

Submission by the
ACT Ombudsman

**REVIEW OF THE *PUBLIC INTEREST
DISCLOSURE ACT 2012 (ACT)***

Submission by the ACT Ombudsman, Michael Manthorpe

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Introduction and summary

The role of the ACT Ombudsman is to influence improvement in public administration in the Australian Capital Territory, as well as providing assurance that ACT Government agencies that fall within our jurisdiction act with fairness and integrity.

The Office welcomes the opportunity to provide a submission in relation to the review of the *Public Interest Disclosure Act 2012* (the Act).

This submission focuses on:

- The functions of the ACT Ombudsman and other integrity agencies under the Act.
- Observations and lessons learned from the [Review of the Public Interest Disclosure Act 2013 by Mr Phillip Moss AM \(Moss Review\)](#).

Response to the Review of the PID Act 2012

Oversight of the ACT PID scheme

Broad oversight of the ACT public interest disclosure (PID) scheme rests with the Public Sector Standards Commissioner (the Commissioner). The Commissioner's functions include:

- Providing advice to entities about PIDs.
- Reviewing the way entities investigate and deal with PIDs.
- Ensuring just outcomes for people who make PIDs and educating entities about PIDs.

The role of the ACT Ombudsman includes:

- Receiving and allocating PIDs relating to ACT government entities.
- Investigating complaints about the handling of PIDs.

The ACT Ombudsman can also investigate PIDs relating to the head of service.

Because of the limited number of PIDs, complaints and enquiries we receive, the ACT Ombudsman has limited visibility of the overall effectiveness of the scheme.

In the 2018–19 financial year, the Office received 10 contacts about the scheme:

- Two were disclosures made directly to our Office.
- Three were complaints about the handling of a disclosure by a Directorate.
- Five were general enquiries about the scheme.

Disclosure officer assessments

In order for a disclosure to be investigated, it must be made to a disclosure officer or other person nominated in section 15 of the Act. When a disclosure officer receives a disclosure, they first need to determine whether it meets the definition of disclosable conduct under section 8 of the Act. If the disclosure officer determines that it does meet that definition (i.e. that it is a PID), they must provide it to the head of the entity to which it relates. Section 18 of the Act requires the receiving entity to investigate the PID or exercise a discretion not to investigate under section 20 of the Act.

We are aware of circumstances in which a second consideration of whether a matter meets the definition of disclosable conduct has been conducted after the disclosure officer has made the original decision and provided the PID to the head of an entity. This can lead to a subsequent determination that the information does not meet the definition of disclosable conduct under section 8, and is therefore not investigated under the scheme. The Act does not explicitly provide for this decision to be made more than once.

We also note that the Act is silent as to the process by which the assessment by a disclosure officer whether or not a disclosure meets the definition of disclosable conduct is made.

In our view, it is in the public interest for a discloser to have certainty as to whether information they provided has been assessed as a PID and whether they are subject to the protections of the PID Act. This is also consistent with the objects of the Act—ensuring people who make public interest disclosures are protected and treated respectfully and that public interest disclosures are properly investigated.

We suggest that the review considers clarifying:

- The obligations of the disclosure officer with regard to assessing disclosures.
- Whether a disclosure officer assessment, once completed, can be overturned by a different decision-maker.

Disclosable conduct

While noting the limited number of PIDs, complaints and enquiries received by this Office, it is our experience that disclosers (or potential disclosers) often have multiple avenues available to address the matter they are raising.

For example, where a disclosure involves a personal employment-related grievance, such as bullying and harassment, or discrimination, disclosers may be able to access personal remedies through the Fair Work Commission, the ACT Human Rights Commission, or an internal review process. More broadly, where disclosures concern matters of administration, disclosers may also access the complaints process under the *Ombudsman Act 1989*.

The threshold test for making a PID, and effectiveness of PID legislation in attracting serious public interest matters in the Commonwealth, was examined in the Moss Review of the *Public Interest Disclosure Act 2013* (Commonwealth PID Act). The Moss Review highlighted that the overwhelming majority of disclosures in the Commonwealth scheme concerned employment-related grievances or minor allegations of wrongdoing. Noting the fact that other existing legislative frameworks are better adapted to dealing with and resolving personal employment-related grievances, the Moss Review recommended that the definition of ‘disclosable conduct’ in the Commonwealth PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless it relates to systemic wrongdoing.

Noting its greater oversight and involvement in the ACT PID scheme, the Commissioner may be in a better position to comment on the operation of the threshold test in the Act. However, this review provides an opportunity to consider how effective the Act’s definition of disclosable conduct is in attracting the kinds of disclosures targeted by the scheme.

Complaints and reviews

The ACT PID scheme is unusual in that it has both an oversight body in the Commissioner and a complaints body in the ACT Ombudsman.

The structure of the current legislative framework also provides for the ACT Ombudsman to:

- Investigate matters under the ACT Ombudsman Act.
- Exercise any of the functions of the Commissioner in relation to a complaint about the handling or investigation of a PID, including amending or setting aside a decision.

We have not been able to identify an occasion on which the Office has used the functions of the Commissioner. However, there is an argument that the current framework creates the potential for duplication in oversight. It could also lead to a situation where disclosers may seek review of a decision with both our Office and the Commissioner.

While in such instances either the ACT Ombudsman or the Commissioner could exercise discretion not to investigate on the basis that the information has already been investigated, it may be unnecessary for both bodies to have the power to undertake the same kind of review.