



A Guide to the

Public Interest

Disclosure

Act 1994

JANUARY 2005

Public Sector Management & Industrial Relations
CHIEF MINISTER'S DEPARTMENT

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NOTE: This guide is intended as an overview of the Act and is provided for information purposes only. Any person seeking to rely on provisions of the Act must refer to the Public Interest Disclosure Act 1994, as amended by the Public Interest Disclosure (Amendment) Act 1997.

THE PUBLIC INTEREST DISCLOSURE ACT 1994 - SUMMARY

The *Public Interest Disclosure Act 1994* provides a vehicle for people to report wrongdoing in the ACT public sector - this is called making a public interest disclosure (also known as “whistleblowing”).

Who can make a disclosure?

- anyone - whether you work in the public sector or know of conduct against the public interest;
- you simply need to believe on reasonable grounds that your information tends to show some wrongdoing has occurred. You don't need to identify the people involved but you do need to give enough information to permit investigation.

There are penalties for providing information that you know to be false or misleading

What can you disclose?

The Act covers reporting of different kinds of wrongdoing by public officials in the ACT public sector such as:

- dishonesty or bias;
- misuse of official information;
- negligent or improper management of government funds;
- trying to influence a public official to act improperly; or
- victimising a person because they have made a public interest disclosure.

Who can you disclose to?

- the agency where the conduct occurred;
- an agency that you think may have the power to investigate the conduct;
- any ACT Government agency you think best;
- the ACT Ombudsman or Auditor General.

How are you protected if you make a disclosure?

- the Act limits legal action that can be taken against you because you have provided the information;
- if you are a government employee and at risk of victimisation, you can ask to be moved to another job;
- if you are victimised, you can go to court to take action to stop victimisation or to seek damages.

You may need to see a lawyer if you need legal advice about your case or about going to court.

What must ACT Government agencies do under the Act?

Agencies must:

- receive disclosures;
- treat disclosures confidentially;
- consider the risk to the informant when referring the disclosure to another agency;
- deal with disclosures that come under the Act and involve that agency;
- keep statistical records of disclosures received and report on this in annual reports;
- give people who make disclosures feedback about the investigation of the disclosure;
- take appropriate action about complaints of victimisation and tell the complainant about the remedies available.

Is every disclosure investigated?

No - agencies can decide not to investigate, but only for reasons set out in the Act. These are:

- that agency is not the right body to deal with the disclosure - they may refer the disclosure to another agency or the Ombudsman;
- the disclosure does not come under the Act;
- another government body, court or tribunal has already dealt with the matter;
- they think the disclosure has no basis; or
- there is a better way to deal with the disclosure.

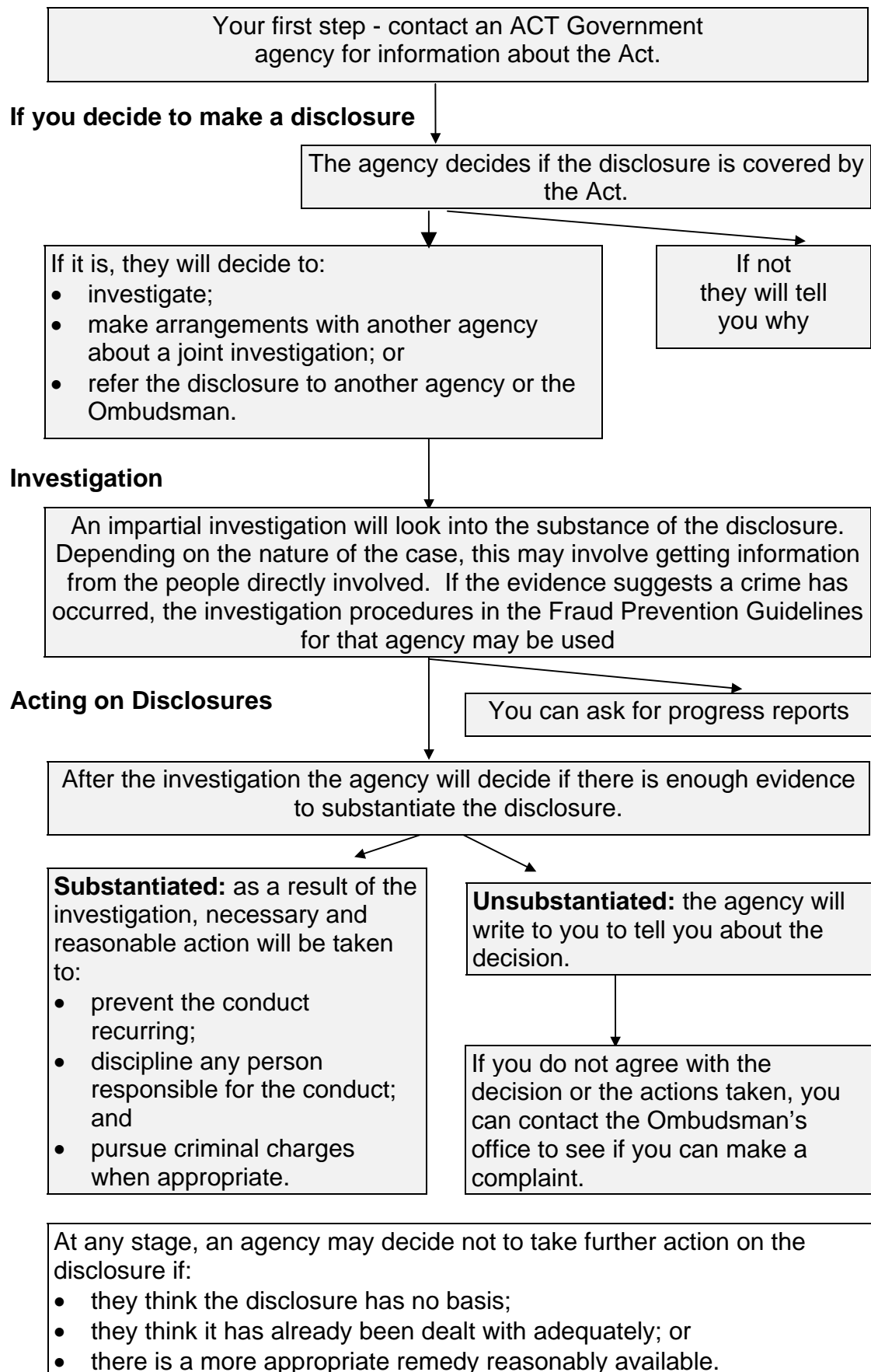
The agency must tell you which reason applies.

Other action available

If you are not satisfied you may:

- contact the ACT Ombudsman or Auditor General. There may be grounds for further action;
- you may also wish to seek your own legal advice about your rights.

What happens when you make a Public Interest Disclosure



GUIDE TO THE PUBLIC INTEREST DISCLOSURE ACT 1994

Introduction

The object of the *Public Interest Disclosure Act 1994* is to encourage the disclosure of improper conduct or wrongdoing in the ACT public service.

The Act:

- requires all government agencies to set up procedures to receive and investigate public interest disclosures and to act on substantiated disclosures;
- ensures that agencies provide information about the Act and procedures;
- provides informants with certain protections in the event of reprisal because they have made a disclosure;
- creates a criminal offence of unlawful reprisal; and
- provides a civil remedy for damages and a right to apply for an injunction or order to stop reprisals.

Members of the public as well as current and former ACT public servants may make a 'public interest disclosure' to any ACT government agency.

THE PUBLIC INTEREST DISCLOSURE ACT 1994

The *Public Interest Disclosure Act 1994* (the Act) commenced on 21 June 1995. It replaced the whistleblower provisions in the *Public Sector Management Act 1994*.

The *Public Interest Disclosure (Amendment) Act 1997* commenced on 3 March 1997 and makes some technical amendments to the Act.

KEY TERMS IN THE ACT

What is a public interest disclosure?

Two key terms are used to define conduct that falls within the ambit of the Act - 'public interest disclosure' and 'disclosable conduct'.

'**Public interest disclosure**' is defined in section 3 as disclosure of information that the informant believes on reasonable grounds tends to show:

- that another person has engaged in, is engaging in or proposes to engage in, **disclosable conduct**;
- **public wastage**;
- that a person has engaged in, is engaging in or proposes to engage in, an **unlawful reprisal**; or
- that a **public official** has engaged in, is engaging in or proposes to engage in, conduct that amounts to a substantial and specific danger to the health or safety of the public.

Conduct includes acts or omissions.

Conduct is taken to be **disclosable** under the Act if it falls within the types of conduct set out in subsection 4(2). The types of conduct are:

- conduct of a person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, honest or impartial performance of official functions by a public official or government agency;
- conduct of a public official that amounts to the performance of any of his or her official functions dishonestly or with partiality;

- conduct of a public official, a former public official, or a government agency, that amounts to a breach of public trust;
- conduct of a public official, a former public official, or a government agency, that amounts to the misuse of information or material acquired in the course of the performance of official functions (whether or not for the benefit of that person or agency or otherwise);
- a conspiracy or attempt to engage in any of the above conduct.

This conduct could be:

- a criminal offence;
- a disciplinary offence (ie grounds for disciplinary action under a Territory law);
- reasonable grounds for terminating the services of a public official.

'Public wastage' means:

'conduct by a public official that amounts to negligent, incompetent or inefficient management within, or of, a government agency resulting, or likely to result, directly or indirectly, in a substantial waste of public funds, other than conduct necessary to give effect to a law of the Territory'.

A **'public official'** is defined as:

- an officer or employee of a government agency;
- a person employed, by or on behalf of the Territory or in the service of a Territory authority or Territory instrumentality, whether under a contract of service or a contract for services, including a person who had ceased to perform those services; or
- a person otherwise authorised to perform functions on behalf of the Territory, a Territory authority or Territory instrumentality.

'Unlawful reprisal' is defined in section 3 of the Act as conduct that causes or threatens to cause, detriment:

- to a person in the belief that any person has made, or may make a public interest disclosure; or
- to a public official because he or she has resisted attempts by another public official to involve him or her in the commission of an offence.

'Detriment' is also defined in section 3. It means:

- injury, damage or loss;
- intimidation or harassment; or
- discrimination, disadvantage or adverse treatment in relation to career, profession, employment, trade or business.

WHO CAN MAKE A PUBLIC INTEREST DISCLOSURE?

Any person

Any person can make a public interest disclosure to a 'proper authority' (section 15).

Disclosures can relate to events or conduct that occurred before the commencement of the Act on 21 June 1995 (section 15). It is not necessary that the person making the disclosure identify the people involved.

There is no requirement that disclosures be in writing.

A court or tribunal

Under Section 5 of the Act, a court or tribunal can refer to a 'proper authority' information that is disclosed during its proceedings that could amount to a public interest disclosure.

WHO CAN RECEIVE DISCLOSURES?

Proper Authorities and Government Agencies

The Act uses two terms to refer to the public sector bodies covered by the Act - proper authorities and government agencies.

Proper authorities are the persons or bodies authorised to receive public interest disclosures under the Act (see the definition in section 3). Each government agency is a proper authority to receive disclosures (section 9).

The term government agency is defined in section 3 to mean:

- an administrative unit;
- a Territory instrumentality; or
- a statutory office holder and associated staff.

Territory owned corporations or subsidiaries fall within the definition of a Territory instrumentality. Other public sector corporate bodies, agencies or instrumentalities of the Territory that are subject to Ministerial control fall within this definition. The Chief Minister may also declare whether a particular body is a Territory instrumentality for the purposes of the Act.

This means disclosures can be made to ACT Government Departments, Territory Owned Corporations (ACTEW, ACTTAB and Totalcare) and to ACT statutory office holders about conduct of public officials (public servants, employees, contractors or consultants) that relates to these bodies.

The ACT Ombudsman and the ACT Auditor General are also proper authorities to receive disclosures.

Each government agency is a proper authority to receive disclosures:

- concerning the agency's conduct or the conduct of a public official in relation to the agency;
- concerning a matter, or conduct of a person that the agency has a function or power to investigate;
- that are referred by another government agency; or
- that the person making the disclosure believes that the agency is a proper authority to receive the disclosure.

OBLIGATIONS OF AGENCIES

The Act requires agencies to:

- establish procedures to deal with disclosures;
- treat disclosures confidentially;
- set procedures in a document available to officers, for inspection by members of the public and for purchase;
- provide information to facilitate the making of disclosures;
- provide information about protection against unlawful reprisals;
- deal with all disclosures received;
- act on substantiated disclosures;
- provide reasonable information about investigations to persons who have made disclosures;
- take appropriate action about complaints of victimisation and tell the complainant about remedies that are available; and
- provide details of disclosures in annual reports.

Procedures

Each government agency must put in place procedures for receiving and dealing with disclosures made under the Act.

Procedures must deal with:

- making public interest disclosures;
- assisting and providing information to people to make public interest disclosures;
- protection from unlawful reprisals; and
- acting on unlawful reprisals.

A document setting out procedures must be available to officers and members of the public within 12 months of commencement of the Act (that is by 21 June 1996) or within 12 months after the establishment of an agency.

Reporting requirements

Agencies must provide information in annual reports (section 11). This must include:

- a description of procedures established;
- annual statistics; and
- particulars of any remedial action taken as a result of a disclosure.

Statistics should describe:

- the number of disclosures received;
- the number of each type of disclosure (this refers to the types described in subsection 4(2) of the Act);
- disclosures received on referral from other agencies;
- disclosures investigated;

- disclosures referred to other agencies by:
 - total number referred;
 - identity of agency and number referred to the agency; and
 - number of each type referred;
- number of disclosures where the agency declined to act under section 17;
and
- the number of substantiated disclosures.

The report of remedial action should state:

- the number of disclosures substantiated on investigation by the agency;
and
- any recommendations of the ACT Ombudsman or the Auditor General that relate to the government agency making the report.

ACTING ON PUBLIC INTEREST DISCLOSURES

When a government agency receives information from an identified informant that falls within the ambit of the Act, the agency must either consider the matter and take proper action; decline the disclosure under section 17; or refer the disclosure to an appropriate agency or the Ombudsman.

Requirement to deal with disclosures

The Act provides that an agency must:

- investigate disclosures that relate to the agency's conduct; the conduct of its public officials; or to matters or conduct that the agency has a function or power to investigate (section 19);
- refer disclosures that do not relate to any of its activities, or to a matter or conduct that it has a power to investigate, to the appropriate agency unless there is a serious risk of unlawful reprisal or prejudice in the investigation. In that case, the disclosure must be referred to the Ombudsman (sections 18, 21);
- refer disclosures under investigation to another agency where the subject matter relates to the conduct of the other agency or is a matter the other agency has a power or function to investigate (section 20).

Where agencies have overlapping obligations under the Act, section 24 permits agencies to make arrangements to avoid duplication; make efficient and economic use of resources; or achieve the most effective result.

When investigation is not required

It is not necessary to investigate a disclosure if:

- the disclosure is made anonymously (section 16);
- the information does not fall within the ambit of the Act (see definition of public interest disclosure in section 3, and disclosable conduct in section 4);
- where the subject matter of the disclosure does not relate to any act by the agency or its officers or employees or is not a matter the agency has a power or function to investigate. In this case, the disclosure must be referred to another agency (section 18) or to the Ombudsman (section 21); or
- the disclosure falls within the grounds to decline to investigate set out in section 17.

Grounds to decline to investigate

Under section 17, agencies can decline to investigate a disclosure where:

- the disclosure is frivolous, vexatious, misconceived or lacking in substance or trivial;
- there is a more appropriate method reasonably available;
- the disclosure has already been dealt with adequately; or
- the disclosure reopens a matter already determined by a court or tribunal.

If the disclosure has been referred to an agency by the Ombudsman or the Auditor General, the disclosure cannot be declined unless the Ombudsman or the Auditor General agrees there are adequate grounds for the decision not to investigate (section 17).

Information to persons making disclosures

Agencies are obliged to provide information about the Act and the protection and remedies against unlawful reprisals to people enquiring about making a public interest disclosure. Agencies are obliged to facilitate the making of disclosures.

Progress reports

Under section 23, people who have made disclosures may request progress reports. Agencies are obliged to respond as soon as practicable; every 90 days after that; and then at the completion of action.

Progress reports must include:

- whether the agency has declined to investigate under section 17 and the ground for the decision;
- whether the matter has been referred to another agency and the details of the agency;
- the status of any investigation; and
- the findings of a completed investigation and proposed action.

Confidentiality requirements

Confidentiality requirements set out in section 33 of the Act apply at all times. This means that information about disclosures gained through an official's involvement in an investigation can be revealed only:

- for the purposes of the Act or any regulations made under the Act;
- if expressly authorised by another Territory law; or
- for the purposes of a court or tribunal proceeding.

“Confidential information” is defined to mean:

- information about the identity, occupation or whereabouts of a person who has made a public interest disclosure, or against whom a public interest disclosure has been made;
- information contained in the disclosure;
- information about a person’s personal affairs; and
- information that, if disclosed, may cause detriment to a person.

A person in breach of these provisions is subject to a penalty.

As a matter of practice, appropriate management of the information in a disclosure is an important way of limiting the possibility of unlawful reprisal against an informant.

REMEDIAL ACTION FOLLOWING INVESTIGATION

Agencies must act on substantiated disclosures

Under section 22, proper authorities must take necessary and reasonable action when the investigation or a report by the Ombudsman or the Auditor General reveals:

- disclosable conduct;
- public wastage;
- an unlawful reprisal;
- action by a public official that amounts to a substantial and specific danger to the health or safety of the public.

Agencies must take necessary and reasonable action to:

- prevent the conduct or reprisal continuing or recurring; and
- discipline any person responsible for the conduct or reprisal.

This requirement does not apply where an investigation reveals conduct that amounts to a substantial and specific danger to the health or safety of the public **and** the conduct is necessary to give effect to a law of the Territory.

PROTECTION PROVIDED BY THE ACT

The Act protects a person making a public interest disclosure from legal action and unlawful reprisal. Under section 35, a person who makes a public interest disclosure to a proper authority:

- is not subject to any liability for making a disclosure or providing information in relation to a disclosure;
- does not commit an offence under a provision of an Act which imposes a duty to maintain confidentiality;
- does not breach an obligation by way of oath or rule of law or practice requiring confidentiality; and
- has a defence of qualified privilege in proceedings for defamation.

Note: there is a penalty for knowingly or recklessly supplying false or misleading information (section 34). Nothing in the Act entitles a person to disclose information otherwise subject to legal professional privilege (section 8).

Unlawful reprisals Part IV of the Act provides certain remedies for, and protection against, unlawful reprisal as a result of making a public interest disclosure. Unlawful reprisal is defined in section 3 of the Act. It refers to: “conduct that causes, or threatens to cause, detriment”

- (a) to a person in the belief that any person has made, or may make a public interest disclosure; or
- (b) to a public official because he or she has resisted attempts by another public official to involve him or her in the commission of an offence”. An unlawful reprisal may be the subject of a further public interest disclosure (see the definition of public interest disclosure in section 3). The protection against unlawful reprisal in the Act include:

- creation of an offence of unlawful reprisal;
- creation of a civil remedy in damages;
- the right for a person who is the subject of unlawful reprisal, or the Ombudsman acting on behalf of that person, to seek a court order or injunction;

- the right of officers of government agencies to be relocated where practicable;
- the requirement that an agency considers the risk of unlawful reprisal before referring a disclosure to another agency for investigation. If there is such a risk, the disclosure must be referred to the Ombudsman; and
- the obligation that proper authorities provide people complaining of unlawful reprisal with information about protection and remedies available under the Act.

Offence of unlawful reprisal Section 25 makes it an offence for a person to engage in, attempt to engage in, or conspire to engage in, an unlawful reprisal. A defence is available where :

- the person had just and reasonable grounds for the conduct; and
- the person was not aware that the informant had made a public interest disclosure at the time of the conduct.

Where it appears an offence may have occurred, agencies will usually seek the advice of the Fraud Prevention Manager in the Chief Minister's Department, the Office of the Director of Public Prosecutions or the Federal Police. A decision can then be made whether a prosecution should be pursued.

Obligation to provide information Under section 26, agencies must provide a person making a disclosure about an unlawful reprisal with information about the remedies and protection available under the Act.

Relocation of officers Officer's of government agencies who fear unlawful reprisal may ask to be relocated (section 27). The government agency must, as far as practicable, relocate the officer if:

- there is a danger of unlawful reprisal if the officer continues in their current position; and
- the only practical means of removing the danger of reprisal is to relocate the officer.

This does not authorise the relocation of a public official to another position in the government agency without the consent of the public official (section 28).

Civil claims Section 29 creates a liability in damages against a person who engages in unlawful reprisals. Claims for damages must be made in a court of competent jurisdiction in the same way as a tort claim (for example, as a claim for damages for negligence). This means a claim can be made in

the Small Claims Court, the Magistrates Court or the Supreme Court. A claim brought in the Magistrates Court is limited to an award of \$50,000. In the Small Claims Court, the limit is \$5,000. *It may be necessary to seek legal advice about taking a case to court.*

Application for an injunction or order Under section 30 of the Act, a person who claims they are, or may be, the subject of unlawful reprisal, may seek an injunction or order from a court against those taking such action. The ACT Ombudsman may also apply for an injunction or order on their behalf. (An injunction is a court order that a person must do or not do something.) Under section 31 of the Act, if the court is satisfied that the claim is substantiated it may:

- order action to remedy the detriment, or
- grant an injunction the court considers appropriate.

This includes an interim order or injunction. These remedies also cover accessory responsibility. That is, the remedies may be applied to people who aid and abet or induce the conduct, or who are in any way knowingly concerned in, or are a party to an unlawful reprisal.

Damages and costs Under section 32 of the Act, if the Ombudsman applies for an injunction or order, no undertaking as to damages or costs is required. An undertaking as to damages refers to a Court's request to a person applying for an interim injunction to cover any loss suffered by the other party as a result of the injunction if the applicant loses at the trial. The undertaking will be a condition of the interim injunction. This provision means the Ombudsman cannot be asked to make such an undertaking. The Ombudsman may give an undertaking on behalf of the person claiming to suffer the detriment for the unlawful reprisal.

Other legal action not limited Section 6 of the Act preserves any rights or protection given by other Acts or laws. The fact that a person makes a public interest disclosure does not prejudice action by other available remedies.

The Ombudsman and the Auditor General are proper authorities to receive disclosures.

THE ROLE OF THE OMBUDSMAN AND THE AUDITOR GENERAL

When investigating a disclosure under the *Public Interest Disclosure Act 1994*, the ACT Ombudsman may exercise any of the powers under the *ACT Ombudsman Act 1989*. Under that Act, the Ombudsman has wide powers to investigate complaints about action that relates to a matter of administration by government agencies and other prescribed authorities.

The wide ambit of the *Auditor-General Act 1996* means the Auditor General may look at a range of matters disclosed under *Public Interest Disclosure Act 1994*. Under functions conferred by the *Auditor-General Act 1996*, the Auditor General may:

- audit financial statements of the Territory, departments and Territory authorities under the *Financial Management Act 1996*;
- audit accounts and records in respect of any person, body or thing determined by regulations; and
- conduct performance audits in respect of any person, body or thing determined by the regulations.

Ombudsman or Auditor General investigation of disclosures

Under section 14, the Ombudsman or the Auditor General may investigate a matter as a public interest disclosure where:

- the conduct relates to their agencies or is a matter they have a power or function to investigate;
- there is no other proper authority that can deal with the matter;
- a proper authority has failed to deal with the matter adequately.

The Ombudsman has an additional role where an agency refers a matter to the Ombudsman because there is a risk of reprisal or prejudice if the matter were referred to another proper authority (section 21).

Recommendations by the Ombudsman and the Auditor

General Agencies must take reasonable and necessary action as a result of recommendations by the Ombudsman or the Auditor General unless the matter involves conduct that amounts to a substantial and specific danger to the health of the public **and** the conduct is necessary to give effect to a law of the Territory (see section 22). Under section 30, the Ombudsman may also apply for injunctions on behalf of a person claiming to suffer from unlawful reprisal.

PENALTIES

The Act sets penalties for certain actions. Where penalties apply to offences under the Act, section 7 states that an agent of the Territory who commits an offence under the Act is liable for the penalty.

The offence of unlawful reprisal Unlawful reprisal is an offence under the Act. The prescribed penalty for engaging in, attempting to engage in or conspiring to engage in unlawful reprisal is \$10,000 or one year's imprisonment, or both (section 25).

Breach of confidentiality Under section 33 of the Act, if a public official, without reasonable cause, makes a record of, or wilfully discloses to another person, confidential information gained through their involvement with a matter under the Act, they face a prescribed penalty of \$5000.

False or misleading information Under section 34 of the Act knowingly or recklessly providing false or misleading information in a public interest disclosure carries a penalty. Knowingly or recklessly making a false or misleading statement, orally or in writing, with the intention that it be acted on as a public interest disclosure, is subject to a penalty of \$10,000 or one year's imprisonment, or both.

Penalties for a body corporate Section 37 of the Act provides that if a body corporate is convicted of an offence under the Act, the court may impose a fine not exceeding five times the maximum prescribed penalty.

Other avenues for reporting wrongdoing Other avenues of reporting information may be relevant. For example, officers and employees can report instances of wrongdoing direct to supervisors. All agencies have fraud prevention procedures. Procedures for customer complaints may also be relevant.

WHERE TO GO FOR MORE INFORMATION?

For more information refer to the Public Sector Management Standards:

Standard 1 Parts 1 and 2 – Ethics

Best Practice Notes 1.1 - Code of Ethics

Standard 1 Part 4 - Fraud Prevention

Best Practice Notes 1.3 - Fraud Prevention

Standard 5 Part 1 - Dealing with Grievances

Best Practice Notes 5.1 - Managing Grievances, Appeals and Discipline.

Further assistance on the provisions of the *Public Interest Disclosure Act 1994* can be obtained by calling or writing to:

Manager

Strategic Human Resources

Chief Minister's Department

GPO Box 158

CANBERRA ACT 2601

Ph: 620 78700

ACT Ombudsman

GPO Box 442

CANBERRA ACT 2601

Ph: 627 60111

ACT Auditor General

PO Box 275

CIVIC SQUARE ACT 2608

Ph: 620 70833

Each agency has a contact officer, who can provide information about procedures in that agency. Copies of the Act can be purchased from the ACT Government Shopfronts.
