



THE FEASIBILITY OF WHISTLEBLOWER PROTECTION IN THE GOVERNMENT OF THE NORTHWEST TERRITORIES

WHAT DO YOU THINK?

Consultation Discussion Paper

July 2007



INTRODUCTION

This paper is designed to encourage discussion and employee participation in the process of considering the development of whistleblower protection.

The most important resource in delivering Government of the Northwest Territories (GNWT) programs and services to residents of the Northwest Territories (NWT) is public service employees. The GNWT strives to create a work environment for employees that recognizes professionalism, leadership, integrity and respect for others. These shared values help public service employees adhere to high standards that maintain and foster public confidence in the GNWT.

Wrongdoing, whether unethical, unlawful or mismanagement, within the public service can seriously undermine employee efforts to keep building a public service to be proud of and to ensure public confidence in transparency and accountability within the public service. In order to ensure continued public confidence in the impartiality and integrity of the public service, it is important that the GNWT have a recognized and documented way of dealing with whistleblowing.

“Whistleblowing” happens when an employee discloses corporate wrongdoings or unlawful conduct of their employer. Whistleblower protection lays out a way for employees to report these wrongdoings and protects that employee from demotion, dismissal, or negative treatment from their employer.

There are many things to think about when considering whistleblower protection for public service employees. We need to think about:

- the goal for the whistleblower protection;
- what form that protection would take (legislation, regulations, policy, etc.);
- how the protection could be implemented and at what cost; and
- how to balance the duty of loyalty to one’s employer with the duty to protect public interest if a wrongdoing is discovered.

It is also necessary to consider what approach would be most practical in the NWT. There are several different approaches that other Canadian jurisdictions have used to achieve the goal of whistleblower protection. Manitoba has opted for stand-alone legislation while Ontario has chosen to entrench comprehensive whistleblower provisions in its *Public Service Act*. Nova Scotia has chosen to combine regulations (under the *Public Service Act*) with a companion policy.

BACKGROUND

Like several other Canadian jurisdictions, the NWT currently does not have specific whistleblower provisions to protect Territorial public service employees who report wrongdoings. This is not to say that GNWT employees have no protection at all. Existing pieces of legislation offer some protection, usually targeting offences that are related to the specific purpose of the Act. These Acts may contain sections that require individuals to report wrongdoing and in some cases, provide protection for the informants as in the following examples:

Example 1

Section 11(1) of the *Safety Act* has a provision for the protection of informants. The Act states that:

- 11(1) Any information obtained by a person under this Act is confidential and may only be disclosed under the authority of the board
- (a) for the purposes of this Act or the regulations or for the purpose of administering other legislation that is administered by the Board;
 - (b) to agencies or departments of the Government of the Northwest Territories, the Government of Canada or the government of a province or territory;
 - (c) to regulatory bodies or agencies approved by the Board; or
 - (d) in accordance with the *Access to Information and Protection of Privacy Act*.
- (2) Notwithstanding subsection (1) and the *Access to Information and Protection of Privacy Act*, no safety officer shall divulge the identity of any person from whom information is obtained under this Act in confidence, unless disclosure is necessary to investigate or prosecute an alleged contravention of this Act or the regulation.

Example 2

Directive 4101 (old 913) of the Financial Administration Manual provides direction for where it is suspected or believed that:

1. a loss of public money or property (including that which is held in trust) has occurred;
2. an offence under Part X of the *Financial Administration Act* (FAA) (e.g. fraud, theft, bribery, collusion, negligence, etc.) has been committed;
3. a robbery, break-in or willful property damage has occurred.

This directive obligates GNWT employees to report in writing to a supervisor any knowledge or information of a suspected fraud or violation of the FAA. All reasonable precautions must be taken to keep confidential the identity of individuals related to or dealing with an allegation of a loss or an offence.

In addition to employee protection under specific legislation, the Government of the Northwest Territories (GNWT) also has a *Code of Conduct respecting Conflict of Interest and Oath of Office and Secrecy for Employees of the Government of the Northwest Territories (Code)*. The *Code* addresses employees' responsibility to report when other employees are in a conflict of interest. The Deputy Head is responsible to ensure that employees or members of the public who report conflicts of interest or other breaches of this *Code* are not subject to reprisal. The *Code* also provides for an independent process for employees to report conflicts of interest or concern about possible conflicts of interest without fear of reprisal. This provision is not for reporting any other wrongdoing or any other illegal or questionable acts of Government.

Appendix A provides a summary of the status of whistleblower protection in other provincial/territorial jurisdictions, grouped by their approach.

Some of the criticisms of current legislation in other jurisdictions include:

- a lack of independence of the person/body receiving the disclosure. In order to encourage disclosure, an employee needs to feel safe from reprisal when reporting the wrongdoing;
- protection for employee reporting is only extended if appropriate channels are followed when disclosing information (i.e., most do not include media as appropriate);
- the definition of wrongdoing is very limited;
- protection for employee reporting is not sufficient;
- it focuses on "wrongdoing" rather than fostering a culture of recognizing appropriate activity.

The need for whistleblower protection has been raised in the NWT Legislative Assembly on a number of occasions over the last several years. Most recently, the Standing Committee on Accountability and Oversight recommended that whistleblower protection legislation be considered by the GNWT.

ISSUES

Public confidence in the GNWT can be enhanced by establishing a mechanism for public service employees to disclose wrongdoings in the public sector without fear of retribution. However, whistleblower protection is complex. In order to determine the feasibility of whistleblower protection for the GNWT, there are many factors to consider.

Some of the key issues are outlined below:

1. **What should be the objective of whistleblower protection?**

The main objectives of whistleblower protection are typically to:

- a) provide a mechanism for employees in the Territorial public service to disclose wrongdoings (actions within, and relating to, the public service) without the fear of retaliation;
- b) protect individuals who disclose or who may disclose wrongdoing from employment-related retribution; and
- c) ensure that appropriate actions are taken upon receipt of the disclosure of wrongdoing.

2. **What type of approach for whistleblower protection is best for the Territorial public service?**

- a) Would stand-alone legislation, *Public Service Act* regulations, policy or a combination of regulation and policy work best?
- b) Which mechanism would provide clear processes of disclosure, investigation and reporting?
- c) Which approach would be most feasible for the Territorial public service?

3. **What key elements should be included in whistleblower protection?**

- a) How is “whistleblowing” to be defined? Although apparently a straightforward issue, how whistleblowing is defined will impact what type of protection is provided.
- b) Who will receive disclosures of wrongdoing? What duties/responsibilities will they have? Will it be an internal or external disclosure process?
- c) Are there circumstances when disclosure is not protected?
- d) What will the process be to disclose, investigate, report?
- e) How do we encourage disclosure yet avoid frivolous complaints?

4. **What will the cost be to the GNWT to implement whistleblower protection?**

- a) What resources will be available to receive complaints and investigate?
- b) What level of knowledge and expertise would be required to deal with complaints?
- c) What would be the cost to implement and enforce the whistleblower protection?

WHAT DO YOU THINK?

Whistleblower protection for public service employees will create an environment that will encourage employees to come forward when they discover a wrongdoing since they will be protected from reprisal if they do so. Whistleblower protection will provide a level of encouragement beyond that currently provided under specific NWT legislation and *Code of Conduct*.

The Government of the Northwest Territories is interested in what you think about the issues raised in this discussion paper. ***Please send your comments or concerns by September 30, 2007 to:***

- Email: hrpolicy@gov.nt.ca
- Fax: 867-873-0216
- Write:

Whistleblower Protection
Human Resources Strategy and Policy
Department of Human Resources
Government of the Northwest Territories
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YELLOWKNIFE NT X1A 2L9

APPENDIX A

**STATUS OF WHISTLEBLOWING PROTECTION FOR PUBLIC SERVICE EMPLOYEES
IN OTHER CANADIAN JURISDICTIONS**

Jurisdiction	Type of Protection	Comments
<p>Canada</p> <p>The Act is available for review on the Government of Canada's Department of Justice website at:</p> <p>http://lois.justice.gc.ca/en/P-31.9/255811.html</p>	<p>On November 25, 2005, the Federal <i>Public Servants Disclosure Protection Act</i> (Bill C-11) received royal assent. The Act entered into force on April 15, 2007.</p> <p>Consequential amendments were made to the <i>Access to Information Act</i>, <i>Canadian Evidence Act</i>, <i>Personal Information Protection and Electronic Documents Act</i> and the <i>Privacy Act</i>.</p>	<p>The highlights of the Act are that it:</p> <ul style="list-style-type: none"> • requires each chief executive responsible for a portion of the federal public sector to establish an internal disclosure mechanism, including the appointment of a senior officer to receive and act on wrongdoing disclosures; • ensures that there is an additional avenue for disclosures, where necessary, by committing the Governor in Council to appointing an independent Public Sector Integrity Commissioner on approval by resolution of the Senate and House of Commons; • empowers the Commissioner to investigate alleged wrongdoings and to make recommendations to the relevant chief executive on the Commissioner's findings; • empowers the Commissioner to investigate reprisal complaints from public servants and permits them to have their complaints dealt with by the appropriate board or tribunal that already has a mandate to address staff relations and workplace issues; and • allows for appropriate disciplinary action, including termination of employment, for public servants who commit a wrongdoing or who make a wrongdoing disclosure in bad faith; this is in addition to, and apart from, other sanctions provided by law.

<p>Canada</p> <p>The Act is available for review on the Government of Canada's Department of Justice website at:</p> <p>http://lois.justice.gc.ca/en/showtdm/cs/F-5.5</p>	<p>On December 12, 2006, the <i>Federal Accountability Act</i> (Bill C-2) received royal assent.</p>	<p>The <i>Accountability Act</i> amends the <i>Public Servants Disclosure Protection Act</i> to:</p> <ul style="list-style-type: none"> • Give the Public Service Integrity Commissioner the power to enforce compliance with the Act; • Extend whistleblower protection to private sector employees who disclose government wrongdoings; • Remove the ability for government to exempt public bodies from the Act; • Require prompt public disclosure of information provided, where possible; • Ensure that individuals who disclose wrongdoing have access to the courts and are provided with adequate legal counsel; and • Establish monetary rewards for those who expose wrongdoing or save taxpayers dollars.
<p>Canada</p> <p>http://lois.justice.gc.ca/en/showtdm/cs/C-46</p>	<p><i>Criminal Code of Canada</i></p>	<p>Section 425.1 of the <i>Criminal Code of Canada</i> makes it an offence for any employer to use employment-related intimidation against an employee with the intent to either:</p> <ul style="list-style-type: none"> • silence or prevent the employee from providing information to a person whose duties include the enforcement of federal or provincial/territorial law; or • retaliate against the employee for providing information to a person whose duties include the enforcement of federal or provincial/territorial law. <p>For section 425.1 to apply, the information disclosed must relate to an offence that the employee believes has been committed contrary to any federal or provincial/territorial Act or regulation by the employer (or an officer or employee of the employer). The <i>Criminal Code</i> applies to all employers in Canada.</p>

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<p>Ontario</p> <p>http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90p47_e.htm</p>	<p>Comprehensive whistleblower protection provisions within <i>Public Service Act</i></p>	<p>In December 2006, the <i>Public Service of Ontario Act, 2006</i> received assent. This Act is not yet in force. The new legislation provides for disclosure procedures, investigation by an Integrity Commissioner and protection from reprisals. The current <i>Ontario Public Service Act</i> enacted in 1993 also contains a section entitled "Whistleblower's Protection". However, this portion of the Act has never been brought into force.</p>
<p>Nova Scotia</p> <p>http://www.gov.ns.ca/legislature/leqc/statutes/pubser.htm</p> <p>http://www.gov.ns.ca/JUST/regulations/regs/cswrong.htm</p> <p>www.gov.ns.ca/tpb/manuals/PDF/500/51401.pdf</p>	<p>Combination of Regulations (under the <i>Public Service Act</i>) and Policy</p>	<p>The Civil Service Disclosure of Wrongdoing Regulations made under the <i>Civil Service Act</i> and the Disclosure of Wrongdoing Policy became effective in 2004. The Regulations state that these regulations are in addition to provisions that already exist under Acts such as the <i>Occupational Health And Safety Act</i>, <i>Ombudsman Act</i>, <i>Environment Act</i> and <i>Human Rights Act</i>. The Policy also states the Nova Scotia government's commitment to providing employees with a reporting process for disclosure and protection against reprisal action that might result from the disclosure.</p>
<p>Manitoba</p> <p>http://www.gov.mb.ca/csc/whistle/links.html</p>	<p>Stand-alone Whistleblower Protection Legislation</p>	<p>The <i>Public Interest Disclosure (Whistleblower Protection) Act</i> was assented to on December 7, 2006. The Act provides for an employee to make a disclosure to a designated officer or the Ombudsman (appointed under the <i>Ombudsman Act</i>), what information must be included in the disclosure statement, and includes a section on protection from reprisal.</p> <p>The Act also includes a provision that allows a person who is not a public service employee to provide the Ombudsman with information on government wrongdoing, and prohibits an employer of a private sector employee from taking reprisal on that employee.</p>

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<p>Saskatchewan</p> <p>http://www.labour.gov.sk.ca/acts-regs/index.htm</p>	<p>Whistleblower protection under labour standards legislation</p>	<p>The <i>Labour Standards Act</i> of Saskatchewan prohibits reprisal or discrimination by an employer (whether public sector or private sector employer) against an employee who reports an unlawful activity.</p> <p>No employer shall discharge, take any reprisal against or in any manner discriminate against an employee because the employee:</p> <ul style="list-style-type: none"> • has reported or proposes to report to a lawful authority any activity that is or is likely to result in an offence pursuant to an Act or an Act of the Parliament of Canada or; • has testified or may be called on to testify in an investigation or proceeding pursuant to an Act or an Act of the Parliament of Canada. <p>This whistleblower protection does not apply where the actions of the employee are vexatious.</p>
<p>New Brunswick</p> <p>http://www.gnb.ca/0062/acts/acts-e.asp#GlossE</p>	<p>Whistleblower protection under labour standards legislation</p>	<p>The <i>Employment Standards Act</i> prohibits retaliation against an employee, in either the public or private sector, for making a complaint or giving evidence against an employer with respect to matters covered by the Act, or disclosing information about an employer contravening a provincial or federal law. The scope of activities covered by the Act is limited to misuse of public funds, gross mismanagement or a serious breach of the New Brunswick government's code of conduct.</p>
<p>NOTE: Labour standards for Territorial public service employees are set out under the <i>Public Service Act</i>.</p>		
<p>Yukon</p> <p>http://www.gov.yk.ca/legislation/</p>	<p>No comprehensive whistleblower protection or only Act-specific protection</p>	<p>The Yukon Territory has Act-specific whistleblower protection in the <i>Yukon Environment Act</i>.</p>

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<p>NWT http://www.justice.gov.nt.ca/Legislation/SearchLeg&Reg.htm</p>	<p>No comprehensive whistleblower protection or only Act-specific protection</p>	
<p>Newfoundland and Labrador http://www.hoa.gov.nl.ca/hoa/sr/</p>	<p>No comprehensive whistleblower protection or only Act-specific protection</p>	<p>Proposed changes are being made to the <i>Environmental Protection Act</i> and the <i>Water Resources Act</i>, one of which will create "whistle-blower protection" prohibiting employers from disciplining or threatening an employee who reports an action that may be in contravention of these Acts.</p>
<p>Alberta http://www.qp.gov.ab.ca/catalogue/</p>	<p>No comprehensive whistleblower protection or only Act-specific protection</p>	<p>In 1998, a private member's bill – the <i>Whistleblower Protection Act</i> – was defeated. No new legislation has been introduced subsequently.</p>

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<p>British Columbia</p> <p>http://www.leg.bc.ca/legislation/index.htm</p>	<p>No comprehensive whistleblower protection or only Act-specific protection</p>	<p>Whistle-blower protection with respect to access to information/protection of privacy is found under the <i>Freedom of Information and Protection of Privacy Act</i>:</p> <p>Under the Standards of Conduct for Public Service Employees, employees have a duty to report any situation that they believe contravenes the law, misuses public funds or assets, or represents a danger to public health and safety or a significant danger to the environment. Union employees report in accordance with the disclosure provisions of their respective Collective Agreements and other employees report to their deputy minister or where the allegation involved the deputy minister, to the deputy minister to the Premier.</p> <p>Employees must report a safety hazard or unsafe condition or act in accordance with the provisions of the WCB Occupational Health and Safety Regulations.</p> <p>Employees will not be subject to discipline or reprisal for bringing forward to a deputy minister, in good faith, allegations of wrongdoing in accordance with the policy.</p>
<p>Prince Edward Island</p> <p>http://www.gov.pe.ca/law/index.php3</p>	<p>None identified at this time</p>	
<p>Quebec</p> <p>http://www2.publicationsduquebec.gouv.qc.ca/home.php</p>	<p>None identified at this time</p>	
<p>Nunavut</p> <p>http://www.justice.gov.nu.ca/english/leg/statreg.html</p>	<p>None identified at this time (in post-division legislation).</p>	