

2004-2005-2006-2007

SENATE

PUBLIC INTEREST DISCLOSURES BILL 2007

EXPLANATORY MEMORANDUM

(Circulated with the authority of Senator Murray)

GENERAL OUTLINE

The purpose of the *Public Interest Disclosures Bill 2007* is to create an effective and transparent framework through which genuine public interest disclosures (sometimes known as whistleblowing) are managed. In this way the legislation follows the life-cycle of a disclosure from initial reporting to appropriate people, through the life of the investigation and ultimately to the appropriate resolution of the issue.

With varying degrees of success, since the 1990s Australian governments at the State, Territory and Commonwealth level have sought to deal with the issue of whistleblowing and the way in which genuine public interest disclosures can be used to make public administration more effective and accountable to the Australian people. The Commonwealth public disclosure legislation has been particularly weak.

This Bill creates a new framework which learns from the drafting and implementation successes and shortcomings of previous legislative frameworks at the Commonwealth, State and Territory level. This process, while not being aligned with, is indebted to the authors of the issues paper '*Public Interest Disclosure Legislation in Australia: Towards the Next Generation*' put together by Dr AJ Brown and the State, Territory and Commonwealth Ombudsman offices. The initial version of the paper delivered at the 'Vital Issues' Seminar of the Commonwealth Parliamentary Library '*Do I Dare? Whistleblowing Laws in Australia*' Australian Parliament House, Canberra, 16 August 2006, was the prompt for this Bill. The paper systematically worked through the existing legislative frameworks in Australia and proposes best practice standards. It revealed that while there is much to be proud of within the existing framework no one piece of legislation is without its flaws.

The *Public Interest Disclosures Bill 2007* is intended to be a next generation piece of legislation that deals solely with the issue of whistleblowing within the public administrative arena. It provides an effective framework which emphasises a tailored risk management strategy which will not only provide the most effective protection for genuine disclosures but also demand a clear and well set out strategy for the handling of complaints within Commonwealth public agencies for the better resolution of administrative misconduct.

The *Public Interest Disclosures Bill 2007* replaces the *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002*.

FINANCIAL IMPACT

This Bill will have no financial impact on Government revenue but there will be a need for agencies affected by this Bill to implement risk strategies and support services which may be funded out of existing resources.

NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1 Short Title

This is a formal clause which provides for the Act, when it is enacted, to be cited as the *Public Interest Disclosures Act 2007*.

Clause 2 Commencement

This clause provides for the commencement of the Act. It provides that all provisions commence on the day the Act receives Royal Assent.

Clause 3 Purpose

This clause provides three key purposes of the Act. First, to create a framework that facilitates the disclosure of information in the public interest. Second, to create a framework that ensures disclosures of information in the public interest are properly dealt with. Third, to provide practical protection (including relief from legal liability) for people who disclose information in the public interest.

The purpose clause reflects the findings of the NSW Ombudsman that these three basic prerequisites need to be fulfilled before most employees, and in this case specifically public officials, will make a disclosure.¹

Clause 4 Act Binds the Crown

This clause notes that if the Bill is passed it will bind the Crown in all respects.

However it also notes that this Act does not create a liability for the Crown but rather is designed to create liabilities for individuals who through their act or omission breach an offence in the Act.

Clause 5 Definitions

This clause defines certain terms which are set out in the Act. Some of the ten definitions may benefit from further elucidation:

agency head – this definition, while it is formulated from references to different pieces of legislation, is designed to create a comprehensive regime to ensure that all heads of Commonwealth agencies, not merely Australian Public Service agencies, are brought under the auspices of this Act to create a thorough regime;

detrimental action – this definition means any act or omission which causes detriment to any person, in which it was a ground of any significance that a

¹ NSW Ombudsman (2004) 'The Adequacy of the *Protected Disclosures Act* To Achieve Its Objectives', Issues Paper April 2004/ June 2005.

public official had made or may make a public interest disclosure. The phrase "a ground of any significance" is one of the major points of principle set out in the 'General Outline' above. There has been a lot of debate over this standard, and the more common 'materially significant' phrase is not regarded as clear as 'a ground of any significance' (the operative word being 'any'), even though it does go close;

improper conduct – this definition of improper conduct sees the amalgamation of issues of corrupt conduct which has been addressed at the Commonwealth, State and Territory level combined for the first time into a statutory procedure which sets out to comprehensively cover conduct which is improper. In that context of the definition of improper conduct, the term 'inappropriate partiality' is a lift from some of the state definitions of corrupt and improper conduct and is regarded as a better term than 'bad faith' because 'bad faith' does not mean the same thing in that context;

public interest information – this definition is intended to provide a comprehensive definition of public interest information which uncovers wrongdoing and improper conduct which it is in the public interest to reveal. This definition also contains a comprehensive subjective/objective standard which follows best practice;

public official – this definition which is constructed from a list of persons is designed to create comprehensive coverage of public officials which extends well beyond the Australian Public Service. It is important to note that contractors and volunteers are included within this definition along with former public officials.

It is also important to note that the term 'whistleblowing' is not defined within this clause or used within this Act. This is to emphasise that the focus should not be upon the person providing information (who may do so for a variety of reasons) but rather on the disclosure itself. This shift is designed to place primacy on addressing the issue raised rather than the person who raised it.

Clause 6 Parliamentary immunity not affected

It is not uncommon for senators and members to be apprised of public interest disclosures. This Bill intends their role to be enhanced and protected.

Nothing in the Act would affect the immunity of proceedings in Parliament under section 49 of the Constitution and the *Parliamentary Privileges Act 1987*. In addition, a public interest disclosure made to the President of the Senate or the Speaker of the House of Representatives under section 7 may be referred by the President or the Speaker to a committee of the Senate or the House of Representatives, respectively, in accordance with a procedure of that House, or to the Senate or the House of Representatives, respectively.

Subclause (2) of the proposed provision would allow a complaint to be dealt with under the right-of-reply procedures of the Houses or simply referred to the relevant House for any further debate or consideration by that House.

The suggested provision would overcome another problem: the possibility of section 8 being interpreted as setting aside and replacing, in a limited way, the parliamentary immunity applying to communications with senators and members.

Part 2 – Public Interest Disclosures

Division 1 – When a public interest disclosure is made

Clause 7 Public Interest Disclosures

This clause allows any public official who discloses public interest information in accordance with clauses 7 to 9 of this Act to be protected under this Act.

Clause 8 Disclosures to proper authorities

This clause allows any public official to disclose public interest information to a proper authority, who is a person who is obligated and able to deal with the issues arising out of a public interest disclosure.

A range of appropriate people may be the proper authority. This is designed to reflect the competing ideals in the Act. First, that a proper authority is clearly designated. Second, that flexibility and specificity are covered by multiple reporting avenues so that each public interest disclosure can be addressed correctly.

The disclosure regime established by the Act creates two basic categories:

1. *internal disclosures* that are made to a ‘proper authority’ (clause 8); and
2. *external disclosures* that are made to persons other than proper authorities, i.e. members of Federal Parliament or journalists (clause 9).

It is important to note that once the required thresholds are met the legal rights in Part 3 of this Act apply equally to whether a disclosure is made under either clause 7 or clause 8. However, unsurprisingly, the obligations on proper authorities are significantly greater than those imposed on members of Federal Parliament or journalists.

Similarly agency heads retain reporting and other responsibilities (such as clause 26) regardless of whether or not a disclosure has been internal or external. This is designed to ensure that public officials who make disclosures under clause 8 are reintegrated into the full protection regime created by this Act.

In this clause a ‘proper authority’ covers four general categories:

- the direct supervisor of the public official;
- a designated officer within an agency for the purposes of being a proper authority;
- an agency with direct legislative jurisdiction over the information contained in the disclosure; and
- the Ombudsman or Deputy Ombudsman.

And ten specific categories:

- an agency head if the information relates to that agency;

- where information relates to possible criminal offences the Australian Federal Police;
- where the information relates to a Commonwealth law enforcement agency – the Australian Commission for Law Enforcement Integrity;
- where the information relates to a Commonwealth intelligence or security service the Inspector-General of Intelligence and Security;
- where the information relates to the misuse of public resources – the Auditor General;
- where the information relates to a member of the Australian Defence Force - the Defence Force Ombudsman;
- where the information relates to the APS Code of Conduct - the Public Service Commissioner;
- where information relates to the Parliamentary Service Code of Conduct - the Parliamentary Service Commissioner;
- where information relates to a Senator or Member of the House of Representatives - the President of the Senate or the Speaker of the House of Representatives;
- where information relates to a judicial officer - the Chief Justice of the High Court of Australia, the Chief Justice of the Federal Court of Australia, the Chief Justice of the Family Court of Australia, the Chief Magistrate of the Federal Magistrates Court.

Subsection (4) also specifically allows designated third parties to hear public interest disclosures if they are contained within a process established by a proper authority. This includes issues such as a ‘whistleblowers hotline’ which can provide timely information to public officials, including contractors, who may wish to make a disclosure but are unaware of the legal protections and obligations set out in this and other pieces of legislation.

Clause 9 Disclosure to persons other than proper authorities

This clause covers the second tier in this stepped regime; *external* disclosures. It provides that in certain situations a public official remains protected under this Act if they disclose public interest information to a Federal Member of Parliament or to a journalist. This external aspect of this legislation is critical to the operation of the legislation as it ensures that there is a public avenue for public interest disclosures which may otherwise not receive adequate attention or remedy. It also sends a clear signal to proper authorities that there are other avenues which may be utilised if they do not adequately deal with the issue. This clause builds upon the work of the *Protected Disclosures Act 1994* (NSW) and also upon the broader legislative framework in the United Kingdom.

It is important to note that requirements on recipients of external disclosures are far less than those required of proper authorities. However once the thresholds required of a public official to make an external disclosure are met they are afforded the same level of protection as set out in Part 3.

A public official may make a public interest disclosure to a Senator or a Member of the House of Representatives if under all the circumstances it is reasonable for them to do so and:

- the disclosure has already been made to a proper authority but to the knowledge of the official has not been acted upon within 6 months; or
- the disclosure was acted upon by the proper authority but it was not adequate or appropriate; or
- the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the making of the disclosure.

A public official may make a public interest disclosure to a journalist if:

- they do not make the disclosure for the purposes of personal gain, whether economic or otherwise; and
- under all the circumstances it is reasonable for the public official to make the disclosure; and
- the disclosure has already been made to the proper authority or to the Senator or Member of the House of Representatives but to the knowledge of the public official has not been made within 6 months; or
- the disclosure has already been made to the proper authority or to the Senator or Member of the House of Representatives but to the knowledge of the public official the response was not adequate or appropriate; or
- the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.

Questions of reasonableness are questions of fact to be determined by the court, commission or tribunal for the purposes of determining liability, rights or entitlements under Part 3.

Clause 10 Disclosures remain disclosures in certain circumstances

This clause sets out that public officials will remain protected for the purposes of this Act in the following circumstances:

- if they initially were anonymous to a proper authority but their identity is later revealed to the original or another proper authority; or
- if they provide further information relating to the initial disclosure whether they were the original provider of the information or not and whether the information is provided voluntarily or they have been required to disclose under this or any other Act; or
- if they honestly but mistakenly provided information to a person who they thought was a proper authority; or
- if the information was provided before the commencement of this Act; or
- whether or not they can identify any person to whom the information relates.

Division 2 – Obligations of a proper authority to whom a disclosure is made

Clause 11 Obligation to carry out an investigation

Once a proper authority is given public interest information they have three options.

First, they must investigate or ensure an investigation is undertaken regarding the information disclosed to it under this Act if it relates to:

- The authority;

- A public officer or public sector contractor of the authority; or
- A matter or person that the authority has a function or power to investigate.

Second, if the proper authority is not the correct person to deal with the information they must refer the information to a more appropriate proper authority and the more appropriate proper authority must investigate the disclosure. A proper authority also has the discretion to refer the information on to a more appropriate proper authority even if they do have the ability to investigate the disclosure.

Third, the proper authority may refuse to investigate or discontinue the investigation if the matter:

- is trivial;
- is vexatious;
- cannot be properly investigated due to the fact that sufficient evidence cannot be found due to the amount of time that has elapsed since the matter occurred;
- has been adequately or properly investigated previously;
- would be more appropriately resolved by private legal action by a complainant;
- does not contain public interest information, notwithstanding the fact that it reasonably appeared to do so at the time the disclosure was made;
- the information never contained public interest information.

The proper authority must inform the Ombudsman whether or not they will investigate the information. These interlink with the Ombudsman's powers under Part 4.

If a proper authority determines that a person may be, may have been or may in the future be involved in a matter which is the subject of a public interest disclosure the proper authority must:

- take operational steps to prevent the matter to which the disclosure relates from continuing or occurring in the future. This could include putting new guidelines in place, ensuring that appropriate checks and balances are in place etc;
- refer the matter to another person, body or organisation to investigate the matter; or
- take or enable disciplinary actions or proceedings against those responsible for the matter.

Clause 12 Risk assessment by proper authority

When a proper authority receives a public interest disclosure they must make an assessment of the risk of reprisals, direct or indirect, against the person making the disclosure.

This risk assessment is a very important innovation designed to tailor the approach of the proper authority so that it suits each unique situation faced by people involved in public interest disclosures. This risk assessment therefore informs all the decisions made in relation to the proper authority carrying out her/his obligation.

Clause 13 Proper authority to notify official of action taken

This clause ensures that the public official remains appropriately informed throughout the assessment process. A proper authority is required (provided it does not adversely affect a person's safety, the investigation of an offence or identify any additional people making related disclosures) to notify the public official as soon as practicable of action or proposed action taken or a progress report in relation to a disclosure.

Notwithstanding this obligation a public official may either before or after this report request a current status report in relation to a disclosure.

The proper authority must also provide a final report to the public official which sets out:

- 1) the outcome of the investigation; and
- 2) the reason for taking the action.

It is important to note that this notification process will only come into effect if the identity of the public official who made the disclosure is known.

Clause 14 Limitation on information provided by the proper authority

This clause emphasises that while providing information to the public official regarding the investigation process it is important such reports must not provide information that, in the proper authority's opinion, would be likely to adversely affect:

- any person's safety;
- the investigation of an offence or possible offence; or
- necessary confidentiality about the existence or identity of another public official who has made a disclosure other than the person being given the information.

Clause 15 Confidentiality

This clause states that a person must not disclose information that might identify or tend to identify anyone a person who has made a disclosure of public interest information under this Act.

This confidentiality does not apply if the following circumstances exist:

- the person consents to the disclosure of information;
- the disclosure is necessary having regard to the rules of natural justice; or
- the disclosure is necessary to have the matter investigated effectively.

However in the interests of keeping the provider of the information involved in the process the public official must be informed a reasonable time before disclosing the information that:

- the disclosure has been made; and
- the reason for the disclosure is given.

To avoid doubt this confidentiality protection is also extended to a person against whom public interest disclosures have been made. This is to ensure that until

disclosures are substantiated that as much as possible is done to protect the reputation of people against whom disclosures are made.

However this confidentiality does not apply if:

- the person consents to the disclosure of information;
- the disclosure is necessary to have the matter investigated effectively;
- the disclosure is necessary for the proper authority in taking action;
- there are reasonable grounds to believe that the disclosure of identifying information is necessary to prevent or minimise the risk of injury to any person or to property.

It is important to note that under subclauses (6) and (7) there is a strong emphasis on the potential consequences of breaching confidentiality. In subclause (6) it notes that if the breach is carried out by a public official then disciplinary proceedings may be taken. In subclause (7) it notes that if any person provides information contrary to the confidentiality requirements then these may expose the person to actions under clause 18 (reprisal an offence) or liability under clause 21 (remedies for detrimental action) or both.

Clause 16 Relationship with other Acts

This clause is designed to set out a procedure regarding the overlap between public interest disclosures and other complaints allegations and matters for investigation under other pieces of legislation that may affect a proper authority. If there are other pieces of legislation which empower the proper authority in addition to this one it is intended that a disclosure may be resolved under those pieces of legislation even if they were commenced under this Act. If this Act adds to the requirements for investigation of a matter the proper authority should apply the obligations of this Act in addition to those contained within the other pieces of legislation.

It is important to note that in the event of an inconsistency between this Act and another Act, it will be the other, more specific piece of legislation which shall prevail.

An example of this could be the powers of investigation contained in the *Ombudsman Act 1976* whereby cross over could exist between a public interest disclosure and other issues that are reported to the Ombudsman. However if there was an inconsistency the *Ombudsman Act 1976* would prevail.

If a proper authority chooses not to investigate any matter under this Act nothing in this Act prevents them from acting in relation to the same matter under any other Act.

Part 3 – Protection

Clause 17 Immunity for public interest disclosures

This clause sets out the parameters of protection for a person under this Act. Namely a person who makes a public interest disclosure will be protected from civil or criminal liability for making that disclosure.

This includes a defence of absolute privilege in a defamation proceeding and actions regarding the confidentiality of information. This results in protection from disciplinary action, dismissal or the termination of providing services.

It is important to note that subparagraphs 17(2)(d)(i) to (iii) do not only relate to damages but also relate to other forms of relief (such as a declaration) for which an affected person will not have to wait until damages are suffered.

For example a contractor may as yet not suffered damages pursuant to subparagraph 17(2)(d)(iii) but may wish to have the contract enforced or wish to claim specific performance without directly pursuing a compensation avenue.

Clause 18 Reprisal an offence

This clause states that a person must not take detrimental action or threaten detrimental action against another person because a public official has made or may make a public interest disclosure.

The person against whom detrimental action or threatened detrimental action is taken does not need to be the person who made the disclosure – it could be anyone: a friend, family member, colleague or even a person who is wrongly assumed to be involved. The key threshold question for this offence is whether the disclosure was ‘a ground of any significance’ for the detrimental action, even if the reasoning is false or misdirected. A ground of significance is a highly important test as it recognises the complex nature of public interest disclosures and reflects the evidential difficulties in trying to make out public interest prosecutions.

The offence carries a penalty of 120 penalty units or imprisonment for 2 years.

Proceedings may be brought by official authorities such as the Director of Public Prosecutions, the Australian Federal Police, a proper authority, an agency head, if the victim is an Australian Public Service employee the Australian Service Commissioner, the Ombudsman or the victim themselves. Proceedings must be brought within 2 years of the offence occurring.

Clause 19 Criminal Code to apply

This clause sets out that Division 11 of the *Criminal Code* applies to all the offences in Part 3.

Clause 20 Remedies for detrimental action – employment appeals

This clause sets out the ability of a public official to request an appeal or review of a disciplinary action, of the appointment or transfer of the official or another official to a position as a public official or of unfair treatment of the official, if it is detrimental action taken in relation to a public interest disclosure.

This clause in addition to clause 21 is designed to supplement the confidentiality requirements in clause 15.

Clause 21 Remedies for detrimental action – civil liability

This clause creates a civil legislative action to remedy victimisation related to a public interest disclosure. The offence requires that the defendant takes or threatens to take detrimental action against another person substantially due to the fact that a public official has made or intends to make a disclosure of public interest information. This victimisation can be suffered by the friends, relatives, colleagues or even misplaced victimisation relating to a person making a disclosure. The defendant may also be liable under this subsection if making a public interest disclosure was ‘a ground of any significance’ in taking the detrimental action, notwithstanding the fact that there may have been other grounds.

Action may also be taken if the defendant fails to take action in the fulfilment of their duty to protect the claimant. This includes the obligations of agency heads to take all reasonable steps to prevent detrimental action.

Both offences also require that the claimant suffers (economic or non-economic) loss or damage.

The onus is upon the defendant to prove that the detrimental action would have been taken against the person even if there was no public interest disclosure and that substantial steps had already been taken regarding the detrimental action before the defendant became aware that there was or might be a public interest disclosure. This reversal of the onus reflects the importance in protecting persons from detrimental action and reflects best practice.

An application for compensation may also be brought by a proper authority if consent has been given by the claimant. Where this occurs the authority shall not be required to give undertakings as to damages or costs, and shall only be required to pay the defendant’s costs in exceptional circumstances.

An action may be commenced within 6 years after the day on which the conduct which created the damage accrued.

If a finding of fact has been made by a court in a criminal setting under section 18 then in a civil proceeding under this clause the findings of fact may be used as prima facie evidence for the civil proceeding. As prima facie evidence this evidence is of course rebuttable by contrary evidence presented by the defendant. This provision is designed to save court time and also to alleviate the potential for misuse of the legal process to discourage people from utilising their legal options.

Clause 22 Remedies for detrimental action – forum and quantum

This clause sets out that actions under clause 20 may be taken to specialist or generalist forums. This is to ensure that legal avenues created under this Act may be pursued by the appropriate body ensuring that low cost options are available for the simple resolution of matters by bodies with appropriate expertise.

If an action concerns an employer and an employee this clause sets out that it may be heard by either the Australian Industrial Relations Commission as though it were a relief action under section 643 of the *Workplace Relations Act 1996* (without limitation as to detrimental action suffered) or the Federal Court or Federal Magistrates Court as though it were a civil remedy under sections 320 and 413 of the *Workplace Relations Act 1996* (without limiting the circumstances which give rise to the action).

If an action concerns any other persons then it may be heard by either the Human Rights and Equal Opportunity Commission, the Federal Court or Federal Magistrates Court as though it were a complaint of unlawful discrimination under Part IIB of the *Human Rights and Equal Opportunity Commission Act 1986* (without limiting the type of detrimental action suffered) or any other federal or State court.

Regardless of the forum chosen for the commission, tribunal or court hearing an application may award compensation for loss and damage as they see fit, including exemplary damages, without limit as to amount of damages given.

Clause 23 Injunctions

This clause sets out that if a defendant has taken, takes or proposes to take detrimental action against the claimant then the Court may grant:

- an injunction restraining the person from taking the action; or
- if the defendant is a Commonwealth officer an order of certiorari, mandamus or prohibition to prevent the action having a detrimental effect.

It is important to note that a proper authority has standing to act for the claimant and if they do so then the proper authority shall not be required to give undertakings as to damages or costs and only under exceptional circumstances shall be required to pay the defendant's costs.

Clause 24 Liability of person disclosing unaffected

This clause clearly states that regardless of the protections contained in this Act it does not affect his or her liability regarding misconduct or any contravention of this Act without reasonable or lawful excuse including breaches of confidentiality, directions regarding the conduct or investigations including the maintaining of secrecy and the provision of further information

Clause 25 Loss of protection

This clause sets of that if a public official makes a disclosure which he or she knows to contain false or misleading information nothing in this Part applies or continues to apply to them. This is to emphasis that this Act is not to be abused and to discourage in public officials any misunderstanding that this Act could be used to protect them from the consequences of their own wrongdoing.

Part 4 – Obligations of Agency Heads, the Ombudsman and the Public Service Commissioner

26 Internal disclosure procedures

This clause establishes a timetable and underlying procedure to assist with the implementation of the obligations and principles contained in the Act.

Within one year of the commencement of this Act the Ombudsman with the assistance of the Public Service Commissioner must publish model internal disclosure procedures to guide proper authorities and Commonwealth agencies.

Within two years of the commencement of this Act the agency head of a Commonwealth department, agency or body must publish internal disclosure procedures which are not inconsistent with the model procedures published by the Ombudsman.

These internal procedures shall set out:

- why public interest disclosures are important to the agency;
- who is entitled to make public interest disclosures within, about or in respect of the agency;
- who are proper authorities for receiving public interest disclosures about the agency and how they may be contacted (while noting that they are not the *only* proper authority);
- how public interest disclosures are to be managed and investigated in the agency;
- how to meet the confidentiality requirements of this Act;
- how risks of detrimental action are to be assessed and managed;
- who is responsible for providing support, guidance and protection to agency employees who make public interest disclosures under this Act; and
- how the effective implementation of the procedures will be monitored and assessed.

Within the same two year period the agency head must designate a specific position within the agency as the person responsible for coordinating the receipt, investigation, notification and referral of public interest disclosures concerning the agency.

It is also required that an agency, including any proper authority, must include in their annual reports information setting out:

- the number of public interest disclosures received by the agency over the report period;
- the number of public interest disclosures investigated and wholly or partly substantiated; and
- the results of actions taken as a result of investigations.

27 Protection of employees

This clause sets out the types of frameworks which need to be put in place to ensure to the greatest extent possible that detrimental action to public officials due to disclosures is minimised by clear steps taken prior to, during and after any investigation by an agency head.

This clause sets out the obligations of the agency head of a Commonwealth department, agency or body clearly stating that the agency head must take all reasonable steps to protect any employees of the agency from detrimental action or the threat of detrimental action. This includes taking active steps to ensure that any detrimental action is prevented, minimised, stopped or remedied.

To ensure this the agency head must ensure that a risk assessment is made regarding risks of detrimental actions taken against any employee in relation to the disclosure. This assessment should inform all other steps made in relation to the disclosure. To avoid doubt if they are the proper authority the risk assessment under clause 11 satisfies this requirement.

If the assessment demonstrates that detrimental action is likely and that relocation of the employee to an alternative position is the only way to remove or reduce the risk of detrimental action the agency head, with the consent of the employee, will do everything necessary and possible to relocate them.

The proper authority or agency head must as soon as is practical notify the Ombudsman of any information of detrimental action, details of the risk assessment informing the process and advice on how they intend to remedy the alleged detrimental action. This is very important as it provides a clear link between the agency and the Ombudsman and assists the Ombudsman in carrying out their 'clearing house' role.

28 Responsibilities of the Ombudsman – disclosures

This clause sets out the responsibilities of the Ombudsman in its 'clearing house' role and how this is intended to work.

These responsibilities include that:

- within a year of the commencement of this Act publishing a protocol which details when and how proper authorities are to notify the Ombudsman of public interest disclosures;
- reviews any decision of a proper authority (whether it is to investigate or not investigate) and may affirm or reverse the decision, refer the decision to another proper authority or investigate it as though it were a complaint under the *Ombudsman Act 1976*, even if the Ombudsman would not normally have jurisdiction to do so.

The Ombudsman may also make directions regarding:

- how a proper authority should investigate a matter;
- whether the Ombudsman should provide support in overseeing or supervising or conducting a joint investigation with the proper authority;

- when an investigation should be completed; and
- any other measures that should be taken to protect a person or prevent any detrimental action in the course of an investigation.

It is important to note that these powers do not apply to proper authorities who include the President of the Senate, the Speaker of the House of Representatives or the Chief Justices' of the High, Federal or Family Courts of Australia or the Chief Magistrate of the Federal Magistrates Court. In respect of disclosures regarding members of Parliament or judicial officers the Ombudsman's role is confined to annual reporting requirements.

Clause 29 Responsibilities of the Ombudsman – reports

This clause requires the Ombudsman to report to Federal Parliament on:

- the numbers and outcomes of disclosures received by proper authorities;
- the numbers of decisions reviewed and varied by the Ombudsman under this section;
- levels of compliance with this Act; and
- any other matter considered relevant to the operation of the Act.

The report will be informed by all proper authorities and agency heads providing their annual reporting information regarding public interest disclosures and investigation data. It must also conform to the guidelines approved by the federal Parliament's Joint Committee of Public Accounts and Audit.

To prepare the report the Ombudsman must consult with the Public Service Commissioner and has the ability to enter into an arrangement for joint reporting for this Act regarding the Australian Public Service agencies.

The Ombudsman may also present additional reports to the Parliament on any matter in relation to his or her obligations under this Act.

Clause 30 Detrimental action

This clause sets out special requirements for the Ombudsman once he or she receives information regarding detrimental action. This aspect of public interest disclosures requires particular attention as detrimental action complaints need to be treated in specialist ways. Detrimental action complaints are particularly complicated issues which require particular attention above and beyond other types of disclosures addressed in this Act. This is because, more than any other type of issue, detrimental action complaints have the ability to undermine an effective public interest disclosure framework.

The power in this clause is supported by the changes to the *Ombudsman Act 1976* which ensures that the Ombudsman has the appropriate jurisdiction to deal with public interest disclosures as set out in Schedule 2.

This clause notes that once the Ombudsman has been informed of any detrimental action suffered in relation to a public interest disclosure the Ombudsman must:

- review the information provided by the agency;

- determine the most appropriate proper authority to investigate or remedy the alleged detriment (if this is an Australian Public Service employee this authority will be the Public Service Commissioner, while the Ombudsman will have jurisdiction over all alleged reprisals); and
- investigate the information as if it were a complaint under the *Ombudsman Act 1976*.

It is important to note that these powers do apply to proper authorities who include the President of the Senate, the Speaker of the House of Representatives or the Chief Justices' of the High, Federal or Family Courts of Australia or the Chief Magistrate of the Federal Magistrates Court.

After the conclusion of the investigation by either a proper authority or the Ombudsman and the Ombudsman is satisfied that a person has suffered a detrimental action but for whatever reason no action has been taken by any other agency or person the Ombudsman must take all reasonable steps to ensure that action is taken including:

- the making of a report containing such findings and recommendations as the Ombudsman sees fit;
- bringing criminal proceedings;
- bringing of proceedings for compensation; or
- bringing proceedings of injunctive relief.

This requirement reflects the belief that it should not be the sole responsibility of an individual who has suffered detriment to pursue this issue, but rather that disclosures under this Act are in the public interest and are not just a private matter. Therefore the Ombudsman has been given appropriate powers to ensure that issues of detrimental action may be pursued and that people who suffer them are properly supported.

Part 5 – Miscellaneous

Clause 31 False and misleading information

This clause sets out that if a person knowingly provides information to a proper authority that is false or misleading in a material particular.

The offence carries a penalty of 120 penalty units or imprisonment for 2 years.

Clause 32 Other laws

This clause clarifies that any protection given by this Act is in addition to any privilege, protection or immunity existing apart from this Act.

Clause 33 Regulations

This clause establishes the regulation power which allows regulations to be made which are necessary or convenient in giving effect to this Act.

Clause 34 Review

This clause sets out that the Minister shall ensure that an independent review of this Act is commenced after three years of the operation of this Act. The review shall be conducted by an independent person who is a current or former judge of the Commonwealth, State or Territory superior court of record, a former Ombudsman or a former member of the Administrative Appeals Tribunal.

The review shall consider:

- the extent to which the purposes of this Act have been attained;
- the administration of this Act; and
- any other matter which appears relevant to the reviewer.

A report shall be prepared based upon the review and as soon as practical after its preparation it shall be presented to the Parliament.

Clause 35 Amendments

This clause sets out appropriate amendments as required for this Act.

Schedule 1 Freedom of Information Act

This Schedule sets out that documents relating to public interest disclosures are exempt if they would constitute an identifying disclosure are set out in the *Public Interest Disclosures Act 2007*.

Schedule 2 Ombudsman Act

This Schedule sets out changes to the Act being a new subsection (4A) which ensures that the Ombudsman can investigate detrimental action under the *Public Interest Disclosures Act 2007*.