

2006

**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

PUBLIC INTEREST DISCLOSURE BILL 2006

EXPLANATORY STATEMENT

**Circulated by authority of
Mr Jon Stanhope MLA
Chief Minister**

EXPLANATORY STATEMENT

This explanatory statement relates to the *Public Interest Disclosure Bill 2006* (the Bill) as introduced into the Legislative Assembly.

Overview

The purpose of the Bill is to replace the *Public Interest Disclosure Act 1994* with a new Act, providing clearer and more effective procedures for making, investigating and addressing disclosures about public maladministration. A focus of the legislation is protecting the identity of disclosers of public interest information, and protecting disclosers from unlawful reprisals.

The new legislative scheme will deal with disclosures that raise matters of public interest only, for example, misuse of public funds, fraud, systemic failure, corruption, nepotism, and illegality of actions or policies. It is not intended to provide a mechanism for pursuing private grievances that do not have broader public interest implications.

Revenue/Cost Implications

The legislation will be implemented within existing financial resources.

Notes on Clauses

PART 1 PRELIMINARY

Clause 1 Name of Act

This clause provides that the name of this Act is the *Public Interest Disclosure Act 2006*.

Clause 2 Commencement

The Act will commence on a day fixed by the Minister, unless the Minister has not commenced the Act within 9 months of its notification day. In that case, the Act will commence automatically on the first day after that 9-month period.

Clause 3 Dictionary

This clause provides that the dictionary of terms at the end of the Act forms part of the Act.

Clause 4 Notes

This clause explains that notes included in the Act are for explanatory purposes only and do not form part of the Act.

Clause 5 Offences against Act – application of the Criminal Code etc

This clause explains that the Criminal Code applies in relation to offences against the Act.

Clause 6 Object of Act

The object of the Act is to improve the quality of public sector administration by: ensuring that people can make confidential disclosures about maladministration by government bodies; setting out procedures for the investigation and reporting of these disclosures; and protecting people who make such disclosures from reprisal.

PART 2 IMPORTANT CONCEPTS

Clause 7 Meaning of *public interest disclosure*

A public interest disclosure must contain information that implicates a government entity or government official in conduct that is contrary to the public interest. In order to be a public interest disclosure, the information must be given to a person who is a contact person for a public interest disclosure. A disclosure is defined broadly as a statement that a person knows, believes or suspects something about an event, action or circumstance.

Clause 8 Meaning of *public interest information implicating a government entity or government official*

This clause explains the meaning of public interest information. It is information that tends to show that a government entity or official was engaging in, is engaging in or will engage in conduct contrary to the public interest. The public interest is a concept that will involve something broader than the interests of an individual. Some examples of conduct that is contrary to the public interest are provided:

- systemic failure – a failure by a government entity or official to implement a system to give effect to a law;
- policy failure – the adoption of a policy by a government entity or official that is inconsistent with a law;
- pattern of non-compliance – repeated failure by a government entity or official to comply with a government policy or a law;
- fraud – for example, intentionally falsifying a document; and
- corruption – for example, receiving a benefit for divulging confidential information.

Clause 9 Meaning of *government entity*

A government entity includes public sector bodies such as departments, statutory authorities and instrumentalities, a statutory office-holder, a company owned by the government or a subsidiary of such a company, the Legislative Assembly secretariat, and any other entity prescribed by regulation.

The terms ‘administrative unit’, ‘territory authority’, ‘territory instrumentality’, ‘territory-owned corporation’ and ‘statutory office-holder’ are defined in the dictionary in the *Legislation Act 2001*.

A government entity does not include the ombudsman, who is the main supervisor for public interest disclosures.

The Act is primarily concerned with accountability of the executive arm of government. Members of the judiciary are excluded from the meaning of government entity. Complaints about members of the judiciary are handled under processes established by the *Judicial Commissions Act 1994*.

Members of the Legislative Assembly and staff who are employed under the *Legislative Assembly (Members’ Staff) Act 1989* are also not covered. Members of the Legislative Assembly are held accountable for their conduct through regular public election.

The Act also allows regulations to be made including other entities or excluding government entities from the operation of the Act.

Clause 10 Meaning of *government official*

A government official is a person who is or has formerly been an employee or contractor of a government entity.

The clause specifies that if an entity is a statutory office-holder or a territory instrumentality, a person is taken to be an employee of that entity for the purposes of this Act if the statutory office-holder or instrumentality exercises powers under section 24 or 25 of the *Public Sector Management Act 1994* as if they were a chief executive of an administrative unit in relation to that person. This provision is necessary as most statutory office-holders and instrumentalities do not employ staff directly. Instead, public servants who are technically employed by an administrative unit are ‘loaned’ to assist a statutory office-holder or instrumentality.

The clerk of the Legislative Assembly and secretariat staff employed under the *Public Sector Management Act 1994* are also ‘government officials’, as are any people prescribed by regulation for the section.

A contractor is only a government official for the purposes of the Act if the contractor is performing a normal function of a government entity under contract, that is, where a government entity has ‘contracted out’ a function to the private sector.

Clause 11 Meaning of *contact person*

In order to make a valid public interest disclosure, a person must make the disclosure to a contact person (see clause 7). Clause 11 provides that a contact person includes:

- a person declared to be a contact person by a government entity implicated in a disclosure;
- if an entity implicated in a disclosure has not declared a contact person, then the CEO of the entity;

- the auditor-general, if the disclosure is about a matter relating to the *Financial Management Act 1996*;
- the commissioner for public administration, if the disclosure is about a matter relating to employment under the *Public Sector Management Act 1994*; and
- the ombudsman.

If a CEO of a government entity declares a person to be a contact person for public interest disclosures, this is a notifiable instrument that is published on the ACT legislation register.

Clause 12 Meaning of *CEO* of a government entity

A CEO of a government entity may be a contact person for receiving public interest disclosures. A CEO also has a number of other functions under the Act. This clause defines a CEO as:

- a chief executive of a government department (an administrative unit);
- a person who has responsibility for managing the affairs of a territory authority, instrumentality or territory-owned corporation;
- a statutory office-holder;
- the clerk of the Legislative Assembly;
- the person with overall responsibility for the control of any prescribed entity.

It is intended that the CEO is the person who has day-to-day responsibility for managing the affairs of an entity (for example, a chief executive officer or managing director), rather than a person who has responsibility for setting strategic direction and may only be involved on a part time basis, such as a governing board member or chairman.

Clause 13 Meaning of *supervisor*

The ombudsman can receive and be a supervisor for any public interest disclosure, because the ombudsman cannot be the subject of a public interest disclosure (see clause 9(2)).

The other supervisors – the auditor general and the commissioner for public administration – are limited to supervising disclosures relating to particular subject areas and only if they are not implicated in the disclosure.

In cases where there could be more than one supervisor, then the possible supervisors must consult and decide which of them will be the supervisor for the purposes of investigating and completing that public interest disclosure. It is expected that matters that would have a bearing on this decision would include particular expertise in the subject matter of the disclosure and available resources.

PART 3 MAKING A PUBLIC INTEREST DISCLOSURE

Clause 14 Definitions – pt 3

This clause refers users of the Act to definitions of terms used in this part.

Clause 15 Making a public interest disclosure

This clause provides that a person may make a public interest disclosure to a contact person orally or in writing. The contact person must make a written record of any oral disclosure, consistent with any approved form made for this purpose.

Clause 16 Receiver's action after public interest disclosure made

A contact person who receives a public interest disclosure must, as far as practicable, take the following actions:

- ask for the discloser's name if not already provided. If the discloser does not provide his or her name, the contact person must advise the discloser that an anonymous disclosure does not have to be investigated;
- ask for the discloser's contact details if not already provided. If the discloser does not provide his or her contact details, the contact person must advise the discloser that he or she would not be kept informed about the progress of any investigation;
- ask the discloser if he or she is making the public interest disclosure honestly and without recklessness as to whether the information is true or not, and inform the discloser that a dishonest or reckless disclosure does not have to be investigated, and that making a false or misleading disclosure may be an offence under the Criminal Code;
- tell the discloser that if he or she makes a public interest disclosure honestly and without recklessness as to the truth of the information, then the Act provides immunity and the discloser is not subject to civil or criminal liability for making the disclosure, and is not subject to disciplinary action or dismissal from employment because of making the disclosure;
- explain to the discloser that this immunity can be lost, however, if the discloser does not cooperate with an investigation of the public interest disclosure, or if the discloser divulges the information that is the subject of the disclosure to anyone else, for instance, the media; and
- tell the discloser that if he or she loses immunity under the Act, the investigator may end an investigation of the public interest disclosure.

Clause 17 Receiver must tell each implicated government entity and supervisor

The contact person who receives a public interest disclosure must ensure that all implicated government entities and supervisors are given a copy of the disclosure as soon as practicable.

Clause 18 Receiver must record public interest disclosure

As soon as practicable after receiving a public interest disclosure, the contact person to whom the disclosure was made must record the disclosure in the register, or tell the agency that administers the register about the disclosure so that that agency can record it. The administering agency is obliged to record a disclosure in the register.

The public interest disclosure register will be maintained by the agency that has responsibility for administering this Act under the Administrative Arrangements made under section 14 of the *Public Sector Management Act 1994*. If a form is approved requiring public interest disclosures to be recorded in a particular way, then that form must be used by a person who receives a disclosure.

PART 4 INVESTIGATING A PUBLIC INTEREST DISCLOSURE

Clause 19 Definitions – pt 4

This clause refers users of the Act to definitions of terms used in this part.

Clause 20 Who is the *investigator* for a public interest disclosure?

If a disclosure involves only one government entity and that entity has appointed a person to investigate that particular disclosure (or to investigate public interest disclosures generally for the entity) then that person will investigate, unless the supervisor for the disclosure decides that it should investigate a particular disclosure.

The supervisor might assume responsibility for investigating, for example, if the disclosure concerns the CEO or other senior staff of an entity, or if the entity consists of a single person (such as a statutory office-holder) and the disclosure relates to the conduct of that person, or if the disclosure relates to more than one entity and the supervisor does not think it would be appropriate for one of the entities to investigate all matters covered in the disclosure.

If the entity that is involved in the disclosure has not appointed an investigator, then the supervisor for the public interest disclosure is the investigator.

Clause 21 Appointed investigators

This clause explains that an investigator appointed by an entity or a supervisor may exercise all of the functions of an investigator under the Act.

Clause 21(3) requires an appointed investigator to disclose any conflict of interest regarding the matters under investigation to the person who appointed the investigator as soon as practicable. Clause 21(4) explains the circumstances in which an investigator would have a material interest in a matter under investigation.

For example, if an investigator appointed by a government department discovered that he or she had a financial interest in the matter that was the subject of the public interest disclosure, that interest would have to be disclosed to the chief executive of the government department as soon as practicable. The chief executive in this example might decide that it was appropriate to end the investigator's appointment and appoint a different investigator.

Clause 22 Investigator must give contact details to discloser

This clause requires the investigator for a disclosure to contact the person who made the disclosure as soon as practicable and give that person the investigator's contact details and information about the supervisor for the disclosure. If the discloser refused to provide contact details to the receiver for the disclosure, then this requirement does not apply.

Clause 23 Investigator must investigate public interest disclosure

This clause provides that an investigator must investigate a public interest disclosure, unless one of the exceptions set out in the Act applies.

Clause 24 Investigator must refuse to investigate or end investigation

An investigator must not investigate a public interest disclosure if satisfied that the information in the public interest disclosure is subject to legal professional privilege, and the person who made the disclosure does not have the authority to waive that privilege.

An investigator must not investigate a public interest disclosure if satisfied that the information in the public interest disclosure has already been fully investigated under this Act (including the former *Public Interest Disclosure Act 1994*) or in another way. The purpose of this exception is to ensure that public resources are not wasted by the unnecessary duplication of investigations.

An investigator must not investigate a public interest disclosure if satisfied that the information in the public interest disclosure could be dealt with in a more appropriate way, and that alternative approach is reasonably available to the discloser.

For instance, if a public interest disclosure involves information about a safety issue that may involve a breach of the *Occupational Health and Safety Act 1989*, it may be more appropriate for the issue to be investigated under that Act by investigators who have expertise in that area and access to a specific range of enforcement mechanisms to address safety problems.

An investigator's decision under this section is not reviewable by the Administrative Appeals Tribunal. However, if the investigator is appointed by a government entity, then the decision to refuse to investigate can be reviewed by the supervisor for the public interest disclosure. An investigator's decision is reviewable under the *Administrative Decisions (Judicial Review) Act 1989*.

Clause 25 Investigator may refuse to investigate or end investigation

An investigator may decide not to investigate a public interest disclosure if the person who made the disclosure withdraws the disclosure. It should be noted that this exception is discretionary. The investigator may decide that the circumstances surrounding the discloser's withdrawal, or the seriousness of the matter that had been disclosed, are such that the disclosure should still be investigated.

An investigator may decide not to investigate a public interest disclosure if the person who made the disclosure has decided to remain anonymous. It is more difficult in this

situation for the investigator to make a judgement about whether the information that forms the basis of the disclosure is reliable, and to properly investigate the claims.

An investigator may decide not to investigate a public interest disclosure if satisfied that the information in the disclosure is trivial or insubstantial. The purpose of this provision is to allow a decision not to proceed with an investigation that would amount to a waste of public resources.

An investigator may decide not to investigate a public interest disclosure if satisfied that the discloser had made the public interest disclosure dishonestly, or with recklessness as to the truth of the disclosure. This exception is discretionary. It may be that even if the discloser has acted dishonestly or recklessly, the information communicated in the public interest disclosure still warrants investigation.

An investigator may decide not to investigate a public interest disclosure if satisfied that the discloser is not protected by the immunity given by this Act. A discloser may lose this immunity if he or she refuses to cooperate with an investigation, or if the discloser divulges the public information being investigated, for instance to the media.

This exception is discretionary. It may be that even if the discloser has lost immunity under the Act, the information communicated in the public interest disclosure still warrants investigation.

An investigator may also refuse to investigate or refuse to investigate if satisfied that, in all the circumstances, investigation or further investigation is not warranted. This exception mirrors section 6(1)(b)(iii) of the *Ombudsman Act 1989*.

An investigator's decision under this section is not reviewable by the Administrative Appeals Tribunal. However, if the investigator is appointed by a government entity, then the decision to refuse to investigate can be reviewed by the supervisor for the public interest disclosure. An investigator's decision is reviewable under the *Administrative Decisions (Judicial Review) Act 1989*.

Clause 26 Investigator must tell discloser of refusal or ending of investigation

If an investigator refuses to investigate a disclosure or ends the investigation of a disclosure under clause 24 or 25, then the investigator must advise the person who made the disclosure by written notice of this decision. The refusal notice must include the reasons for the decision and either:

- if the investigator is an entity-appointed investigator, advise that the discloser can apply to the supervisor within 21 days to have the decision to refuse or end the investigation reviewed; or
- if the investigator is a supervisor-appointed investigator, advise that the decision is not reviewable by the Administrative Appeals Tribunal.

The refusal notice must not include any information that would identify any informants to the investigation.

If the investigator is not the supervisor for the public interest disclosure, the investigator must also give a copy of the refusal notice to the supervisor.

The requirement to give a refusal notice to the discloser does not apply if the discloser refused to provide his or her name or contact details to the receiver of the public interest disclosure.

Clause 27 Discloser may appeal refusal or ending to supervisor

If an investigator who is not a supervisor for a public interest disclosure decides to refuse or end an investigation under either clause 24 or 25, then the discloser may apply to the supervisor to have this decision reviewed not more than 21 days after being given the refusal notice.

Clause 28 Supervisor must review investigator's refusal or ending

Following an application of the discloser under clause 27, the supervisor is obliged to review the decision of the investigator and must either confirm the decision, amend the decision, or set aside the decision and substitute a new decision. By way of example, if an investigator has decided that a disclosure should not be reviewed because there was a better way of investigating the matter, the supervisor might:

- confirm that decision; or
- decide that there is not in fact a better way of dealing with the disclosure, so it should be investigated under the Act; or
- decide that there is not a better way of dealing with the disclosure, but that the disclosure should not be investigated under the Act for another reason, for instance, because the information in the disclosure is trivial or insubstantial.

The supervisor's decision under this clause is not reviewable by the Administrative Appeals Tribunal, but is reviewable under the *Administrative Decisions (Judicial Review) Act 1989*.

Clause 29 Supervisor must tell discloser about decision

After making a decision under clause 28, the supervisor must inform the discloser about the decision by written notice. The review notice must include the supervisor's reasons for the decision and advise that the decision is not reviewable by the Administrative Appeals Tribunal. The refusal notice must not include any information that would identify any informants to the investigation.

The requirement to give a review notice to the discloser does not apply if the discloser refused to provide his or her name or contact details to the receiver of the public interest disclosure.

Clause 30 Investigator must tell discloser about progress

If an investigator is required to or has decided to investigate a public interest disclosure under the Act, then the investigator must give regular information about progress to the discloser, if the discloser provided his or her name and contact details to the receiver.

The investigator must contact the discloser at least once every three months to advise about progress of the investigation. However, the investigator must not give any

information to the discloser that would identify informants to the investigation, or would adversely affect the investigation.

Clause 31 Investigator may ask anyone for information

An investigator has the power to ask anyone for information about a public interest disclosure under investigation. A government entity or a government official is obliged to promptly comply with such a request.

The investigator must advise a person from whom information is requested that it is an offence under section 338 of the Criminal Code to give false or misleading information. If the investigator is asking the discloser for information under this provision, he or she must advise the discloser that a failure to comply with the request within 14 days could result in the discloser losing immunity under the Act.

Clause 32 Protection of people giving information

If someone provides information to an investigator honestly and without recklessness as to the truth of the information, then the Act provides immunity to that person and the informant is not subject to civil or criminal liability for making the disclosure, and is not subject to disciplinary action or dismissal from employment because of making the disclosure.

This section does not apply to a discloser for a public interest disclosure, as a separate provision regarding protection for disclosers is contained in clause 49.

Clause 33 Investigator must give people opportunity to explain

If an investigator suspects, as a result of the investigation of a public interest disclosure, that a government entity or government official may have engaged, or will engage, in conduct contrary to the public interest, the investigator must either give that entity or official a written investigation notice, or refer the matter to the police.

An investigation notice must set out the investigator's suspicion and the nature of the suspected conduct that is contrary to the public interest by the entity or official. The notice must also advise that the person has 21 days to make a submission to the investigator. The investigation notice must not contain sensitive information (including information that would identify disclosers or informants).

If the government entity or official makes a submission within the 21-day period, the investigator is obliged to consider the submission.

Clause 34 Investigation may be referred to police

If an investigator is satisfied, as a result of the investigation of a public interest disclosure, that a government entity or government official may have engaged or may engage in conduct that is an offence against an ACT law, then the investigator may refer the public interest disclosure to the chief police officer.

The chief police officer must either investigate the public interest disclosure, or refuse to investigate the disclosure. In the case of a refusal to investigate, the chief police officer must advise the investigator of the reasons for the refusal.

If the chief police officer decides to investigate the disclosure, when the investigation ends, the chief police officer must advise the investigator of the outcome of the police investigation.

Following a referral of a public interest disclosure to the police, the investigation by the investigator is suspended until the investigator is advised by the chief police officer about a decision to refuse to investigate or of the outcome of the police investigation.

Clause 35 Investigator must tell discloser about police investigation

Following a referral of a public interest disclosure to the police, the investigator must advise the discloser of this referral, and tell the discloser about the outcome of the referral once advised by the chief police officer. However, the investigator must not give any information to the discloser that would identify an informant, or may adversely affect a police investigation or a proceeding arising out of a police investigation.

This requirement to provide information to the discloser does not apply if the discloser refused to give his or her name or contact details to the receiver of the public interest disclosure.

PART 5 COMPLETING AN INVESTIGATION

Clause 36 Definitions—pt 5

This clause refers users of the Act to definitions of terms used in this part.

Clause 37 Investigator must complete investigation promptly

An investigator is required to conduct an investigation of a public interest disclosure promptly.

Clause 38 Completion of investigation—fully investigated

If an investigator fully investigates a public interest disclosure, that investigation is completed when:

- an investigation has been conducted; and
- the investigator has considered any submission made by a person no later than 21 days after the investigator gave them an investigation notice; and
- the investigator has considered all relevant information that is available to the investigator, or could be obtained by the investigator; and
- the investigator is satisfied that no further relevant information could be obtained through further reasonable investigation (this means that the investigator does not have to investigate any possibly relevant matter if it would require unreasonable effort or expense); and
- has formed a reasonable conclusion as a result of the investigation.

The conclusion formed by the investigator may be:

- that a government entity or official has been engaging in, is or is likely to engage in conduct contrary to the public interest;
- that a government entity or official has not been engaging in, is not or is not likely to engage in conduct contrary to the public interest; or
- that there is no reasonable likelihood that the investigator can determine whether a government entity or government official has been engaging in, is or is likely to engage in conduct contrary to the public interest.

Clause 39 *Completion of investigation—investigation refused or ended*

An investigation may also be completed by the investigator deciding to refuse to investigate or deciding to end an investigation under clause 24 or 25. In this case, the investigation is completed once an investigator who is a supervisor has given the discloser a refusal notice (if required).

If the investigator is an entity-appointed investigator, then the investigation is completed once the investigator has given the discloser a refusal notice and either:

- the 21 day period for the discloser to apply to the supervisor for review of the decision has passed without the discloser making such an application; or
- if the discloser does apply to the supervisor for review of the decision, the supervisor reviews and confirms the decision, and has told the discloser about the confirmation of the decision (if required).

Clause 40 *Completion of investigation – police investigation*

An investigation may also be completed by the investigator referring a disclosure to the chief police officer. In this case, the investigation is completed once:

- the chief police officer has told the investigator that the police have decided not to investigate under section 34(3), or that the police have investigated the disclosure and told the investigator of the outcome of the police investigation under subsection 34(4); and
- the investigator has told the discloser about the police refusal to investigate or outcome of the police investigation (if required).

Clause 41 *Completion of investigation to be recorded*

The investigator must record the date of completion of an investigation in the public interest disclosures register, and whether the investigation was completed under section 38, 39 or 40 (or provide this information to the agency administering the register) as soon as practicable after completion of the investigation.

The administering agency is obliged to record the completion information in the register. If a form is approved requiring the completion information to be recorded in a particular way, then that form must be used by the investigator.

Clause 42 Investigator must report on completed investigation

After completion of an investigation, the investigator must give an investigation report to the CEO of each implicated government entity and to the supervisor for the public interest disclosure, unless the supervisor is the investigator of the disclosure.

The investigation report must normally be provided within one month of completion of the investigation, but this period may be extended by the supervisor.

Clause 43 Investigation report must include all relevant information

The investigation report must include all information relevant to the investigation of the disclosure that is known to the investigator at the end of the investigation. This includes protected information, such as the identity of the discloser and informants.

Clause 44 Investigation report must include conclusions etc

If the investigation is completed after a full investigation, then the investigation report must include the investigator's conclusion under clause 38 and the reasons for forming the conclusion.

If the investigation is completed because the investigator has refused to investigate or ended the investigation under clause 24 or 25, the investigation report must identify the investigator's reasons for refusing to investigate or ending the investigation.

If the investigation is completed following a referral of the disclosure to the chief police officer under clause 34, the investigation report must advise of the outcome of the police investigation, or that the chief police officer refused to investigate. However, the investigation report must not include any information that may adversely affect a police investigation or proceeding arising out of a police investigation.

Clause 45 Investigation report must include recommendations

An investigation report must include a recommendation that the CEO of an implicated agency either take a stated action, or take no stated action about the public interest disclosure. Examples of stated actions might be taking disciplinary action against a particular government official, or providing training to a particular government official, or the amending a government procedures manual.

The investigation report may include additional recommendations that the CEO take stated action to prevent or reduce the likelihood of future conduct contrary to the public interest happening.

Clause 46 CEO to make decision on investigation report

After receiving an investigation report, a CEO must consider the report and decide whether to:

- take action as recommended in the report;
- take any other action to prevent or reduce the likelihood of future conduct contrary to the public interest;

- take any action to prevent or reduce the likelihood of detrimental action being taken against the discloser; and
- take any other appropriate action.

Clause 47 CEO to tell discloser and supervisor of decision on investigation report

A CEO who receives an investigation report must give the discloser and the supervisor a written report about any action that the CEO decides to take in response to the investigation report. However, the CEO must not give information to a discloser that would identify an informant to the investigation. The requirement to provide a written report to the discloser does not apply if the discloser did not provide his or her name or contact details to the receiver for the public interest disclosure.

Clause 48 Supervisor may tell Chief Minister if action not taken

The supervisor may tell the Chief Minister if a CEO does not appropriately respond to an investigation report, for example, if a CEO fails to consider or respond to an investigation report, or responds in a manner that is not adequate or appropriate in the opinion of the supervisor.

If the supervisor tells the Chief Minister about the CEO's action, the supervisor must give the Chief Minister a copy of the investigation report and the CEO's action report, if any.

PART 6 PROTECTION FOR DISCLOSERS

Clause 49 Immunity for discloser

This clause provides immunity for a person who makes a public interest disclosure honestly and without recklessness as to the truth of the disclosure.

If a person does make a disclosure honestly and without recklessness, then the immunity provides that the person has not breached confidence, professional etiquette, ethics, or professional conduct. The discloser is not subject to any civil or criminal liability that would otherwise attach only because of the making of the public interest disclosure. The discloser cannot be disciplined in or dismissed from his or her employment only because of the making of the public interest disclosure.

The immunity may end in two circumstances:

- if the discloser refuses to cooperate with an investigation of the disclosure; or
- if the discloser divulges the information in the public interest disclosure otherwise than in accordance with the Act or other legislation.

Clause 50 What is *detrimental action*?

This clause defines the term 'detrimental action', which is used in Part 6. Detrimental action includes:

- discriminating against a person;
- harassing or intimidating a person;
- injuring a person; and
- damaging a person's property.

A person who has been subjected to detrimental action or threats of detrimental action because of a public interest disclosure or because he or she might make a public interest disclosure may be able to take action under the *Human Rights Commission Act 2005* and the *Discrimination Act 1991*.

Clause 51 Offence—detrimental action to deter discloser

This clause creates an offence, punishable by a maximum penalty of 100 penalty units, imprisonment for one year, or both.

It is an offence to take detrimental action against another person in order to deter that person from making a public interest disclosure, or to threaten to take detrimental action against another person in order to deter that person from making a public interest disclosure.

It is not necessary for the prosecution to prove that a person actually intended to make a public interest disclosure or that a person was actually deterred from making a public interest disclosure.

Clause 52 Offence—detrimental action to punish discloser

This clause creates an offence, punishable by a maximum penalty of 100 penalty units, imprisonment for one year, or both.

It is an offence to take detrimental action against another person in order to punish that person for making a public interest disclosure, or to threaten to take detrimental action against another person in order to punish that person for making a public interest disclosure.

It is not necessary for the prosecution to prove that a person actually made a public interest disclosure or that a person was actually punished for making a public interest disclosure.

Clause 53 Victim of detrimental action may sue for damages

If a person takes or threatens to take detrimental action against another person in order to deter that person from making a public interest disclosure, or to punish that person for making a public interest disclosure, then the person who took the detrimental action is liable in damages to anyone who suffers detriment as a result.

The damages may be recovered in a court of competent jurisdiction, for instance the ACT Supreme Court. Any remedy that is available to the court for a tort is available in a proceeding under this clause, including exemplary damages.

However, in order to prevent ‘double dipping’, an award of damages is to be reduced by the amount of any compensation already ordered in relation to the same detrimental action under the *Discrimination Act 1991*.

PART 7 INFORMATION SHARING AND SECRECY

Clause 54 Definitions – part 7

This clause refers users of the Act to definitions of terms used in this part.

Clause 55 Who is an *information holder*?

This clause defines the term ‘information holder’, which is used in this part.

An information holder includes a contact person, a supervisor, an investigator, a CEO of an implicated government entity, another person exercising a function under the Act or a person involved in the administration of the Act. This includes someone who has obtained information because he or she was formerly such a person.

An information holder also includes a person who has been given information under the Act by one of the listed people.

Clause 56 What is *protected information*?

This clause defines the term ‘protected information’, which is used throughout the Act. Protected information is information that is obtained by or disclosed to an information holder because he or she is an information holder under the Act.

For example, a contact person obtains public disclosure information because disclosers are required by the Act to make public interest disclosures to a contact person. An investigator may obtain confidential information about a person or the operations of a government entity because he or she is authorised under the Act to investigate allegations made in a public interest disclosure.

Clause 57 What is *sensitive information*?

Sensitive information is a category of protected information. Sensitive information includes:

- public interest disclosure information (defined in clause 58);
- discloser identifying information (defined in clause 59);
- informant identifying information (defined in clause 60); and
- information prescribed by regulations to be sensitive information.

Clause 58 What is *public interest disclosure information*?

Public interest disclosure information is a category of sensitive information. This clause provides that public interest disclosure information means any information in a public interest disclosure or a record of a public interest disclosure, or information that

would allow the contents of a public interest disclosure or record of a public interest disclosure to be worked out.

Clause 59 **What is *discloser identifying information*?**

Discloser identifying information is a category of sensitive information, and means any information that identifies a discloser or would allow the identity of a discloser to be worked out.

Clause 60 **What is *informant identifying information*?**

Informant identifying information is a category of sensitive information, and means any information that identifies an informant to an investigation or would allow the identity of an informant to be worked out.

Clause 61 **Offence – secrecy of protected information**

This clause creates an offence, punishable by a maximum penalty of 50 penalty units, imprisonment for six months, or both.

It is an offence for an information holder to make a record of protected information if the information holder is reckless about whether the information is protected.

It is an offence for an information holder to divulge protected information if the information holder is reckless about whether the information is protected and reckless about whether the information is divulged to someone else.

The offence is subject to exceptions set out in the following four clauses.

Clause 62 **Exception to s 61—information given under this Act**

The offence in clause 61 does not apply if an information holder makes a record of or divulges protected information, where the record is made, or the information is divulged, under the Act or in the exercise of a function as an information holder under the Act.

Clause 63 **Exception to s 61—information given under another law**

The offence in clause 61 does not apply if an information holder makes a record of or divulges protected information, where the record is made, or the information is divulged under another territory law, or in the exercise of a function as an information holder under another law.

Clause 64 **Exception to s 61—information given with agreement**

The offence in clause 61 does not apply if an information holder divulges protected information, and the information divulged is not sensitive information, and is information about a person and that person has agreed to the information being divulged.

Clause 65 Exception to s 61—information given to court or tribunal

The offence in clause 61 does not apply if an information holder makes a record of or divulges protected information, where the record is made, or the information is divulged, for a proceeding in a court or tribunal.

However, discloser identifying information and informant identifying information may only be provided to a court or tribunal if the respective discloser or informant has agreed to that information being provided to the court or tribunal.

This is because the information will generally be publicly available once it has been provided to a court or tribunal.

PART 8 MISCELLANEOUS

Clause 66 Public interest disclosures register

This clause obliges the chief executive of the agency responsible for administering this Act under the Administrative Arrangements to maintain a register of public interest disclosures. The register must include appropriate information, and information specifically required by the Act.

Clause 67 Protection of officials from liability

This clause protects people exercising functions under the Act from civil liability arising from their conduct in exercising those functions. This is provided that they act honestly and without recklessness in exercising a function under the Act or purporting to exercise a function under the Act.

Civil liability that would have attached to the official, or person acting under the direction of an official, attaches to the Territory instead.

Clause 68 Annual report of administering agency

This clause requires the agency responsible for administering the Act under the Administrative Arrangements made under section 14 of the *Public Sector Management Act 1994* to include information about the operation of the Act in its annual report each year.

This includes information that will be obtained from the register:

- the total number of public interest disclosures made in the reporting period;
- the total number of investigations completed in the reporting period, and whether the investigations were completed under section 38, 39 or 40 of the Act; and
- the average time taken for investigations to be completed.

The annual report may also include anything else prescribed under the regulations, but cannot include protected information.

Clause 69 Approved forms

The Minister may approve forms for use under the Act, and there is a requirement to use any approved forms. An approved form must be notified on the legislation register in accordance with the *Legislation Act 2001*.

Clause 70 Regulation-making power

This clause provides that regulations may be made by the Executive for this Act.

PART 20 TRANSITIONAL—PUBLIC INTEREST DISCLOSURE ACT 1994**Clause 100 Transitional—Act applies to disclosures made after commencement**

This clause provides that this Act will apply to any public interest disclosures made after commencement of this Act, regardless of when the conduct that gave rise to the public interest disclosure occurred.

For example, an incident of fraud by a government official may have occurred in October 2004. If a public interest disclosure about that incident was made after the commencement date for this Act, then the disclosure would be dealt with under this Act, and the procedures for making, investigating and reporting the disclosure would be as set out in this Act.

Clause 101 Transitional—Public Interest Disclosure Act 1994 applies to disclosures made before commencement

This clause provides that the former Act, the *Public Interest Disclosure Act 1994*, as in force immediately before the repeal of that Act, will apply to any public interest disclosures made before commencement of this Act.

In the above example of an incident of fraud that occurred in October 2004, if a public interest disclosure about this incident had been made in June 2006, then the disclosure would be dealt with under the *Public Interest Disclosure Act 1994*.

Clause 102 Transitional—no investigation of matters already investigated under Public Interest Disclosure Act 1994

This clause provides that, for the purposes of section 24(b), the words ‘this Act’ also include the *Public Interest Disclosure Act 1994*. This means that an investigator must refuse to investigate a public interest disclosure that has already been investigated under the *Public Interest Disclosure Act 1994*.

Clause 103 Transitional—regulation

This clause provides that regulations may be made about transitional matters, including regulations to modifying this part if there is a transitional issue that is not adequately or appropriately dealt with in this part.

Clause 104 Expiry—pt 20

This clause provides that part 20 will expire five years after commencement. It should be noted, however, that sections 100 – 102 will continue to operate beyond that expiry, as section 88 of the *Legislation Act 2001* applies to those sections.

PART 21 AMENDMENTS AND REPEAL

Clause 105 Legislation amended—sch 1

This clause explains that the Act amends other Acts, including the *Auditor-General Act 1996*, the *Discrimination Act 1991*, the *Ombudsman Act 1989* and the *Public Sector Management Act 1994*.

Clause 106 Legislation repealed

This clause provides that the Act repeals the *Public Interest Disclosure Act 1994*.

Schedule 1 Consequential amendments

Part 1.1 Auditor-General Act 1996

Amendment 1.1 inserts a new paragraph (da) into section 10 providing that the auditor-general's functions also include functions given under the *Public Interest Disclosure Act 2006*.

Part 1.2 Discrimination Act 1991

Amendment 1.2 inserts a new section 68A into the Act. This section provides that it is unlawful to take or threaten to take detrimental action against someone to deter the person from or punish the person for making a public interest disclosure.

Amendment 1.3 inserts a new note after section 71 about offence provisions in the *Public Interest Disclosure Act 2006*.

Amendment 1.4 inserts a new note after section 72 about the right to sue for damages under the *Public Interest Disclosure Act 2006*.

Amendment 1.5 makes a consequential amendment to section 98(3)(b) of the Act, to insert a reference to new section 99A.

Amendment 1.6 amends section 99 and inserts new sections 99A and 99B. Section 99A sets out the types of order the tribunal may make after finding that a person has engaged in unlawful conduct under the Act. In the case of a finding that a person has engaged in unlawful conduct, the tribunal may make orders to prevent the conduct from occurring again, to require a person to take action to redress loss or damage, to require a person to pay compensation for loss or damage or that the person who has been discriminated against be moved to another job. The amount of any compensation ordered by the tribunal must be reduced by the amount of any damages already received under section 54 of the *Public Interest Disclosure Act 2006*.

Amendment 1.7 makes a consequential amendment to a reference to section 99.

Part 1.3 Ombudsman Act 1989

Amendment 1.8 makes a consequential amendment to replace a reference to the *Public Interest Disclosure Act 1994* with a reference to the *Public Interest Disclosure Act 2006*.

Part 1.4 Public Sector Management Act 1994

Amendment 1.9 inserts a new example after section 9(q) to explain that a public servant may comply with his or her obligation to report corruption, fraud or maladministration by making a public interest disclosure under the *Public Interest Disclosure Act 2006*.

Amendment 1.10 amends section 20 to provide that the commissioner for public administration's functions also include functions given under the *Public Interest Disclosure Act 2006*.