Consultation Paper

**Whistleblower Protection for the**

**Independent Commissioner Against Corruption**

**for the Northern Territory**

**January 2017**

**Introduction**

The Northern Territory Government is looking for responses to this consultation paper from the community and stakeholders by mid-February 2017. Please direct all responses to whistleblowerfeedback@nt.gov.au.

The Northern Territory Government is establishing an Independent Commissioner Against Corruption (‘ICAC’) in the Northern Territory, in line with 50 of the 52 recommendations made by an Independent Inquiry into reducing corruption in the Territory public sector. (The two recommendations not committed to are recommendations 4 and 5.) A full copy of the Report, including submissions made by stakeholders, can be found at <https://acimcinquiry.nt.gov.au/>.

This new ICAC will have the resources and powers necessary to investigate corruption at the highest levels of government. The ICAC will replace the Public Interest Disclosure Commissioner, which has some powers and the jurisdiction to investigate public sector corruption, but not to the extent that the ICAC will possess.

**Intended public consultation and timing for developing the ICAC**

The Government wishes to ensure that the legislation establishing the ICAC is supported by adequate consultation. In addition to the widespread consultation conducted during the Inquiry, the Government intends to release the proposed Bill for public comment in the first half of 2017. Work has already commenced on this Bill in line with the recommendations of the Martin Report.

This discussion paper seeks public input from interested persons concerning the issue of whistleblower protection. This issue was not explored in detail by submissions to the Inquiry or by the Report itself. This consultation will be taken on board in the further development of the draft Bill.

The final Bill will be introduced to Parliament in the second half of 2017 and the ICAC will be operational in early 2018.

**1. Current Situation**

The *Public Interest Disclosure Act (NT)* allows people to blow the whistle on public sector corruption. The Martin Report (see particularly paragraphs 361 to 366) proposes that the *Public Interest Disclosure Act* be repealed and that the new ICAC replace the Public Interest Disclosure Commissioner. Accordingly, the Martin Report proposes that roughly equivalent protections be included in the new ICAC legislation. The Report also indicated support for a joint submission by the Public Interest Disclosure Commissioner, Ombudsman NT, Auditor-General, Commissioner for Public Employment and Commissioner of Police, that:

‘it might be an appropriate time to review the protection provisions to consider whether current reprisal protections are adequate and to consider whether greater guidance should be provided for agencies and agency heads involved in investigations’.

**2. Proposed Model**

Subject to any changes made as a result of this consultation, the proposed future framework for whistleblower protection is anticipated to include features as set out below.

As recommended by the Martin Report, the *Public Interest Disclosure Act* will be repealed and replaced by the new ICAC legislation. The starting point for future whistleblower protection is therefore to copy the provisions in the current *Public Interest Disclosure Act* into the ICAC legislation, so that they effectively continue after the *Public Interest Disclosure Act* is repealed. A summary of these provisions is included below. Transitional provisions will also be included to ensure that persons who are already protected under the existing scheme continue to be protected.

In addition to the provisions in the *Public Interest Disclosure Act*, recommendation 46 of the Martin Report is that ‘The [ICAC] be empowered to arrange physical and other protections for witnesses and staff.’ To give effect to this recommendation, it is also proposed to make amendments to the *Witness Protection (Northern Territory) Act.* This Act establishes the Territory’s witness protection program, and allows for a person and their family at risk of threats or harm to be provided with protection and assistance including payment, accommodation, security protection, and to be given a new identity.

Currently, the Commissioner of Police is responsible for establishing and maintaining the witness protection program. As establishing an additional witness protection scheme administered by the ICAC is unlikely to be viable from a resourcing or logistical perspective, it is intended that amendments would allow the ICAC to refer a person to the Commissioner of Police for witness protection, and that the Commissioner of Police would be required to evaluate the person’s need for protection in accordance with the witness protection scheme. The definition of ‘witness’ in the scheme would include persons who have given or agreed to give evidence of the kinds of improper conduct that the ICAC can investigate.

It is also intended that there be a provision that, in the event the ICAC forms the view it would be inappropriate to refer a witness in need of protection to the Commissioner of Police (for example, because the person’s evidence is against the Commissioner or other senior Police, or because Police have refused to protect the witness and the ICAC remains of the view that protection is warranted), the ICAC may enter into arrangements with an appropriate interstate body or private security service to provide protection to the witness, and provision for the ICAC to apply to the Supreme Court to provide such a person with a new identity. It is anticipated that the need for the ICAC to arrange protection for a witness that cannot be referred to the Commissioner of Police would be exceedingly rare, but that appropriate mechanisms be provided to cater for the potential possibility this could occur.

**3. Policy Objectives**

Submissions as to the merits of the present framework and the changes outlined above will be considered in light of the following objectives. The Government wishes to ensure that:

* the Northern Territory has an effective and realistic whistleblower protection framework;
* the framework addresses disincentives to reporting corruption; and
* the framework can deal appropriately with persons who make false allegations or make allegations as an abuse of process.

**4. Summary of the Current Legislative Framework**

The *Public Interest Disclosure Act* contains the following features:

* protection of whistleblowers and persons who assist in reporting or investigating corruption are one of its objectives - s 3;
* only individuals (eg. not organisations) may ‘make a disclosure’ (blow the whistle) – s 10;
* disclosures may be made anonymously – s 11(3);
* to obtain protection, a person must make their disclosure to the Public Interest Disclosure Commissioner or the CEO of the organisation in which the alleged corruption is occurring – s 11;
* if a person makes a disclosure to someone else (eg. a media outlet) and is then targeted for retaliation as a result, the current scheme offers no protection in that situation – s 11;
* a person can make a public interest disclosure even though this may breach workplace rules, confidentiality agreements, or even be an offence to do so – and they cannot be prosecuted or disciplined for doing so; the disclosure is also absolutely privileged if a person is sued for defamation – s 14;
* however, this does not apply if the disclosure is an abuse of process or if the discloser knows the information disclosed is misleading – s 14;
* protection for disclosers does not mean a person can escape prosecution or discipline by reporting his or her own improper conduct, and it is also an offence to provide misleading information to the Commissioner – s 51;
* it is an offence to commit an ‘act of reprisal’, meaning to cause harm or threaten to harm someone because they reported improper conduct, or cooperated with an investigation into improper conduct – s 15;
* a person who suffers an act of reprisal can sue the person or organisation that committed the act of reprisal – s 16;
* injunctions can be sought from the Supreme Court to restrain a person from committing an act of reprisal – s 17;
* a person can request relocation because they suffer or expect they are going to suffer an act of reprisal, and the Commissioner can review a decision to refuse a relocation – ss 18 and 19, and reg 7;
* if an act of reprisal is reported to the Commissioner, the Commissioner can investigate this allegation on the basis it is itself improper conduct, and potentially prepare a brief for prosecution; and
* the Commissioner has obligations to keep in contact with the discloser as to the status of the investigation relating to the disclosure – reg 6.

At present, a disclosure about a Member of the Legislative Assembly (MLA) can only be made to the Speaker of the Legislative Assembly. Given that the new ICAC will be able to accept and investigate allegations against MLAs, it is intended that disclosures of improper conduct made about MLAs to the ICAC will be protected.

**5. Further Information**

For further detail about the legislative provisions, please refer to the *Public Interest Disclosure Act*, available at <https://legislation.nt.gov.au/en/Legislation/PUBLIC-INTEREST-DISCLOSURE-ACT>. This link also includes a link to the Public Interest Disclosure Regulations. (If the link is broken, you can navigate to the Act from <https://legislation.nt.gov.au/>.)

For further information about how the *Public Interest Disclosure Act* has operated in practice, please refer to the Annual Reports of the Public Interest Disclosure Commissioner, available at <https://blowthewhistle.nt.gov.au/publications/annual-reports>. Ongoing research about the effectiveness of whistleblower protection schemes around Australia is being conducted by the ‘Whistling While They Work’ project, of which the Commissioner for Public Interest Disclosures is a partner. Results of the project’s research is available at [www.whistlingwhiletheywork.edu.au](http://www.whistlingwhiletheywork.edu.au).

**6. Particular Issues to Consider**

This consultation’s immediate purpose is to inform the development of legislation, and so the primary focus of submissions should be on the legislative provisions. Discussion of other matters that may impact the effectiveness of the legislation, such as resourcing, organisational culture, processes, and training are also welcome. General submissions are welcome, however responses to the following proposals and questions are of particular interest.

1. Should protected disclosures be able to be made to a broader range of persons? In particular, should the scheme cover disclosures to any statutory authority charged with investigations (eg. Ombudsman, Health Complaints Commissioner, Children’s Commissioner etc) and should it cover disclosures to persons within the organisation other than the CEO?
2. Are the current provisions effective deterrents against acts of reprisal? If not, how could they be improved?
3. Are there any potential loopholes or problematic ambiguities in the provisions as they are currently worded?
4. Does the current framework adequately support whistleblowers? If not, what else could be done and who should be responsible for providing support?
5. Does the current framework adequately deal with situations where a person attempts to exploit whistleblower protections, for example in an attempt to deter reasonable management action being taken against them? What could be done to better handle these situations without undermining whistleblower protection? Please bear in mind that disclosures motivated by personal interests may still be in the public interest if they are not false allegations.