

POLICY PAPER

Governance in the ACT public sector—public interest disclosures

Public Interest Disclosure Act 1994

The *Public Interest Disclosure Act 1994* (the Act) sits within the legislative and policy framework governing the ACT's executive arm of government.¹

Any person may make a disclosure under the Act, but its application is limited to activity within the ACT public sector.

The Act is one element of the whole-of-government accountability framework that includes the ACT Integrity Policy. However, the relationship between the Act and the Integrity Policy is not explicitly recognised beyond a reminder to agencies that “they have specific obligations under the *Public Interest Disclosure Act 1994* and that these perform a crucial role in the integrity framework.”² The Integrity Policy focuses on fraud and corruption.

The Act also operates in tandem with the ethical obligations imposed on public sector staff. These obligations are encapsulated in the *ACT Public Service Code of Ethics*.³ This relationship is also not explicitly recognised.

Accordingly, while the purpose of the Act is expressly stated as being “to encourage the disclosure of conduct adverse to the public interest in the public sector and for related purposes”,⁴ its application to fraud, corruption and unethical activity in that sector is unclear.

The application of the Act to activity otherwise dealt with in under whole-of-government accountability legislation insofar as it imposes duties and obligations variously on public officials, officers, employees and workers, is equally unclear.

Much of this lack of clarity is the result of the failure of the Act to target disclosable conduct that can be distinguished from other conduct attracting a duty to report, for example, as arise under section 9 of the *Public Sector Management Act 1994* and under the *Financial Management Accountability Act 1996*.

A further difficulty lies in the cultural context of the Act within the realm of whistleblowing at large. Thus, within the ACT public sector (as generally applying elsewhere), the act of making a public disclosure is conventionally described⁵ as ‘whistleblowing’.⁶

¹ *Public Sector Management Act 1994, Financial Management Accountability Act 1996, Public Sector Management Standards.*

² ACT Integrity Policy p 6, Chief Minister's Department publication.

³ ACT Public Service Code of Ethics, Chief Minister's Department publication.

⁴ Long title. The Act has no objects clause as is provided in South Australia, Queensland, New South Wales and Victoria.

⁵ For example in *Annual Reports 2006-09*, Chief Minister's Department publications. The Act is administered under current Administrative Arrangements 2009 (No 1) (23 September 2009) by the Chief Minister's Department as a public sector management matter, this being a matter within the remit of the Chief Minister, as is “Government accountability frameworks”.

⁶ “The disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to person or organisations that may be able to effect

The negative connotations of the term ‘whistleblowing’ have attracted debate,⁷ not least because they tend to focus attention on the person making the disclosure rather than on the substance of the disclosure itself. This in turn arguably makes it harder to protect the person from reprisal.

Nonetheless, ‘whistleblower protection’ was an important focus in the 2007 Federal election campaign. In this regard, the description of whistleblowing as “the disclosure of information relating to the improper practices of a person’s employers or co-employees in the public interest”⁸ was particularly useful in capturing the public interest element that generally triggers a disclosure. At the same time, it also identified the notion of propriety (or lack of it, as distinct from criminal or disciplinary or dismissable offences) on which considerations of ethics and integrity—acknowledged triggers for disclosures—is based.

The Act was the fourth of the suite of public disclosure Acts now applying in the Commonwealth, State and other Territory jurisdictions. It is ranked,⁹ for present purposes, as a best practice model in the following areas:

- clarity of purpose
- an expanded coverage (any reprisal target)
- imposing an obligation to investigate.

The Act is ranked weakest in best practice terms because of:

- a lack of clarity in affording protection to public contractors, employees, ex-employees or internal witnesses
- in barring anonymous disclosures
- inadequate protections against misuse involving false and misleading disclosures or those wholly involving policy disputes
- inadequate procedures for receiving handling and investigating disclosures
- an absence of anti-reprisal offences
- inadequate protection of confidentiality and for managing, monitoring, researching and developing policy on public interest disclosures.

Public Interest Disclosure Bill 2006

The ACT Government acknowledged a number of these deficiencies in sponsoring the Public Interest Disclosure Bill 2006 which was presented by the Chief Minister, Mr Jon Stanhope MLA, to the ACT Legislative Assembly on 8 June 2006.

The Bill was to replace the current *Public Interest Disclosure Act 1994* with a new Act to provide:

“... clearer and more effective procedures for making, investigating and addressing disclosures about public maladministration. A focus of the legislation is protecting

action”. Near JP and Miceli MP (1985) *Organisational dissidence: the case of whistleblowing*, *Journal of Business Ethics* 4: 1—16, p 4 quoted in Brown following.

⁷ Dr A J Brown *Public Interest Disclosure Legislation in Australia: Towards the Next Generation—An Issues Paper*, November 2006 at pp 6-7.

⁸ Kevin Rudd MP and Senator Joe Ludwig (2007) *Government Information: Restoring Trust and Integrity* (Election 2007 Policy Document), Australian Labor Party.

⁹ These ranking are derived from Brown op cit at pp 56-57.

the identity of disclosers of public interest information, and protecting disclosers from unlawful reprisals.”¹⁰

The new legislative scheme was to focus only on disclosures raising matters of public interest, such as the misuse of public funds, fraud, systemic failure, corruption, nepotism, and illegal actions or policies. In this regard the Bill was specifically intended to exclude private grievances having no broader public interest implications.

These limitations appear to reflect the kinds of claims made by the ACT Ombudsman, in each of his annual reports from 2006-09,¹¹ that most disclosures he investigated involved workplace disputes and grievance processes.

The Bill also included an objects clause:

“The object of the Act is to improve the quality of public sector administration by: ensuring that people can make confidential disclosures about maladministration by government bodies; setting out procedures for the investigation and reporting of these disclosures; and protecting people who make such disclosures from reprisal.”¹²

Importantly, the Bill made it mandatory for a public interest disclosure to contain information “that implicates a government entity or government official in conduct that is contrary to the public interest.”¹³

A ‘disclosure’ was defined broadly in the Bill as a statement that a person knows, believes or suspects something about an event, action or circumstance. The Bill also specified the person to whom the information had to be given (the contact person).

Equally importantly, the Bill defined ‘public interest information’ as information that tends to show that a government entity or official was engaging in, is engaging in or will engage in conduct contrary to the public interest.

The ‘public interest’ was described as something broader than the interests of an individual, of which the following were identified¹⁴ as examples of conduct contrary to the public interest:

- systemic failure—failure by a government entity or official to implement a system to give effect to a law
- policy failure—adoption of a policy by a government entity or official inconsistent with a law
- pattern of non-compliance—repeated failure by a government entity or official to comply with government policy or law
- fraud—for example, intentionally falsifying a document
- corruption—for example, receiving a benefit for divulging confidential information.

The Bill continued to apply only to the executive arm of government (excluding members of the judiciary and Members of the Legislative Assembly and staff) and only to

¹⁰ Explanatory Statement, Public Interest Disclosure Bill 2006.

¹¹ In fact only one of the disclosures identified in those reports is referenced to an employment-related matter; it was referred to the Commissioner for Public Administration in any event. None of the other matters involved a workplace dispute or grievance process *per se*.

¹² Public Interest Disclosure Bill 2006, clause 6.

¹³ *Ibid*, clause 7 (1).

¹⁴ Explanatory Statement to the Bill, *op cit*, in relation to clause 8.

'government officials', defined as a person who is or has formerly been an employee or contractor of a government entity (including entities which are a statutory office-holder or a territory instrumentality).

Where a government entity 'contracted out' a function to the private sector, the contractor was to be taken to be a government official if they performed a normal function of a government entity under the contract.

The Bill also made explicit the relationship between a public servant's obligation under section 9 of the *Public Sector Management Act 1994* to report corruption, fraud and maladministration and making a public interest disclosure under the *Public Interest Disclosure Act 2006* by including an example at the end of the section 9 code of conduct provisions.

Importantly, the Bill provided an expanded immunity¹⁵ for a person who made a public interest disclosure honestly and without recklessness as to the truth of the disclosure. In this case, the immunity provided that the person had not breached confidence, professional etiquette, ethics, or professional conduct as could attract civil or criminal liability that would otherwise attach only because of the making of the disclosure.

The Bill also defined 'detrimental action' as including discriminating against a person, harassing or intimidating them, injuring them, or damaging their property. It explicitly acknowledged that the victim of detrimental action could access remedies available to them under the ACT *Discrimination Act 1991* and the ACT *Human Rights Act 2004*.¹⁶

It also created two offences,¹⁷ each punishable by a maximum penalty of 100 penalty units, imprisonment for one year, or both, where a person threatened or took detrimental action to *deter* a person from making a public interest disclosure, or to *punish* a person for making a public interest disclosure.

The victim of detrimental action could continue to sue in tort under the Bill (as now under the Act) for damages (including exemplary damages) in any court of competent jurisdiction. However, in order to prevent 'double dipping', an award of damages was to be reduced by the amount of any compensation already ordered in relation to the same detrimental action under the *Discrimination Act 1991*.

The Bill lapsed on 18 October 2008, polling day for the 2008 ACT general election and, as a result, the current arrangements continue unamended.

¹⁵ Public Interest Disclosure Bill 2006, clause 49. The immunity could end in two circumstances: where the discloser refused to cooperate with an investigation of the disclosure, or if the discloser divulged the information in the disclosure otherwise than in accordance with legislation.

¹⁶ The ACT Supreme Court recently found a substantive statutory right to compensation for a breach of section 18 (7) of the *Human Rights Act 2004*. Previously this Act was seen as merely declaratory in intention: see *Morro, N & Ahadizad v Australian Capital Territory* [2009] ACTSC 118 (10 September 2009). In this case the plaintiffs received general damages for unlawful detention. By contrast, the ACT Human Rights Commission has an explicit statutory basis for respecting, protecting, fulfilling and promoting civil and political rights but will rarely recommend compensation for discrimination given its primary focus on conciliation. Anecdotally, compensation where ordered has been limited to <\$5,000.

¹⁷ Public Interest Disclosure Bill 2006, clauses 51 and 52. The prosecution did not have to prove that a person actually made a public interest disclosure or that a person was actually punished for making a public interest disclosure.

Current practise

The following table¹⁸ illustrates the take-up in selected ACT Government agencies defined as a 'proper authority'¹⁹ for the purpose of receiving a public interest disclosure under the Act.

The period 2006-09 was selected because, during it, the Chief Minister's *Annual Report Directions* imposed uniform statutory reporting criteria to disclosures under the Act reportable by ACT government agencies in their annual reports.

Agencies were selected on the basis of being:

- major service delivery agencies: ACT Health, Department of Territory and Municipal Services (TAMS), Department of Education and Training (DET), Department of Disability, Housing and Community Services (DHCS), Department of Justice and Community Safety—Corrective Services and Courts (JACS)
- key central agencies: Chief Minister's Department (CMD), Department of Treasury
- independent statutory officers: ACT Auditor-General, Commissioner for Public Administration—see also ACT Ombudsman.

Number of disclosures 2006-09—selected ACT entities

ACT government agency ('proper authority')	2006-07	2007-08	2008-09
Territory & Municipal Services	Nil	1 new (not resolved therefore ongoing)	1 new (not resolved therefore ongoing)
Disability, Housing & Community Services	1 new (not resolved therefore ongoing)	1 (not resolved in 2006-07 therefore ongoing)	2 new 2 resolved (1 ongoing from 2006-07 and 2007-08, 1 referred)
Treasury	Nil	Nil	1 new (not resolved in 2008-09 therefore ongoing)
Health	2 new (1 resolved, 1 ongoing)	4 new (1 referred, 2 not resolved therefore ongoing,	2 new (1 referred, 1 not resolved therefore ongoing)

¹⁸ This table is based on annual report data published on the website of each proper authority for the periods specified. Because agencies do not report uniformly on the outcomes of investigations or, in the case of referrals, identify the agency from which a referral has been made, it is not possible on a whole-of-government basis to arrive at the total number of disclosures made in each reporting period.

¹⁹ *Public Interest Disclosure Act 1994*, section 9.

ACT government agency ('proper authority')	2006-07	2007-08	2008-09
		1 rejected)	
Justice & Community Safety	Nil	Nil	Nil
Education & Training	1 (not resolved therefore ongoing)	1 (ongoing from 2006-07)	Nil
Chief Minister's	1 new	Nil	Nil
Auditor-General	2 (1 new, 1 referred)	1 new plus 2 investigations undertaken as performance audits	2 new (1 referred, 1 declined)
Commissioner for Public Administration	1 (referred by DHCS, not resolved therefore ongoing)	Nil (but 1 ongoing from 2006-07)	1 new and 1 ongoing (disclosure from 2006-07 resolved)

The above data suggests that the take-up is low relative to the total number of employees in the ACT public sector, which at 30 June 2008 by headcount was 18,895.²⁰

Commentary

In the light of current practise set against the amendments proposed in the Bill, some general observations can be made about the overall lack of transparency, rigor and accountability demonstrated in the current arrangements.

Variations in reporting

It is not possible to analyse the effect of the Act with any precision because of variations in reporting between agencies, of which the majority are minimally compliant.

That is, data for 2006-08 is not uniformly provided under the requisite categories²¹ of number of disclosures received, type of disclosure under section 4 (2) of the Act, number referred by or to other agencies for investigation, number investigated, number on which the agency has declined to act under section 17 of the Act, and the number of disclosures substantiated by investigation.

In particular, no agency reported the outcome of the investigation of a disclosure in any meaningful way. Referencing the type of disclosure to the relevant provision in section 4 (2) of the Act was equally inconsistent and unhelpful.

²⁰ 2007-08 ACT Public Service Workforce Profile (2008), Governance Division, ACT Chief Minister's Department publication.

²¹ Public Interest Disclosure Act 1994, section 11.

However, DET reported in a relatively transparent fashion as follows:

“One disclosure made during the previous reporting period, relating to the conduct of a staff member employed under the *Public Sector Management Act 1994*, continued during 2007-08. Subsequently, the matter of complaint was not handled under the PID Act, but was treated as a complaint under the *Department’s Complaints Resolution Policy*.”

Similarly, CMD reported:

“During the reporting year 2006-07 one disclosure was referred to the Department by another agency under the *Public Interest Disclosure Act 1994*. The Public Interest Disclosure referred to alleged conduct as described in section 4 (2) of the *Public Interest Disclosure Act 1994*.

The disclosure was accepted for investigation on the basis that the reported conduct fell within the *Public Interest Disclosure Act 1994*. As the person concerned ceased their employment, no further action was taken on the basis that there was no criminal offence, and the only possible action would have been through disciplinary processes.

It was recommended that guidance material be developed to address the area of concern.”

Most agencies also declined to identify the agency involved in a referral. For example, the Auditor-General identified only the ACT Ombudsman in reporting on referrals to and from her office during 2006-09. However, the Commissioner for Public Administration had no such reservations in identifying a disclosure within DHCS that originated in 2006-07 alleging public wastage and reprisal action.

Passive reporting

Most agencies adopted a passive approach to disclosures under the Act by aligning their procedures with the requirements in the Act and going no further.

However, JACS in 2008-09 reported a focus on the development of an agency Integrity Plan, although its proposed review to further facilitate the making of disclosures and raising awareness did not occur.

DET also adopted a proactive approach by promulgating relevant information on its website together with nominated contacts points in and outside the agency and, in its annual report, identifying both a designated position to receive public interest disclosures and a nominated officer to provide advice on disclosures located in the Governance and Legal area. This was in contrast to most other agencies.

Reporting investigations of disclosable conduct and outcomes

As noted, few agencies report the outcome of an investigation beyond the most minimal of descriptions.

For example, the Auditor-General in 2007-08 reported on two disclosures, one referred by the ACT Ombudsman in 2006-07 that was investigated as a performance audit and the other received by the Auditor-General in 2007-08, also investigated as a performance audit, of which the following reported outcomes are almost meaningless:

“The performance audits that addressed issues raised in disclosures highlighted some aspects of unsatisfactory administration and management of the relevant government activities, but did not substantiate activities that were considered disclosable conduct as defined by the PID Act.”²²

Furthermore, there is no due diligence or quality assurance apparent in any of the investigation and reporting processes. This is clear from the disclosure within DHCS on which the Commissioner for Public Administration reported from 2006-09.

This disclosure alleged public wastage and reprisal action originating in 2006-07 and was in two parts. One part was referred by the ACT Ombudsman to the Commissioner as presumably being employment-related. The Commissioner with DHCS jointly investigated the disclosure under section 24 of the Act over the next three years.

However, all that was reported in 2008-09 was that “an investigation ... relating to alleged public wastage and reprisal action within the Department of Disability, Housing and Community Services was completed.”²³

Reporting workforce data

There is a significant delay between the publication of whole-of-government data on the workforce profile of the ACT Public Service (ACTPS) and the incidence of disclosures by each entity (reportable by no later than 30 September each year) as would enable analysis of the number of disclosures relative to number by headcount and full-time equivalent (FTE) for each agency.²⁴

This is in spite of the purpose of the profile being “to enhance data comparability and identify trends in relation to the shape and size of the ACTPS.”²⁵

The following table provides the most recent data across all ACT government agencies.

Headcount and FTE by agency as at June 2008²⁶

Agency	HEADCO UNT	% of ACTPS by headcou nt	TOTAL FTE
ACT Health	5,015	26.5%	4,359.3
ACT Planning and Land Authority	277	1.5%	262.6
Auditor General's Office	37	0.2%	35.4
Calvary Public Hospital	998	5.3%	705.4
Canberra Institute of Technology	994	5.3%	593.9

²² Auditor-General's Annual Report 2007-08.

²³ It is unclear what happened to the first part of the disclosure; the ACT Ombudsman does not appear to address the matter in any of his annual reports from 2006-09.

²⁴ In 2006-09 the ACTPS workforce profile as at end June 2007 and 2008 respectively was not published until the following calendar year. At the time of writing (October 2009) the ACTPS workforce profile as at end June 2009 has not been published.

²⁵ *2007-08 ACT Public Service Workforce Profile*, Governance Division, ACT Chief Minister's Department publication, January 2009, Foreword.

²⁶ *Ibid.* The ACTPS workforce profile “provides both a snapshot of the Service as at the last pay date in the 2008 financial year (23 June 2008) and the financial year (July 2007 to June 2008).”

Chief Minister's Department	185	1.0%	176.8
CIT Solutions	94	0.5%	53.1
Cultural Facilities Corporation	133	0.7%	81.1
Department of Education and Training	5,298	28.0%	4,392.0
Department of Treasury	1,049	5.6%	1,010.3
Disability, Housing and Community Services	1,133	6.0%	1,060.4
Exhibition Park in Canberra	10	0.1%	9.7
Gambling and Racing Commission	31	0.2%	31.8
Justice and Community Safety	1,443	7.6%	1378.1
Land Development Agency	74	0.4%	72.9
Legal Aid Commission (ACT)	56	0.3%	53.1
Legislative Assembly Secretariat	41	0.2%	29.6
Territory and Municipal Services	1,230	6.5%	1,160.7
Territory and Municipal Services – Action Buses	797	4.2%	692.1
Total	18,895	100.0%	16,158.3

The Commissioner for Public Administration is not bound to publish ACTPS workforce data and does so of her own volition. The Bill would have amended section 20 of the Act to provide that the Commissioner's functions also included functions given under the Bill.

No substantiated disclosures

No agency from 2006-09 reported on the requirements in section 11 of the Act to publish in their annual report particulars of remedial action taken for each substantiated disclosure, together with any recommendation of the Ombudsman or Auditor-General relating to the agency involved.

It is not clear if this is the result of a formal finding following an investigation of all matters of fact and law that a disclosure was *not* substantiated to the applicable standard of proof²⁷ or a universally loose approach to what 'substantiated' really means.

Absence of analysis

In the absence of any rigorous analysis, there appears to be scant grounds for the claim that disclosures (at least those investigated by the Ombudsman) tend to be connected with workplace disputes and grievance processes. One may also ask why the Ombudsman would investigate such disclosures (rather than the Commissioner for Public Administration) where wider agency-specific issues are involved.

On the other hand, legal proceedings invoking the Act appear to have greater relevance. *Falk v Australian Capital Territory and Ors*²⁸ involved reprisal action arising wholly in the context of serious workplace issues ultimately leading to termination of employment and

²⁷ That is, on the balance of probability (civil) or beyond a reasonable doubt (criminal).

²⁸ *Falk v Australian Capital Territory and Ors* [2006] ACTSC 68 (7 July 2006).

reinstatement. *Berry v Ryan*²⁹ also involved reprisal action within the workplace in relation to the tort of misfeasance in a public office. Both actions failed.

Against this, *Fry and University of Canberra*³⁰ involved Freedom of Information claims of exemptions and the imposition of a processing charge with the link to the Act being limited to protection of information, while the plaintiff in *Mann v Carnell*³¹ sought to characterise his substantive claims involving legal professional privilege and defamation as 'whistleblowing'. The ACT Supreme Court found it unnecessary to rule on this point.

In addition, no agency that reported disclosures it received or transferred during 2006-09 identified the way in which the ones it described as having been 'resolved' or 'completed' were in fact resolved or completed.

Similarly, there is little if any carry-over by agencies between reporting periods for disclosures the investigation of which is reported as 'ongoing'. The result is that the final outcome of most such investigations cannot be tracked with certainty or at all.

²⁹ *Berry v Ryan* [2001] ACTSC 11 (22 February 2001).

³⁰ *Fry and University of Canberra* [2005] ACTAAT 23 (13 October 2005).

³¹ *Mann v Carnell* [2001] ACTSC 18 (16 March 2001).