a reprisal; inducing or attempting to induce a person to take a reprisal; or being in any way knowingly concerned in the taking of a reprisal.

Clause 52 provides that if the Industrial Commission or Supreme Court is satisfied that a person has engaged or is engaging in conduct in relation to a reprisal as mentioned in section 51, it may issue an injunction to require the person to take action to remedy the detriment caused by the reprisal.

Clause 53 provides that the Industrial Commission or Supreme Court can grant an injunction restraining a person from engaging in a reprisal whether or not the person intends to engage or continue to engage in the conduct; or has previously engaged in the conduct; or whether or not there is an imminent danger of substantial damage to anyone if the person engages in the conduct. Likewise, the Industrial Commission or Supreme Court may grant an injunction requiring a person to take action whether or not it considers the person intends to fail again or continue to fail to take the action; whether or not the person previously failed to take action; or whether or not there is an imminent danger of substantial damage to anyone if the person fails to take the action.

Clause 54 permits an interim injunction to be made while a decision on whether to make a final decision to grant an injunction is made.

Clause 55 provides that the Industrial Commission or Supreme Court can order that any report of proceedings not be published or that evidence given, filed or tendered be withheld from release or only released on a stated condition. Such directions may be given where it is considered that the disclosure would not be in the public interest, or that persons other than the parties to the application do not have a legitimate interest in being informed or the report or evidence. This discretionary power is provided primarily to safeguard the legitimate interests of the discloser where, in proceedings for injunctive relief, he or she may be subject to unsubstantiated attacks on their reputation from a party against whom the injunction is being sought. The Bill also enables an application to be heard in chambers. The Bill allows the Industrial Commission or the Supreme Court to hear an application for an injunction without the other parties being heard, if necessary in the circumstances.

Clause 56 provides that no undertaking about damages or costs is required if the application for the injunction is made by the Crime and Misconduct Commission.

Chapter 5 Oversight agency

Clause 57 provides a definition of ‘public sector entity’ for chapter 5. The result is that chapter 5 applies to corporate entities and government owned corporation and their subsidiaries, but not to courts or tribunals. The exclusion of courts and tribunals is a recognition of the independence of the judiciary.

Clause 58 provides that the oversight agency will be the Public Service Commission.

Clause 59 provides that the main functions of the oversight agency are to monitor the management of public interest disclosures, review the way in which public sector entities deal with public interest disclosures either generally or in relation to particular public interest disclosures, and to perform an educational and advisory role. The Bill does not give the oversight agency the power to investigate public interest disclosures.

Clause 60 allows the oversight agency to issue standards about the way in which public sector entities deal with public interest disclosures. Standards are intended to relate to the operational administration of the Act. The Bill gives examples of the types of procedures which may be included in a standard. These include the way in which entities facilitate the making of public interest disclosures, the way in which entities perform their functions under the Act, the protection of persons from reprisal and the provision of statistical information about disclosures to the oversight body. The oversight agency is required to take reasonable steps to consult with the public sector entities to which the standard may apply before making the standard. A failure to consult does not affect the validity of the standard. The standard is binding on public sector entities. However, the standard is binding on a government owned corporation only if the shareholding Ministers have notified the board that the standard is to apply to the government owned corporation, and complied with section 114 (3) of the *Government Owned Corporations Act 1993*. If, as a result, a standard is not binding on a government owned corporation, the shareholding Ministers must notify the oversight agency in writing.

The standard can only be made by gazette notice and the oversight body must ensure it is published on its website as soon as is practicable.

Clause 61 provides that the oversight agency is to report on the operation of the Act during the previous financial year as soon as is practicable after

the end of that year. The report must include statistical information about public interest disclosures and may include information about the performance of the oversight body's functions, and the performance of public sector entities with the requirements of the Act, standards issued under section 60 and any other matter prescribed by regulation. The provision of a single annual report on public interest disclosures will provide a more comprehensive view of the management of public interest disclosures and the performance of public sector entities.

Clause 62 provides that the oversight agency review the operation of the Act within 5 years of the commencement of the Act. The objects of the review include deciding whether the main objects of the Act remain valid, whether the Act is achieving its objectives and whether the provisions of the Act are appropriate for achieving its main objectives. The oversight body must give the Minister a report on the review and the Minister must, as soon as practicable after receiving the report, table a report about the outcome of the review in the Legislative Assembly.

Clause 63 clarifies how the oversight provisions apply to the Crime and Misconduct Commission and the Ombudsman. Subsection (1) provides that nothing in chapter 5 gives the oversight agency power to review or monitor the way in which the Crime and Misconduct Commission exercises its functions, or requires it to report to the oversight agency about the way in which it exercises its powers, under the *Crime and Misconduct Act 2001*. Subsection (1) also provides that nothing in chapter 5 gives the oversight agency power to review or monitor the way in which the Ombudsman exercises its functions, or requires it to report to the oversight agency about the way in which it exercises its powers, under the *Ombudsman Act 2001*. However, subsection (1) does not apply to their role as public sector entities in relation to public interest disclosures made to them by their own staff, or a public interest disclosure referred under section 31 (1) (a).

Chapter 6 Miscellaneous

Clause 64 provides that a person responsible for discharging a function or part of a function under this Act is not liable for an act or omission made honestly and without negligence under the Act. The clause also states how

liability will attach if a person is excused from liability under the section. If the person is a public officer of an entity that represents the State, liability will attach to the State. In all other cases liability attaches to the entity.

Clause 65 provides that it is an offence if a person gains confidential information through the person's involvement in the Act's administration and they make a record or intentionally or recklessly disclose the information to another person, other than provided under subsection 3. The maximum penalty for this offence is 84 penalty units.

Subsection 3 provides that a person may make a record of confidential information or disclose it to someone else for this Act; to discharge a function under another Act; for a proceeding in a court or tribunal; if the person to whom the confidential information relates consents in writing; if it is reasonably necessary to provide for the safety or welfare of a person; or where authorised by a regulation or another Act. This subsection also permits the recording or disclosing of confidential information if the person's consent can not reasonably be obtained and it is unlikely that the person's interests will be harmed by the disclosure of the information and it is reasonable in the circumstances. This subsection provides an appropriate balance between a requirement to receive and deal with public interest disclosures in private to safeguard the identity of disclosers and the need for some flexibility, where it is appropriate, to reveal confidential information in order to protect and support disclosers and to allow the effective management of public sector workplaces to reduce the possibility of reprisals. Public sector entities will be expected to only record or disclose the minimum amount of confidential information is necessary in the circumstances.

The section does not affect an obligation a person may have under the principles of natural justice to disclose information to a person whose rights may be otherwise be detrimentally affected, if it is essential to do so under the principles of natural justice and it is unlikely a reprisal will be taken because of the disclosure. Confidential information is broadly defined to include the identity and address of a person who makes or against whom a disclosure is made, personal information about either of these persons, and information disclosed by the disclosure.

Clause 66 provides that a person commits an offence if he or she makes a statement to a proper authority intending it to be acted upon as a public interest disclosure, and the person intentionally gives information that is false or misleading in a material particular. Reference to a proper authority

includes a corporate entity and a government owned corporation. The offence is an indictable offence and the maximum penalty is 167 penalty units or 2 years imprisonment.

Clause 67 provides that if a public officer contravenes a section of the Act concerning protection from reprisal, preservation of confidentiality or false or misleading information, the officer is guilty of misconduct under which the officer may be dismissed or disciplined for misconduct. Sub clause (2) clarifies that the Crime and Misconduct Commission may investigate the contravention, or the alleged or suspected contravention, if the officer is a member of the police service, or the contravention is official misconduct by a person holding an appointment in a unit of public administration under the *Crime and Misconduct Act 2001*.

Clause 68 provides that, except for offences declared to be indictable offences, all offences under the Act are summary offences.

Clause 69 provides that a proceeding on a charge for an indictable offence must be heard summarily. However, a Magistrate Court must abstain from dealing summarily with a charge for an indictable offence under this Act if satisfied either because of the nature or seriousness of the offence, the defendant may not be adequately punished on summary conviction, or if satisfied, that because of exceptional circumstances, the charge should not be heard summarily. This clause will provide consistency with reforms introduced to summary disposition in the *Civil and Criminal Jurisdiction Reform and Modernisation Bill 2010*.

Clause 70 provides that if during a proceeding to hear and decide a charge for an indictable offence summarily the court decides that the charge is not one that should be dealt with summarily, the court must stop treating it summarily and start treating it as a committal proceeding.

Clause 71 provides for regulation making power under the Act.

Chapter 7 Repeal

Clause 72 provides for the repeal of the *Whistleblowers Protection Act 1994*.

Chapter 8 Transitional provisions for Public Interest Disclosure Act 2010

Clause 73 provides definitions of terms to be used in Chapter 8, including that commencement means the commencement of this section.

Clause 74 provides that a public interest disclosure made under the *Whistleblower Protection Act 1994* before the commencement of section 73 is taken to be a public interest disclosure made under the *Public Interest Disclosure Act 2010*.

Clause 75 provides that proceedings under section 42 may only be taken in respect of reprisals after the commencement of section 73.

Clause 76 provides that a complaint made under the *Anti-Discrimination Act 1991* in relation to a reprisal, may only be made for reprisals occurring after the commencement of section 73.

Clause 77 provides that confidential information gained in the administration of the repealed Act is taken to have been gained under section 65 (3) of the new Act, even if they gained the information before the commencement of section 73.

Chapter 9 Amendment of legislation

Clause 78 provides that the legislation as set out in Schedule 3 is amended.

Schedule 1 Chief Executive officers

Schedule 1 provides details of who is included as a chief executive officer for the purposes of section 8 of the Act.

Schedule 2 Offences endangering the environment

Schedule 2 prescribes details of legislation and conditions imposed under those provisions which, if breached or contravened, could be the subject of a public interest disclosure under section 12 (1) (b) or (c).

Schedule 3 Legislation amended

Schedule 3 provides for consequential amendments to legislation.

Schedule 4 Dictionary

Schedule 4 defines certain terms used in the Bill.