

1994
THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

(As presented)

(Ms Carnell)

Public Interest Disclosure Bill 1994

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1994
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Public Interest Disclosure Bill 1994

**A BILL
FOR**

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

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART I—PRELIMINARY

Short title

- 5 1. This Act may be cited as the *Public Interest Disclosure Act 1994*.

Commencement

- 10 2. (1) Section 1 and this section commence on the day on which this Act is notified in the *Gazette*.
(2) The remaining provisions commence on a day, or respective days, fixed by the Minister by notice in the *Gazette*.
(3) If a provision referred to in subsection (2) has not commenced before the end of the period of 6 months commencing on the day on which this Act is notified in the *Gazette*, that provision, by force of this subsection, commences on the first day after the end of that period.

Interpretation

3. In this Act, unless the contrary intention appears—

“act” includes investigate;

“conduct” includes act or omission;

5 “corrupt conduct” means conduct which, by virtue of subsection 4 (1),
is to be taken to be corrupt;

“detriment” means—

(a) injury, damage or loss;

(b) intimidation or harassment; or

10 (c) discrimination, disadvantage or adverse treatment in
relation to career, profession, employment, trade or
business;

“offence” means an offence under an Act;

15 “officer”, in relation to a public sector unit, means a member of the
public sector unit, whether holding office by election or selection;

“proper authority” means a person or body authorised to receive a
public interest disclosure under this Act and includes, in relation to
such a person or body—

(a) its Chief Executive Officer; or

20 (b) its governing body;

“public interest disclosure” means a disclosure of information that the
person making the disclosure believes on reasonable grounds
tends to show—

25 (a) that another person has engaged, is engaging, or proposes
to engage, in corrupt conduct;

(b) public wastage;

(c) that a person has engaged, is engaging, or proposes to
engage, in an unlawful reprisal; or

30 (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;

“public official” means—

(a) an officer of a public sector unit;

(b) a person employed, by or on behalf of the Territory or in the service of a Territory authority, whether under a contract of service or a contract for services; or

5 (c) a person otherwise authorised to perform functions on behalf of the Territory or a Territory authority;

“public sector unit” means—

(a) an administrative unit of the Public Service established in accordance with subsection 54 (2) of the *Australian Capital Territory (Self-Government) Act 1988*; or

10 (b) a Territory authority;

“public wastage” means conduct by a public official that amounts to negligent, incompetent or inefficient management within, or of, a public sector unit resulting, or likely to result, directly or indirectly, in a substantial waste of public funds, other than

15 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 in the belief that any person has made, or may make a public interest disclosure; or

20 (b) to a public official because he or she has resisted attempts by another public official to involve him or her in the commission of an offence.

Corrupt conduct

25 4. (1) For the purposes of this Act, conduct is to be taken to be corrupt if—

(a) it is of a type referred to in subsection (2); and

(b) it could constitute—

(i) a criminal offence;

(ii) a disciplinary offence; or

30 (iii) reasonable grounds for dismissing or dispensing with, or otherwise terminating, the services of a public official who is engaged in it.

(2) Paragraph (1) (a) applies in relation to the following types of conduct:

- (a) conduct of a person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial performance of official functions by a public official or public sector unit;
- 5 (b) conduct of a public official which amounts to the performance of any of his or her official functions dishonestly or with partiality;
- (c) conduct of a public official, a former public official or a public sector unit that amounts to a breach of public trust;
- 10 (d) conduct of a public official, a former public official or a public sector unit 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 unit or otherwise);
- (e) a conspiracy or attempt to engage in conduct referred to in paragraphs (a) to (d) (inclusive).

15 (3) In this section—

“criminal offence” means an offence against a law in force in the Territory;

“disciplinary offence” means conduct that constitutes grounds for disciplinary action under a law in force in the Territory.

20 **Disclosures during proceedings**

5. 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.

Other protection preserved

25 6. 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.

Liability of agent of the Crown

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

PART II—PROPER AUTHORITIES

Division 1—Public sector units

Proper authorities

8. Each public sector unit is a proper authority to receive—

35 (a) a public interest disclosure—

- (i) concerning the unit's conduct or the conduct of an officer of the unit;
- (ii) concerning a matter, or the conduct of a person, that the unit has a function or power to investigate;
- 5 (iii) referred to it by another public sector unit; or
- (iv) if the person making the disclosure believes that the unit is a proper authority to receive the disclosure; or
- (b) a public interest disclosure that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal where—
- 10 (i) in the case of an unlawful reprisal that relates to a previous public interest disclosure—the previous public interest disclosure was made to the public sector unit; or
- (ii) in the case of an unlawful reprisal that relates to an attempt by a public official to involve another person in the commission of an offence—the public official is an officer of the public sector unit.
- 15

Procedures

- 9. (1) A public sector unit shall establish procedures—
- (a) to facilitate the making of public interest disclosures; and
- 20 (b) to deal with public interest disclosures that it is the proper authority to receive;
- as soon as practicable, and in any event, within 12 months after—
- (c) the commencement of this section; or
- (d) the public sector unit comes into existence;
- 25 whichever is later.
- (2) A public sector unit shall ensure that procedures established under subsection (1) are maintained.
- (3) The procedures to be established under subsection (1) shall include procedures dealing with the following:
- 30 (a) making public interest disclosures;
- (b) assisting and providing information to a person who makes a public interest disclosure;
- (c) protecting a person who makes a public interest disclosure from unlawful reprisals, including unlawful reprisals taken by officers of the public sector unit;
- 35

(d) acting on public interest disclosures.

(4) The public sector unit shall, in respect of a document setting out the procedures established and maintained in accordance with this section—

- 5 (a) make a copy of the document available to its officers;
- (b) make a copy of the document available to the public for inspection at all reasonable times; and
- 10 (c) supply to a person a copy of the document on payment of an amount directed by the public sector unit to be paid in relation to supply of such a copy (being an amount that the public sector unit has determined, on reasonable grounds, to be equal to the costs that will be incurred by the public sector unit in providing such a copy).

Report on disclosures

15 10. (1) A public sector unit that is required by an Act to prepare an annual report of its activities during a year for tabling before the Legislative Assembly shall include in the report—

- (a) a description of the procedures maintained by it under section 9 during the year;
- (b) statistics relating to the year in accordance with subsection (2); and
- 20 (c) 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 public sector unit;
- 25 (b) the number of each type of public interest disclosure received by the public sector unit;
- (c) the number of public interest disclosures received by the public sector unit that were referred to it by other public sector units;
- (d) the number of public interest disclosures investigated by the public sector unit;
- 30 (e) where the public sector unit has referred public interest disclosures to other public sector units for investigation—
- (i) the total number of disclosures referred;
- (ii) the identity of each other unit to which a disclosure was referred;
- 35 (iii) the number of disclosures referred to each other unit; and

- (iv) the number of each type of public interest disclosure referred to each other public sector unit;
 - (f) the number of public interest disclosures on which the public sector unit declined to act under section 16; and
 - 5 (g) the number of public interest disclosures that were substantiated by the public sector unit's investigation of the disclosure.
- (3) The annual report shall include particulars of remedial action taken by the public sector unit in relation to—
- 10 (a) each public interest disclosure that was substantiated on investigation by the public sector unit; and
 - (b) any recommendations of the Ombudsman that relate to the public sector unit.

Division 2—The Ombudsman

Application of Ombudsman Act 1989

- 15 11. For the purposes of this Act, the Ombudsman may exercise any of the powers referred to in the *Ombudsman Act 1989* as if a reference to an investigation under the *Ombudsman Act 1989* were a reference to an investigation under this Act.

Ombudsman a proper authority

- 20 12. The Ombudsman is a proper authority to receive a public interest disclosure from any person.

Intervention by Ombudsman

- 25 13. If, in relation to a public interest disclosure that he or she has received, the Ombudsman considers—
- (a) that there is no other proper authority that can adequately or properly act on the disclosure; or
 - (b) that any proper authority that should have acted on the disclosure has failed, or been unable for any reason, to adequately act on the disclosure;
- 30 the Ombudsman may exercise his or her powers to act on the disclosure.

Directions by Ombudsman

14. (1) The Ombudsman may, in relation to the procedures required to be maintained by public sector units under section 9, give directions to a public sector unit—

- (a) specifying the procedures that the public sector unit should maintain;
- (b) modifying the existing procedures;
- 5 (c) requiring new procedures to be approved by the Ombudsman before being put into practice; or
- (d) providing that the public sector unit be exempted from the requirements of section 9.
- (2) The Ombudsman shall not exempt a public sector unit under paragraph (1) (d) unless he or she believes that, having regard to the limited number of officers constituting or employed by a public sector unit, compliance with section 9 is not warranted.
- 10 (3) The Ombudsman shall publish a direction under subsection (1) in the *Gazette*.

PART III—PUBLIC INTEREST DISCLOSURES

15 Making a public interest disclosure

15. (1) Any person may make a public interest disclosure to a proper authority.
- (2) Without limiting the generality of subsection (1) a person may make a public interest disclosure—
- 20 (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 that the information disclosed concerns.

Frivolous etc. disclosures

- 25 16. (1) A proper authority may decline to act on a public interest disclosure received by it if it considers that the disclosure—
- (a) is frivolous or vexatious;
- (b) is misconceived or lacking in substance;
- (c) is trivial; or
- 30 (d) has been adequately dealt with by itself or another proper authority.
- (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 shall decline to act on the disclosure to the extent that the disclosure attempts to reopen the issue.

- 5 (3) If a public interest disclosure was referred to the proper authority by the Ombudsman, the proper authority shall not decline to act on the disclosure under this section unless the Ombudsman is satisfied that the proper authority has adequate grounds under this section to make that decision.

Referral without investigation

- 10 17. Subject to section 20, if a public interest disclosure received by a proper authority is not related to—

- (a) the conduct of the authority or of an officer of the authority; or
- (b) a matter, or the conduct of any person, that it has a function or power to investigate;

- 15 the proper authority shall refer the disclosure to a public sector unit 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.

Investigation by proper authority

18. A proper authority shall investigate a public interest disclosure received by it if the disclosure relates to—

- 20 (a) its own conduct or conduct of an officer of the authority;
- (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 an officer, performing services for or on behalf of the authority.

25 Referral with investigation

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

- (a) the conduct of another public sector unit or the conduct of an officer of another public sector unit; or
- 30 (b) a matter, or the conduct of any person, that another public sector unit has a function or power to investigate;

the proper authority may refer the public interest disclosure to the other public sector unit.

- 35 (2) Nothing in this section affects the duty of a proper authority to act under section 18.

No referral

20. (1) A proper authority shall not refer a public interest disclosure to another public sector unit, other than the Ombudsman, under section 17 or subsection 19 (1) if, in the authority's opinion—

- 5 (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;
- as a result of the reference to the other public sector unit.

10 (2) Where, but for subsection (1), a proper authority would have referred a public interest disclosure to another public authority under section 17, the proper authority shall refer the disclosure to the Ombudsman.

Action by proper authority

21. (1) Subject to subsection (2), if, after investigation, a proper authority is of the opinion that a public interest disclosure has revealed—

- 15 (a) that a person has engaged, is engaging, or proposes to engage, in corrupt conduct;
- (b) public wastage;
- (c) that a person has engaged, is engaging, or proposes to engage, in an unlawful reprisal; or
- 20 (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 shall take such action as is necessary and reasonable—

- 25 (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) Where the Ombudsman reports that a public interest disclosure has revealed—

- 30 (a) that a person has engaged, is engaging, or proposes to engage, in corrupt conduct;
- (b) public wastage;
- (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;

5 a proper authority to which the disclosure relates shall, having regard to any recommendations of the Ombudsman, take such action as is 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.

10 (3) Subsections (1) and (2) do not apply if—

- (a) an investigation, or a report by the Ombudsman, reveals conduct referred to in paragraphs (1) (d) or (2) (d); and

- (b) the conduct is necessary to give effect to a law of the Territory.

Progress report

15 22. (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.

20 (2) Where a request is made under subsection (1), the proper authority to which it is made shall 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)—

25 (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.

30 (3) A progress report provided under subsection (2) shall contain the following particulars with respect to the proper authority that provides the report:

- (a) where the authority has declined to act on the public interest disclosure under section 16—that it has declined to act and the ground on which it so declined;

35 (b) where the authority has referred the public interest 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) where the authority has accepted the public interest disclosure for investigation—the current status of the investigation;

5 (d) where the authority has accepted the public interest 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.

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

Joint action

15 23. If more than 1 proper authority is required by this Act to act on a public interest disclosure, the proper authorities may enter into such arrangements with each other as are necessary and reasonable—

(a) to avoid duplication of action;

(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.

20

PART IV—UNLAWFUL REPRISALS

Division 1—Unlawful reprisals—general

Offence

24. (1) A person shall not engage, or attempt or conspire to engage, in an unlawful reprisal.

25 Penalty: \$10,000 or imprisonment for 1 year, or both.

(2) It is a defence to a prosecution under subsection (1) if it is established that the accused person—

30 (a) had just and reasonable grounds for engaging in the conduct, or attempting or conspiring to engage in the conduct, that would, except for this subsection, amount to an unlawful reprisal; and

(b) was engaging, or had engaged, in the conduct, or had conspired or attempted to engage in the conduct, before forming the belief that a person had made or may make a public interest disclosure.

Function to assist complainant

25. Where a proper authority receives a public interest disclosure that relates to an unlawful reprisal it shall provide the person who made the public interest disclosure with information about the protection and remedies available under this Act in relation to an unlawful reprisal.

Relocation powers

26. Where an officer of a public sector unit applies in writing to the public sector unit for relocation and the public sector unit considers—

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

the public sector unit shall, as far as practicable, make arrangements for relocation of the officer to another position in a public sector unit.

Consent to relocation

27. Section 26 does not authorise the relocation of an officer to another position in a public sector unit without the consent of the officer.

Division 2—Civil claims

Liability in damages

28. (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) Any 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.

Application for injunction or order

29. An application to a court of competent jurisdiction for an injunction or order under section 30 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 Ombudsman on behalf of a person referred to in paragraph (a).

Injunction or order to take action

30. (1) If, on receipt of an application under section 29, a court is satisfied that a person has engaged or is proposing to engage, in—

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

the court may—

- 15 (c) order the person to take specified action to remedy any detriment caused by the unlawful reprisal; or
- (d) grant an injunction in terms the court considers appropriate.

(2) The court may, pending the final determination of an application under section 29, make an interim order in the terms referred to in paragraph (1) (c) or grant an interim injunction.

- 20 (3) 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.

- 25 (4) 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.

Undertakings as to damages and costs

31. (1) If the Ombudsman applies under section 29 for an injunction or order, no undertaking as to damages or costs shall be required.

- 30 (2) The Ombudsman may give an undertaking as to damages or costs on behalf of a person applying under section 29 and, in that event, no further undertaking shall be required.

PART V—MISCELLANEOUS**Confidentiality**

- 35 32. (1) A public official shall not, without reasonable excuse, make a record of, or wilfully disclose to another person, confidential information

gained through the public official's involvement in the administration of this Act.

Penalty: \$5,000.

5 (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;
- (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.

10 (3) 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 against whom a public interest disclosure has been made;
- 15 (b) information contained in a public interest disclosure;
- (c) information concerning an individual's personal affairs; or
- (d) information that, if disclosed, may cause detriment to a person.

False or misleading information

20 33. A person shall 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: \$10,000 or imprisonment for 1 year, or both.

Limitation of liability

25 34. (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.

30 (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;

5 by reason only that the person has made a public interest disclosure with respect 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.

10 Liability of person disclosing

35. 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.

Corporations—penalties

15 36. Where a body corporate is convicted of an offence under this Act, the penalty that the court may impose is a fine not exceeding 5 times the maximum amount that, but for this section, the court could impose as a pecuniary penalty for the offence.

Regulations

20 37. The Executive may make regulations, not inconsistent with this Act, prescribing matters—

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

Amendment of *Ombudsman Act 1989*

25 38. Section 4 of the *Ombudsman Act 1989* is amended—

- (a) by omitting from subsection (1) "For the purposes of this Act, there shall be an" and substituting "There shall be established the office of the"; and
- 30 (b) by adding at the end of subsection (2) "or the *Public Interest Disclosure Act 1994*".