



CPSU (PSU Group) Submission:

**Review into the ACT Public Interest
Disclosure Act**

July 2019

Background

The Community and Public Sector Union (CPSU) PSU Group is an active and progressive union committed to promoting a modern, efficient and responsive public sector delivering quality services and quality jobs. As the largest union in the ACT Public Service (ACTPS), the CPSU welcomes the opportunity to review the legislation to strengthen its Public Interest Disclosure (PID) legislation.

Protection for whistle blowers is an issue of great significance to our members in the ACT public sector, as well as other public service jurisdictions. Our submission is based on the observations and experiences of our members through the utilisation of the Public Interest Disclosure Act.

It should be noted that the CPSU provided a comprehensive submissions and testimony to the Legislative Assembly Committee examining the Integrity Commission, and the critical importance of Public Servants being able to come forward and say something when they identify questionable actions or conduct.

CPSU noted during this testimony and in submissions that adequate protections for Public Servants in taking this action are critical. This principle extends to the PID Act, and ensuring that when a Public Servant is making, or involved in a disclosure regarding questionable or potentially corrupt conduct, that protection is conferred to those involved in the disclosure, against any adverse action, and their identities where possible.

There are three key issues that our submission will address:

1. Strengthening the protections for both complainants and witnesses under the PID Act and other legislation;
2. Ensuring staff of the ACTPS are adequately educated in their rights, protections and responsibilities, with regard to the PID Act, and other legislation;
3. Reframing how the PID Act interacts with the Integrity Commission and other legislation.

Protection for both complainants and witnesses

Relevant term of reference: The application of the PID Act to the IC Act - in particular, its articulation with any protected disclosure provisions that may apply to any informants providing assistance to the Integrity Commissioner or anyone consequently at risk.

In responding to the Term of Reference (ToR), the CPSU notes concern with the interaction between the disclosures under the PID Act, and the protections provided to those involved. Currently, when a disclosure is made under the PID Act, the person disclosing the action is protected from any adverse action and identification, where possible.

However, it is the CPSU's understanding that this protection does not extend to the

other parties that are involved in the proceeding investigations once the disclosure has been made. This would include witnesses to the disclosed action, or other parties that are providing information on the disclosed action.

This has the significant risk of inadvertently being able to identify the discloser by omission. An example of this can be seen when a disclosure is made in a small team of five Public Servants, for an action taken by the team's director. If the other team members are identified as witnesses, it is clear that by omission of the fifth person, that the remaining public servant is the person who has made the disclosure.

Another issue with not providing protections to witnesses, is the recourse available against that witness/es for making an adverse testimony in support of the disclosure. While it is of course both unethical and prohibited to take adverse action against these witnesses, it is the CPSU's experience that retribution against cooperating witnesses is not uncommon in these scenarios.

It should also be noted that Section 9 of the Public Sector Management Act, 1994 confers an obligation to Public Servants to report any maladministration or corrupt or fraudulent conduct to the head of service or another Director General.

While it is appropriate for some matters to be dealt with through this process rather than escalating it through the PID process, the protections are not apparent. While these are implied, section 9 of the Public Sector Management Act, 1994 does not explicitly confer the same protections to disclosers of such conduct.

Recommendation 1: That the PID Act be amended to provide the same protections against both adverse action and identification, that are provided to disclosers, to Witnesses.

Recommendation 2: That the Public Sector Management Act, 1994 is amended to reflect the same protections for disclosers and witnesses, under S.9 PSM Act, as are proposed under the PID Act.

Education of the ACTPS in the PID Act and other Legislation

Relevant term of reference: The application of the PID Act to the IC Act - in particular, its articulation with any protected disclosure provisions that may apply to any informants providing assistance to the Integrity Commissioner or anyone consequently at risk.

The CPSU recognises the PID Act sits within a hierarchy of complementary legislation with common objectives relating to integrity.

Section 9 of the Public Sector Management Act, 1994 confers an obligation to Public Servants to report any maladministration or corrupt or fraudulent conduct to the head

of service or another Director General. Likewise, the Integrity Commission Act 2018, confers similar obligations on Public Servants.

The CPSU recognises the challenges faced by ACTPS in complying with several layers of legislation and obligations pertaining to how a Public Servants should report questionable conduct or potential misconduct. This has recently become more relevant with the changes to the ACT Government Enterprise Agreements, Section H; as well as the PID Act's interaction between the Public Sector Management Act 1994, and the Integrity Commission Act 2018.

It is the experience of the CPSU that some staff are unaware of the avenues available, and/or the obligations in reporting questionable conduct or potential misconduct. This is exacerbated, given the inability to determine what level the conduct in question is, as to what legislation or instrument, should be reported under.

It is clear that educational programs, and/or clear and concise information sessions need to be conducted with the ACTPS, as to both make staff aware of their obligations, and demonstrate how these decisions should be made. These programs should be reflected in all relevant guidelines and published material.

Recommendation 3: At the completion of the PID Act review, that the ACT Government undertake an educational program with ACTPS, to ensure staff are aware of their obligations in reporting questionable conduct or potential misconduct, are aware of how these actions should be reported and to which body they should be reported to. These programs should be developed in consultation with the CPSU, and other relevant stakeholders.

Interaction between the PID Act and other legislation

Relevant term of reference: the Relationships between existing integrity bodies in the ACT, including the sharing of information and the referral of complaints; oversight and accountability mechanisms; and identifying gaps in the current framework to determine solutions.

As discussed previously, the CPSU recognises the PID Act sits within a hierarchy of complementary legislation with common objectives relating to integrity. The CPSU supports these aims as they pertain to an open, honest and transparent public service beyond reproach; that can and must provide frank and fearless advice, with integrity.

Section 9 of the Public Sector Management Act, 1994 confers an obligation to Public Servants to report any maladministration or corrupt or fraudulent conduct to the head of service or another Director General. Likewise, the Integrity Commission Act 2018, confers similar obligations on Public Servants.

What is not apparent to members of the CPSU, and to the wider ACTPS, is how

these instruments interact with each other, including how matters are referred from one level to another. The CPSU believes this is a vital aspect that must be resolved to ensure a public service beyond reproach.

This could include complimentary amendments to both the Public Sector Management Act 1994 and the Integrity Commission Act 2018 to clearly demonstrate how these actions interact with each other.

Recommendation 4: That the ACT Government consider clear and concise amendments to instruments to demonstrate how these interact with each other.