

Public Interest Disclosure (Integrity Commission – Handling public interest disclosures as a Member of the Legislative Assembly) Guidelines 2021*

Notifiable instrument NI2021–656

made under the

Public Interest Disclosure Act 2012, section 32(1)(c) (Integrity Commissioner’s Guidelines)

1 Name of instrument

This instrument is the *Public Interest Disclosure (Integrity Commission – Handling public interest disclosures as a Member of the Legislative Assembly) Guidelines 2021*.

2 Commencement

This instrument commences on the day after notification.

3 Commission’s Guidelines

I make the *Public Interest Disclosure (Integrity Commission – Handling public interest disclosures as a Member of the Legislative Assembly) Guidelines 2021* as set out at Schedule 1 to this instrument.

The Hon Michael F Adams QC

Commissioner

ACT Integrity Commission

29 October 2021

*Name amended under Legislation Act, s 60



Schedule 1

Handling public interest disclosures as a Member of the Legislative Assembly

A guide to handling a report under the *Public Interest Disclosure Act 2012* for
Members of the ACT Legislative Assembly

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Commissioner's foreword

Public servants are bound both in the public interest and by law to keep confidential information that comes to them in the course of their employment. Even disclosure to a Member of the Legislative Assembly ('**MLA**') or a journalist is prohibited. However, the public interest also requires that wrongdoing or maladministration in the public service be reported so that it can be corrected. Accordingly, where the reports are made to appropriate officers within the public service, it is the duty of responsible managers to properly handle the reports, investigate them, and, if necessary, take action to correct the impugned conduct. They are also entrusted with the critical responsibility of ensuring that reporters are not subjected to any kind of retribution. Those who make these reports ('**whistle-blowers**') provide a valuable service to the integrity of government in the Territory.

The *Public Interest Disclosure Act 2012* ('**PID Act**') constructs an administrative system to ensure that disclosures of certain kinds of conduct are appropriately dealt with and whistle-blowers are protected. Such a disclosure, if properly reported, is called a "public interest disclosure" ('**PID**'). To qualify, the report must also be about substantial problems involving maladministration, threats to public health, safety or threats the environment, and relate to matters which it is in the public interest to resolve. There are occasions, however, where the management of disclosures within the public service has been inadequate. In those circumstances it may be reasonable for the whistle-blower to bring their concerns to an MLA or journalist. The PID Act makes provision for disclosure of a relevant report to MLAs and journalists in such instances.

An important part of the structure put in place by the PID Act is to give a supervisory role to the ACT Integrity Commission ('**Commission**') in the administration and management of the PID scheme. One of the Commission's responsibilities is to make guidelines to assist MLAs in dealing with PIDs and practical advice about handling the disclosures they receive. A guide about how the PID Act works, and the responsibilities of public sector entities to carry out relevant investigations, has already been published and may be found on the Commission's website.

Governments and the public services that support them are entrusted to manage public resources and make decisions on the community's behalf. Alongside other mechanisms, the PID scheme plays an important role in maintaining the integrity of public administration and ensuring that public resources are not wasted or used for individual gain.

Applying the PID scheme to reports and PIDs made to MLAs is designed to ensure that, where there is a breakdown within the public sector in dealing with a PID, whistle-blowers have an additional avenue by which their concerns can be addressed.

I encourage all citizens of the ACT to speak up if they witness, or suspect, wrongdoing. Whistle-blowers play a critical role in ensuring our government remains accountable, transparent and responsive to scrutiny. The PID Act provides important protections for those brave enough to speak out.

The Hon Michael F Adams QC

Commissioner

ACT Integrity Commission



Key terms

Term	Description
ACT Public Service ('ACTPS')	The ACT Public Service is established under section 12(1) of the <i>Public Sector Management Act 1994</i> (ACT). The ACTPS is made up of the administrative units declared under the Administrative Arrangements as they exist from time to time.
ACTPS entity	<p>These fall into five different categories:</p> <ul style="list-style-type: none"> • <i>Administrative units</i> (e.g. Chief Minister, Treasury and Economic Development Directorate, Justice and Community Safety Directorate, ACT Health Directorate, etc); • <i>Territory authorities</i> (bodies established for a public purpose under an Act, e.g. Canberra Institute of Technology, ACT Insurance Authority, Teacher Quality Institute, Cemeteries Authority, etc); • <i>Territory-owned corporations or their subsidiaries</i> (corporations established under the <i>Territory-Owned Corporations Act 1990</i> (ACT) e.g. Icon Water Limited); • <i>Territory instrumentalities</i> (corporations established under the <i>Corporations Act 2001</i> (Cth) or another Act or statutory instrument that are: <ul style="list-style-type: none"> ○ subject to control or direction by a Minister; or ○ composed of people whose majority are appointed by: <ul style="list-style-type: none"> ▪ a Minister; ▪ the Head of Service; ▪ a director-general; or ▪ a statutory office-holder); and <p><i>Statutory office-holders</i> (e.g. 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>
Disclosable conduct	Conduct which involves either maladministration, or a threat to public health, safety or the environment.
Disclosure	A report regarding suspected disclosable conduct. Referred to throughout this document as a 'report'.
Discloser	A person who makes a disclosure. Referred to throughout this document as a 'whistle-blower'.
Disclosure Officer	A person nominated by an ACTPS entity to receive reports, or a person specified in section 11 of the PID Act.
Integrity Commission ('Commission')	The Commission comprises the Commissioner who is supported by staff.
Integrity Commissioner ('Commissioner')	The head of the Integrity Commission.



Member of the Legislative Assembly ('MLA')	An elected representative sitting in the ACT Legislative Assembly.
Minister	The Chief Minister or a Minister appointed under the <i>Australian Capital Territory (Self-Government) Act 1988</i> (Cth), section 41, as defined in section 162 of the <i>Legislation Act 2001</i> (ACT).
PID Act	The <i>Public Interest Disclosure 2012 Act</i> (ACT).
Public Interest Disclosure ('PID')	A PID is a special type of complaint, defined in the PID Act as relating to maladministration or threats to public health, safety or the environment.
Public official	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.
Third parties	Members of the Legislative Assembly or journalists.
Whistle-blowers	Colloquial term used to describe disclosers.

Understanding PIDS – an overview for MLAs

By virtue of their role as elected representatives, MLAs receive information of various kinds from members of the public, including complaints about problems within the public service. These guidelines deal with reports that, under the PID Act (to which all statutory references are made, unless otherwise indicated), attract special protections and entail specific obligations of investigation and report. The corollary is that, when an MLA receives one of these reports, the MLA has certain obligations to the reporter (called a “whistle-blower” in these guidelines).

In essence, a PID is a report, made by anyone, about suspected wrongdoing in the ACTPS or ACT Government. To qualify as a PID, such a report must have been made to specified people or bodies, and about certain subject matter. The Commission is responsible for determining which reports qualify as PIDs.¹ Where the Commission determines a report to be a PID, either the Commission or an ACTPS entity must investigate it and ensure that appropriate steps are put in place to protect the whistle-blower from retribution. In certain circumstances a report that has been made to an appropriate person or body can still attract the PID protections even if it is also later given to an MLA.

A report under the PID Act can make its way to an MLA in three main ways:

1. where the MLA is also a Minister, they can be the ‘first receiver’ of a report under s 15(1)(b). In this context, the Minister must then pass the report on to a specified class of person (ie a ‘disclosure officer’) for handling and consideration under the PID Act;
2. MLAs can receive reports already made to a proper recipient (disclosure officer) – but only when particular circumstances have arisen. This has the effect of converting the report into a PID; and
3. MLAs can be forwarded PIDs - but only in particular circumstances.

These scenarios are discussed in further detail below.

As the Public Sector Standards Commissioner said in an earlier version of these guidelines:²

The PID Act does not provide specific guidance as to how a PID is to be managed from the time a MLA 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. MLAs, of course, retain the prerogative to use information they receive from any person within the proceedings of the Assembly.

This remains the case for scenarios 2 and 3 above. These guidelines outline processes within the PID Act and recommended steps for MLAs to take if they receive a report or a PID. They also consider the risks that may arise for MLAs if they mishandle information they receive through the PID scheme.

¹ With the exception of reports under s 27 of the *Public Interest Disclosure Act 2012* (ACT) (**‘PID Act’**); ie where the report has been made and subsequently passed to an MLA in specified circumstances. In that case, where the relevant criteria are met, the PID Act deems the report to be a PID.

² Public Sector Standards Commissioner, *Public Interest Disclosure Guidelines 2019* (Guidelines, 7 May 2019) 29 (*‘Public Interest Disclosure Guidelines 2019’*).



What kind of report is required for a PID?

Essential content

The first element of a PID is that the report must be made by a whistle-blower, who need not be a public official. The PID Act provides that any person may report 'disclosable conduct'.³ Disclosable conduct is an:

- action,
- policy,
- practice, or
- procedure

of an ACTPS entity, or person who works for an ACTPS entity, that:

- is maladministration or
- results in a substantial and specific danger to public health or safety, or the environment.⁴

A PID may be about the conduct of employees of, or those responsible for, an ACTPS entity or the ACT Government. They 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 includes not-for-profit or other non-government entities providing a public service to the community under a contract with an ACTPS entity.

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

A whistle-blower may make a report even if they are not able to identify who is responsible for the alleged conduct.

There is no requirement that a whistle-blower say they are making a PID or even mention the PID Act. Whistle-blowers may not even know they have made a PID.

'Maladministration'

'Maladministration' is conduct or a policy, practice or procedure that:⁵

- results in a substantial mismanagement of public resources or public funds; or
- involves substantial mismanagement in the performance of official functions.

Maladministration requires 'substantial mismanagement'. For example, should a manager be making poor decisions resulting in wastage of hundreds of thousands of dollars, it would amount to substantial mismanagement. Alternatively, where the report is about the limited private use of a government plated vehicle by a public official, this would be unlikely to amount to substantial mismanagement.

Whether maladministration is considered 'substantial' is also informed by whether it is in the public interest to investigate the alleged maladministration. Taking the example of the wastage of significant sums of money, it would clearly be in the public interest to investigate and fix that wastage.

³ PID Act s 14.

⁴ PID Act s 8(1).

⁵ PID Act s 8(3).



‘Substantial and specific danger to public health or safety, or the environment’

‘Substantial and specific danger’ refers to a situation where the conduct of a public official, or a policy, practice or procedure risks damaging ‘public health or safety’ or the environment. ‘Public health or safety’ refers to the health or safety of people: ⁶

- under lawful care or control; or
- using community facilities or services; or
- in workplaces.

As with maladministration, the report must relate to ‘substantial’ danger. Substantial in this context is determined not only by how likely it is to occur, but also by consequences risked by its occurrence. For example, any conduct which puts even one person at risk of serious injury or death is substantial. Where conduct puts many people at a minor risk of injury, this also may be substantial (for example, releasing even a mild irritant into a communal waterway).

‘Specific’ requires that the conduct be capable of a reasonably precise description. This means that vague or imprecise reports of dangers to public health, safety or the environment will probably not amount to disclosable conduct. For example, were a whistle-blower to allege imminent unspecified dangers due to a proposed project but is unable to provide any useful information as to what those dangers are, this is unlikely to be ‘disclosable conduct’.

What is not disclosable conduct?

Disclosable conduct is not an action or a policy practice or procedure of an ACTPS entity, or a public official for an ACTPS entity, that: ⁷

- relates to a whistle-blower’s personal work-related grievance; or
- is to give effect to a policy about amounts, purposes or priorities of public expenditure.

Reports which are:

- not about disclosable conduct;⁸
- frivolous or vexatious;⁹ or
- not in the public interest;¹⁰

are not PIDs.

PIDs are generally not appropriate to resolve individual workplace issues. The Public Sector Standards Commissioner has issued guidance regarding what is not likely to amount to a PID, which the Commission endorses:¹¹

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

⁶ PID Act s (8)(3).

⁷ PID Act s 8(2).

⁸ PID Act s 17A(2)(a).

⁹ PID Act s 17A(2)(c).

¹⁰ PID Act s 17A(2)(b).

¹¹ *Public Interest Disclosure Guidelines 2019*, p 8.



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.

A good question to ask in determining whether the whistle-blower's report is about disclosable conduct is whether their concerns have (or potentially have) widespread impact. This does not mean issues which may be affecting the whistle-blower personally are not PIDs (if there is a risk that others may also be adversely affected), but if they affect only the whistle-blower it is less likely they will be PIDs.

Figure 1 below gives an overview of the required content for a PID.

Reports regarding substantial maladministration may be PIDs

- Issues relating to the action, or inaction, of an ACTPS entity or public official that are of a serious nature, unjust, unreasonable, improperly discriminatory or involve dishonesty. This includes acts, decisions, advice or omissions which:
 - violate administrative fairness;
 - contradict the principles of fairness or equity;
 - are inconsistent with policies or procedures;
 - demonstrate negligence, or the absence of proper care or attention; or
 - involve excessive use of authority or where authority is used to intimidate, harass or subject someone to unreasonable conditions.

Reports regarding substantial and specific dangers to the health or safety of the community or environment may be PIDs

- Where the action, or inaction, of an ACTPS entity or public official puts either the community or the environment at serious risk of significant harm.

Reports regarding workplace complaints or grievances are unlikely to be PIDs

- A report is unlikely to be a PID where the issue relates to:
 - industrial matters such as overtime, workloads or working conditions;
 - individual allegations of bullying, harassment or discrimination;
 - the conduct of an individual and the consequences are not substantial, systemic or widespread;
 - concerns arising from a underperformance or performance management process; or
 - an official failing to exercise their duties with reasonable care or skill, but the consequences are slight and localised.

Reports regarding conduct giving effect to ACT Government policy about amounts, purposes or priorities of public expenditure are not PIDs

Figure 1. Determining whether the whistle-blower's concerns are likely to be a PID

To whom can a report be made?

The usual process and channels

For a report to qualify as a PID, it must also be made to certain officials. The PID Act specifies the people responsible for receiving reports. These are called 'disclosure officers'. They are:

- For reports relating to an ACTPS entity:
 - the Auditor-General;
 - the Public Service Standards Commissioner;
 - the Head of Service;
 - the Head of an ACTPS entity (or nominated disclosure officer);
 - the Ombudsman; or
 - the Commissioner.
- For reports relating to a Legislative Assembly entity:
 - the Auditor-General;
 - the Ombudsman;
 - the Commissioner;
 - a person nominated to be a disclosure officer for a Legislative Assembly entity; or
 - the Clerk of the Legislative Assembly.¹²

The relevant ACTPS entity's website must provide contact details for its disclosure officers. The Commission's website also contains a list of people who have been nominated as disclosure officers.

In addition to disclosure officers, whistle-blowers can make reports in the first instance to:

- a Minister; or
 - if the whistle-blower works for an ACTPS entity:
 - their supervisor or manager;
 - a member of the ACTPS entity's governing board (if applicable); or
 - someone at the ACTPS entity who deals with the issues the whistle-blower's report raises.¹³

In those scenarios, the receiver of the report (ie Minister or ACTPS entity representative) **must** forward the report to a disclosure officer.¹⁴ This should be done **as soon as practicable**.

ACTPS entities include:¹⁵

- the public service;
- a Territory authority;
- a Territory-owned corporation;

¹² PID Act s 11.

¹³ PID Act s 15.

¹⁴ PID Act s 15(2).

¹⁵ PID Act, Dictionary (definition of 'ACTPS entity').



- a subsidiary of a Territory-owned corporation;
- a Territory instrumentality; and
- a statutory office-holder.

The PID Act defines 'public official' as a person who is, or has been:

- an employee of an ACTPS entity;¹⁶ or
- a contractor, employee of a contractor or volunteer at an ACTPS entity.¹⁷

Figure 2 (below) provides an overview of the process and channels for reporting under the PID Act.

When can PIDs be made or referred to MLAs?

Part 5 of the PID Act outlines when PIDs can be made or given to MLAs.

There are three situations where information or materials given to an MLA will attract PID Act protections:

1. where the whistle-blower has **not received the requisite initial notifications**.¹⁸ That is, where the whistle-blower has:
 - made a report of 'disclosable conduct' to an appropriate person (see above, 'To whom can a report be made?');
 - did not make the report/disclosure anonymously; and
 - not received the relevant notifications about their disclosure (under s 17B or s 19A) within three months of their report being made.

In this scenario, the disclosable conduct can be disclosed by the whistle-blower to an MLA, and this then converts the report/disclosure into a PID. This applies whether or not the Commission has decided (or would decide) that the report qualified/did not qualify as a PID;
2. where the whistle-blower has not received an investigation progress update.¹⁹ That is:
 - the Commission has classified the disclosure as a PID;
 - the Commission has informed the whistle-blower of the s 19A notification matters (ie that the disclosure will be investigated and by whom, together with the date of referral if it has been referred, the right to be kept informed and make a disclosure to an MLA, and the PID protections); and
 - the whistle-blower has not been told about progress for more than three months;
3. where the whistle-blower is told that **required action will not be taken**.²⁰ That is:
 - the PID is investigated;
 - there is clear evidence that one or more instances of disclosable conduct from the report has occurred, or is likely to have occurred; and
 - the whistle-blower is told by the investigating entity that no action will be taken in relation to the disclosable conduct (in contravention of the requirement for action to be taken under s 24).

¹⁶ PID Act s 10(a)(i).

¹⁷ PID Act s 10(a)(ii).

¹⁸ PID Act s 27.

¹⁹ PID Act s 27A(1)(a).

²⁰ PID Act s 27A(1)(b).



In the first scenario the whistle-blower can only disclose information to the MLA that is reasonably necessary to show that the conduct complained of is 'disclosable conduct'.²¹ In the second two scenarios the whistle-blower can only give information that is reasonably related to the disclosure.²²

Note: these three scenarios also permit a whistle-blower to provide the information to a journalist.

What if the report is about the Commission?

Where a report relates to the Commission, the Commission recommends MLAs forward it to the Inspector of the Commission. All reports concerning the Commission will be treated as a complaint under the *Integrity Commission Act 2018*.²³ Where the PID relates to the Commission, contacting the Inspector is also recommended.

Report by anyone

- Anyone can make a report under the PID Act

About wrongdoing in the ACTPS

- Can relate to an ACTPS entity, contractor or public official.
- The wrongdoing must be about maladministration, threats to public safety and health, or a threat to the environment.

Reports regarding workplace complaints or grievances are unlikely to be PIDs

- Disclosure officer;
- Commissioner;
- Minister; or
- If the whistle-blower is a public official for an ACTPS entity:
 - The whistle-blower's supervisor, manager or other specified senior leaders within the ACTPS entity they work for.

OR (potentially later) made to a journalist or MLA

- Where the relevant notices have not been provided in the three months following the making of the disclosure.
- The whistle-blower has been informed the required action will not be taken.

Figure 2. The elements of making a PID

²¹ PID Act s 27(3).

²² PID Act s 27A(2).

²³ *Integrity Commission Act 2018* (ACT) s 257.



Assessment and treatment of reports once received

The usual process

The PID process begins with the whistle-blower making a report of disclosable conduct to a disclosure officer or other specified persons (which includes Ministers, each of whom have an obligation to forward the report to a disclosure officer).²⁴ The report is initially assessed by a disclosure officer who, if certain criteria are satisfied, forwards the report to the Commissioner to determine whether it is a PID.²⁵ If so determined, the Commissioner must decide either to investigate the disclosure or refer it to specified entities for investigation.²⁶ If the disclosure is not taken to be a PID, the Commissioner must inform the disclosure officer and the (non-anonymous) whistle-blower.²⁷

Additional avenues

Further avenues open up to a whistle-blower if they haven't been notified of certain matters within a specified time frame. Where that occurs, a whistle-blower may then approach an MLA or journalist and give them their report/PID without jeopardising the protections of the PID Act. These limited circumstances apply in three situations. First, where the whistle-blower has disclosed (not anonymously) disclosable conduct to a relevant person, but has not been informed of the Commissioner's determination (and certain other information) within three months.²⁸ In that event, the report is taken to be a PID and attracts the PID Act protections from the day of disclosure.²⁹ This is the case even if the Commissioner has in fact considered the disclosure and decided it is not a PID – the point is that this outcome has not been notified to the whistle-blower within the three month time frame. The second scenario arises where the whistle-blower has been informed about the Commissioner's decision – including that the disclosure has been assessed as a PID and will be investigated – but is not given a progress update for more than three months.³⁰ The third scenario arises where the disclosure is assessed as a PID, investigated, and there is clear evidence that disclosable conduct has, or is likely to have, occurred, but the whistle-blower is told that no action will be taken in response (despite the requirement for the relevant ACTPS entity to address the issue).³¹

However, the PID Act does not provide any specific instructions on how MLAs ought then handle these PIDs. Guidance on this is set out below.

Note: Where a report of disclosable conduct is made to an MLA, and it becomes a PID under s 27, and the Commission becomes aware of it, the Commission **must** either investigate the PID or refer it for investigation.³² For example, should an MLA receive a PID and then represent in a public forum that they had received a PID and what it is about, the Commission would be obliged to take this action.

Supervision by the Commission

The Commission may review decisions relating to a refusal to investigate, or cessation of an investigation into, a PID, and/or any actions taken in response to findings following the investigation of a PID.³³ In doing so, the Commission may uphold, amend or substitute any decisions made by either an investigating entity or ACTPS

²⁴ PID Act ss 15-16.

²⁵ PID Act s 17.

²⁶ PID Act s 17A.

²⁷ PID Act s 17B.

²⁸ The notification requirements are in PID Act ss 17B and 19A.

²⁹ PID Act s 27.

³⁰ PID Act s 27A(1)(a).

³¹ PID Act ss 27A(1)(b) and 24.

³² PID Act ss 19(1)(b) and 19(2).

³³ PID Act s 29.



entity in relation to a PID.³⁴ The Commission is also empowered to direct ACTPS entities to take certain specified actions in respect of a PID.

In addition, the Commission may provide reports to the Chief Minister regarding an ACTPS entity's treatment of PIDs.³⁵ This could include, for example, telling the Chief Minister that an ACTPS entity's treatment of a PID was inappropriate, and providing suggestions as to how it should be handled. Before making an adverse or critical report, the Commission will give the ACTPS entity or affected person an opportunity to be heard.

³⁴ PID Act s 29.

³⁵ PID Act s 30.



What protections do whistle-blowers get?

Overview

The protections for whistle-blowers (and witnesses helping the investigation of PIDs) are split into four categories:

- certain limits on liability;³⁶
- protection from defamation action;³⁷
- protection from detrimental action;³⁸ and
- protection against the misuse of protected information.³⁹

Immunity from liability

Whistle-blowers do not, in making a PID, commit:⁴⁰

- a breach of confidence; or
- a breach of professional etiquette or ethics; or
- a breach of a rule of professional conduct; or
- if the report is made in relation to a member of the Legislative Assembly—a contempt of the Assembly.

Important: The Commission notes these immunity provisions may appear to permit legal practitioners to make PIDs concerning matters covered by legal professional privilege, without professional consequences. The Commission considers that the immunity protections of the PID Act **do not extend to breaches of legal professional privilege.**

Whistle-blowers do not incur civil or criminal liability only because of the making of a PID.⁴¹

In summary, the PID Act supports whistle-blowers by protecting them from suffering legally or professionally. Were it not for the PID Act, a whistle-blower could be the victim of some retribution for having made a report.

Note: These protections relate only to the **making of** the PID. Liability arising from other conduct of the whistle-blower does not attract these protections.⁴² This means that whistle-blowers who have engaged in wrongdoing themselves may still be liable for that wrongdoing, despite having made a PID.

Note: These protections may be lost if a court determines that the whistle-blower has knowingly provided false or misleading information to the investigator of the PID, or where the whistle-blower's report is vexatious.⁴³ However, the protection may continue if the court determines that that conduct has not materially prejudiced the investigation and is of a minor nature.

Note: Similar protections exist for those who make corruption reports to the Commission under the *Integrity Commission Act 2018*.

³⁶ PID Act s 35.

³⁷ PID Act s 36.

³⁸ PID Act s 40.

³⁹ PID Act s 44.

⁴⁰ PID Act s 35(a).

⁴¹ PID Act s 35(b).

⁴² PID Act ss 35-36.

⁴³ PID Act s 37.



Protection from defamation action

In addition to the immunity from liability discussed above, a whistle-blower also has some protection from defamation action.⁴⁴ Where defamation proceedings are brought because of a PID, the whistle-blower has a defence of absolute privilege for publishing the information in their report/the PID.

Protection from ‘detrimental action’

It is an offence to take ‘detrimental action’ because of a public interest disclosure.⁴⁵

Detrimental action is any action that involves:⁴⁶

- **discriminating** against a person – by treating, or proposing to treat, a person unfavourably in relation to their reputation, career, employment or trade. This includes:
 - damaging, or promising to damage, a person’s personal or professional reputation;
 - threatening a person’s career;
- **harassing** or **intimidating** a person;
- **injuring** a person; or
- **damaging** a person’s **property**.

People who take, or threaten to take, detrimental action are called ‘retaliators’. Retaliators commit an offence where they take, or threaten to take, detrimental action against a person who:

- has made, or intends to make, a PID; or
- the retaliator believes has made or intends to make a PID.

A penalty of up to 1 year imprisonment and/or a 100-penalty unit fine applies.⁴⁷

It is a serious offence to take detrimental action against a person. Where it occurs, and if brought to the attention of the Commission, the matter will be referred to the ACT Director of Public Prosecutions to consider whether prosecution is appropriate.

Those who suffer detriment as a result of detrimental action may recover damages.⁴⁸ This means if a whistle-blower suffers loss as a result of detrimental action taken against them, they may sue the person responsible and recover that loss.

The ACT Supreme Court can make orders including injunctions, to either fix detrimental action already taken or prevent it from occurring.⁴⁹ Either the Commission, the whistle-blower, or the victim of alleged detrimental action can apply for such an order. This means that if someone takes or is expected to take detrimental action, the ACT Supreme Court can step-in on the alleged victim’s behalf.

Note: The protections of the PID Act may be lost if a court determines that the whistle-blower has knowingly provided false or misleading information to the investigator of the PID, or where the report is vexatious.⁵⁰

⁴⁴ PID Act s 36.

⁴⁵ PID Act s 40.

⁴⁶ PID Act s 39.

⁴⁷ PID Act s 40.

⁴⁸ PID Act s 41.

⁴⁹ PID Act s 42.

⁵⁰ PID Act s 37.



However, the protection may continue if the court determines that the whistle-blower's conduct has not materially prejudiced the investigation and is of a minor nature.

Protection from the misuse of protected information

Those with responsibilities under the PID Act (such as the Commission, and disclosure officers) must not use or share 'protected information' recklessly.⁵¹ Protected information is information obtained, by certain people, through the exercise of a function under the PID Act. This would include, for example, the whistle-blower's identity. Recklessly means (in essence) not treating the protected information carefully and properly.

Subject to a lawful excuse (such as using the information to investigate the PID or where a court requires it), the reckless use or divulgence of protected information carries a penalty of six months imprisonment, or a 50-penalty unit fine, or both.⁵²

MLAs must exercise caution in how they handle information and reports received that may qualify as, or already be, a PID. While MLAs have absolute privilege as to what they say in Parliament, the situation is different outside that setting. Statements made in Parliament may still be a risk to the whistle-blower and witnesses, even if the MLA is protected. Liability issues may also arise for the MLA for statements which are not protected by parliamentary privilege. The Commission encourages MLAs to contact the Commission and seek guidance before making any public remarks relating to a PID.

Protection for witnesses

People who help PID investigations are protected against criminal and civil liability in relation to the help they provide.⁵³ However, as with whistle-blowers, this protection does not extend to the conduct of the witness themselves (eg if their help reveals wrongdoing on their part).⁵⁴

⁵¹ PID Act s 44.

⁵² PID Act s 44.

⁵³ PID Act s 42A(1).

⁵⁴ PID Act s 42A(2).



Handling a report/PID as an MLA

Overview

How an MLA ought treat a report will depend on the circumstances. The PID Act is silent on what an MLA can do with the information in a report/PID they have received from a member of the public – whether under s 27, s 27A or otherwise. The Commission recommends that MLAs be very careful in how they deal with reports, whether or not they are already classified as PIDs. At all times regard should be had to the potentially significant personal risk the whistle-blower may face should their identity be revealed.

It is important to remember that whistle-blowers **only** receive (or retain) protections when they report through the correct channels. Furthermore, whistle-blowers can only share their report/PID with an MLA and preserve the protections in limited circumstances. With the exception of making the initial report to a Minister, the protections are only available where there has already been some failure in the processing of the report by an ACTPS entity or the Commission (as described above).

In dealing with a member of the public in the context of the PID Act, an MLA's first and primary consideration should always be the protection of the whistle-blower. If the whistle-blower has not followed the proper processes, they may have lost, or prevented themselves from acquiring, the significant protections available under the PID Act. It is incumbent upon an MLA to ascertain the current status of a report/PID, and whether the PID protections have been enlivened.

The Commission is available to provide guidance to an MLA if the circumstances are not clear.

In addition, while the whistle-blower's protections may have been maintained through their dealings with an MLA, it is important that MLAs understand that those same protections do **not** extend to them. Parliamentary privilege aside, for example, while a whistle-blower can rely upon a defence of absolute privilege in defamation proceedings,⁵⁵ that protection does not apply to the MLA. Furthermore, while a whistle-blower can acquire an immunity from criminal/civil liability,⁵⁶ the MLA they interact with does not receive the same protections, and questions of being an accessory to an offence may arise for the MLA. Accordingly, MLAs need to exercise caution and give careful consideration to how they handle any information provided to them by a whistle-blower.

Where the whistle-blower has not followed the proper process

If an MLA, after receiving a report, discovers that the whistle-blower has not met the criteria for making a report to an MLA (ie they have not first reported to the appropriate authority and/or they have received the appropriate notices), the MLA should give the report to the Commission as soon as practicable.

What should I do if I receive a report?

The first thing an MLA should do if they get a report is to review these guidelines and make sure they understand the PID process, what is involved and how they can assist the whistle-blower.

A good start is to consider:

1. Has the whistle-blower tried to have this issue resolved elsewhere and failed (whether in accordance with the PID Act or otherwise)?

⁵⁵ PID Act s 36.

⁵⁶ PID Act s 35(b).



- a. If yes, why did those efforts fail?
 - b. If not, why not?
2. Is the whistle-blower aware of the PID Act and how it works?
3. Has the whistle-blower attempted to raise this issue with an appropriate authority? In particular, have they made a report to anyone in accordance with s 15?
- a. If yes, why is the whistle-blower unsatisfied?
 - b. If no, the protections under the PID Act do not apply. It is recommended that the whistle-blower be notified of this.

For Ministers, it is critical to work out whether they have received the report in their capacity as a ‘first receiver’ (under s 15 of the PID Act), or whether it has come to them later in the PID process under s 27 or s 27A of the PID Act (ie in one of the three scenarios outlined in the ‘Assessment and treatment of reports once received’ section above). These considerations are also relevant for other MLAs, who will not be able to deal with the information without jeopardising the whistle-blower’s position **unless** s 27 or s 27A of the PID Act is satisfied.

Considerations for Ministers as ‘first receivers’

The report must be about ‘disclosable conduct’

Additional considerations arise for Ministers in their capacity as potential ‘first receivers’ of a report under s 15. Importantly, if a member of the public makes a report of disclosable conduct to them, the Minister must give a copy of the report to a disclosure officer.

In deciding whether the report is about disclosable conduct, the Minister should consider whether the issues raised by the whistle-blower relate to:

- maladministration (including public wastage, organisational negligence or inaction); or
- a danger to the health or safety of the community or environment (eg has someone done something that will adversely affect people’s health or significantly damage the environment, leaving it in a worse state than it was previously)?

Does the report have to be in writing?

Reports do not need to be in writing, or in any specific format.⁵⁷ This means whistle-blowers can make a report orally or in writing, although they should be advised, for obvious reasons, to put it in writing. Reports can be made using any form of communication platform, including email, fax, letter or phone.

MLAs should keep records in relation to any reports that are received. This would include, at a minimum, a record of relevant dates, events/interactions with the whistle-blower, and any correspondence given or received.

Whistle-blowers should also be advised to keep their own records, as they may be useful if they need to rely on PID Act protections.

⁵⁷ PID Act s 16.



Can whistle-blowers be anonymous?

Whistle-blowers can remain anonymous if they wish.⁵⁸

Anonymous whistle-blowers may also be encouraged to contact the Commission for a confidential discussion. This will allow the options available to the whistle-blower arising from their wish to remain anonymous to be understood and communicated.

What information should I ask for when receiving a report?

The PID Act does not require the whistle-blower to provide any specific information other than sufficient to enable a determination to be made that it is about disclosable conduct.⁵⁹

It is useful to obtain as much relevant information as possible from the whistle-blower. This will assist in considering how best to address the whistle-blower's concerns. The following would be a good start:

- the whistle-blower's name and contact details;
- the nature of the conduct complained about;
- who the whistle-blower thinks responsible for the conduct;
- when and where the whistle-blower believes the conduct to have occurred;
- any relevant events surrounding the issue;
- whether it is possible to point to matters that support the allegation;
- what, if any, action was taken by the whistle-blower in response to the conduct;
- whether anyone else is aware of the conduct;
- whether the whistle-blower considers their report to amount to a PID; and
- whether the whistle-blower fears detrimental action because of making the report.

Considerations for all MLAs

Record keeping

Whistle-blowers can engage with an MLA orally or in writing, although they should be encouraged to put things in writing.

MLAs should keep records in relation to any reports/PIDs they receive. This would include, at a minimum, a record of relevant dates, events/interactions with the whistle-blower, and any correspondence given or received.

Whistle-blowers should also be advised to keep their own records, as they may be useful if they need to rely on PID Act protections.

⁵⁸ PID Act s 16(1)(c).

⁵⁹ PID Act s 7.



Can whistle-blowers be anonymous?

Whistle-blowers can remain anonymous if they wish.⁶⁰ Were an MLA to receive what appears to be a PID from an anonymous whistle-blower, caution should be exercised. The whistle-blower may not receive any of the PID Act protections if they had also made their initial report anonymously, or not provided the ACTPS entity or person they made their report to with a mode of communication. In such a situation, it may not be possible to provide the required notices to the whistle-blower, such that the report to the MLA could not be deemed a PID.⁶¹

Where an MLA receives an anonymous report/PID – and they can communicate with the whistle-blower – they should warn them that if their initial report was also made anonymously the protections under the PID Act may not apply.

Anonymous whistle-blowers may also be encouraged to contact the Commission for a confidential discussion. This will allow the options available to the whistle-blower arising from their wish to remain anonymous to be understood and communicated.

Where the anonymity of the whistle-blower prevents the MLA from confirming whether the initial report was made anonymously, the Commission recommends the MLA assume that the protections may not apply to the whistle-blower.

Risks associated with revealing PID information

It is critical that MLAs ascertain whether the whistle-blower meets all relevant criteria for receiving protections under the PID Act and do this before taking any action in respect of the PID. A failure to do so may result in the whistle-blower failing to qualify for, or forfeiting, the PID protections.

Even if a whistle-blower's report has been classified as a PID (whether via s 17A or s 27), and they have acquired all of the protections of the PID Act, an MLA should exercise caution in further disclosing/using the information in the PID. MLAs should ask themselves:

1. Is the information rumour or fact?
2. Has the whistle-blower provided, or are they willing to provide, evidence?
3. Are the whistle-blower's assertions credible or reasonable?
4. Does the conduct complained of damage the public interest? (eg is the harm limited to an individual, or could the public at large suffer due to the actions of the individual or entity?)
5. Does the issue have wide ramifications or long-term implications?
6. Does the whistle-blower have sufficient supports in place to deal with the stresses associated with making a report?
7. Are the whistle-blower's expectations regarding the treatment of the PID reasonable?

⁶⁰ PID Act s 16(1)(c).

⁶¹ PID Act ss 27-27A.



Importantly, even if a whistle-blower's report has been classified as a PID, they have qualified for the PID Act protections, and the MLA disclosure threshold is met – there are limits on what a whistle-blower can share with an MLA. In particular, they can only disclose information to an MLA that is:

- a. **reasonably necessary to show the conduct is disclosable conduct** (where the whistle-blower has not received notification of the Commission's assessment within three months);⁶² or
- b. **reasonably related to the disclosure** (where the whistle-blower hasn't received an update on the progress of the PID investigation, or the relevant entity has told them required action will not be taken).⁶³

As noted above, the PID Act is silent on precisely what an MLA can do with the information they validly receive via a PID. Even if the whistle-blower has secured the PID Act protections for themselves, revealing the information in the PID publicly can have far-reaching, and potentially negative, consequences, including for the whistle-blower. The welfare of the whistle-blower and any other affected persons (including the subject matter of the report/PID) should be taken into account.

The MLA should consider whether raising the report with the relevant ACTPS entity is appropriate and, if so, with whom. In some cases, it may not be at all appropriate. On the other hand, raising the report with the Commission, even if there has been some failure on the part of the Commission, will often be a better course, to ensure that the matter is taken up appropriately. Complaints about the way the Commission deals with a matter can be made to the Inspector.

⁶² PID Act s 27.

⁶³ PID Act s 27A.



Related policies and procedures

The following related material is available on the Commission's website:

1. Public sector entity guide to managing disclosures and conducting investigations under the *Public Interest Disclosure Act 2012*
2. Contact details for all disclosure officers within the ACT
3. Factsheet: Public Interest Disclosures

The following related material is available on the internet:

1. [Public Interest Disclosure Act 2012 \(ACT\)](#)
2. [Public Interest Disclosure Guidelines 2019](#) (the Public Sector Standards Commissioner's former PID guidelines)
3. [Public Interest Disclosure Act 2013 \(Cth\)](#)
4. [Agency guide to the Public Interest Disclosure Act 2013](#) (the Commonwealth Ombudsman's guidance for the Commonwealth PID scheme)

Administration

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