

Australian Capital Territory

Public Interest Disclosure Guidelines 2019

Notifiable instrument NI2019 281

made under the

Introduction

The ACT Government recognises the inherent value in providing effective mechanisms to support transparency and accountability in the public sector creating a channel for the reporting of wrongdoing in the delivery of government services.

The *Public Interest Disclosure Act 2012* (the Act) specifically encourages and enables anyone witnessing serious wrongdoing that falls within the definition of 'disclosable conduct' to raise concerns. It provides for these concerns to be seriously considered and investigated where warranted. The Act sets out the

Part One Guidance for disclosers

This part makes the distinction between a public interest disclosure and other types of complaints, looks at how to make a disclosure, the types of information that might amount to a public interest disclosure, protections available and what happens after a disclosure is made.

1. Public Interest Disclosures

There are many types of feedback that may be provided in relation to concerns about ACT Public Sector administration ranging from formal client satisfaction surveys, general complaints and allegations, to personal grievances and workplace disputes. These guidelines deal with complaints about suspected illegal or illegitimate practices of ACT Government employees and entities.

1.1 What is a Public Interest Disclosure?

Sometimes matters raised are so serious they should sit outside normal complaint or feedback systems. Certain matters suggest serious or systemic concerns that may bring harm directly or indirectly to the general public, now, or in the future. These matters are outside of the bounds of the regular complaint handling process and are in a special category called a 'Public Interest Disclosure' (PID).

Disclosable conduct is more serious than a technical breach of policy or procedures: it is action (or inaction)

Differentiating between a PID, complaints /grievances and performance management matters

If the matter involves:	Then it could be a:
<p><u>Unlawful activity</u> – has someone broken a law or engaged in illegal activity?</p> <p><u>Corruption</u> – has someone been involved in corrupt behaviour such as bribery, graft, extortion, political manipulation, kickbacks, misappropriation or theft, fraud, abuse of discretion, creating or exploiting a conflict of interest, nepotism or favouritism?</p> <p><u>Misconduct</u> – has someone breached section 9 of the <i>Public Sector Management Act 1994</i> in a way that has significant consequences for their organisation or a third party, or a widespread impact?</p> <p><u>Maladministration</u> – does the issue relate to the action (or inaction) of an entity or public official for an entity that is of a serious nature and is unjust, unreasonable, improperly discriminatory, involves dishonest or fraudulent decisions or is contrary to law, including an act, decision, advice or omission:</p> <ul style="list-style-type: none"> that does not comply with the law, is inconsistent with relevant legislation, or which violates administrative fairness; or that goes against the principles of fairness or equity; or that is inconsistent with well-established policies or procedures; or that demonstrates negligence, or the absence of proper care or attention; or that involves excessive use of authority or where authority is used to intimidate, harass or subject someone to unreasonable conditions. <p><u>A substantial danger to the health or safety of the community or environment</u> is someone doing something that will adversely affect people’s health or damage the environment?</p>	<p>Public Interest Disclosure – talk to your manager, supervisor or disclosure officer.</p>

2.1 Who can make a disclosure?

Anyone suspecting a misuse of public resources or with information that indicates questionable activity relating to the work of an entity is encouraged to make a disclosure. This includes ACTPS employees, contractors and others who work with entities, and members of the public.

Here are some tips for raising a concern:

Raise it when it's a concern – you won't be asked to prove it, but your concern must be reasonably based.

Keep it in perspective – there may be an innocent expl

If you are unsure about how you can make a disclosure or have a question about procedural matters relating to PIDs, you can may approach the disclosure officer within the entity for which the matter relates, or, for sensitive matters, approach the office of the Public Sector Standards Commissioner for confidential advice.

2.2 How should a disclosure be made?

A disclosure may be made orally or in writing. There is no prescribed form.

Before making a disclosure, you should think about the problem and what you think should be done to fix it. You should try to communicate these things when making your disclosure and provide as much detail as will be needed to resolve the issue, but no more. This might include the main facts, dates and times, and steps already taken to resolve the problem.

While you will not be required to satisfy a legal level of proof, a discloser must have good reasons or evidence for their suspicions.

If you make your disclosure in person or over the phone, the receiver will make a written record of the conversation. For this reason, to avoid any ambiguity it is best to document the details of your concern in a letter or email.

If you feel that the matter is so serious that you cannot discuss it internally, you should inform the Public Sector Standards Commissioner, ACT Auditor General or the ACT Ombudsman.

2.3 Making a disclosure inadvertently

A disclosure may be made without the discloser asserting that the disclosure is made under the Act.

Essentially this means that a disclosure could be made unintentionally, possibly during a casual conversation, or without the person claiming that the information is provided as a disclosure. For example, while chatting in the kitchen, a colleague might mention that an invoice was paid for a range of services that were never delivered. This should be addressed as a disclosure.

Similarly, you may find yourself in a situation where you inadvertently witness the disclosure of information which you suspect is wrongdoing. For example, you may overhear a conversation in the lift that a manager has selected their own family member through a recruitment process without declaring a conflict of interest. This should also be addressed as a disclosure.

Although you may not be directly involved in the discussion or actions, you may have nonetheless witnessed wrongdoing. It is strongly encouraged that you report these matters to a supervisor or disclosure officer.

A disclosure assessed as not being a PID may still be investigated in accordance with the PSM Act or Enterprise Agreements as appropriate.

Because a disclosure can be made inadvertently, it emphasises the importance of all employees being aware of this type of disclosure and that managers and supervisors be aware of their possible role as a

2.4 Making a disclosure anonymously or in-confidence

The chance of an outcome will be more likely where the identity of a discloser is known. However, a disclosure can be made anonymously, where the discloser does not identify themselves at all (for example an anonymous phone call or letter).

Remember that if you make a disclosure anonymously, it will not be possible for the decision maker to seek clarification, so it is essential that as much information is provided as possible. In weighing the veracity of any anonymous complaint, decision makers will have regard to the extent to which the allegations made can be independently verified. If enough information is provided, anonymous reports may be inquired into, however it will not be possible to keep the discloser protected or informed about that status of their disclosure.

A disclosure can also be made in-confidence, where the discloser asks that they not be revealed as the source of the disclosure. Where a disclosure is made in confidence, the discloser's identity should not be revealed without that person's consent, unless required by law.

In some circumstances a discloser's identity may be required to be disclosed by law, for example for a witness of an assault in a workplace. Under Section 21 of the Act, an entity must refer a disclosure to the chief police officer if satisfied on reasonable grounds that the subject of the disclosure involves, or could involve, an offence.

Should an anonymous disclosure be received by an employee, the employee should pass the disclosure, including the date and time the disclosure was received, to a disclosure officer, after which time their role in the process ceases.

2.5 Protection for people who make a disclosure

Under the Act, a person who acts honestly and reasonably in making a disclosure (the discloser) receives protection from reprisal that results from the disclosure (reprisal is called _____ in the Act).

Under the Act, all ACT Public Sector employees (employees) are required to report any fraudulent, corrupt or maladministration that comes to their attention. An employee, a contractor, employee of a contractor, volunteer exercising a function of the entity, or a person prescribed by regulation who makes a disclosure is not liable under the Act to administrative action, including disciplinary action or dismissal because of the making of a disclosure.

If a person makes a disclosure, they will not incur civil or criminal liability only because of the making of the disclosure. A disclosure is not:

- a breach of confidence; or

- a breach of professional etiquette or ethics; or

- a breach of a rule of professional conduct; or

- if the disclosure is made in relation to a member of the Legislative Assembly – a contempt of the Assembly.

If a person retaliates against the discloser by directly or indirectly punishing them for reporting information, they will be held accountable for their behaviour.

There can be serious consequences for reprisals. Under Section 40 of the Act, the person who takes detrimental action has committed an offence. Th98 re3m0 Gu 10.98u.21ion wh

Every disclosure will be treated as being made in good faith. However, if it is found that a person has maliciously raised a concern that they know is untrue, protections are not provided. If the person is

Under the Act, the discloser will be informed about the outcome of the investigation. The discloser is not entitled to all the information obtained during the course of investigating a PID. The discloser does not have to be kept informed about information in relation to a PID where this is likely to bring risk to a person's safety or an investigation relating to the PID.

2.8 What happens if I think my disclosure is not handled properly?

If, as a discloser, you are not satisfied with the process used to deal with your disclosure, you should first talk

Part Two: Management of disclosures by ACT Public Sector Entities.

This part outlines the integrated management approach entities should follow in handling of disclosures. It will be of particular use to those involved in receiving and managing PIDs. It outlines the responsibilities of disclosure officers, entities and the Commissioner.

It articulates what to do when a disclosure is received, the types of information that might amount to a PID, the steps a disclosure officer should follow in actioning a disclosure, the parameters an entity must work within in handling a disclosure, and the functions of the Public Sector Standards Commissioner in overseeing the handling of disclosures.

It also reminds entities of their reporting responsibilities and underlines the importance of timely processes.

3. Responsibilities of ACT Public Sector entities

Because the ACT Public Sector is committed to ensuring the effective and timely management of PID processes, all entities are expected to have effective and efficient processes in place for the management of disclosures received from employees and members of the public.

3.1 What must each entity do under the Act?

Each entity has a number of responsibilities under the Act. Each must:

- declare at least one disclosure officer;
- keep the list of disclosure officers current;
- make information on entity procedures accessible;
- notify the Public Sector Standards Commissioner of any disclosures received

Entities should consider:

- comparing and correlating disclosure data with information from other risk management systems;
- and

A Referral Form template is provided as an Appendix to these guidelines.

b) Is the disclosure actually a PID?

It is imperative for the disclosure officer to make a decision whether the disclosure qualifies as a PID under the Act.

Part One of the guidelines will assist disclosure officers in making this decision.

Remember that PIDs are about serious and systemic concerns; personal or other relationship-based problems alone will rarely amount to a PID.

Questions to consider include:

What type of conduct has occurred?

How serious is it?

How many people are involved?

What is the seniority of those involved or affected?

Is the conduct of a type referred to in the Act or these Guidelines?

Is the behaviour systemic?

Are amounts involved substantial?

If proven, could the allegations result in termination of employment?

It is not necessary for the discloser to identify a matter as a PID. It is the disclosure officer's responsibility to identify a PID as such and address it accordingly.

Should the disclosure officer require additional information to make their decision as to whether the disclosure qualifies as a PID, the disclosure officer may consider conducting limited inquiries, interviewing the complainant, and seeking advice from GSO or the office of the Public Sector Standards Commissioner.

Situations that appear to involve false or vexatious allegations should be handled carefully. The starting point for any disclosure officer is to look at the concern and examine whether there is substance to it. Every concern should be treated as being made in good faith, unless it is subsequently found not to be. However, if it is found that an employee has maliciously raised a concern that they know is untrue, disciplinary proceedings should be initiated.

Step 4: Determine if an investigation is required.

a) Investigate:

The head of the public sector entity (or their delegate) must investigate a PID received which relates to their entity (*Section 18 of the PID Act*).

Before an investigation is undertaken, the investigating entity must:

decide whether the investigation is to be conducted internally, or whether an external investigation is required; and

develop clear terms of reference, including timeframes.

There are scenarios where the head of an entity may not be responsible for investigating a disclosure. These are where a disclosure involves the head of the entity, the Head of Service, or the Public Sector Standards Commissioner (*Section 18(2) of the PID Act*).

Where a PID relates to a head of an entity, the Head of Service must investigate the disclosure. If a disclosure relates to the Head of Service, the ACT Ombudsman may investigate the disclosure or refer it to the head of another entity. Similarly, where a PID relates to the Public Sector Standards Commissioner, the Head of Service must investigate the disclosure.

If the disclosable conduct could involve a criminal offence, the investigating entity must refer the PID to the Chief Police Officer ().

b) No investigation required: (*Section 20 of the PID Act*)

In certain circumstances the investigating entity may make a decision not to investigate a PID. Reasons for not further investigating allegations in a PID are listed in section 20 of the Act. They include the following:

- the discloser has withdrawn the PID and the investigating entity is reasonably satisfied that there are no further matters in the disclosure that warrant investigation;
- the discloser has not disclosed his or her name and contact details and the investigating entity is reasonably satisfied that this lack of information makes it impracticable for the disclosure to be investigated;
- the discloser fails, without reasonable excuse, to give assistance when requested from the investigating entity;
- the investigating entity is reasonably satisfied that the disclosure information is wrong in a material way and investigation of the disclosure is not warranted;
- the investigating entity is reasonably satisfied that the age of the disclosed information makes it impracticable for the disclosure to be investigated;
- the investigating entity is reasonably satisfied that the substance of the disclosure has already been investigated under the Act or another law in for in the ACT; or

The Public Sector Standards Commissioner may notify the ACT Ombudsman about a PID if the Public Sector Standards Commissioner believes it is appropriate for the ACT Ombudsman to know about the disclosure.

9.1 Public Sector Standards Commissioner may review an entity's decisions and actions

The Public Sector Standards

function of monitoring the management of public interest disclosures by public sector entities, so again referral to the Public Sector Standards Commissioner is an option that is available.

If the discloser made the PID under the circumstances set out in paragraph (e) above, where the disclosure is honestly and reasonably concerned about detrimental action from the entity to which the PID relates, the Member would want to ensure that any action taken by the Member to progress the investigation of the PID would not cause any detrimental harm to the discloser or anyone else. Accordingly, a tailored approach might have to be undertaken. In this context, the Public Sector Standards Commissioner is available for consultation, and should be informed of steps taken in dealing with the disclosure.

In the normal course where none of the specific circumstances listed in s.27 apply, Members of the Assembly who receive correspondence intended as PIDs, or information considered to be possible disclosures under the PID Act, should comply with provisions of the Act specific to receiving officers and provide that correspondence to a disclosure officer within the entity for which the matter relates.

If there is doubt whether the disclosure qualifies as a PID, the Member should assume that the disclosure is protected by the PID Act and manage the disclosure accordingly.

Glossary

Act	<i>Public Interest Disclosure Act 2012</i>
ACT Public Service (ACTPS)	the ACT Public Service is established under section 12(1) of the <i>Public Sector Management Act 1994</i> . The ACTPS is made up of the administrative units declared under the Administrative Arrangements.
ACT Public Sector entity (entity)	<p><i>administrative units</i> (eg. Chief Minister, Treasury and Economic Development Directorate, Justice and Community Safety Directorate, ACT Health Directorate, etc.);</p> <p><i>territory authorities</i> (bodies established for a public purpose under an Act, eg. Canberra Institute of Technology, ACT Insurance Authority, Teacher Quality Institute, Cemeteries Authority, etc);</p> <p><i>territory owned corporations</i> or their subsidiaries (corporations established under the <i>Territory Owned Corporations Act 1990</i> eg. Icon Water Limited);</p> <p><i>territory instrumentalities</i> (corporations established under the <i>Corporations Act</i> or another Act or statutory instrument that are subject to control or direction by a Minister; or composed of people whose majority are appointed by a Minister or the Head of Service or a director-general or a statutory office-holder eg. Board of Senior Secondary Studies);</p> <p><i>statutory office holders</i> (eg. ACT Ombudsman, Auditor General, Commissioner for Revenue, Director of Public Prosecutions, Registrar General, Human Rights Commissioner, Public Trustee and Guardian, Electoral Commissioner, Work Safety Commissioner, Conservator of Flora and Fauna,</p>

- Disclosable Conduct Per section 8 of the Act,
- a) conduct of a person that could, if proved—
 - (i) be a criminal offence against a law in force in the ACT; or
 - (ii) give reasonable grounds for disciplinary action (ie that will result in terminating a person's employment, appointment or contract for services) against the person;
 - (b) action of a public sector entity or public official for a public sector entity that is any of the following:
 - (i) maladministration (ie illegal, unreasonable, unjust, oppressive, improperly discriminatory, negligent or improper motives) that adversely affects a person's interests in a substantial and specific way;
 - (ii) a substantial misuse of public funds;
 - (iii) a substantial and specific danger to public health or safety;

References

Better practice guide to complaint handling, Commonwealth Ombudsman,
<http://www.ombudsman.gov.au/better-practice-guide>

Whistling While They Work - A good-practice guide for managing internal reporting of wrongdoing in public sector organisations, Australia and New Zealand School of Government,
<https://press.anu.edu.au/publications/series/anzsog/whistling-while-they-work>

4: DETERMINE IF INVESTIGATION IS REQUIRED.

(3) Is an investigation required?



Appendix B - Acknowledgement letter suggested template for use on receipt of a disclosure

<Insert Letterhead>

<Name of discloser>

<Address of discloser>

Dear <name of discloser>

Thank you for your letter/email/phone call of <date> about <insert details of disclosure>.

I am writing to thank you for bringing this matter to my attention.

I am currently assessing your disclosure in terms of the *Public Interest Disclosure Act 2012*.

I will write again within three months from the date of this letter to notify you how this matter is being handled, consistent with the provisions of section 23 of the Act.

If you require any further information or assistance, please do not hesitate to contact me.

Yours sincerely

<Name of Disclosure Officer>

<Name of entity>

CC: Public Sector Standards Commissioner

Appendix C - Referral letter suggested template for use in providing a public interest disclosure to another entity

<Insert Letterhead>

<recipient/address>

Dear *<insert name of head of entity>*

Referral of a public interest disclosure

Appendix D -

PUBLIC INTEREST DISCLOSURE Final Report

ACTPS entity responsible for investigating PID:
Date disclosure received:
Date disclosure assessed as a PID: Disclosure officer assessing:
Date discloser notified of decision to investigate:
Date Public Sector Standards Commissioner notified:
Date investigation commenced or closed under section 20:
Date investigation completed:
Decision (including reason for decision):
Action taken:
Date discloser notified of outcome:

Signed..... <disclosure officer>..... Date /.... /....