



Australian Capital Territory

Public Interest Disclosure Act 2012

A2012-43

Contents

		Page
Part 1	Preliminary	
1	Name of Act	2
2	Commencement	2
3	Dictionary	2
4	Notes	2
5	Offences against Act—application of Criminal Code etc	3
6	Object of Act	3
Part 2	Important concepts	
7	Meaning of <i>public interest disclosure</i>	4
8	Meaning of <i>disclosable conduct</i>	5

J2011-811

Authorised by the ACT Parliamentary Counsel—also accessible at www.legislation.act.gov.au

	Page
9	Meaning of <i>public sector entity</i> 7
10	Meaning of <i>public official</i> 8
11	Meaning of <i>disclosure officer</i> 8
12	Meaning of <i>relates</i> to an entity 9
13	Meaning of <i>head</i> of a public sector entity 9
Part 3	Making a public interest disclosure
14	Who may make a public interest disclosure? 11
15	To whom may a public interest disclosure be made? 11
16	How may a public interest disclosure be made? 12
17	Disclosure officer must tell public sector entity about public interest disclosure 13
Part 4	Investigating a public interest disclosure
18	Investigation of public interest disclosure 14
19	Referral to another public sector entity 15
20	Investigating entity may decide not to investigate etc 15
21	Referral to chief police officer 17
22	Investigating entity must keep referring entity informed 17
23	Discloser must be kept informed 17
24	Public sector entity must take action 18
25	Commissioner must be kept informed 19
26	Limitations on obligations to keep people informed etc 20
Part 5	Public interest disclosure to third parties
27	When disclosure may be made to Legislative Assembly or journalist 21
Part 6	Oversight of public interest disclosures
28	Commissioner's functions 23
29	Commissioner may review decisions 23
30	Report by commissioner 24
31	Commissioner must tell discloser about decision 25
32	Commissioner's guidelines 25
33	Public interest disclosure procedures 26

	Page
34	Role of the ombudsman 26
Part 7	Protections for disclosers
35	Immunity from liability 28
36	Protection from defamation action 28
37	Loss of protection 28
38	Liability for own conduct 29
39	What is <i>detrimental action</i> ? 29
40	Offence—taking detrimental action 30
41	Damages for detrimental action 30
42	Injunction to prevent detrimental action etc 31
Part 8	Miscellaneous
43	Protection of officials from liability 32
44	Offences—use or divulge protected information 33
45	Information to be included in annual report 35
46	Approved forms 36
47	Regulation-making power 36
Part 20	Transitional
100	Act applies to disclosures made after commencement 37
101	Public Interest Disclosure Act 1994 applies to disclosures made before commencement 37
102	Transitional regulations 37
103	Expiry—pt 20 37
Part 21	Repeals and consequential amendments
104	Repeal of Public Interest Disclosure Act 1994 38
105	Ombudsman Act 1989, section 4A (c) 38
106	Ombudsman Act 1989, new section 5 (2A) 38
Dictionary	39



Australian Capital Territory

Public Interest Disclosure Act 2012

A2012-43

An Act to facilitate public interest disclosures and protect people making those disclosures, and for other purposes

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

Part 1 Preliminary

1 Name of Act

This Act is the *Public Interest Disclosure Act 2012*.

2 Commencement

This Act commences on 1 February 2013.

Note The naming and commencement provisions automatically commence on the notification day (see Legislation Act, s 75 (1)).

3 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere.

For example, the signpost definition '*head of service*—see the *Public Sector Management Act 1994*, dictionary.' means that the term 'head of service' is defined in that dictionary and the definition applies to this Act.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

4 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

5 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

6 Object of Act

The object of this Act is to promote the public interest by—

- (a) providing a way for people to make public interest disclosures; and
- (b) ensuring people who make public interest disclosures are protected and treated respectfully; and
- (c) ensuring public interest disclosures are properly investigated and dealt with; and
- (d) ensuring that appropriate consideration is given to the interests of people who make public interest disclosures and the people who are the subject of the disclosures.

Part 2 Important concepts

7 Meaning of *public interest disclosure*

- (1) For this Act, a *public interest disclosure*—
 - (a) is a disclosure of information by a person about disclosable conduct that—
 - (i) the person honestly believes on reasonable grounds tends to show disclosable conduct; or
 - (ii) tends to show disclosable conduct regardless of whether the person honestly believes on reasonable grounds the information tends to show the conduct; and
 - (b) includes any assistance given by the discloser during an investigation of the information mentioned in paragraph (a).
- (2) However, a *public interest disclosure* does not include a disclosure of information by a person—
 - (a) that the person knows is false or misleading; or
 - (b) that relates entirely or in substance to a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure.

Note If a disclosure is not a *public interest disclosure*, the person disclosing the information is not protected under this Act and there is no obligation under this Act for an entity to investigate the disclosure.

8 Meaning of *disclosable conduct*

- (1) For this Act, *disclosable conduct* means any of the following:
- (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 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 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;
 - (iv) a substantial and specific danger to the environment.

Note Taking detrimental action is a criminal offence for par (a) (see s 40).

- (2) In this section:

action includes inaction.

conduct means—

- (a) for a person, regardless of whether the person is a public official for a public sector entity—conduct of, or involving, the person that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial exercise of a function of a public official or public sector entity; or
- (b) for a public official for a public sector entity—conduct of, or involving, the person that is or involves—

- (i) the exercise of the person's functions as a public official in a way that is not honest or is not impartial; or
 - (ii) a breach of trust as a public official; or
 - (iii) a misuse of information or material acquired in or in relation to the exercise of the person's functions as a public official whether the misuse is for the person's benefit or the benefit of someone else; or
- (c) a conspiracy or attempt to engage in conduct mentioned in paragraph (a) or (b).

disciplinary action, against a person, means action—

- (a) terminating the person's employment; or
- (b) ending the person's appointment; or
- (c) terminating the person's contract for services.

environment—see the *Environment Protection Act 1997*, dictionary.

maladministration means an action about a matter of administration that was—

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

public funds means funds that are available to, or under the control of, a public sector entity including public and trust money within the meaning of the *Financial Management Act 1996*.

public health or safety includes health or safety of people—

- (a) under lawful care or control; or

(b) using community facilities or services provided by the public or private sector; or

(c) in workplaces.

Examples—par (a)

1 students under the care or control of a teacher

2 patients in a health facility

3 detainees in a correctional facility

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

9 **Meaning of *public sector entity***

(1) For this Act, a ***public sector entity*** is any of the following:

(a) an ACTPS entity;

(b) a Legislative Assembly entity;

(c) an entity prescribed by regulation.

Note ***ACTPS entity*** and ***Legislative Assembly entity***—see the dictionary.

(2) However, a ***public sector entity*** does not include an entity prescribed by regulation.

(3) Subject to any disallowance or amendment under the Legislation Act, chapter 7, a regulation made for subsection (2) commences—

(a) if there is a motion to disallow the regulation and the motion is negated by the Legislative Assembly—on the day after the day the motion is negated; or

(b) on the day after the 6th sitting day after the day it is presented to the Legislative Assembly under that chapter; or

(c) if the regulation provides for a later date or time of commencement—on that date or at that time.

10 Meaning of *public official*

For this Act, a *public official* for a public sector entity is—

- (a) a person who is or has been—
 - (i) an employee of the public sector entity; or
 - (ii) a contractor, employee of a contractor or volunteer exercising a function of the public sector entity; or
- (b) a person prescribed by regulation.

11 Meaning of *disclosure officer*

(1) For this Act, a *disclosure officer* for a public interest disclosure is any of the following:

- (a) for a disclosure that relates to an ACTPS entity—
 - (i) the commissioner; or
 - (ii) the head of service; or
 - (iii) the auditor-general; or
 - (iv) the ombudsman; or
 - (v) the head of an ACTPS entity; or
 - (vi) a person declared under subsection (2) for an ACTPS entity;
- (b) for a disclosure that relates to a Legislative Assembly entity—
 - (i) the clerk of the Legislative Assembly; or
 - (ii) the auditor-general; or
 - (iii) the ombudsman; or
 - (iv) a person declared under subsection (2) for a Legislative Assembly entity.

- (2) The head of a public sector entity must declare at least 1 person to be a disclosure officer for public interest disclosures for the entity.
- (3) A declaration is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

12 **Meaning of *relates* to an entity**

For this Act, a public interest disclosure *relates* to an entity if it is about—

- (a) the entity's disclosable conduct; or
- (b) for a public sector entity—the disclosable conduct of a public official for the entity; or
- (c) the disclosable conduct of another person that affects the exercise of functions of—
 - (i) the entity; or
 - (ii) for a public sector entity—a public official for the entity.

13 **Meaning of *head* of a public sector entity**

For this Act, the *head* of a public sector entity is any of the following:

- (a) for an ACTPS entity—
 - (i) for an administrative unit—the director-general of the administrative unit; and
 - (ii) for a territory authority—the person who has responsibility for managing the affairs of the territory authority; and
 - (iii) for a territory-owned corporation or a subsidiary of a territory-owned corporation—the person who has responsibility for managing the affairs of the territory-owned corporation; and

- (iv) for a territory instrumentality—the person who has responsibility for managing the affairs of the territory instrumentality; and
- (v) for a statutory office-holder—the statutory office-holder;
- (b) for a Legislative Assembly entity—the clerk of the Legislative Assembly;
- (c) for an entity prescribed by regulation under section 9 (1) (c)—the person prescribed by regulation.

Part 3 Making a public interest disclosure

14 Who may make a public interest disclosure?

Any person may make a public interest disclosure.

15 To whom may a public interest disclosure be made?

- (1) A public interest disclosure may be made to—
- (a) a disclosure officer; or
 - (b) a Minister; or
 - (c) if the discloser is a public official for a public sector entity—
 - (i) a person who, directly or indirectly, supervises or manages the discloser; or
 - (ii) for a public sector entity that has a governing board—a member of the board; or
 - (iii) a public official of the entity who has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information.

Examples—subpar (iii)

- 1 the chief financial officer of a public sector entity in relation to a disclosure about the substantial misuse of public funds by an employee of the entity
- 2 a workplace bullying and harassment contact officer for a public sector entity in relation to a disclosure about an employee of the entity threatening physical violence against another employee
- 3 a public official on a clinical standards committee for a public hospital in relation to a disclosure about medical malpractice at the hospital that was causing or likely to cause a substantial danger to public health

Note 1 If s 27 applies, a public interest disclosure may be made to a member of the Legislative Assembly or a journalist.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) If a person mentioned in subsection (1) (b) or (c) receives a public interest disclosure, the person must give a copy of the disclosure to a disclosure officer.

Note A person must comply with s (2) as soon as possible after receiving a public interest disclosure (see Legislation Act, s 151B).

16 How may a public interest disclosure be made?

- (1) A public interest disclosure may be made—
- (a) orally or in writing; and
 - (b) anonymously; and
 - (c) without the discloser asserting that the disclosure is made under this Act.

Examples—par (c)

- 1 Tranh comments to her supervisor during a coffee break that she believes there are a number of significant irregularities in the ordering of office supplies for her business unit. Tranh does not ask or infer that the irregularities should be investigated.
- 2 Cheryl is a senior human resources manager and is attending a training course with Beverly, who is an employee in another directorate. Beverly tells Cheryl about employment practices of a manager in Beverly's directorate that Cheryl believes involve substantial noncompliance with territory law. Beverly is unaware that those practices are noncompliant.

Note 1 An investigating entity may decide to not investigate an anonymous public interest disclosure if the entity is reasonably satisfied that not knowing the discloser's name and contact details makes it impracticable for the disclosure to be investigated (see s 20 (b)).

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) If a public interest disclosure is made orally to a person mentioned in section 15 (1), the person must make a written record of the disclosure.

Note If a form is approved under s 46 for this provision, the form must be used.

17 Disclosure officer must tell public sector entity about public interest disclosure

After receiving a public interest disclosure, the disclosure officer must give a copy, or if the disclosure is made orally a written record, of the disclosure to—

- (a) the head of each public sector entity to which the disclosure relates; and
- (b) the commissioner; and
- (c) for a disclosure that relates to the head of service—the ombudsman; and
- (d) for a disclosure that relates to an administrative unit—the head of service.

Note 1 A disclosure officer need not give a copy or record of a disclosure to a person mentioned in this section if the disclosure is likely to adversely affect a person's safety or an investigation relating to the disclosure (see s 26 (1)).

Note 2 A disclosure officer must comply with this section as soon as possible after receiving a public interest disclosure (see Legislation Act, s 151B).

Note 3 For when a public interest disclosure *relates* to an entity—see s 12.

Part 4 Investigating a public interest disclosure

18 Investigation of public interest disclosure

- (1) If a disclosure officer receives a public interest disclosure, the head of the public sector entity to which the disclosure relates must investigate the disclosure.

Note For when a public interest disclosure *relates* to an entity—see s 12.

- (2) However, if a public interest disclosure relates to the disclosable conduct of—
- (a) a head of a public sector entity other than the head of service—the head of service must investigate the disclosure; or
 - (b) the commissioner—the head of service must investigate the disclosure; or
 - (c) the head of service—the ombudsman may—
 - (i) investigate the disclosure; or
 - (ii) refer the disclosure to the head of a public sector entity other than the head of service.
- (3) A head of a public sector entity to whom a public interest disclosure has been referred under subsection (2) (c) (ii), must investigate the disclosure.

Note The person responsible for investigating the public interest disclosure must investigate the disclosure as soon as possible after the person receives the disclosure (see Legislation Act, s 151B).

19 Referral to another public sector entity

- (1) This section applies if—
- (a) the head of a public sector entity is told about a public interest disclosure that relates to the public sector entity; and
 - (b) the head of the public sector entity reasonably believes that the disclosure is more appropriately investigated by another public sector entity that has a function or power to investigate.

Examples—par (b)—appropriate grounds for referring disclosure

- 1 the public interest disclosure relates to systemic or whole-of-government issues
- 2 there is a significant risk of a person taking detrimental action against a discloser if the public interest disclosure is investigated by the public sector entity to which the disclosure relates

Note 1 For when a public interest disclosure *relates* to an entity—see s 12.

Note 2 An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The head of the public sector entity may refer the disclosure to the head of the other public sector entity.
- (3) The head of the other public sector entity must investigate the public interest disclosure.

Note The head of the other public sector entity must investigate the public interest disclosure as soon as possible after the disclosure is referred (see Legislation Act, s 151B).

20 Investigating entity may decide not to investigate etc

An investigating entity may decide not to investigate a public interest disclosure, or may end the investigation of the disclosure, if—

- (a) the discloser has withdrawn the public interest disclosure and the investigating entity is reasonably satisfied that there are no further matters in the disclosure that warrant investigation; or

- (b) 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; or
- (c) the following applies:
 - (i) the investigating entity asks the discloser for assistance to investigate the disclosure;
 - (ii) the discloser fails, without reasonable excuse, to give the assistance;
 - (iii) the investigating entity is reasonably satisfied that this lack of assistance makes it impracticable for the disclosure to be investigated; or
- (d) the investigating entity is reasonably satisfied that the disclosed information is wrong in a material way and investigation of the disclosure is not warranted; or
- (e) the investigating entity is reasonably satisfied that the age of the disclosed information makes it impracticable for the disclosure to be investigated; or
- (f) the investigating entity is reasonably satisfied that the substance of the disclosure has already been investigated under this Act or another law in force in the ACT; or
- (g) there is a more appropriate way reasonably available to deal with the disclosable conduct in the disclosure.

Note 1 The investigating entity's decision may be reviewed by the commissioner under s 29.

Note 2 An investigating entity must tell a referring entity about its decision to not investigate a disclosure, or to end an investigation of the disclosure (see s 22).

21 Referral to chief police officer

The investigating entity for a public interest disclosure must refer the disclosure to the chief police officer if satisfied on reasonable grounds that the disclosable conduct the subject of the disclosure involves, or could involve, an offence.

22 Investigating entity must keep referring entity informed

- (1) This section applies if a public interest disclosure is referred by a head of a public sector entity (the *referring entity*) to the head of another entity under section 19.
- (2) The investigating entity must tell the referring entity about—
 - (a) if the investigating entity decides not to investigate the disclosure, or to end the investigation of the disclosure—
 - (i) the decision; and
 - (ii) the ground mentioned in section 20 for the decision; and
 - (iii) the reasons for making the decision on that ground; or
 - (b) if the disclosure is investigated by the investigating entity—the progress and outcome of the investigation.

23 Discloser must be kept informed

- (1) The investigating entity for a public interest disclosure must tell the discloser about—
 - (a) the referral of a public interest disclosure to another head of a public sector entity or to the chief police officer; and
 - (b) the decision not to investigate a disclosure, or to end the investigation of the disclosure, including—
 - (i) the ground mentioned in section 20 for the decision; and
 - (ii) the reasons for making the decision on that ground; and

- (c) if a disclosure is investigated—
- (i) the progress of the investigation at least once every 3 months; and
 - (ii) the outcome of the investigation.

Note An investigating entity must comply with this section as soon as possible after a referral etc is made (see Legislation Act, s 151B).

- (2) This section does not apply if—
- (a) the public interest disclosure was made anonymously; or
 - (b) the discloser has asked in writing not to be kept informed about the public interest disclosure.

Note Certain information need not be given to the discloser (see s 26).

- (3) If the disclosure has been referred to the chief police officer, the investigating entity is only required to comply with subsection (1) (b) and (c) to the extent that relevant information has been given to the entity by the chief police officer.

24 Public sector entity must take action

- (1) If a head of a public sector entity believes on reasonable grounds that disclosable conduct has occurred, is likely to have occurred or is likely to occur, the entity must take action necessary and reasonable to—
- (a) prevent the disclosable conduct continuing or occurring in the future; and
 - (b) if the investigation of the public interest disclosure has been completed—discipline any person responsible for the disclosable conduct.

Note **Disclosable conduct** includes taking detrimental action (see s 8 and s 40).

- (2) The head of the public sector entity must tell the discloser about any action taken or proposed to be taken.

- (3) Subsection (2) does not apply if—
- (a) the public interest disclosure was made anonymously; or
 - (b) the discloser has asked in writing not to be kept informed about the public interest disclosure.

Note Certain information need not be given to the discloser (see s 26).

25 Commissioner must be kept informed

- (1) An investigating entity for a public interest disclosure must tell the commissioner about the following:
- (a) the progress and outcome of an investigation of the disclosure;
 - (b) the referral of the public interest disclosure to the head of another public sector entity or to the chief police officer;
 - (c) any action taken, or proposed to be taken, in relation to disclosable conduct the subject of the disclosure;
 - (d) a decision not to investigate the disclosure, or to end the investigation of the disclosure and—
 - (i) the ground mentioned in section 20 for the decision; and
 - (ii) the reasons for making the decision on that ground; and
 - (iii) if the ground mentioned in section 20 (g) was a reason for the decision—how the disclosure was otherwise dealt with and the result (if any) of dealing with the disclosure in that way.

Note An investigating entity must comply with this section as soon as possible after an investigation etc is completed (see Legislation Act, s 151B).

- (2) If the disclosure has been referred to the chief police officer, the investigating entity is only required to comply with subsection (1) (a), (c) and (d) to the extent that relevant information has been given to the entity by the chief police officer.

26 Limitations on obligations to keep people informed etc

- (1) A person, including a discloser, need not be told about information in relation to a public interest disclosure if telling the person would be likely to adversely affect—
 - (a) a person's safety; or
 - (b) an investigation relating to the disclosure.

Examples

- 1 a disclosure officer need not comply with the requirement under s 17 (a) to give the head of the public sector entity to which the public interest disclosure relates a copy or record of the disclosure if the disclosure officer believes it is likely that detrimental action will be taken against the discloser if the head of the entity is given the disclosure
- 2 an investigating entity need not comply with the requirement under s 25 (1) to give the commissioner information about a public interest disclosure if the disclosure relates to the commissioner and the disclosure officer believes it is likely that the investigation of the disclosure will be adversely affected if the commissioner is given the information

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) However, subsection (1) does not apply to section 21 (Referral to chief police officer).
- (3) A discloser need not be told about information in relation to a public interest disclosure if telling the discloser—
 - (a) would identify a person that has given information in relation to the disclosure; or
 - (b) could allow the identity of the person to be worked out.
- (4) A discloser must not be told about information in relation to a public interest disclosure if telling the discloser is contrary to a law in force in the ACT.

Part 5 Public interest disclosure to third parties

27 When disclosure may be made to Legislative Assembly or journalist

(1) This section applies if a discloser has made a public interest disclosure to a person mentioned in section 15 and—

(a) an investigating entity has refused or failed to investigate the disclosure; or

Example—failure to investigate

an investigating entity has not investigated a disclosure because the discloser's supervisor failed to give a copy of the disclosure to a disclosure officer

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

(b) the discloser has not been told within 3 months after the day the disclosure is made whether or not the disclosure will be investigated or dealt with; or

(c) the discloser has been told the disclosure will be investigated but has not been told about the progress of the investigation for a period of more than 3 months; or

(d) the following applies:

(i) the disclosure has been investigated;

(ii) there is clear evidence that 1 or more instances of disclosable conduct mentioned in the disclosure has occurred, or was likely to have occurred;

(iii) the discloser has been told by the investigating entity that no action will be taken in relation to the disclosable conduct.

- (2) This section also applies if a person honestly believes on reasonable grounds that—
- (a) the person has information that tends to show disclosable conduct; and
 - (b) there is a significant risk of detrimental action to the person or someone else if a disclosure is made to a person mentioned in section 15; and
 - (c) it would be unreasonable in all the circumstances for the person to make a disclosure to a person mentioned in section 15.
- (3) The person may make a disclosure of information about the disclosable conduct to—
- (a) a member of the Legislative Assembly; or
 - (b) a journalist.
- (4) In making a disclosure under this section, the person—
- (a) must disclose sufficient information to show that the conduct is disclosable conduct, but not more than is reasonably necessary to show that the conduct is disclosable conduct; and
 - (b) if a public interest disclosure was made to a person mentioned in section 15—may inform the member of the Legislative Assembly or journalist about the progress and outcome of any investigation.
- (5) In this section:

journalist means a person who is engaged and active in the publication of news and who may be given information by someone else in the expectation that the information may be published in a news medium.

news medium means a medium for the dissemination to the public, or a section of the public, of news and observations on news.

Part 6 Oversight of public interest disclosures

28 Commissioner's functions

- (1) The commissioner has the following functions:
 - (a) to give advice about public interest disclosures;
 - (b) to monitor the management of public interest disclosures by public sector entities;
 - (c) to review the way in which public sector entities investigate and deal with public interest disclosures generally, or particular public interest disclosures;
 - (d) to ensure just outcomes for people who make public interest disclosures, including by preventing and remedying the effect of detrimental action against people because of disclosures;
 - (e) to undertake, or coordinate the undertaking of, education and training programs about public interest disclosures.
- (2) The commissioner may tell the ombudsman about a public interest disclosure if the commissioner believes it is appropriate for the ombudsman to know about the disclosure.

29 Commissioner may review decisions

- (1) The commissioner may, at any time, review—
 - (a) a decision by an investigating entity to refuse to investigate a public interest disclosure, or to end the investigation of the disclosure; and
 - (b) an action taken, or proposed to be taken, by a public sector entity in relation to disclosable conduct the subject of a public interest disclosure.

- (2) The commissioner may ask anyone to give the commissioner information, including protected information, relevant to the investigation of the disclosure.
- (3) A public sector entity or public official must comply with a request made to the entity or official.
- (4) After reviewing a decision, the commissioner may—
 - (a) amend the decision; or
 - (b) set aside the decision and substitute a new decision; or
 - (c) take no action.
- (5) After reviewing an action, or proposed action, the commissioner may direct a public sector entity or public official to take, or not take, action in relation to the disclosable conduct.

30 Report by commissioner

- (1) The commissioner may give a report to the Minister about—
 - (a) a public sector entity's public interest disclosure procedures; or
 - (b) how a public interest disclosure is dealt with by a public sector entity.
- (2) However, the commissioner—
 - (a) may only include in a report information that may be adverse to, or critical of, a person if the commissioner has given the person an opportunity to be heard; and
 - (b) must not include in a report information that is likely to adversely affect—
 - (i) a person's safety; or
 - (ii) an investigation relating to the disclosure.

- (3) The Minister must present the report to the Legislative Assembly within 9 sitting days after the day the report is given to the Minister.
- (4) Subsection (2) (a) applies whether or not the adverse or critical material is—
 - (a) express or implicit; or
 - (b) by way of opinion or otherwise.

31 Commissioner must tell discloser about decision

- (1) If the commissioner makes a decision under section 29 (4) (a) or (b), the commissioner must tell the discloser—
 - (a) the commissioner's decision; and
 - (b) the reasons for the commissioner's decision.
- (2) This section does not apply if—
 - (a) the public interest disclosure was made anonymously; or
 - (b) the discloser has asked in writing not to be kept informed about the public interest disclosure.

Note Certain information need not be given to the discloser (see s 26).

32 Commissioner's guidelines

- (1) The commissioner must make guidelines about the way in which public sector entities deal with public interest disclosures.
- (2) A guideline is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

33 Public interest disclosure procedures

- (1) The head of a public sector entity must make procedures for the entity for dealing with public interest disclosures.
- (2) Without limiting subsection (1), a public sector entity's procedures must include—
 - (a) clear obligations on the entity and its public officials to take action to protect disclosers; and
 - (b) risk management steps for assessing and minimising—
 - (i) detrimental action against people because of public interest disclosures; and
 - (ii) detriment to people against whom allegations of disclosable conduct are made in a disclosure.
- (3) The head of a public sector entity must obtain the commissioner's approval of the entity's public interest disclosure procedures and any amendment of those procedures.
- (4) The commissioner may only approve a public interest disclosure procedure that is consistent with the commissioner's guidelines under section 32.

34 Role of the ombudsman

- (1) A person may complain to the ombudsman about an action taken by a public sector entity in exercising a function under this Act.

Note **Exercising a function** includes exercising or performing an authority, duty or power (see Legislation Act, dict, pt 1, defs **exercise** and **function**).
- (2) Without limiting subsection (1), a complaint may be about—
 - (a) the adequacy of a public sector entity's public interest disclosure procedures; or

- (b) whether a public sector entity or public official has followed the entity's public interest disclosure procedures.
- (3) If a complaint is made to the ombudsman, the ombudsman may exercise any function of the commissioner under this Act in relation to the public interest disclosure that is related to the complaint.
- (4) Nothing in this Act is intended to limit the ombudsman's powers under the *Ombudsman Act 1989*.

Part 7 Protections for disclosers

35 Immunity from liability

If a person makes a public interest disclosure—

- (a) the making of the public interest disclosure is not—
 - (i) a breach of confidence; or
 - (ii) a breach of professional etiquette or ethics; or
 - (iii) a breach of a rule of professional conduct; or
 - (iv) if the disclosure is made in relation to a member of the Legislative Assembly—a contempt of the Assembly; and
- (b) the discloser does not incur civil or criminal liability only because of the making of the public interest disclosure; and
- (c) for a discloser who is a public official—the discloser is not liable to administrative action (including disciplinary action or dismissal) only because of the making of the public interest disclosure.

36 Protection from defamation action

Without limiting section 35, in a proceeding for defamation, a discloser has a defence of absolute privilege for publishing the information disclosed.

37 Loss of protection

- (1) This section applies if a person makes a public interest disclosure and a court is satisfied that—
 - (a) the discloser has given information to a person investigating the disclosure that the discloser knows is false or misleading; or
 - (b) the disclosure is vexatious.

- (2) The discloser forfeits the protections under this Act in relation to the public interest disclosure.
- (3) However, a court may make an order that subsection (2) does not apply if the court considers that the discloser's conduct mentioned in subsection (1) (a)—
 - (a) has not materially prejudiced the investigation of the public interest disclosure; and
 - (b) is of a minor nature.

38 Liability for own conduct

- (1) A person's liability for the person's own conduct is not affected by the person's disclosure of that conduct under this Act.
- (2) In this section:

liability includes civil or criminal liability or any liability arising from an administrative action (including disciplinary action or dismissal).

39 What is *detrimental action*?

For this Act, *detrimental action* is action that involves—

- (a) discriminating against a person by treating, or proposing to treat, the person unfavourably in relation to the person's reputation, career, profession, employment or trade; or
- (b) harassing or intimidating a person; or
- (c) injuring a person; or
- (d) damaging a person's property.

40 Offence—taking detrimental action

- (1) A person commits an offence if the person (the *retaliator*) takes detrimental action because of a public interest disclosure.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (2) For this Act, a retaliator *takes* detrimental action because of a public interest disclosure if the retaliator takes, or threatens to take, detrimental action against someone else because—
- (a) a person has made, or intends to make, a public interest disclosure; or
 - (b) the retaliator believes that a person has made or intends to make a public interest disclosure.
- (3) In determining whether a retaliator has taken detrimental action because of a public interest disclosure, it is sufficient if a reason mentioned in subsection (2) is a contributing reason.

41 Damages for detrimental action

- (1) A person who takes detrimental action against someone else is liable in damages to anyone who suffers detriment as a result.
- (2) Detrimental action is a tort and damages may be recovered in a proceeding in a court of competent jurisdiction.
- (3) Any remedy that may be given by a court for a tort, including exemplary damages, may be given by a court in a proceeding under this section.
- (4) The right of a person to bring a proceeding for damages under this section does not affect any other right or remedy available to the person arising from detrimental action.

42 Injunction to prevent detrimental action etc

- (1) On application, the Supreme Court may—
 - (a) if satisfied that a person has taken detrimental action—order the person who took detrimental action to remedy the action; or
 - (b) if satisfied that a person is taking, or is likely to take, detrimental action—grant an injunction to prevent detrimental action being taken.
- (2) An application may be made by—
 - (a) the commissioner; or
 - (b) the discloser; or
 - (c) a person against whom detrimental action has been or is likely to be taken.
- (3) The Supreme Court may grant an interim injunction restraining a person from taking detrimental action before deciding an application for an injunction under this section.

Part 8 Miscellaneous

43 Protection of officials from liability

- (1) An official is not civilly liable for anything done or omitted to be done honestly and without recklessness—
 - (a) in the exercise of a function under this Act; or
 - (b) in the reasonable belief that the act or omission was in the exercise of a function under this Act.
- (2) Any civil liability that would, apart from subsection (1), attach to an official attaches instead to the Territory.
- (3) In this section:

official means—

 - (a) the commissioner; or
 - (b) the ombudsman; or
 - (c) a disclosure officer; or
 - (d) an investigating entity; or
 - (e) a person authorised under this Act to do or not to do a thing.

Note A reference to an Act includes a reference to the statutory instruments made or in force under the Act, including any regulation (see Legislation Act, s 104).

44 Offences—use or divulge protected information

- (1) A person to whom this section applies commits an offence if—
- (a) the person uses information; and
 - (b) the information is protected information about someone else; and
 - (c) the person is reckless about whether the information is protected information about someone else.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (2) A person to whom this section applies commits an offence if—
- (a) the person does something that divulges information; and
 - (b) the information is protected information about someone else; and
 - (c) the person is reckless about whether—
 - (i) the information is protected information about someone else; and
 - (ii) doing the thing would result in the information being divulged to someone else.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (3) Subsections (1) and (2) do not apply if the information is used or divulged—
- (a) under this Act or another territory law; or
 - (b) in relation to the exercise of a function, by a person to whom this section applies, under this Act or another territory law; or
 - (c) in a court proceeding.

- (4) Subsections (1) and (2) do not apply to the using or divulging of protected information about a person with the person's consent.

Note The defendant has an evidential burden in relation to the matters mentioned in s (3) and s (4) (see Criminal Code, s 58).

- (5) A person to whom this section applies need not divulge protected information to a court, or produce a document containing protected information to a court, unless it is necessary to do so for this Act or another law in force in the ACT.

- (6) In this section:

court includes a tribunal, authority or person having power to require the production of documents or the answering of questions.

divulge includes—

- (a) communicate; or
- (b) publish.

person to whom this section applies means—

- (a) a person who is or has been—
 - (i) the commissioner; or
 - (ii) the ombudsman; or
 - (iii) a disclosure officer; or
 - (iv) an investigating entity; or
- (b) anyone else who has exercised a function under this Act.

produce includes allow access to.

protected information means information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else.

Examples—protected information

- 1 information given to a disclosure officer whether or not it is a public interest disclosure
- 2 information given to an investigating entity about a public interest disclosure by someone other than the discloser
- 3 information that would identify the discloser or would allow the discloser's identity to be worked out
- 4 information that would identify a person, other than the discloser, who has given information to an investigating entity about a public interest disclosure or would allow the person's identity to be worked out

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

use, in relation to information, includes make a record of the information.

45 Information to be included in annual report

- (1) The director-general must, in an annual report under the *Annual Reports (Government Agencies) Act 2004* for a financial year, include details of the following for the year:
 - (a) the total number of public interest disclosures made;
 - (b) the total number of investigations carried out;
 - (c) the total number of investigations completed;
 - (d) the average time taken for completed investigations;
 - (e) anything else prescribed by regulation.
- (2) However, the annual report must not include protected information.

46 Approved forms

- (1) The commissioner may approve forms for this Act.
- (2) If the commissioner approves a form for a particular purpose, the approved form must be used for that purpose.

Note For other provisions about forms, see the Legislation Act, s 255.

- (3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

47 Regulation-making power

The Executive may make regulations for this Act.

Note A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

Part 20 Transitional

100 Act applies to disclosures made after commencement

This Act applies to a public interest disclosure made after the commencement of this Act, regardless of when the conduct the subject of the disclosure is alleged to have happened.

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

The *Public Interest Disclosure Act 1994* as in force immediately before the commencement of this Act continues to apply to a public interest disclosure made before the commencement of this Act.

102 Transitional regulations

- (1) A regulation may prescribe transitional matters necessary or convenient to be prescribed because of the enactment of this Act.
- (2) A regulation may modify this part (including in relation to another territory law) to make provision in relation to anything that, in the Executive's opinion, is not, or is not adequately or appropriately, dealt with in this part.
- (3) A regulation under subsection (2) has effect despite anything elsewhere in this Act or another territory law.

103 Expiry—pt 20

This part expires 5 years after the day it commences.

Note Transitional provisions are kept in the Act for a limited time. A transitional provision is repealed on its expiry but continues to have effect after its repeal (see Legislation Act, s 88).

Part 21 Repeals and consequential amendments

104 Repeal of Public Interest Disclosure Act 1994

The *Public Interest Disclosure Act 1994* (A1994-108) is repealed.

105 Ombudsman Act 1989, section 4A (c)

omit

Public Interest Disclosure Act 1994

substitute

Public Interest Disclosure Act 2012

106 Ombudsman Act 1989, new section 5 (2A)

insert

(2A) Nothing in subsection (2) prevents the ombudsman from—

- (a) exercising a function given to the ombudsman under the *Public Interest Disclosure Act 2012*; or
- (b) investigating a complaint made under the *Public Interest Disclosure Act 2012*, section 34 (1).

Dictionary

(see s 3)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- ACT
- auditor-general
- commissioner for public administration
- entity
- Legislative Assembly
- Minister (see s 162)
- Office of the Legislative Assembly
- ombudsman
- statutory office-holder
- Supreme Court
- territory authority
- territory instrumentality
- territory law
- territory-owned corporation
- the Territory.

ACTPS entity means any of the following:

- (a) an administrative unit;
- (b) a territory authority;
- (c) a territory-owned corporation;
- (d) a subsidiary of a territory-owned corporation;
- (e) a territory instrumentality;
- (f) a statutory office-holder.

commissioner means the commissioner for public administration.

contact details, for a discloser, means details of how a disclosure officer or investigating entity may contact the discloser about the public interest disclosure.

detrimental action—see section 39.

disclosable conduct—see section 8.

discloser means a person who makes a public interest disclosure.

disclosure officer, for a public interest disclosure—see section 11.

head, of a public sector entity—see section 13.

head of service—see the *Public Sector Management Act 1994*, dictionary.

investigating entity, for a public interest disclosure, means—

- (g) the head of the public sector entity to whom the disclosure relates; or
- (h) if section 18 (2) (a) or (b) (Investigation of public interest disclosure) applies—the head of service; or
- (i) if section 18 (2) (c) applies—the ombudsman or the head of the entity to whom the ombudsman has referred the disclosure; or
- (j) if section 19 (Referral to another public sector entity) applies—the head of the entity to whom the disclosure is referred.

Legislative Assembly entity means any of the following:

- (a) a member of the Legislative Assembly;
- (b) the Office of the Legislative Assembly;
- (c) a person employed under the *Legislative Assembly (Members' Staff) Act 1989*.

protected information—see section 44 (6).

public interest disclosure—see section 7.

public interest disclosure procedures means procedures under section 33 (1).

public official, for a public sector entity—see section 10.

public sector entity—see section 9.

relates, to an entity—see section 12.

takes, detrimental action—see section 40 (2).

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 7 June 2012.

2 Notification

Notified under the Legislation Act on 5 September 2012.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Public Interest Disclosure Bill 2012, which was passed by the Legislative Assembly on 23 August 2012.

Clerk of the Legislative Assembly

© Australian Capital Territory 2012