

Serial 47
Whistleblowers Bill 2006
Ms Carney

**A BILL
for
AN ACT**

to encourage the disclosure of conduct in the public sector adverse
to the public interest, and for related purposes

NORTHERN TERRITORY OF AUSTRALIA

WHISTLEBLOWERS ACT 2006

Act No. [] of 2006

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NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2006

AN ACT

to encourage the disclosure of conduct in the public sector adverse to the public interest, and for related purposes

[Assented to [] 2006]
[Second reading [] 2006]

The Legislative Assembly of the Northern Territory enacts as follows:

PART 1 – PRELIMINARY MATTERS

1. Short title

This Act may be cited as the *Whistleblowers Act 2006*.

2. Commencement

This Act comes into operation one month after the day on which the Administrator's assent to this Act is declared.

3. Objects of this Act

The objects of this Act are to:

- (a) support the principle of public interest disclosure and safeguard the rights, including employment rights, of persons who make public interest disclosures; and
- (b) provide a framework within which public interest disclosures will be independently and rigorously dealt with; and

- (c) provide a framework within which persons who make a public interest disclosure will be protected.

4. Definitions

In this Act, unless the contrary intention appears:

"act" includes investigate;

"Agency" has the same meaning as in the *Financial Management Act*;

"Commissioner" means the Commissioner for Public Employment within the meaning of the *Public Sector Employment and Management Act*;

"conduct" includes an act or omission;

"detriment" means:

- (a) injury, damage or loss; or
- (b) intimidation or harassment; or
- (c) discrimination, disadvantage or adverse treatment in relation to career, profession, employment, trade or business;

"disclosable conduct" has the meaning in section 5;

"employee" means a person who is a Chief Executive Officer, or an employee, within the meaning of the *Public Sector Employment and Management Act*;

"offence" means an offence under an Act;

"prescribed body" has the meaning in section 6;

"proper authority" has the meaning in section 12;

"public interest disclosure" has the meaning in section 7;

"public official" means:

- (a) an employee of an Agency; or
- (b) a person employed by or on behalf of an Agency or in the service of a prescribed body, whether under a contract of service or a contract for services, including a person who has ceased to perform those services; or

- (c) a person otherwise authorised to perform functions on behalf of an Agency or a prescribed body;

"public wastage" means conduct by a public official that amounts to negligent, incompetent or inefficient management within, or of, an Agency resulting, or likely to result, directly or indirectly, in a substantial waste of public funds, other than conduct necessary to give effect to a law of the Territory;

"unlawful reprisal" means conduct that causes, or threatens to cause, detriment:

- (a) to a person directly because a person has made, or may make, a public interest disclosure; or
- (b) to a public official directly because he or she has resisted attempts by another public official to involve him or her in the commission of an offence.

5. Disclosable conduct

(1) Conduct is disclosable conduct if:

- (a) it is of a type mentioned in subsection (2); and
- (b) it would, if proven, constitute:
 - (i) a criminal offence; or
 - (ii) a disciplinary offence; or
 - (iii) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public official who is engaged in it; or
 - (iv) interference with a police investigation or the administration of justice.

(2) For subsection (1)(a), the following types of conduct are disclosable:

- (a) conduct of a person (whether or not a public official) that adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of official functions by a public official or Agency;
- (b) conduct of a public official amounting to dishonesty or partiality in the performance of any of his or her official functions;

- (c) conduct of a public official, a former public official or an Agency that amounts to a breach of public trust;
- (d) conduct of a public official, a former public official or an Agency that amounts to the misuse of information or material acquired in the course of the performance of official functions (whether for the benefit of that person or Agency or otherwise);
- (e) conduct of a public official of a kind that amounts to maladministration which is action or inaction of a serious nature that is:
 - (i) contrary to law; or
 - (ii) unreasonable, unjust, oppressive or improperly discriminatory; or
 - (iii) based wholly or partly on improper motives;
- (f) a conspiracy or attempt to engage in conduct mentioned in paragraphs (a) to (e).

(3) In this section:

"disciplinary offence" means conduct that constitutes grounds for disciplinary action under the *Public Sector Employment and Management Act*.

6. Prescribed body

A prescribed body is one of the following:

- (a) a body corporate that is incorporated for a public purpose by an Act;
- (b) a body corporate that is prescribed by regulation.

7. Public interest disclosure

(1) A public interest disclosure is a disclosure of information that the person making the disclosure believes on reasonable grounds tends to show:

- (a) that another person has engaged, is engaging, or proposes to engage, in disclosable conduct; or
- (b) public wastage; or
- (c) conduct involving substantial risk to the environment; or

- (d) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or
- (e) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public.

(2) To avoid doubt, public interest disclosure includes an anonymous disclosure.

8. Disclosures during proceedings

If information that could amount to a public interest disclosure is disclosed in the course of the proceedings of a court or tribunal, the court or tribunal may refer the information to a proper authority.

9. Other protection preserved

This Act does not limit the protection given by any other Act or law to a person who makes a public interest disclosure or prejudice any other remedy available to the person.

10. Liability of agent of Territory

An agent of the Territory who commits an offence against this Act is liable for a penalty for the offence.

11. Legal professional privilege

This Act does not entitle a person to disclose information that is the subject of legal professional privilege.

PART 2 – PROPER AUTHORITIES

12. Proper authority

Each of the following is a proper authority to receive a public interest disclosure concerning an Agency's conduct or the conduct of a public official in relation to the Agency, or a public interest disclosure that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal:

- (a) the Chief Executive Officer of the Agency;
- (b) the Commissioner;
- (c) the Ombudsman.

13. Procedures

- (1) The Commissioner must establish procedures:
 - (a) to facilitate the making of public interest disclosures; and
 - (b) to deal with public interest disclosures received by a proper authority.
- (2) The Commissioner must establish the procedures as soon as practicable, and in any event, within one month after the commencement of this section.
- (3) The Commissioner must ensure the procedures are maintained.
- (4) The procedures must deal with the following:
 - (a) making public interest disclosures;
 - (b) assisting and providing information to a person who is considering making or who makes a public interest disclosure;
 - (c) protecting a person who makes a public interest disclosure from unlawful reprisals, including unlawful reprisals taken by public officials in relation to the Agency;
 - (d) acting on public interest disclosures;
 - (e) other matters the Commissioner considers appropriate.
- (5) The Commissioner must, in respect of a document setting out the procedures established and maintained in accordance with this section:
 - (a) make a copy of the document available to public officials; and
 - (b) make a copy of the document available to the public for inspection at all reasonable times; and
 - (c) determine the amount, reasonably referable to the costs incurred, to be charged for supplying a copy of the document; and
 - (d) on payment of the amount determined under paragraph (c) – supply to any person a copy of the document.

14. Report on disclosures

(1) An Agency that is required to prepare an annual report of its activities during a year for tabling in the Legislative Assembly must include in the report:

- (a) statistics relating to the year in accordance with subsection (2); and
- (b) particulars relating to the year in accordance with subsection (3).

(2) The statistics to be included in the annual report are:

- (a) the number of public interest disclosures received by the Agency; and
- (b) the types of received by the Agency and the numbers of each type; and
- (c) the number of disclosures received by the Agency that were referred to it by other Agencies; and
- (d) the number of disclosures investigated by the Agency; and
- (e) if the Agency has referred disclosures to other Agencies for investigation:
 - (i) the total number of disclosures referred; and
 - (ii) the identity of each other Agency to which a disclosure was referred; and
 - (iii) the number of disclosures referred to each other Agency; and
 - (iv) the number of each type of public interest disclosure referred to each other Agency; and
- (f) the number of disclosures on which the Agency declined to act under section 17; and
- (g) the number of disclosures that were substantiated on investigation by the Agency.

(3) The annual report must include particulars of remedial action taken by the Agency in relation to:

- (a) each public interest disclosure that was substantiated on investigation by the Agency; and

- (b) any recommendations of the Commissioner that relate to the Agency.

PART 3 – PUBLIC INTEREST DISCLOSURES

15. Making a public interest disclosure

(1) A person may make a public interest disclosure to a proper authority.

(2) Without limiting subsection (1), a person may make a public interest disclosure:

- (a) about conduct in which a person engaged, or about matters arising, before the commencement of this Act; and
- (b) whether or not the person is able to identify any person in relation to the information disclosed.

16. Anonymous disclosures

(1) A person may make an anonymous disclosure in accordance with this section and such a disclosure is protected by this Act.

(2) A person making an anonymous disclosure must identify themselves to the Commissioner or the Ombudsman and request that his or her identity be kept confidential by the proper authority.

(3) An anonymous disclosure is subject to the tests set out in section 17.

(4) The head of the proper authority must personally consider an anonymous disclosure and make a preliminary assessment of the disclosure against the matters specified in section 17.

(5) If the head of the proper authority refers the matter to staff of the proper authority for further and full investigation, the head must ensure there is no identification of the person making the disclosure.

(6) The proper authority must maintain confidentiality when examining a matter referred in accordance with this section.

17. Frivolous disclosures and the like

(1) A proper authority may decline to act on a public interest disclosure received by it if it considers that:

- (a) the disclosure is frivolous or vexatious; or
- (b) the disclosure is misconceived or lacking in substance; or

- (c) the disclosure is trivial; or
- (d) there is a more appropriate method of dealing with the disclosure reasonably available; or
- (e) the disclosure has already been dealt with adequately.

(2) If an issue raised in a public interest disclosure has been determined by a court or tribunal authorised to determine the issue at law after consideration of the matters raised by the disclosure, the proper authority must decline to act on the disclosure to the extent that the disclosure attempts to re-open the issue.

18. Referral without investigation

Subject to section 22, if a public interest disclosure received by a proper authority is not related to:

- (a) the conduct of the authority or of a public official in relation to the authority; or
- (b) a matter, or the conduct of any person, that it has a function or power to investigate,

the authority must refer the disclosure to an Agency that, because it has a function or power to deal with the conduct or matter the disclosure concerns, is a proper authority to receive the disclosure.

19. Investigation by proper authority

(1) A proper authority must investigate a public interest disclosure received by it if the disclosure relates to:

- (a) its own conduct or conduct of a public official in relation to the authority; or
- (b) a matter, or the conduct of any person, that the authority has a function or power to investigate; or
- (c) the conduct of a person, other than a public official, performing services for or on behalf of the authority.

(2) If a proper authority investigates a matter in accordance with subsection (1) and is unable to investigate the matter impartially or without a conflict of interest, the matter must be referred to another proper authority.

20. Ombudsman to oversee investigations

(1) A proper authority investigating a public interest disclosure must notify the Ombudsman of the fact within 2 weeks after receiving the disclosure.

(2) At any time, the Ombudsman may, on the Ombudsman's own initiative, take over the investigation of a public interest disclosure.

21. Non-investigation by proper authority

(1) This section applies if:

- (a) a proper authority receives a public interest disclosure; and
- (b) the authority decides not to investigate the disclosure.

(2) The proper authority must refer the matter to the Ombudsman for approval to not investigate the disclosure.

(3) If the proper authority receiving the disclosure is the Ombudsman, the matter must be referred to the Auditor-General for approval to not investigate the disclosure.

22. Referral with investigation

(1) Subject to subsection (2), if a public interest disclosure being investigated by a proper authority relates to:

- (a) the conduct of another Agency or the conduct of a public official in relation to another Agency; or
- (b) a matter, or the conduct of any person, that another Agency has a function or power to investigate,

the authority may refer the disclosure to the other Agency.

(2) This section does not affect the duty of a proper authority to act under section 19.

23. No referral

(1) A proper authority must not refer a public interest disclosure to another Agency under section 18 or 22(1) if the authority is satisfied:

- (a) there is a serious risk that a person would engage in an unlawful reprisal; or
- (b) the proper investigation of the disclosure would be prejudiced,

if the matter was referred to the other Agency.

(2) If subsection (1) applies, the matter must be referred immediately to the Ombudsman who must decide what action is to be taken in relation to the matter.

24. Action by proper authority

(1) If, after investigation, a proper authority is satisfied a public interest disclosure has revealed:

- (a) that a person has engaged, is engaging, or proposes to engage, in disclosable conduct; or
- (b) public wastage; or
- (c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or
- (d) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public,

the authority must take the action necessary and reasonable:

- (e) to prevent the conduct or reprisal continuing or occurring in future; and
- (f) to discipline any person responsible for the conduct or reprisal.

(2) If the Commissioner reports a public interest disclosure has revealed:

- (a) that a person has engaged, is engaging, or proposes to engage, in disclosable conduct; or
- (b) public wastage; or
- (c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or
- (d) that a public official has engaged, is engaging, or proposes to engage, in conduct that amounts to a substantial and specific danger to the health or safety of the public,

a proper authority to which the disclosure relates must, having regard to any recommendations of the Commissioner, take the action necessary and reasonable:

- (e) to prevent the conduct or reprisal continuing or occurring in future; and
- (f) to discipline any person responsible for the conduct or reprisal.

- (3) Subsections (1) and (2) do not apply if:
 - (a) an investigation, or a report by the Commissioner, reveals conduct mentioned in subsection (1)(d) or (2)(d); and
 - (b) the conduct is necessary to give effect to a law of the Territory.

25. Progress report

(1) A person who makes a public interest disclosure, or a proper authority which refers a disclosure to another proper authority, may request the proper authority to which the disclosure was made or referred to provide a progress report.

(2) If a request is made under subsection (1), the proper authority to which it is made must provide a progress report to the person or authority who requested it:

- (a) as soon as practicable after receipt of the request; and
- (b) if the proper authority takes further action with respect to the disclosure after providing a progress report under paragraph (a):
 - (i) while the authority is taking action – at least once in every 90-day period commencing on the date of provision of the report under paragraph (a); and
 - (ii) on completion of the action.

(3) A progress report must contain the following particulars with respect to the proper authority that provides the report:

- (a) if the authority has declined to act on the public interest disclosure under section 17 – that it has declined to act and the ground on which it so declined;
- (b) if the authority has referred the disclosure to another proper authority – that it has referred the disclosure to another authority and the name of the authority to which the disclosure has been referred;
- (c) if the authority has accepted the disclosure for investigation – the current status of the investigation;
- (d) if the authority has accepted the disclosure for investigation and the investigation is complete – its findings and any action it has taken or proposes to take as a result of its findings.

(4) Nothing prevents the proper authority from providing a progress report in accordance with subsection (3) to a person who could make a request under subsection (1).

26. Joint action

If more than one proper authority is required by this Act to act on a public interest disclosure, the proper authorities may enter into arrangements with each other that are necessary and reasonable:

- (a) to avoid duplication of action; and
- (b) to allow the resources of the authorities to be efficiently and economically used to take action; and
- (c) to achieve the most effective result.

PART 4 – UNLAWFUL REPRISALS

Division 1 – Unlawful reprisals generally

27. Agency must protect its officers against reprisals

Within one month after the commencement of this Act, the Commissioner must establish reasonable procedures to protect public officials from reprisals that are, or may be, taken against them.

28. Offence

A person must not engage, or conspire to engage, in an unlawful reprisal.

Penalty: If the offender is a natural person – 100 penalty units or imprisonment for 12 months.

If the offender is a body corporate – 500 penalty units.

29. Function to assist complainant

(1) If a proper authority receives a public interest disclosure that relates to an unlawful reprisal, the authority must provide the person who made the disclosure with information about the protection and remedies available under this Act in relation to an unlawful reprisal.

(2) A proper authority must provide a person who has suffered an unlawful reprisal with access to counselling services if requested by the person to do so.

30. Relocation powers

(1) If a public official in relation to an Agency applies in writing to the Agency for relocation and the Agency considers:

- (a) there is a danger that a person will engage in an unlawful reprisal in relation to the public official if the official continues to hold his or her current position; and
- (b) the only practical means of removing or substantially removing the danger is relocation of the official to another position in an Agency,

the Agency must, as far as practicable, make arrangements for relocation of the official to another position in an Agency.

(2) If a public official is relocated in accordance with this section, the employing Agency of the official being relocated must:

- (a) meet all reasonable relocation expenses; and
- (b) take all reasonable steps to ensure the official is placed in a position of equivalent level of salary and duties.

31. Consent to relocation

Section 30 does not authorise the relocation of a public official in relation to an Agency to another position in the Agency without the consent of the public official.

Division 2 – Civil claims

32. Liability in damages

(1) A person who engages in an unlawful reprisal is liable in damages to any person who suffers detriment as a result.

(2) The damages may be recovered in an action as for a tort in any court of competent jurisdiction.

(3) A remedy that may be granted by a court with respect to a tort, including exemplary damages, may be granted by a court in proceedings under this section.

33. Application for injunction or order

An application to the Supreme Court for an injunction or order under section 34 may be made:

- (a) by a person claiming that he or she is suffering or may suffer detriment from an unlawful reprisal; or

- (b) by the Commissioner on behalf of such a person.

34. Injunction or order to take action

(1) This section applies if, on receipt of an application under section 33, the Supreme Court is satisfied a person has engaged, or is proposing to engage, in:

- (a) an unlawful reprisal; or
- (b) conduct that amounts to or would amount to:
 - (i) aiding, abetting, counselling or procuring a person to engage in an unlawful reprisal; or
 - (ii) inducing or attempting to induce, whether by threats, promises or otherwise, a person to engage in an unlawful reprisal; or
 - (iii) being in any way, directly or indirectly, knowingly concerned in, or party to, an unlawful reprisal.

(2) The Court may:

- (a) order the person to take specified action to remedy any detriment caused by the unlawful reprisal; or
- (b) grant an injunction in terms the Court considers appropriate.

(3) The Court may, pending the final determination of an application under section 33, make an interim order in the terms mentioned in subsection (2)(a) or grant an interim injunction.

(4) The Court may grant an injunction or an interim injunction under this section whether or not the person has previously engaged in conduct of that kind.

(5) The Court may make an order or an interim order under this section requiring a person to take specified action, whether or not the person has previously refused or failed to take that action.

35. Undertakings as to damages and costs

(1) If the Commissioner applies under section 33 for an injunction or order, no undertaking as to damages or costs is required.

(2) The Commissioner may give an undertaking as to damages or costs on behalf of a person applying under section 33 and, in that event, no further undertaking is required.

PART 5 – MISCELLANEOUS MATTERS

36. Confidentiality

(1) A public official must not, without reasonable excuse, make a record of, or wilfully disclose to another person, confidential information gained through the official's involvement in the administration of this Act.

Penalty: 50 penalty units.

(2) Subsection (1) does not apply to a public official who makes a record of, or discloses, confidential information:

- (a) to another person for the purposes of this Act or the Regulations; or
- (b) to another person, if expressly authorised under another law of the Territory; or
- (c) for the purposes of a proceeding in a court or tribunal.

(3) To avoid doubt, despite subsection (2)(b), the *Information Act* does not apply to a record, within the meaning of that Act, in the possession of a public sector organisation to the extent the record discloses confidential information.

(4) In this section:

"confidential information" means:

- (a) information about the identity, occupation or whereabouts of a person who has made a public interest disclosure or in relation to whom a public interest disclosure has been made; or
- (b) information contained in a public interest disclosure; or
- (c) information concerning an individual's personal affairs; or
- (d) information that, if disclosed, may cause detriment to a person who has made a public interest disclosure;

"public sector organisation" has the same meaning as in the *Information Act*.

37. False or misleading information

A person must not knowingly or recklessly make a false or misleading statement, orally or in writing, to a proper authority with the intention that it be acted on as a public interest disclosure.

Penalty: If the offender is a natural person – 100 penalty units or imprisonment for 12 months.

If the offender is a body corporate – 500 penalty units.

38. Limitation of liability

(1) A person is not subject to any liability for making a public interest disclosure or providing any further information in relation to the disclosure to a proper authority investigating it, and no action, claim or demand may be taken or made of or against the person for making the disclosure or providing the further information if the person is acting in good faith.

(2) Without limiting subsection (1), a person:

- (a) does not commit an offence under a provision of an Act which imposes a duty to maintain confidentiality with respect to a matter; and
- (b) does not breach an obligation by way of oath or rule of law or practice requiring him or her to maintain confidentiality with respect to a matter,

by reason only that the person has made a public interest disclosure in relation to that matter to a proper authority.

(3) Without limiting subsection (1), in proceedings for defamation there is a defence of absolute privilege in respect of the making of a public interest disclosure, or the provision of further information in relation to a public interest disclosure, to a proper authority.

(4) The defence of absolute privilege is not available if the complaint is frivolous, vexatious or otherwise meets the conditions specified in section 17.

39. Liability of person disclosing

A person's liability for his or her own conduct is not affected by the person's disclosure of that conduct in a public interest disclosure.

40. Regulations

The Administrator may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
