



DEPARTMENT OF JUSTICE

**EXECUTIVE SUMMARY
DISCUSSION PAPER**

PUBLIC INTEREST DISCLOSURE BILL 2004

**A BILL
for
AN ACT**

About the disclosure of improper conduct by public officers and public bodies, and for related purposes

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INTRODUCTION

The Public Interest Disclosure Bill (“the Bill”) will:

- encourage and facilitate disclosures of improper conduct by public officers and public bodies in the Northern Territory;
- protect persons who make those disclosures and persons who may suffer reprisals in relation to those disclosures; and
- provide for the matters disclosed to be properly investigated and dealt with.

The Bill provides a framework for the management and investigation of matters disclosed in the public interest. It is designed to promote an environment in which persons can safely make disclosures in the knowledge that they will be appropriately dealt with.

As the draft Bill incorporates the best features of current “whistleblower protection” legislation, the Northern Territory has the opportunity to demonstrate best practice in this field.

COMPONENTS OF THE BILL

The Bill consists of four main components that provide for:

1. making a disclosure;
2. protection of persons making disclosures;
3. determination of public interest disclosures; and
4. investigation of disclosures.

DISCLOSURES OF IMPROPER CONDUCT

Making a Disclosure

The draft Bill provides for any person who believes on reasonable grounds that a public officer or public body has engaged, is engaging or proposes to engage in improper conduct in that capacity, or has taken, is taking or poses to take detrimental action in contravention of the legislation, to disclose that improper conduct and be protected from any reprisal for doing so? Disclosures can be made to the Ombudsman or to the public body about whom the disclosure relates. In certain circumstances, the disclosure must be made to a specific person or body, for example, a disclosure that relates to a member of the Legislative Assembly must be made to the Speaker. Disclosures may be made orally or in writing and may be made anonymously and may be made about conduct which occurred prior to the commencement of the legislation.

Improper conduct

Improper conduct covers:

- corrupt conduct;
- substantial mismanagement of public resources;
- conduct involving substantial risk to public health or safety or the environment, that would, if proved, constitute a criminal offence or reasonable grounds for dismissal.

The Bill exempts courts, boards, tribunals and commissions presided over by a Judge, Magistrate or legal practitioner presiding by appointment, and certain other statutorily appointed persons from the categories of public body or public officer.

There are also some well-recognised privileges which are not affected by the legislation. These are in relation to:

- the Legislative Assembly;
- the Speaker;
- members and committees of the Legislative Assembly;
- matters the subject of legal professional privilege.

PROTECTION OF PERSONS MAKING DISCLOSURES

Immunity from liability

The Bill provides for immunity from civil or criminal liability or liability such as disciplinary action for making a protected disclosure. If a person makes a protected disclosure, it is not an offence against any law imposing a duty to maintain confidentiality, or a breach of any obligation under an agreement or law to maintain confidentiality, and there is a defence of absolute privilege in any proceedings for defamation.

Protection from reprisal

The Bill provides a penalty of 240 penalty units or two years imprisonment for any person who takes, or incites or permits another person to take or threaten detrimental action against a person for making a protected disclosure. It allows a prosecution for this offence to be commenced within two years after the offence is alleged to have been committed. The Bill also provides for a person to obtain an injunction against any person taking or threatening to take detrimental action.

Confidentiality

The Bill also makes it an offence, except in limited circumstances, for a person who receives information in the course of an investigation of a disclosed matter to reveal the information other than in circumstances provided for (such as reporting purposes of criminal proceedings against a Police officer). The Bill provides for a penalty of 60 penalty units or imprisonment for six months.

DETERMINATION OF PUBLIC INTEREST DISCLOSURES

The Bill provides the procedures for determination of a disclosures as a public interest disclosure by:

- providing the criteria to determine whether the disclosure is a public interest disclosure (being that the disclosure shows or tends to show that a public officer or public body has engaged, is engaging or proposes to engage in improper conduct or has taken, is taking or proposes to take detrimental action);
- providing a 45 day response time;

- providing that certain complaints about Police officers are to be investigated as public interest disclosures (as opposed to complaints under the *Ombudsman (Northern Territory) Act*;
- requiring notification to the discloser of the result of the determination;
- requiring public bodies to refer a matter to the Ombudsman within 14 days of concluding that it is a public interest matter for determination by the Ombudsman;
- providing for a person to request that the disclosure be referred to the Ombudsman for determination;
- providing a 45 day response time and a 14 day notification time in relation to disclosures made to the Commissioner of Police;
- requiring that the Ombudsman investigate, or refer for investigation where appropriate, every disclosure he or she determines to be a public interest disclosure – except where a person fails to give a satisfactory explanation for a delay of 12 or more months, in making the disclosure.

INVESTIGATION OF PUBLIC INTERESTS DISCLOSURES

The Bill provides for investigation of public interest disclosures by:

- the Ombudsman;
- the relevant public body;
- the Commissioner of Police.

The Ombudsman may refer a disclosed matter to any of the following to investigate, where he or she considers it appropriate to do so:

- the Commissioner of Police;
- the Auditor-General;
- a prescribed public body;
- the prescribed holder of an office;
- a public body.

The Ombudsman will be the central clearing house for protected disclosures. The Ombudsman will have a duty under the Bill to investigate every disclosure he or she has determined is a public interest disclosure, or refer the matter for investigation if appropriate. The Ombudsman will have the following powers and functions under the Bill:

- to develop and issue guidelines;
- to conduct hearings and making determinations;
- to second Police officers to assist in an investigation;
- to request a prescribed public body to make available staff to assist in an investigation;
- to notify the relevant persons or bodies of the proposed investigation and to carry out an investigate in private;
- to determine whether a person may have legal representation at any hearing in an investigation;
- to obtain information in any manner he or she considers appropriate for the purposes of the investigation;

- to require a Police officer to give any relevant information or produce any relevant document or answer any relevant question;
- to enter and inspect premises occupied or used by a public officer or public body in that capacity;
- to provide a public body, officer, council member or police officer with an opportunity to comment any adverse report.

There are certain exemptions to the information that can be compelled by the Ombudsman or Commissioner of Police, being:

- deliberations or decisions of Cabinet;
- deliberations of any Legislative Assembly committee formed for the purpose of advising Ministers in their deliberations;
- any deliberations in private session of a committee of the Legislative Assembly;
- any documents that are exempt under section 45(1)(a) of the *Information Act*.

A certificate issued by the Chief Minister certifying that information relates accordingly, is conclusive of the fact so certified.

There is no power in the Bill to compel a person to give evidence or produce documents where that evidence or those documents could not be compelled to be given or produced in a court proceedings.

The Bill will make it an offence to obstruct the Ombudsman in his or her exercise of powers. The penalty will be 240 penalty units or imprisonment for two years.

Action on completion of investigation by the Ombudsman

The Ombudsman will be required, on completion of an investigation, to:

- report the findings to the responsible person; and
- make any recommendations as to the action to be taken.

The Ombudsman may request to be notified of the steps taken to give effect to the recommendation, and may report through the Chief Minister to the Legislative Assembly as to the failure of a responsible person to take action on the recommendations.

Where there is disagreement between the Ombudsman and the Commissioner of Police as to the recommendation with respect to an investigation concerning a police officer, the matter must be referred to the Police Minister, who may ultimately refer the matter to the Director of Public Prosecutions if it concerns a question of possible criminal proceedings to be taken against that, or another officer.

Investigation by Public Bodies

The Bill will require a public body to:

- establish and make available, procedures to facilitate the making of disclosures, for investigating disclosures and for protecting persons from reprisals; (the Ombudsman will be responsible for reviewing the procedures and implementation of procedures of a public body);
- carry out an investigation in accordance with procedures established for the public body;
- investigate any disclosed matter which the Ombudsman refers to it;
- refer back to the Ombudsman any investigation it considers is being obstructed (and notify the person who made the disclosure of that referral).

In certain circumstances, the person who made the disclosure may also request that the Ombudsman, rather than the public body, investigate the disclosed matter and the Ombudsman will have the power to take over an investigation in certain circumstances. In those circumstances, the public body must provide to the Ombudsman, any information it has and any findings it has made in respect of the matter.

Action upon Completion of an Investigation by a Public Body

Upon completion of an investigation, a public body:

- must report the findings to the responsible person or body;
- must take reasonable steps to prevent the conduct from continuing or occurring again;
- may take action to remedy harm or loss arising from the conduct (including bring disciplinary proceedings and referring a matter to an appropriate authority for further action);
- must notify the Ombudsman of the findings and steps taken;
- must notify the responsible person or body of any steps taken;
- must inform the person who made the disclosure of the findings and any steps taken.

Investigation by the Commissioner of Police

The Commissioner of Police will be required to investigate matters that relate to a police officer that the Ombudsman refers to him or her to be investigated and must report in writing as requesting by the Ombudsman, on the progress of an investigation. Similar powers to those given to the Ombudsman are provided in the Bill to the Commissioner of Police. In certain circumstances, a disclosed matter may be referred back to the Ombudsman at the request of the person who made the disclosure.

Action on Completion of an Investigation by the Commissioner of Police

On completing an investigation, if the Commissioner of Police finds that the conduct has occurred, he or she must:

- take all reasonable steps to prevent the conduct from continuing or occurring in the future;
- must remedy any harm of loss arising from the conduct (including carrying out disciplinary proceedings);
- must notify the Ombudsman of the findings and steps taken or proposed to be taken; and
- must report to the person who made the disclosure of the investigation and any steps taken.

If a matter is referred to the Police Minister as a result of disagreement between the Ombudsman and the Commissioner of Police as to steps to be taken, the Minister may give directions as to the action to be taken, and may refer the matter to the Director of Public Prosecutions.

Investigation of Disclosures about Members of the Legislative Assembly

The Speaker may refer a disclosure to the Ombudsman for investigation, who must within a reasonable time determine whether or not the disclosure is a public interest disclosure and notify the Speaker of the determination. The Ombudsman must investigate every disclosure referred to him by the Speaker that has been determined by him to be a public interest disclosure. On completion of an investigation, the Ombudsman must report the findings to the Speaker.

ANNUAL REPORTS

The Ombudsman will be required to detail in his/her annual report the current guidelines and details concerning action taken or not taken under the Bill. Public bodies will be required to submit similar annual reports including any recommendations the Ombudsman may have made that relate to that body.

The Ombudsman may also give the Chief Minister a report on any matter arising in relation to a disclosed matter for tabling in the Legislative Assembly.

GENERAL PROVISIONS

Offences

A penalty of 240 penalty units or imprisonment for two years is imposed for providing false information intending that it be acted on as a disclosed matter.

Legal Immunity

Legal immunity will be provided for the Ombudsman and his or her staff for acts done or omitted to be done in good faith in the exercise of a power or the performance of a function under the Bill.

Evidence not admissible

The Bill provides that information obtained from the Ombudsman, the Commissioner of Police or a public body in the course of or as a result of a disclosure or investigation is not admissible as evidence in legal proceedings, except in proceedings for an offence against the Bill or in criminal or disciplinary proceedings against a police officer as a result of an investigation.

Information Act

The *Information Act* will not apply to the extent that the record discloses information in relation to a disclosure, or is likely to lead to identification of a person who made a disclosure

CONCLUSION

The purpose of the legislation is to provide a framework for the establishment of effective complaints and investigation policies and procedures to encourage the reporting of improper conduct within a public body, which will result in more efficient fiscal management, more effective general management, healthier and safer work environments, improved morale and an enhanced perception and reality that an entity is taking its governance obligations seriously.

COMMENTS

All comments received will be taken into account in the finalisation of the Public Interest Disclosure Bill. Comments should be directed to:

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OR

e-mailed to CEO_FEEDBACK.DOJ

Comments should be provided by Friday 18 March 2005.