

Australian Capital Territory

# Public Interest Disclosure Guidelines 2019

**Notifiable instrument NI2019–281**

made under the

**Public Interest Disclosure Act 2012, section 32 (Commissioner’s Guidelines)**

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**1 Name of instrument**

This instrument is the Public Interest Disclosure Guidelines 2019.

**2 Commencement**

This instrument commences on the day after notification.

**3 Commissioner’s Guidelines**

I make the guidelines as set out in schedule 1.

**4 Revocation**

This instrument revokes Public Interest Disclosure Guidelines 2017 [NI2017–290].

Ian McPhee AO PSM  
Public Sector Standards Commissioner  
7 May 2019



Public Sector Standards Commissioner

# Public Interest Disclosure Guidelines 2019

Made under the *Public Interest Disclosure Act 2012*  
May 2019

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## Commissioner's Foreword

It is critical to the proper functioning of the ACT Government, the ACT Public Service (ACTPS) and other ACT Public Sector entities (entities) that the citizens we serve have trust and confidence in the integrity and probity structures that underpin the ACT's system of representative democracy. A focus on the desired standards of behaviour of the holders of public office – be they either elected representatives or officials – plays an important role in this regard and is achieved through the maintenance of legislative frameworks and codes of conduct for decision making and behaviour.

It is also important that there is a range of measures and institutions that provide avenues for the independent review of decisions made and actions taken. Public interest disclosure (PID) legislation and processes form part of this governance framework and provide an opportunity for people to raise concerns about any suspected wrongdoing in the public sector without fear of reprisal. In the ACT, a disclosure or complaint to an official becomes a PID when it is about concerning conduct that could amount to a criminal offence, gives grounds for disciplinary action, or actions that could amount to a serious malfeasance of public office, or danger to public health, safety or the environment. As such, they are a more serious category of complaint outside the bounds of the regular complaint handling processes available to members of the public and employees.

Governments and the public services that support them hold a special place in society, being entrusted to manage public resources and make decisions on the community's behalf. It is proper that mechanisms are in place to ensure these public resources are not wasted or used for individual gain.

The ACT Government is committed to promoting a workplace culture where employees feel confident and comfortable about reporting PIDs, and recognises its fundamental obligation to proactively deal with cases of wrongdoing in a fair and robust fashion. Indeed, the maintenance of proper standards of integrity and probity in the discharge of official duties is central to the expectations of behaviour enshrined in the *ACTPS Code of Conduct* and comprises one of the four ACTPS Values.

Furthermore, the ACTPS believes that employees or members of the public who raise genuine disclosures of wrongdoing are acting in an exemplary manner by assisting in promoting open and accountable government and best practice public sector management. In recognition of this, the ACTPS is committed to ensuring that any employee who raises genuine concerns through proper processes about wrongdoing is protected from retaliation or reprisal.

Under the *Public Interest Disclosure Act 2012* (the Act), I am obliged to make guidelines about the way in which the ACTPS and other entities covered by the Act should handle PIDs. These guidelines have been prepared to provide a clear framework in which concerns can be raised with confidence, investigated fairly and properly, and responded to appropriately. This version of the guidelines draws on experience in managing PIDs since the issue of the previous version of the guidelines some 2 years ago, presents the guidance material more concisely and emphasises the importance of the timely management of relevant processes.

The Head of Service and I encourage any employee or member of the public who considers that they have witnessed disclosable conduct to report in a timely manner, in order that the integrity of the ACT Public Service is preserved.

Ian McPhee AO PSM  
Public Sector Standards Commissioner  
May 2019

## 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 obligations of those raising a potential PID (the discloser), the protections available for disclosers, how disclosures should be dealt with, and the obligations of staff who manage disclosures and PIDs.

These guidelines are designed to explain and support PID arrangements and assist individuals who wish to make a disclosure, as well as ensure that ACT Public Sector entities have arrangements in place to consider disclosures and take appropriate action on PIDs. They will be reviewed periodically to ensure they meet the needs of users. This version of the guidelines updates those issued in June 2017.

The guidelines comprise three parts:

**Part One** is directed towards would-be disclosers. It provides information and guidance for those who are considering making a disclosure under the framework established by the Act.

**Part Two** explains the management and handling of disclosures and PIDs by ACT Public Sector entities. It has been written with an internal focus and aims to assist those with responsibility for receiving and managing disclosures and PIDs.

**Part Three** provides guidance to assist Members of the ACT Legislative Assembly respond to disclosures made to them.

## The ACT Integrity Commission

The ACT Legislative Assembly passed the *Integrity Commission Act 2018* (IC Act) on 29 November 2018. The Act is available at <https://www.legislation.act.gov.au/a/2018-52/>.

The ACT Integrity Commission is an independent body that has the power to investigate corruption in public administration in the interests of strengthening public confidence in government integrity. The Integrity Commission, which is operational from 1 July 2019, will investigate conduct that is alleged to be corrupt conduct in relation to all ACT public officials including public servants, statutory office holders, officers of the Legislative Assembly, Members of the Legislative Assembly (MLAs) and their staff. Judicial officers and ACT Civil and Administrative Tribunal members, assessors and registrars are also included in the definition of an ACT public official for the purposes of the IC Act.

The intended focus of the Commission is on current and emerging corrupt conduct. The Act also has retrospective operation in circumstances where investigation is in the public interest and is appropriate in the circumstances.

The legislation also requires mandatory reporting of corrupt conduct by all senior public servants, MLAs and chiefs of staff to Ministers and the Leader of the Opposition. Extending mandatory reporting obligations to persons beyond the head of a public sector agency is intended to create a higher level of accountability among ACT Public Sector leaders. The ACT Integrity Commission model also introduces a criminal offence for a mandatory reporter who fails to notify the Commission of serious or systemic corrupt conduct. This reflects

the intent of the ACT Government to require ACT Public Sector leaders to maintain the highest ethical standards.

It is anticipated that the next version of these guidelines will include advice on any protocols or other arrangements developed with the Integrity Commission to assist in managing the responsibilities of the Commission, ACT Public Sector entities and the office of the Public Sector Standards Commissioner.

## 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) that has, or has the potential to create, a significant or widespread negative impact. Disclosures of this kind require a special type of treatment due to their seriousness. Likewise, a person disclosing information of this nature needs special protection for taking the risk of raising such serious allegations.

**Reporting suspected wrongdoing is essential to the integrity of the ACTPS.**

Any person prepared to speak up about wrongdoing in the public sector, should be recognised as one of the most important sources of information about problems that may disadvantage or endanger others. People who raise concerns of this kind are sometimes called ‘whistle blowers’. Whistle blowing is important because it serves to uphold community standards and enhance the integrity of the public sector.

**A disclosure becomes a PID when it is about disclosable conduct, as defined by the PID Act. Because of the technical definition, a disclosure officer must first determine whether, based on the disclosure provided, the various elements of the definition are met before processing the disclosure as a PID.**

**The more details the discloser is able to provide the easier it will be for the disclosure officer to make that determination.**

Examples of disclosable conduct<sup>1</sup> include:

- corruption, e.g. accepting money or other benefits in exchange for helping someone to avoid prosecution, win a contract or gain government approval;
- fraud or theft, e.g. falsifying documents or information, or stealing an employer’s property or funds;
- official misconduct or maladministration, e.g. gaining personal benefit by not revealing a conflict of interest; or
- practices endangering the health or safety of staff, the community or the environment.

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<sup>1</sup> Please refer to the glossary (attached) or section 8 of PID Act for the definition of **disclosable conduct**.



The legislation provides for a PID to be made about an ACT Public Sector entity (entity), which is broadly defined to include anyone performing a function on behalf of the ACT government using public funds (i.e. all government agencies and their staff or contractors). In other words, a PID might be made about activity by an instrumentality, officer, employee, contractor, or anyone else who exercises a function on behalf of the ACT Government.

A PID can be about the actions of permanent, temporary or casual staff and employees of the ACTPS and other entities, including the ACT Legislative Assembly.

It can also be about the actions of contractors, sub-contractors, consultants and volunteers working on ACT Government sponsored projects or on programs funded by the ACT Government. This might include not-for-profit or other non-government entities providing a public service to the community under a contract with an entity.

A PID might relate to events which are happening (or are strongly suspected of happening) now, in the past, or that may happen in the future.

A PID may be made unintentionally, for example, during a causal conversation or other informal means.

A person may make a PID even if they are not able to identify a particular person who is responsible for the activity.

If you are worried that something seriously wrong or dangerous is happening within the ACT Public Sector, please do not keep it to yourself. Unless you pass on information about such concerns that may involve serious or systemic fraud, safety risks, or other wrongdoing, it is possible these issues will not become known until it is too late.

## **1.2 What is not a Public Interest Disclosure?**

Not all concerns will amount to a PID. Making false or misleading allegations knowingly, and vexatious disclosure are not PIDs. Matters that affect only personal or private interests are unlikely to be a PID. Complaints relating to individual employment and industrial matters, isolated allegations of bullying or harassment, personnel matters, individual performance management concerns and individual workplace health or safety concerns would generally not be considered a PID and are best dealt with through other means.

A PID is not a mechanism for solving a personal grievance. It is a process within government to deal with matters of a serious nature which if resolved would increase trust and confidence in the integrity and probity structures that underpin the ACT's system of representative democracy.

Certain matters can be more appropriately addressed through other complaint handling mechanisms such as internal review or grievance resolution procedures, a workplace inspection or sometimes the Fair Work Commission. If you think your concerns fall outside of the PID framework, as a first step you should speak to your manager, supervisor, a work health and safety representative, or Respect, Equity and Diversity contact officer

It is important that you are aware of what a PID is before making a disclosure. Consider whether your concerns only affect you, or have a wider impact. Other avenues to pursue your concerns may be more suitable.

**Table 1: Differentiating between a PID, complaints /grievances and performance management matters**

If the matter involves:	Then it could be a:
<ul style="list-style-type: none"> <li>• <u>Unlawful activity</u> – has someone broken a law or engaged in illegal activity?</li> <li>• <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?</li> <li>• <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?</li> <li>• <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:               <ul style="list-style-type: none"> <li>○ that does not comply with the law, is inconsistent with relevant legislation, or which violates administrative fairness; or</li> <li>○ that goes against the principles of fairness or equity; or</li> <li>○ that is inconsistent with well-established policies or procedures; or</li> <li>○ that demonstrates negligence, or the absence of proper care or attention; or</li> <li>○ that involves excessive use of authority or where authority is used to intimidate, harass or subject someone to unreasonable conditions.</li> </ul> </li> <li>• <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?</li> </ul>	<p><b>Public Interest Disclosure</b> – talk to your manager, supervisor or disclosure officer.</p>
<ul style="list-style-type: none"> <li>• Industrial matters – is it an issue relating to overtime, workload, or working conditions?</li> <li>• Individual allegations of bullying, harassment or discrimination.</li> <li>• Conduct of an individual where the consequences do not have a widespread impact.</li> </ul>	<p><b>Workplace complaint/grievance</b> – talk to your manager, supervisor, workplace representative or Human Resources area.</p>
<ul style="list-style-type: none"> <li>• Issues relating to underperformance or performance management.</li> <li>• The exercise of duties without reasonable care or skill where the consequences are localised.</li> </ul>	<p><b>Performance management or misconduct issue</b> - talk to your manager or supervisor.</p>

### **1.3 Relationship to other external scrutiny and complaint functions**

In some situations, it may be more appropriate for a concern or complaint to be addressed under other statutory or regulatory provisions. For example, this may be the case in relation to health matters, where approaches can be made directly to the Health Services Commissioner, the Clinical Practice Committee of Canberra Health Services, or a nationally regulated health professional board. It is also possible for a disclosure officer under the Act to refer a matter to such bodies, or to decide not to investigate a matter if it is being or has already been dealt with by such an external scrutineer. Conversely, there may be occasions when a matter is brought to the attention of one of those entities but cannot be progressed by them. In such instances, if permissible under their own confidentiality and secrecy restrictions, they should refer relevant issues to a disclosure officer under the Act.

## 2. Making a Disclosure

This section deals with the matters someone considering making a disclosure needs to know before they come forward.

**Table 2: Before making a disclosure:**

1. Consider what have you witnessed or otherwise come to know. Is it
  - a. unlawful (has someone has broken a law or are they engaging in illegal activity)?
  - b. corruption (for example, bribery, graft, extortion, political manipulation, kickbacks, misappropriation or theft, fraud, self-dealing, patronage, abuse of discretion, creating/exploiting a conflict of interest, nepotism, or favouritism etc.)?
  - c. misconduct (see Section 9 PSM Act and the *ACTPS Code of Conduct*)?
  - d. maladministration (including public wastage, organisational negligence or inaction)?
  - e. a substantial danger to the health or safety of the community or environment (has someone done something that will adversely affect people's health or damage the environment leaving it in a worse state than it was previously)?
2. Think about what you are reporting. Is the information rumour or fact? Can you provide evidence to support your assertions?
3. Is your belief reasonable?
4. Does the activity damage the public interest? (is the harm limited to an individual, or does the public at large suffer due to the actions of the individual or entity?)
5. Does the issue have wide ramifications or longer-term implications?
6. Have you thought about how others might react to your PID? It is a good idea to establish a support network (e.g. employee assistance provider or seek the assistance of others trained in helping people to deal with stressful situations) so that if matters become complex, you are in a good position to take care of your interests.
7. If after considering the above, you decide you hold information that will serve to protect the public interest and uphold the integrity of the public sector:
  - a. Do you know how to make the disclosure? Are you willing to put it in writing? A disclosure may be made to your supervisor, a disclosure officer, the head of a public sector entity, or the Public Sector Standards Commissioner. Only in very specific circumstances should a disclosure be made to a journalist or a Member of the Legislative Assembly (see section 27 of the PID Act).
  - b. Do you know the kinds of information you should provide when making a disclosure? You should have good reasons and possibly evidence for your suspicions.
  - c. Is the outcome you expect reasonable? You should communicate your expectations when making your disclosure. Do you know what happens next? If unsure you should ask when making your disclosure.

## **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 explanation.
- Stay calm - you are doing the right thing in raising genuinely held concerns about suspected illegal or illegitimate practices.

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.

There are a number of people you can approach in order to make a disclosure.

Every entity has at least one disclosure officer who has been given special responsibility and training in dealing with disclosures and PIDs.

- In relation to the ACTPS, a disclosure can be made to a Director-General or the Head of Service.
- If there is a governing board, a disclosure can be made to a board member.
- For matters that relate to the ACT Legislative Assembly, a disclosure can be made to the Clerk of the Legislative Assembly.
- Disclosures can also be made to a Minister, the Public Sector Standards Commissioner, the ACT Auditor-General, or the ACT Ombudsman.
- For employees of the ACTPS, a disclosure can be made to your supervisor or manager.

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 **receiving officer**.

### **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.

- Anonymity and confidentiality may have practical implications in consideration of a disclosure.
- There may be times when a concern cannot be examined without revealing the discloser's identity, for example where personal evidence is essential. In such cases, the matter should be discussed with the discloser.
- Where a disclosure is made anonymously, it is generally more difficult for an entity to look into the matter. It is also not possible to protect the discloser or keep them informed of the process.

## **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 **detrimental action** 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. This person may also be pursued for damages in court (Section 41).**

Examples of detrimental action include:

- intimidating or harassing the discloser;
- damaging or taking the discloser's property;
- disadvantaging the discloser in relation to their career, employment, trade or business;
- threats of any of the above; or
- deliberately causing financial loss to the discloser.

If a disclosure is made in good faith but turns out to be untrue, the discloser is still entitled to protection under the Act.

Protection will not be provided to people who knowingly make false claims.

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 employed under the Public Sector Management Act 1994 (PSM Act), they may be subject to disciplinary proceedings as articulated in the PSM Act or Enterprise Agreement as appropriate.

Vexatious disclosures may be investigated, however where a person makes a disclosure vexatiously or with otherwise unethical intentions, they will lose the protections provided in the Act.

Similarly, an employee making a disclosure about their own conduct will not protect them from management or criminal action.

Making a disclosure to a journalist or Member of the Legislative Assembly other than in strictly defined circumstances (see Part 5 of the Act) may constitute an unauthorised release of official information and render the individual liable to misconduct proceedings under the PSM Act and/or prosecution under the Crimes Act.

## **2.6 Making a disclosure externally**

Usually, issues or concerns with the processes following a disclosure should be reported to the disclosure officer in the relevant entity in the first instance.

Under certain circumstances, the discloser may make a disclosure to a third party, specifically, a journalist or a Member of the ACT Legislative Assembly.

Protection only applies to disclosures made in this way under very specific circumstances, specifically where:

- an entity refuses or otherwise fails to look into your disclosure;
- where an entity agrees someone has acted inappropriately but the entity does not act to address the problem; or
- where you have not been told about progress on your disclosure within the statutory timeframe.

If you believe the conduct involves many people or is so deeply embedded in the culture of an entity and for this reason making an internal disclosure is unlikely to be taken seriously or may be detrimental to your health or wellbeing, you may make a disclosure to a third party. Section 27 of the Act permits this where a person honestly believes on reasonable grounds that:

- a person has information that tends to show disclosable conduct;
- there is a significant risk of detrimental action to the person or someone else if a disclosure is made through the usual process; and
- it would be unreasonable to make a disclosure through the usual process to a person mentioned in Section 15 of the Act.

If you approach a third party in this manner, you:

- must disclose sufficient information to demonstrate disclosable conduct but should not provide more than is reasonably necessary; and
- may inform an MLA or journalist about the progress and outcome of any investigation of a PID you have made.



## **2.7 What happens after a disclosure has been made?**

The steps taken by the entity in relation to a disclosure are explained in detail in Part Two of these guidelines. In summary, your disclosure will be handled as follows:

### **1) Assessment:**

Your disclosure will be assessed by a designated disclosure officer within the entity to which the conduct relates. The disclosure officer will determine whether the alleged conduct meets the definition of disclosable conduct and is in fact a PID.

**It is important to note that it is the disclosure officer who determines whether a disclosure qualifies as a PID, not the discloser.**

### **2) Investigation**

If the disclosure officer has assessed the disclosure as being a PID, the disclosure officer will refer the matter to the head of the relevant entity or their delegate, who will determine whether an investigation is required. If an investigation is warranted, the investigating entity will determine the terms of reference for the investigation, decide who will conduct the investigation, monitor progress of the investigation, and provide periodic updates to the discloser and the Public Sector Standards Commissioner.

In certain circumstances, the investigating entity may make a decision not to investigate a PID, for reasons cited under Section 20 of the Act. This is a decision that would end the process. The discloser will be notified of that decision.

Under the Act, the disclosure officer must inform the discloser about a referral of the disclosure to another entity.

The discloser will be informed by the investigating entity of a decision not to investigate the disclosure, including reasons for making that decision.

If a disclosure is investigated the discloser must be informed of the progress of the investigation at least once every 3 months, and about the outcome of the investigation when concluded.

### **3) Determination and Action**

Once the investigation is completed, the head of the public sector entity (or their delegate) will make a determination as to whether the disclosable conduct occurred or may occur, and what action is taken to address that conduct. The determination is based on the findings of the investigation.

If the head of the 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 reasonable and necessary action to prevent the disclosable conduct continuing or occurring in the future; and discipline any person responsible for the disclosable conduct.

Following completion of the investigation, the disclosure officer must inform the discloser of the outcome of any investigation; or if it is decided that the investigation will be ended, the reason for this decision and how this complies with Section 20 of the Act.

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 to the disclosure officer and, if circumstances require, the head of the relevant entity to better understand the process which was used. The disclosure officer is responsible for making clear to a discloser how their disclosure was handled, and any steps taken to address their concerns.

After taking these actions, if you remain dissatisfied with the outcome of an investigation, you may consider reporting your concerns to the Public Sector Standards Commissioner, who may review an investigation or any aspect of the handling of a disclosure. Additionally, the ACT Ombudsman may look into any matter dealt with under the Act.

- If you think a matter has not been handled appropriately, there are certain checks and balances in place to ensure the disclosure receives proper evaluation.
- If you have contacted your disclosure officers and are still unsatisfied with how your disclosure has been handled, you may contact the office of the Public Sector Standards Commissioner for further advice.

## **2.9 What happens if my disclosure is determined not to be a PID?**

Sometimes your concerns, even though warranted, will not be serious enough to amount to a PID.

There may also be occasions when a disclosure is made either with an ulterior motive or maliciously. In such a case, an entity is unable to provide the assurances and safeguards to someone who is found to have maliciously raised a concern that they also know to be untrue.

If it is found that your concerns are false or otherwise misplaced, they will not be dealt with as a PID. If information is assessed and determined not to be a PID, the discloser should be informed of the decision and may be advised of an alternate means of addressing the complaint, if appropriate.

Decisions made under the Act are subject to review. You may seek clarification about the decision from the disclosure officer, or request a formal review by the Public Sector Standards Commissioner.

The ACT Ombudsman is also available to investigate complaints about the actions and decisions of entities to determine if they are wrong, unjust, unlawful or discriminatory. As a general rule, however, the ACT Ombudsman will not investigate a complaint unless the concern has been raised with the entity concerned and an attempt has been made to solve the problem.

A disclosure that has been assessed as not qualifying as a PID may still be investigated in accordance with the Public Sector Management Act or Enterprise Agreement, as appropriate.

## **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 which have been determined to be PIDs;
- determine whether to investigate a disclosure or whether a matter needs to be referred to another entity for investigation;
- conduct appropriate investigation of disclosures;
- keep the discloser, the Public Sector Standards Commissioner, and other parties informed during the process in accordance with the timeframes and other requirements in the Act;
- take action if disclosable conduct is proven; and
- inform the discloser, Public Sector Standards Commissioner, and referring entity of outcome and actions taken.

#### **3.2 Delegation of responsibilities:**

The head of each ACT Public Sector entity has responsibility for these actions and should determine whether delegations are to be established in relation to these matters. The head of an ACT Public Sector entity, in declaring who will be a disclosure officer, must do so in writing and place this document on the legislation register by notifiable instrument. The ACT Legislation Register for the PID Act is available at <https://www.legislation.act.gov.au/a/2012-43/>.

It is important that public sector entities maintain current delegations for discharging their responsibilities under the PID Act, as determined by the head of each entity.

### **3.3 Publish PID procedures**

Under Section 33 of the Act, entities are required to prepare and publish procedures about how they intend to deal with disclosures and those procedures must be approved by the Public Sector Standards Commissioner.

Entities may choose to adopt these guidelines and apply them as their PID procedures. In the event that these guidelines are updated, entities who have adopted these guidelines as their entity procedures may be required to revise their internal procedures. Entities intending to do this should publish a statement that they adopt these guidelines (which may be amended from time to time), and name their disclosure officer(s) in keeping with the requirements of Section 11 (2) of the Act. In addition, entities must provide a copy of the statement endorsing the guidelines to the Public Sector Standards Commissioner for approval.

Where entities require specific amendments/additions to reflect their particular circumstances, these must be approved by the Public Sector Standards Commissioner.

### **3.4 Manage the Public Interest Disclosure Process**

Each entity must establish a means of tracking disclosures and PIDs, and develop internal procedures to monitor the progression of disclosures throughout the process. The tracking mechanism is intended to give confidence that reported matters are being handled in a timely and effective manner within the entity.

This information can also be used by entities to fulfil their PID reporting requirements under the *Annual Reports (Government Agencies) Directions 2019*.

### **3.5 Annual Reporting**

ACT Public Sector entities are requested to maintain effective record keeping concerning disclosures received and report to the Public Sector Standards Commissioner the following information on an annual basis:

- Number of claimed Public Interest Disclosures received during the financial year;
- Number of claims assessed by relevant entity as meeting definition of disclosable conduct under the *Public Interest Disclosure Act 2012* (the Act);
- Number of claims investigated;
- Number of claims not investigated by virtue of Section 20 of the Act.

For reporting purposes, each separate allegation should be reported as a separate PID, unless the matters are clearly linked and it would be reasonable to view them as a single disclosure.

The above information must also be provided to the Head of Service for inclusion in the State of the Service report, as required under the *Annual Reports (Government Agencies) Directions 2019*.

### **3.6 Other actions by each entity**

Each public sector entity should review their procedures, and the timeliness of their actions, periodically.

Each entity should periodically ensure staff are aware of the procedures and the intention of the legislation.

Entities should consider:

- comparing and correlating disclosure data with information from other risk management systems; and
- gauging staff awareness and trust of PID arrangements

#### **4. What to do if someone makes a disclosure to me.**

You could receive a disclosure if:

- you are an ACTPS employee with responsibility for supervising staff; or
- you are the member of a governing board of an entity; or
- you are in a position where you receive information about matters such as funding, conduct, whether administrative procedures have been followed, health or safety risks, or environmental risks – such as a Chief Financial Officer; Workplace Health and Safety Representative; Respect, Equity and Diversity Contact Officer; or member of an audit committee.

If you are not a disclosure officer and you receive a disclosure, you are known as the receiving officer. The receiving officer should thank the discloser for coming forward and let them know that they are not the disclosure officer, but that you will provide the disclosure to the disclosure officer as soon as possible.

The receiving officer should inform a disclosure officer of the disclosure as soon as possible. The receiving officer should not attempt to investigate the matter or tell others about the disclosure as this might put the discloser or any subsequent investigation at risk.

If the matter is raised orally, the receiving officer should make a written note including details of the discloser and any individuals implicated in the matter, and inform the discloser that they will probably be asked to check, sign and date the record.

Given the seriousness of making a disclosure, it is important that the disclosure is acknowledged, and the discloser is commended for taking this action. It is suggested the disclosure officer send a letter to acknowledge the discloser's public interest in reporting the matter.

There are certain general principles to follow when receiving a disclosure.

- Thank the discloser for raising the concern, even if they may appear to be mistaken.
- If you are not a disclosure officer for your entity, let the discloser know that you will inform the disclosure officer.

If there is doubt whether the disclosure is a PID, the receiving officer should assume that the disclosure is protected by the PID Act and manage the disclosure as if it were a PID.

Advice for Members of the ACT Legislative Assembly who receive a disclosure is included within Part Three of these Guidelines.

## **5. The Role of Disclosure Officers**

In practice, disclosure officers have been the central coordination point for all matters relating to Public Interest Disclosures. They have ensured that appropriate action is taken in response to a disclosure and maintain the effective and timely administration of the process.

The role of a disclosure officer is to receive the disclosure, determine if it is within the correct entity, and assess the allegations to determine if it qualifies as a PID. Subject to appropriate delegations from the investigating entity (or head of the entity), they may also decide whether an investigation is required, develop terms of reference for the investigation, keep the discloser and Commissioner informed, and ensure compliance with other requirements of the Act.

A consistent criticism levelled at disclosures that are poorly managed is that often the links in the communication chain break down and disclosures slip between the cracks or fail to be investigated when they should be.

**It is the responsibility of a disclosure officer to manage the relevant processes and deal with matters in a timely manner.**

Section 11(2) of the Act requires the head of an entity to declare at least one other person to be a disclosure officer in their entity. The declaration is a notifiable instrument and must be listed on the ACT Legislation Register (<https://www.legislation.act.gov.au/a/2012-43/>). It is recommended that one of the disclosure officer declared be a Senior Executive Responsible for Business Integrity and Risk (SERBIR).

The head of the entity may elect to delegate all or part of their responsibilities as investigating entity to the disclosure officer.

In the event disclosure officer designations change in an entity, a new declaration by **notifiable instrument** is required.

Entities are also encouraged to make the names of their disclosure officers known by posting their names on their intranet website.

In addition, the following positions are authorised to act as disclosure officers and must meet the requirements of the Act if a disclosure is made to them:

- Public Sector Standards Commissioner;
- Head of Service;
- Auditor-General;
- ACT Ombudsman; and
- Integrity Commissioner.

## **6. Guidance for Disclosure Officers**

The following outlines the steps that should be undertaken by a disclosure officer upon receiving a disclosure. A table summarising the steps is included at Appendix A of these guidelines.

Remember, disclosure officers must take their responsibilities under the legislation seriously. It is imperative that the process is followed and completed in a timely manner, to retain the integrity of the ACT Public Sector.

Disclosure Officers should treat all disclosures in the strictest confidence, including disclosures which do not finally qualify as PIDs. A discloser's concerns should be taken seriously and their privacy and confidentiality protected as far as possible throughout any investigation process.

Section 44 of the Act makes it an offence for a person to use or recklessly divulge protected information contained in a PID to anyone except as authorised by the Act.

### **Step 1 - Receive the Disclosure**

Under the Act, a person who has been designated as a disclosure officer is an officer declared by the head of their respective entity to make certain decisions about PIDs.

Under section 15 of the Act, a *receiving officer* may include a disclosure officer, Minister, a supervisor of the discloser or a Board member of a relevant governing board. A receiving officer must provide a disclosure to a disclosure officer **as soon as possible** after receiving the disclosure.

If the disclosure is made orally, the person receiving the disclosure must make a written record of the disclosure.

Under Section 17 of the Act, the head of the public sector entity (or their delegate) must provide a copy of a PID to:

- the head of each entity to which the PID relates;
- the Public Sector Standards Commissioner;
- and in some cases, the ACT Ombudsman or the Head of Service.

### **Step 2 – Acknowledge**

Given the seriousness of making a disclosure, it should be acknowledged that the person making the disclosure will most likely be under some stress. It is important that the disclosure be acknowledged and that they are thanked for taking this action.

### **Step 3 – Assess the disclosure**

#### **a) Is it in the correct entity?**

The disclosure officer must decide if the disclosure should be handled in another entity. For example, if the disclosure:

- involves a staff member from another entity; or
- involves a program managed under another entity; or
- relates to an entity which is funded by another entity.

The disclosure officer who receives the disclosure must, in the normal course of events, give a copy of the disclosure to the head of the entity to which the disclosure relates.

A disclosure should not be referred to another public sector entity if it creates an unacceptable risk that a reprisal would happen because of the referral. In considering whether there would be an unacceptable risk, the entity may first consult with the person who made the PID.

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.

- The assessment of the PID should be based on the content of the disclosure, not the expected outcome of the investigation.
- If in doubt, err on the side of caution. If there is reasonable grounds to believe the alleged matter involves disclosable conduct then treat the matter as a PID.

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, as articulated in the *Public Sector Management Act 1994*, may be commenced against that employee, and as a result, the protections provided under the PID Act can be removed.



**If the disclosure officer determines that the disclosure does not qualify as a PID, the disclosure officer should advise the discloser of that, the reasons why the reported conduct was determined not to be disclosable conduct, and what further action, if any, is to be taken regarding the complaint.**

**The disclosure officer should provide the Public Sector Standards Commissioner with a copy of the complaint as well as the communication informing the discloser of the decision.**

It is important to provide the discloser with clear reasons why their allegations were not considered to qualify as disclosable conduct, rather than merely restating the legalisation.

If a disclosure is determined not to be a PID, the disclosure officer must still consider whether the reported allegations require investigation outside of the PID framework.

It is recommended that a *Preliminary Assessment* be considered to evaluate the merits of the reported conduct and determine the need for a formal investigation or other type of inquiry.

**After assessing the disclosure as a PID, the disclosure officer must give a copy of the disclosure to the head of the public sector entity to which the disclosure relates – who will be the head of the *investigating entity*, and to the Public Sector Standards Commissioner (*Section 17 of the PID Act*). A disclosure officer must comply with this requirement as soon as possible after receiving the PID.**

There are exceptions to the requirement of providing the disclosure to the head of the entity (and others referred to in section 17 of the Act) if doing so is likely to adversely affect a person's safety or an investigation of the disclosure (*see Note 1 Section 17 of the Act*).

## **7. Guidance for the Investigating Entity:**

The PID Act defines the *investigating entity* for a public interest disclosure as the head of the public sector entity to whom the disclosure relates. (See definition of *investigating entity* in the dictionary section of the PID Act.)

The head of the public sector entity may delegate their responsibilities as investigating entity to the disclosure officer or other entity officer. The extent to which these responsibilities are delegated is a decision of the head of the entity, however the delegation of authorities should be appropriately documented.

**The head of the public sector entity to which the public interest disclosure relates (the investigating entity) must investigate the disclosure as soon as possible after receiving the disclosure.**

The investigating entity may refer the disclosure to the head of another public sector entity if the matter is more appropriately investigated by the other entity (*Section 19 of the PID Act*).

The investigating entity may decide not to investigate a public interest disclosure, or end an investigation, based on reasons listed in section 20 of the Act.

#### **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 (*Section 21 of the PID Act*).**

##### **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 force in the ACT; or

- there is a more appropriate way reasonably available to deal with disclosable conduct in the disclosure.

**If the head of the public sector entity (or their delegate) declines to investigate a disclosure under section 20 of the Act, they must provide reasons for that decision, and inform the discloser, the referring entity and the Public Sector Standards Commissioner of the decision (Section 23 of the PID Act).**

Under Section 23 of the Act, the investigating entity must update the discloser and the Public Sector Standards Commissioner within three months after the day the disclosure is made whether or not the disclosure will be investigated or dealt with under the Act.

Entities should note that should this timeframe not be met, a discloser is allowed to make their disclosure known to a Member of the Legislative Assembly or a journalist.

### **Step 5: Proceed with an investigation**

The investigation should be undertaken as per the terms of reference and in a timely manner. The basic framework for developing the terms of reference is to aim to answer **who-what-where-when-how** questions.

When conducting an investigation, entities must collect and document information in a fair and unbiased way; inform people of the nature of allegations and give them time to reflect on this information before seeking their input; allow people the opportunity to state their case and respond to subsequent allegations; avoid using investigators with a personal interest in an investigation; and ensure any investigation is and is perceived as being conducted fairly, respectfully and in confidence.

The investigating entity must be mindful of notification requirements defined under Sections 22, 23 and 25 of the Act, specifically, informing:

- the referring entity (where applicable);
- the discloser; and
- the Public Sector Standards Commissioner.

**The investigating entity must inform the discloser and Public Sector Standards Commissioner of the progress of the investigation at least once every three months – this is a legislative requirement (Section 23(1)(c) of the PID Act).**

### **Step 6: Determination and action**

Under section 24 of the PID Act, upon completion of the investigation, the head of the entity should make a determination on whether they believe, on reasonable grounds, that disclosable conduct has occurred, is likely to have occurred, or is likely to occur.

If such is determined, the entity must take action necessary and reasonable to:

- prevent the disclosable conduct continuing or occurring in the future; and
- discipline any person responsible for the disclosable conduct.

When coming to a decision, the head of the entity should always act within the bounds of the legislation, apply the principles of natural justice, be consistent and reasonable, make clear and document decisions.

### **Step 7: Report**

The discloser must be informed of the outcome of the investigation as well as any action taken or proposed in relation to the disclosable conduct the subject of the disclosure (*sections 23 (1)(c) and 24(2)*).

The Public Sector Standards Commissioner must be informed of the outcome of the investigation as well as any action taken or proposed in relation to the disclosable conduct (*section 25 (1) (a) and (c)*).

There are limitations to what should be reported to a discloser detailed in section 26 of the Act.

In drafting reports, entities should be aware of FOI requirements and privacy considerations.

For consistency across the ACT Public Sector, a template is included at Appendix D of these guidelines for reporting PID outcomes to the Public Sector Standards Commissioner.

## **8. Review of a PID process**

A review may not be necessary for all disclosures, however where a review occurs, those undertaking the review should not have been involved in the initial investigation.

### **Evaluation by entities**

Entities are encouraged to put in place procedures by which they will systematically review or otherwise evaluate their handling of disclosures with the aim of continuous improvement.

### **Oversight by the Public Sector Standards Commissioner**

The Public Sector Standards Commissioner has a role in overseeing the action taken once a PID has been made, and will take steps to consider whether all significant matters are handled appropriately, consistent with legislative requirements.

This includes:

- reviewing a decision by an investigating entity to refuse to investigate a PID or to end an investigation; and
- significant actions taken, or proposed to be taken, in relation to a PID.

## **9. Role of the Public Sector Standards Commissioner**

Under Part 6 of the Act, the Public Sector Standards Commissioner is given a broad oversight role in relation to the ACT Public Sector's management of PIDs. The Public Sector Standards Commissioner's functions include providing advice about PIDs to entities, reviewing the way entities investigate and deal with PIDs, ensuring just outcomes for people who make PIDs including preventing and remedying the effect of detrimental action against people because of disclosures; and undertaking education and training about PIDs.

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 Commissioner has strong powers in relation to overseeing an entity's decisions and actions in relation to PIDs. Under Section 29, the Commissioner has the power to review decisions and actions by entities in relation to disclosures and the way they are handled.

Where an entity declines to investigate a disclosure, or deems a disclosure not to qualify as a PID, the Public Sector Standards Commissioner may review and remake the decision. Likewise, the Public Sector Standards Commissioner may review and remake decisions made by entities to end the investigation of a disclosure as well as any action taken by an entity in response to disclosable conduct being found.

The Public Sector Standards Commissioner may ask anyone to give him/her information, including protected information, relevant to the investigation of the disclosure.

An entity or public official must comply with a request made to the entity or official. Under Section 29(4) of the Act, after review of a decision, the Commissioner may:

- amend the decision; or
- set aside the decision and substitute a new decision; or
- take no action.

After reviewing an action, or proposed action, the Public Sector Standards Commissioner may direct an entity or public official to take action (or cease an action) in relation to the disclosable conduct.

### **9.2 Report by the Public Sector Standards Commissioner**

Under Section 30 of the Act, the Public Sector Standards Commissioner may give a report to the Chief Minister about an entity's PID procedures or how a PID is dealt with by an entity.

However, the principles of natural justice apply to these reports. Namely, the Commissioner must not include information that may be critical of a person unless the Public Sector Standards Commissioner has given the person an opportunity to be heard. Likewise, the Public Sector Standards Commissioner must not include information that is likely to endanger a person's safety or jeopardise an investigation relating to the disclosure.

**Under Section 30 (3), the Minister must present the report to the Legislative Assembly within nine sitting days after the day the report is given to the Minister.**

### **9.3 Public Sector Standards Commissioner must keep discloser informed**

The Public Sector Standards Commissioner is not immune to the requirement to keep the relevant parties informed about what is happening with a disclosure. If the Public Sector Standards Commissioner calls on the powers of review contained in Part 6 of the Act and substitutes or otherwise makes a decision about the way a disclosure is being handled or acted upon, the Public Sector Standards Commissioner must tell the discloser about the decision and what led to that conclusion (unless the disclosure was made anonymously or the discloser has otherwise made it clear that they do not wish to be kept informed).

### **Part Three: Disclosures made to Members of the ACT Legislative Assembly**

Members of the ACT Legislative Assembly may receive information from members of the public or ACT Public Sector employees, which may satisfy the definition of a PID.

In these cases, the action taken by the Members will depend on the circumstances under which the disclosure was made.

The circumstances under which a Member becomes a recipient of a PID are varied. However, the PID Act clearly envisages five specific circumstances where a Member could become a recipient of a PID.

The five specific circumstances set out in section 27 of the PID Act, are summarised as follows:

Where the discloser has already made a PID to one of those persons specified in section 15 of the Act and –

- a. the investigating entity has refused or failed to investigate the disclosure;
- b. the discloser has not been told within three months after the day the PID is made whether or not the PID will be investigated or dealt with;
- c. the discloser has been told the disclosure will be investigated but has not been told about the progress of the investigation for more than three months;
- d. the disclosure has been investigated, there is clear evidence that one or more instances of disclosable conduct mentioned in the disclosure has occurred or likely to have occurred and the investigating entity told the discloser that no action will be taken in relation to the disclosable conduct;
- e. the discloser honestly believes on reasonable grounds that:
  - i. he/she has information that tends to show disclosable conduct; and
  - ii. there is significant risk of detrimental action to the discloser or someone else to make a disclosure to a person mentioned in section 15; and
  - iii. it would be unreasonable in all the circumstances for the discloser to make a disclosure to a person mentioned in section 15.

In addition, there may be instances where the above circumstances do not apply, and the discloser simply prefers to make the disclosure directly to a Member of the Legislative Assembly.

The PID Act does not provide specific guidance as to how a PID is to be managed from the time a Member becomes a recipient of the disclosure. How the PID should be managed from there onwards would depend on the particular circumstances under which the discloser made the PID. Members, of course retain the prerogative to use information they receive from any person within the proceedings of the Assembly.

If the disclosure received under circumstances listed in section 27 of the PID Act, then the following options are also available.

If the disclosure is received under paragraphs (a) or (d) above, where the investigating entity has refused or failed to investigate the disclosure, or failed to take action in relation to the disclosable conduct, then the matter may be referred to Public Sector Standards Commissioner. Under the section 29 of the PID Act, the Commissioner has the function of reviewing a decision of an investigating entity.

In circumstances where the investigating entity has failed to keep the discloser informed of the progress of the investigation, paragraphs (b) and (c) above, the Public Sector Standards Commissioner also has the

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, the Clerk of the Legislative Assembly etc.</p>
Commissioner	Public Sector Standards Commissioner established under the <i>Public Sector Management Act 1994</i> .
Disclosure officer	officer designated by respective head of entity to be a decision-maker in relation to PIDs
Detrimental action	discriminating against a person (including threats) by treating the person unfavourably in relation to reputation, career, profession, employment or trade; or harassing or intimidating a person; or injuring a person; or damaging a person's property.



Disclosable Conduct	<p>Per section 8 of the Act,</p> <p>a) conduct of a person that could, if proved—</p> <ul style="list-style-type: none"> <li>(i) be a criminal offence against a law in force in the ACT; or</li> <li>(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;</li> </ul> <p>(b) action of a public sector entity or public official for a public sector entity that is any of the following:</p> <ul style="list-style-type: none"> <li>(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;</li> <li>(ii) a substantial misuse of public funds;</li> <li>(iii) a substantial and specific danger to public health or safety;</li> <li>(iv) a substantial and specific danger to the environment.</li> </ul>
Discloser	a person who makes a PID by providing information about wrongdoing or suspected wrongdoing
Investigating entity	means the Head of an entity. Generally, the function of investigating a disclosure will be delegated, but it is important to recognise that ultimately, the head of an entity is responsible for the way a PID is handled.
Protected information	Means information about a person that is disclosed to, or obtained by, a person to whom section 44 of the Act applies because of the exercise of a function under the Act by the person or someone else.
Public Interest Disclosure (PID)	means a disclosure of information about disclosable conduct (wrongdoing or suspected wrongdoing in the public sector)
Public official	means a person who is or has been an employee of a public sector entity; or a contractor, employee of a contractor or volunteer exercising a function of the public sector entity.
Receiving officer	means a person (eg. supervisor or manager) who receives a PID, but is not necessarily a disclosure officer. Note that receiving officers are <i>not</i> decision makers in relation to PIDs
Senior Executives with Responsibility for Business Integrity and Risk (SERBIR)	senior executives who are tasked with upholding and managing risks to public sector integrity.

## 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>

## Appendix A - Steps in managing a disclosure

Step	Information	Action
<p><b>1: RECEIVE</b></p> <p><i>(Disclosure Officer)</i></p>	<p>Discloser makes a disclosure to a disclosure officer or receiving officer</p> <p>or</p> <p>Disclosure officer receives a disclosure passed to them from a receiving officer.</p> <p>(A receiving officer must provide the disclosure to the disclosure officer <b>as soon as possible.</b>)</p>	<p>Make written notes if matter is orally raised.</p> <p>Manage expectations and respect promises of confidentiality where applicable.</p> <p>Handle all required processes in a timely manner</p> <p>Move to Step 2 – Acknowledge</p>
<p><b>2: ACKNOWLEDGE</b></p> <p><i>(Disclosure Officer)</i></p>	<p>It generally takes courage to raise a disclosure, therefore the discloser should be afforded appropriate recognition.</p> <p>The discloser should be reassured that their complaint is receiving attention.</p>	<p>Thank the discloser for making the disclosure.</p> <p>It is suggested the disclosure officer provides an acknowledgement letter at this stage - the letter should also outline the process the disclosure officer will undertake in handling the disclosure. A copy of the letter should be provided to the Commissioner.</p> <p>Move to Step 3 – Assess.</p>
<p><b>3: ASSESS</b></p> <p><i>(Disclosure Officer)</i></p>	<p><b>(a) <u>Is the disclosure in the appropriate entity?</u></b></p> <p>The disclosure officer must consider whether the disclosure would be better handled by another entity</p> <p>Does it relate to another entity’s staff or resources?</p>	<p><b>If not in appropriate entity → have referred.</b></p> <ul style="list-style-type: none"> <li>• Provide a referral form to notify the other entity of the decision; and</li> <li>• notify the discloser and Commissioner of the decision to refer the matter to another entity.</li> </ul> <p>This closes the process from the receiving entity’s perspective; however, the disclosure officer will be kept informed as they have now become the <i>referring entity</i> (Section 22).</p> <p>If the disclosure is within the appropriate entity, move to assessment step 3(b).</p>
<p><i>(Disclosure Officer)</i></p>	<p><b>(b) <u>Is the disclosure about <i>disclosable conduct</i>?</u></b></p> <p>It is <b>critical</b> for the disclosure officer to make a decision as to whether the disclosure is in-fact a PID and subject to requirements of the Act.</p> <p><b>If in doubt, consult with the office of the Commissioner or seek legal advice from GSO.</b></p>	<p><b>If yes:</b></p> <p>Disclosure officer must provide a copy of the PID to:</p> <ul style="list-style-type: none"> <li>• The head of each entity to which the PID relates; and</li> <li>• The Commissioner.</li> </ul> <p><b>If assessed as not being a PID:</b></p> <p>The disclosure officer must write to the discloser explaining why their disclosure is not a PID and advise the discloser of other avenues for their complaint to be examined eg. Internal review, WorkSafe ACT, misconduct process, etc . A copy of the letter should be provided to the Commissioner.</p> <p><b>The disclosure officer must consider whether the allegations require investigation as a misconduct matter or through other means.</b></p> <p><b>Note: The discloser must be notified within three months after the day the disclosure is made whether or not their disclosure will be investigated or dealt with under the Public Interest Disclosure Act 2012.</b></p>

<b>4: DETERMINE IF INVESTIGATION IS REQUIRED.</b>  <i>(Investigating Entity)</i>	<b>(3) <u>Is an investigation required?</u></b>	Assess allegations and determine if an investigation is required or if no investigation required for reasons listed under section 20 of the Act.
	<b>a) <u>Investigate</u></b>  Upon receipt of a PID, the investigating entity must investigate the allegations, or refer to another entity, as provided in the Act.	The investigating entity determines: <ul style="list-style-type: none"> <li>• the matters to be resolved,</li> <li>• terms of reference for the investigation (the office of the Commissioner may be consulted)</li> <li>• resources required,</li> <li>• who will conduct the investigation (internal vs external)</li> </ul> <i>Move to step 5 – Investigate &amp; Update</i>
	<b>b) <u>No investigation required</u></b>  In certain circumstances the investigating entity may make a decision not to investigate allegations made in a PID.	An investigating entity may decide not to investigate allegations made in a PID for reasons listed in Section 20 of the Act.  The entity must provide reasons and inform the discloser, head of the entity and Commissioner.  <b>This letter closes the process, subject to a request to review the decision.</b>
<b>5: INVESTIGATE &amp; UPDATE</b>  <i>(Investigating Entity)</i>	Manage the investigation and provide the required updates to the discloser and Commissioner.	Monitor progress.  <b>The discloser and Commissioner must be advised of the decision to investigate and provided updates at least once every 90 days.</b>  <i>Move to Step 6 – Determination, Recommendation, Report.</i>
<b>6: DETERMINATION, RECOMMENDATION and ACTION.</b>  <i>(Head of the ACTPS Entity)</i>	The head of the entity (or their delegate) makes a decision based on the findings/recommendations arising from the investigation.	The head of the entity must decide if there is reasonable grounds to believe that disclosable conduct has occurred, is likely to have occurred, or is likely to occur. If so, the head of the entity (or delegate) must take action necessary and reasonable to— <ol style="list-style-type: none"> <li>(a) prevent the disclosable conduct continuing or occurring in the future; and</li> <li>(b) discipline any person responsible for the disclosable conduct.</li> </ol>
<b>7. REPORT</b>  <i>(Head of the ACTPS Entity)</i>	The discloser, PSSC and referring entity must be informed of outcomes.	<b>Prepare a report documenting decision and actions taken.</b>  Following completion of the investigation, the discloser, PSSC, and referring entity must be informed of the outcome of the investigation, determination, recommendations, actions taken or to be taken.  The discloser is not entitled to all the information obtained during the course of investigating the PID.  There are limitations on obligations to keep people informed detailed in section 20 of the Act.  <b>This report closes the process, subject to a request to review the decision.</b>

<b>ANNUAL REPORTING</b>	Report summary information concerning PIDs to the Head of Service for inclusion in the state of the service report	<p>Entities must provide the following information to the Head of Service for inclusion in the state of the service report:</p> <ul style="list-style-type: none"> <li>• number of claimed PIDs received during the reporting year;</li> <li>• number of claims assessed by relevant entity as meeting the definition of disclosable conduct under the PID Act;</li> <li>• number of investigations completed;</li> <li>• number of claims not investigated by virtue of Section 20 of the PID Act.</li> </ul>
<b>REVIEW</b> Best practice	Entities should periodically evaluate the effectiveness of their PID procedures and whether the outcomes are meeting the objective of the Act.	Entities should monitor and evaluate the effectiveness of their PID procedures.
Commissioner	<p>The Commissioner has a role in overseeing the actions taken by entities and will ensure all matters are handled fairly and properly. This includes:</p> <ul style="list-style-type: none"> <li>• reviewing a decision by an investigating entity to refuse to investigate a PID or to end an investigation; and</li> <li>• any action taken, or proposed to be taken, in relation to a PID.</li> </ul>	Entities must be aware that the Commissioner is informed at each significant stage in the process of handling a disclosure. Where irregularities occur, or potentially insufficient actions are taken, the Commissioner may intervene in the handling of a disclosure.

## 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**

On <insert date>, <insert name of entity that received the disclosure> received a disclosure from <insert name of discloser>. The disclosure was about <insert details of disclosure>. I have attached the disclosure for your information.

Under section 19 of the *Public Interest Disclosure Act 2012* (the Act), it is my opinion that this matter falls within the portfolio responsibilities of your entity as it involves staff in your entity <or> involves a program under your control <or> involves funds under your control <delete as appropriate>.

Under the Act, you should note that you have an obligation to keep the discloser, myself (as the referring entity) and the Public Sector Standards Commissioner informed about any actions or decisions you make about this matter at least once every three months or at significant points should you decide to investigate the matter.

Thank you for your consideration of this referral.

Yours sincerely,

<insert head of entity name - referring entity - date>

CC: Public Sector Standards Commissioner

This section to be completed by the head of the entity to which the disclosure has been referred:

Agree / Not Agree

Signed...../ /

**Appendix D - PID report template – to be provided to the PSSC.**

**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 .... /... /....