

**DARWIN CITY COUNCIL**  
**SPECIAL COUNCIL MEETING**  
**THURSDAY, 5 NOVEMBER, 2009**

MEMBERS: The Right Worshipful, Lord Mayor, Mr G R Sawyer (Chairman); Member J D Bailey; Member R T Dee; Member R K Elix; Member H I Galton; Member G M Jarvis; Member G A Lambert; Member R Lesley; Member F P Marrone; Member A R Mitchell; Member K M Moir; Member J L Sangster; Member H D Sjoberg.

OFFICERS: Acting Chief Executive Officer, Mr J Banks; Acting General Manager Corporate Services, Mr L Carroll; General Manager Infrastructure, Mr L Cercarelli; Committee Administrator, Ms L Elmer.

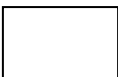
***Enquiries and/or Apologies: Linda Elmer***  
***E-mail: [l.elmer@darwin.nt.gov.au](mailto:l.elmer@darwin.nt.gov.au)***  
***PH: 8930 0670***

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**1 MEETING DECLARED OPEN**

THAT Member .....be elected as Acting Chairman for the Special Council Workshop, on Thursday, 5 November, 2009 in the absence of The Right Worshipful, The Lord Mayor, Mr G R Sawyer.

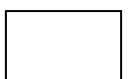
**2 APOLOGIES AND LEAVE OF ABSENCE****2.1 Apologies****2.2 Leave of Absence Granted**

- A. THAT it be noted that The Right Worshipful, The Lord Mayor, Mr G R Sawyer is an apology due to a Leave of Absence being previously granted on 20 October 2009 for the period 2 – 6 November 2009.
- B. THAT it be noted that Member R K Elix is an apology due to a Leave of Absence being previously granted on 15 September 2009 for the period 24 October – 13 December 2009.
- C. THAT it be noted that Member G A Lambert is an apology due to a Leave of Absence being previously granted on 29 September 2009 for the period 4 - 6 November 2009

DECISION NO.20\() (05/11/09)

**2.3 Leave of Absence Requested****3 ELECTED MEMBERS CONFLICT OF INTEREST DECLARATION****4 CONFIDENTIAL ITEMS**

Nil



**5 MISCELLANEOUS ITEMS****5.1 Rating Review Workshop**

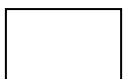
Common No.1333675

*Mr John Comrie of Access Economics Pty Ltd will be in attendance from 5.00 p.m. to brief the Council on Review of Rating Options.*

THAT the presentation by the Access Economics Pty Ltd, on Review of Rating Options, be received and noted.

DECISION NO.20\() (05/11/09)

***No business papers are being distributed.***



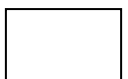
**5 MISCELLANEOUS ITEMS****5.2 Public Interest Disclosure Act**  
Common No. 1636840

*Ms Caroline Norrington, Senior Investigator, Office of the Commissioner will be in attendance from 6.30 p.m. to brief the Council on for Public Interest Disclosure Act.*

THAT the presentation by the Office of the Commissioner, on the Public Interest Disclosure Act, be received and noted.

DECISION NO.20\() (05/11/09)

***Summary Information attached.***



## WHISTLEBLOWING IN THE NORTHERN TERRITORY

### New Legislation:

*Public Interest Disclosure Act*

*Public Interest Disclosure Regulations*

### Key Features of New Act:

- NT 'whistleblower' legislation – commenced 31 Jul 09
- Creates Commissioner for Public Interest Disclosures – currently  
AC Commissioner Robert Bradshaw
  - Independent investigatory body with power to accept & investigate disclosures about serious improper conduct in public sector.
- Public sector includes not only Agencies, but local govt councils, and any body created under an NT Act (doesn't have to be incorporated).
  - Includes Council staff and Councillors / Aldermen.
  - Does not include contract service providers
- Commissioner has powers to obtain information, including by requiring answers to questions, documents to be provided, and can search premises.
  - Can't demand confidential Cabinet docs, Can demand legal advice files.
- Prohibits causing harm to a whistleblower or potential whistleblower, or someone who cooperates with Commissioner's investigation.
  - Applies when the action causing harm is taken in retribution for speaking to us, or to deter someone from speaking to us.
  - Both an offence and a civil cause of action.
  - Harm is defined broadly: physical, mental, emotional, intimidation and harassment, and adverse action in relation to employment / career / business.
- Anyone can make a disclosure!
  - Do not have to be employee of public body.
  - Do not have to have a 'personal interest' in the matter.
  - Discloser can forum shop – nothing to stop them complaining to Commissioner, Minister, Ombudsman, Agency, courts etc. – however Commissioner has ability to reject or refer in some of these situations.
- Legislation is retrospective – people can complain about old improper conduct.
  - NB, Commissioner has discretion to reject if matter too old for successful investigation
- Discloser can apply for relocation using a process under *PIIDA* (this is separate to and additional to any process under *PSMA* or other legislation).



## Disclosure Process:

### *Assessment:*

- Discloser contacts Commissioner with information.
- Commissioner assesses whether information fits legal definition of a disclosure.
- Commissioner decides whether matter should be rejected or referred:
  - o Can only reject for the list of reasons in s 21
  - o Can only refer to particular bodies: Ombudsman, Police Commissioner, Auditor-General, OCFE, Work Health Authority
- If matter is not rejected or referred then Commissioner must investigate.

### *Investigation:*

- The 'responsible authority' for the public body / public officer is notified that an investigation is commencing. Details of matter will not usually be provided.
  - o Mostly, responsible authority is the chief executive of the public body in which the improper conduct occurred.
  - o But if CI is themselves implicated, then s 8 lists the appropriate alternative people:
    - For most bodies, it is a Minister,
    - If Council CE then, Mayor and Minister for local govt
- Commissioner and / or delegates investigate. Comm required to conduct investigation in private, to protect the discloser's identity where possible
  - o People will be asked questions, and won't necessarily get notice of the fact they are going to be interviewed or what the questions will be about.
  - o If the Comm or delegate comes to public body, public officers are required to provide reasonable assistance as requested
- Must be in accordance with natural justice. This requires:
  - o Comm to be impartial.
  - o Persons / bodies about whom the Comm is considering making adverse comments must be told the substance of those allegations and given opportunity to respond.

### *Reporting:*

- The Commissioner reports the findings of the investigation to the 'responsible authority' and makes recommendations about what should be done in response (this is an internal / private report).
- The responsible authority is given a 'reasonable time' to implement the recommendations and then is required to provide a report on implementation to the Commissioner.
- If Commissioner feels insufficient steps have been taken within the time, then Commissioner reports matter to Minister, who must table it in parliament within 6 sitting days (external / public report).
- Discloser must be notified of the findings, recommendations, and the steps the public body takes to give effect to the recommendations.

## 5 Improper conduct

(1) Conduct on the part of a public body or public officer in, or related to, the performance of official functions is **improper conduct** if:

(a) the conduct involves 1 or more of the following and constitutes a criminal offence or, if engaged in by a public officer, reasonable grounds for terminating the services of the public officer:

- (i) seeking or accepting a bribe or other improper inducement;
- (ii) any other form of dishonesty;
- (iii) inappropriate bias;
- (iv) a breach of a public trust;
- (v) misuse of confidential information; or

(b) the conduct involves 1 or more of the following (whether or not the conduct constitutes a criminal offence or, if engaged in by a public officer, reasonable grounds for terminating the services of the public officer):

- (i) substantial misuse or mismanagement of public resources;
- (ii) substantial risk to public health or safety;
- (iii) substantial risk to the environment;
- (iv) substantial maladministration that specifically, substantially and adversely affects someone's interests.

(2) The following also constitute improper conduct:

- (a) an act of reprisal;
- (b) a conspiracy or attempt to engage in improper conduct that constitutes a criminal offence.

(3) In this section:

**substantial maladministration** means conduct that includes action or inaction of a serious nature that is any of the following:

- (a) contrary to law;
- (b) unreasonable, unjust, oppressive, or improperly discriminatory;
- (c) based wholly or partly on improper motives.



## Commissioner's Power to Require Information and Assistance

The Commissioner for Public Interest Disclosures is empowered to conduct investigations into allegations of improper conduct in Northern Territory public bodies. The *Public Interest Disclosure Act* gives the Commissioner powers to demand information:

### 26 Power to require information and documents

- (1) For an investigation, the Commissioner may ask a person:
  - (a) to answer specified questions or provide specified information; or
  - (b) to produce specified documents or things or documents or things of a specified kind, in the person's possession or control.
- (2) When making a request of a person under subsection (1), the Commissioner must inform the person about the following but is not required to give any other information about the nature or purpose of the investigation:
  - (a) that the request is made for the purposes of an investigation;
  - (b) if the person is under investigation – that fact.
- (3) A request under subsection (1), and accompanying information under subsection (2), may be given:
  - (a) if an oral response to a question is required – orally; or
  - (b) otherwise – by written notice given to the person to whom the request is addressed.
- (4) A person requested, by written notice under this section, to provide written information must, if the notice requires, verify the information by statutory declaration.
- (5) A person to whom a request is addressed under this section must comply with it:
  - (a) if an oral response to a question is required – immediately; or
  - (b) otherwise – within a reasonable time stated in the request.

Fault element: Strict liability offence.  
Maximum penalty: 100 penalty units.
- (6) It is a defence to a charge of an offence against subsection (5) if the defendant establishes a reasonable excuse for non-compliance with the request.
- (7) If a document or other thing is produced to the Commissioner in connection with an investigation:
  - (a) the Commissioner may retain possession of it for a reasonable period and may make copies of, or take extracts from, it; and
  - (b) while it remains in the Commissioner's possession, the Commissioner must allow the owner reasonable access to it.

### 28 Investigation at premises of public officer or public body

- (1) For an investigation, the Commissioner may do 1 or more of the following at any reasonable time:
  - (a) enter and inspect premises occupied by a public officer or public body, other than premises, or the part of premises, used as a residence;
  - (b) take into the premises the persons, equipment and materials reasonably required for the investigation;
  - (c) take copies of, or extracts from, documents located at the premises.
- (2) A public officer at the premises must, at the request of the Commissioner, give reasonable assistance to the Commissioner for exercising the powers under this section.

## Providing Information

If you are requested to provide information, you should:

- request to see the person's ID to confirm that they are a person delegated to exercise the powers of the Commissioner according to ss 26 and 28 of the *Public Interest Disclosure Act*;
- ask: 'Am I the person under investigation?';
- provide oral answers to questions;
- not provide written answers or documents unless you have been provided with a notice requesting you to provide this information;
- ask for clarification if you are unsure what information is being sought;
- look at the timeframe and let the person know if you think the timeframe is unrealistic; and
- let the investigator know if you think you are being asked to provide confidential Cabinet documents.

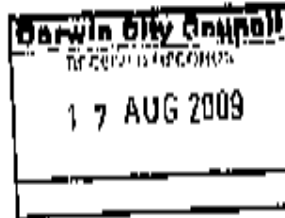
But don't:

- talk to your boss or any other person without asking the Commissioner or investigator whether this would be okay. It might put the investigation at risk!
- try to obtain information you are not authorised to access. If you are asked to provide information that you cannot legally obtain, explain this to the Commissioner.

**Keep the matter confidential except for talking to the Commissioner or seeking confidential legal advice.**



FREEDOM OF INFORMATION - PRIVACY



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 GPO Box 1750, Darwin NT 0801

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 TOLL FREE: 1300 005 610  
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 Web: [www.info.nnt.gov.au](http://www.info.nnt.gov.au)

Our Ref: 2009/0781

13 August 2009

Chief Executive Officer  
 Darwin City Council  
 PO Box 84  
 DARWIN NT 0801

Dear Mr. Dowd,

**RE: THE NEW WHISTLEBLOWERS ACT**

This letter is to make you aware that the new *Public Interest Disclosure Act* ('*PIDA*') has been passed by the Northern Territory Government, and commenced on 31 July 2009. Our office can offer your organisation training and assistance concerning *PIDA*.

**The function of *PIDA***

*PIDA* allows whistleblowers to make protected disclosures about improper conduct in Northern Territory public bodies. It creates the Commissioner for Public Interest Disclosures ('the Commissioner'), an independent officer with the responsibility of assessing and investigating a disclosure. If the public body fails to adequately address any improper conduct revealed by the investigation, the Commissioner prepares a report about the matter which is tabled in parliament.

**Your role in relation to *PIDA***

*PIDA* allocates new responsibilities to the chief executive of a public body. If you are the chief executive of a public body, the operation of *PIDA* imposes non delegable duties on you, and also has implications for your staff and procedures.

**Chief executive:**

Under *PIDA*, the 'chief executive' is the person with the responsibility for the management and administration of a public body, regardless of whether they are referred to as a 'chief executive'.

**Public body:**

The definition of a 'public body' includes local government councils, and *PIDA* allows investigation of both employees of the council and council members.

## New statutory responsibilities for the chief executive

### 1. Process disclosures

A person who wishes to disclose improper conduct that is occurring within a public body can make a protected disclosure to the chief executive of that public body. The disclosure may be made orally or in writing, including by telephone or email, and can be made anonymously. The discloser does not have to specifically say 'this is a public interest disclosure' in order for it to be a public interest disclosure for the purposes of *PIDA*.

If you are a chief executive who receives a purported disclosure of improper conduct, you have **fourteen days** in which to assess that it is in fact a disclosure under *PIDA*, and if so, to refer it to the Commissioner. This time frame is specified by *PIDA* and cannot be extended. If the disclosure satisfies the necessary criteria under *PIDA*, you must refer it to the Commissioner, regardless of whether you would prefer to deal with it in other ways.

#### *How to tell if it is a public interest disclosure under PIDA:*

Any disclosure about wrongdoing occurring within a public body is potentially a public interest disclosure. Please see our website for a more detailed explanation of the criteria set out in *PIDA* for assessing a disclosure ([http://www.bjowthewhitele.net.gov.au/about/whistleblowers/assessing\\_a\\_disclosure](http://www.bjowthewhitele.net.gov.au/about/whistleblowers/assessing_a_disclosure)).

If the discloser has provided a postal or email address, you are obliged to inform the discloser in writing of whether you have or have not referred the matter within **fourteen days** of receiving the disclosure.

### 2. Keep disclosures confidential

When processing disclosures or performing other functions under *PIDA*, a chief executive is 'acting in an official capacity'. Section 53 of *PIDA* makes it an offence to communicate information acquired when acting in an official capacity. This section is designed to protect the whistleblower's identity, and to ensure evidence is not tampered with in anticipation of an investigation.

#### *Who you can speak to:*

You can seek confidential legal advice from a practising lawyer.

You can contact the Commissioner's Office for assistance and advice. If you wish to use staff within the organisation to help you process the disclosure, the Commissioner has the power to approve the disclosure of particular information to an appropriate person. The procedure of seeking approval ensures that proper consideration is given to confidentiality and possible conflicts of interest in each individual case.

In addition, you can also seek the consent of the discloser to communicate their disclosure to a particular person.

#### *Who you can't speak to:*

Most people, including staff inside your organisation. You must not pass the disclosure to another manager to deal with, and you cannot ask your assistant to type or file information if it would involve revealing the content of the disclosure to them.

Sometimes, the disclosure may concern behaviour or a risk that you wish to deal with immediately. We suggest that you consider whether there is a way of taking action that does not reveal the identity or nature of the discloser. If this is impossible, you need to seek the consent of the discloser or the Commissioner before taking action.

### **3. Process requests for relocation made under PIDA**

A person who has been adversely treated as a result of having made a disclosure or of having cooperated with an investigation can request to be relocated. A person can also request relocation if they apprehend they are about to be adversely treated for those reasons.

Under PIDA, this request must be made to the chief executive of their public body, regardless of whether this is the person who usually deals with other relocation processes.

If you are a chief executive who receives such a request, you have 28 days to consider the request and issue a response. If the relocation has not taken place within that time, the response must contain:

- the reason why relocation has not taken place;
- if you are not satisfied there are reasonable grounds for the request, the reasons why you are not satisfied; and
- a statement that the person may seek review of your decision in accordance with section 18 of PIDA.

Note that you do not have to include this information if to do so would involve giving information that would prejudice the conduct of an investigation or endanger the safety of any person.

When processing a request for relocation, you are acting in an official capacity, and are bound by section 53 of PIDA not to communicate the matter, except to a lawyer, the Commissioner, or with the consent of the discloser or the approval of the Commissioner.

### **4. Provide a point of contact for the Commissioner**

The Commissioner is obliged to notify the 'responsible authority' when an investigation is about to commence into that public body or its officers. If the disclosure is about an officer or employee of a council, the persons who must be notified are the CEO of the council and the mayor. If the disclosure is about the CEO of the council, the persons who must be notified are the mayor and the Minister responsible for local government. If the disclosure is about the mayor, the persons who must be notified are the Minister for Local Government and the CEO of the council.

If the Commissioner is considering making adverse comments about a public body in a report, the responsible authority is given a chance to respond to those comments. The responsible authority is also provided with a copy of the Commissioner's initial report, which includes findings and recommendations as a result of the investigation.

The Commissioner can require the responsible authority to report back on the implementation of the Commissioner's recommendations. If the responsible authority has failed to adequately implement the recommendations within the specified time, the Commissioner may produce a further report on the improper conduct and the responsible authority's failure to respond. This report is tabled in parliament.

### **Implications for your staff and procedures**

In addition to the statutory responsibilities the chief executive has under *PIDA*, we draw to your attention the way this new legislation may affect your organisation so that you may consider appropriate forward planning.

#### *An additional avenue for complaints:*

People are entitled to disclose improper conduct under *PIDA* even if your organisation has an existing complaints process, and even if their matter is being investigated or has been resolved using other processes. Anyone can make a disclosure, regardless of whether they are internal or external to your organisation. You cannot reject a disclosure on the basis that you would prefer it to be dealt with through other complaint processes, however you may discuss this with the Commissioner when you refer a disclosure.

#### *Human resources:*

*PIDA* creates civil and criminal liability for causing 'harm' to someone for disclosing improper conduct or for not cooperating with an investigation. Harm is defined very broadly, to include not only physical and mental injury, but also loss, intimidation or harassment, or adverse treatment in relation to employment, business or career. This means that when there is a disclosure in a workplace, special care must be taken when conducting supervision, performance management, or taking any kind of disciplinary action. We recommend that managers and supervisors are trained to be able to identify these situations and seek appropriate assistance.

The relocation process under *PIDA* is additional to any existing relocation processes your organisation may currently have.

#### *Liability:*

*PIDA* allows someone to sue and claim damages for any harm caused to them in retribution for reporting improper conduct or cooperating with an investigation, or deterring a person from reporting improper conduct or cooperating with an investigation. Damages are awarded 'as for a tort', which essentially means the person harmed must be returned to the position they were in before the harm occurred, usually by means of monetary compensation. The court can also award 'exemplary damages', which means additional compensation awarded as punishment to the person who caused the harm.

This is a new type of claim. In some situations, a person could choose to make this kind of claim instead of a workers compensation claim. It may also be possible to make a claim under *PIDA* in addition to a workers compensation claim, although that seems to be a matter that would be open to legal argument.

If an employee was found liable under *PIDA*, the question would arise as to whether the employee would have to pay the compensation themselves, or whether their employer would be vicariously liable. The answer to this question would vary on a case by case basis, depending on whether the employee was 'acting within the

course of their employment'. At one extreme, an employee who assaults a discloser in retaliation for a disclosure is unlikely to be acting within the course of their employment. At the other end of the spectrum would be a manager who disciplines an employee for disclosing, in accordance with organisational procedures and directions from senior management; in this situation it is likely the organisation would be vicariously liable.

We suggest you identify any existing procedures that require or allow adverse action to be taken against an employee for either:

- taking a matter outside the usual chain of command; or
- breaching confidentiality obligations.

We recommend you amend these procedures so it is clear that adverse action is not to be taken against someone on these grounds if the person was making a disclosure under *PIDA* or cooperating with an investigation under *PIDA*.

*Providing information and access to premises:*

When conducting an investigation, the Commissioner can require any person to answer questions or provide information. The Commissioner can also enter and inspect the premises of a public body, and take copies of and extracts of documents located at the premises. The Commissioner can require employees of the public body to provide reasonable assistance when accessing premises, for example by unlocking doors, providing passwords, or showing where certain information is located.

If a person fails to answer questions, provide information as requested, or provide reasonable assistance when the Commissioner seeks to access premises, the person will have committed an offence under *PIDA*. If a person provides misleading information, including information that is misleading by virtue of omitting relevant information, the person will have committed an offence punishable by up to two years imprisonment.

It is important that your employees understand their rights and obligations during an investigation. This will ensure the investigation proceeds smoothly, and your employees do not inadvertently commit an offence.

*Confidentiality:*

People who are interviewed by the Commissioner or asked to provide information must take care to keep these matters confidential, particularly from other employees in their workplace. It is an offence to obstruct the Commissioner from conducting the investigation, which must be conducted in private.

*Managing during and after an investigation:*

During an investigation, there may be heightened workplace tensions and increased risk of inappropriate behaviour from staff. In addition, careful management of workloads may be needed if some staff are required to divert efforts from their usual work to respond to a request for information by the Commissioner. We recommend that staff who are required to manage an area where an investigation is occurring are given access to support and advice to ensure appropriate and effective management. Staff should generally be encouraged to access services to assist with relieving stress and developing conflict resolution skills, particularly if your organisation has a scheme in place to allow them to access such services for free or at reduced rates. Organisations such as the Community Justice Centre can be contacted to facilitate mediation of a dispute if one arises.

Much of the stress and additional management issues can be avoided by keeping an investigation as confidential as possible so that most employees are not aware it is happening. This is why *PIDA* contains strict confidentiality obligations and requires special care in handling information. However, with some investigations secrecy is not possible. In these situations, strong ethical direction and appropriate role-modelling by senior management is of great assistance in promoting appropriate workplace behaviour.

In addition to supporting staff and managers generally, it will be necessary to provide particular support to persons who disclose improper conduct. A recent extensive study of whistleblowing in the Australian public sector showed that 43% of whistleblowers experienced extreme stress as a result of disclosing. If this stress is coupled with adverse treatment by public bodies and public officers, it may translate into a legal claim for compensation, as well as claims for stress leave and secondary effects such as loss of efficient work and tensions in the workplace.

The Commissioner will issue more specific guidelines about how a public body should manage the welfare of disclosers to ensure they are properly supported. Until the guidelines are issued, we encourage public bodies to liaise with the Commissioner about managing the welfare of whistleblowers on a case by case basis.

*'Front counter' staff:*

For many organisations, incoming queries and correspondence are handled by other staff and filtered before being directed to the chief executive. We recommend that persons who are responsible for handling emails, mail, and phone lines that a discloser may use to contact a chief executive be provided with guidance as to who to direct the discloser to (in order to ensure it passes through as few hands as possible) before reaching the chief executive, or being redirected to the Commissioner. In addition, persons who literally sit at a physical front counter should be aware of what to do if the Commissioner's staff arrive seeking access to premises.

**How we can help:**

The Office of the Commissioner for Public Interest Disclosures is responsible for providing training and assistance to public bodies concerning *PIDA*. As part of this process we:

- are happy to come and meet senior management, human resource and legal staff in your organisation, to answer questions about the best way to minimise your risks and achieve legislative compliance; and



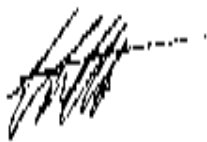
- can offer general training to your staff to make them aware of their rights and responsibilities under PIIA.

We have also developed online resources for organisations, including interactive online training modules that your staff will be able to access. The online training will have the capability to notify you of which staff have completed the training, and advise as to their level of understanding. Please go to our website ([www.blowthewhistle.nt.gov.au](http://www.blowthewhistle.nt.gov.au)) and click on 'Training' on the main menu for more information.

Please do not hesitate to contact us via phone on 1800 005 810 or via email [blowthewhistle@nt.gov.au](mailto:blowthewhistle@nt.gov.au) if you have any questions or concerns.

Yours faithfully

  
**ROBERT BRADSHAW**  
 Acting Commissioner  
 for Public Interest Disclosures

  
**CAROLINE NORRINGTON**  
 Education and Policy Officer