

Chief Minister and Treasury Directorate,  
ACT Government  
GPO Box 158 Canberra ACT 2601

11 February 2013

Dear sirs,

**Re: Comments on ‘Public Interest Disclosure Guidelines, a user’s guide to understanding the Public Interest Disclosure Act 2012 (ACT) (the ‘Act’) (the ‘Guidelines)’**

Thank you for the opportunity to provide comments on the Guidelines. This is a joint submission.

Blueprint for Free Speech (**Blueprint**) is an Australian based, internationally focused not-for-profit concentrating on research into ‘freedoms’ law. Our areas of research include public interest disclosure (whistleblowing), defamation, censorship, shield laws, media law, internet freedom (net neutrality) and freedom of information.

Our organisation has built significant expertise in the area of public interest disclosure and is currently compiling an online database to include comparative legal analysis on best-practice whistleblowing law worldwide. We regularly participate in conferences on the subject and are asked to present submissions on the importance and content of public interest disclosure legislation and related issues.

We unequivocally support the Guidelines. We also suggest the following by way of improvement.

## 1 Terminology

- (a) The use of the phrase ‘**genuine public interest disclosure**’ (see foreword) is generally not a helpful one. The reason for this is that in some cases a disclosure made, whilst made in good faith, may not in fact be one that turns out to be true. If a disclosure is made in good faith, but it turns out to be untrue, the discloser should still be afforded the protections under the Act. The normative benefit of assuring potential disclosers of the protections they will be afforded far outweighs the risk of potentially ‘untrue’ disclosures gaining protection under the Act.
- (b) The use of the phrase ‘**substantial wrongdoing**’ (see page 5, introduction) is not consistent with the definitions in the Act. Wrongdoing does not have to be ‘substantial’ within the meaning of section 8 and similar to (a) above, this has a potentially negative normative character.

## 2 'Serious' versus the 'Public Interest'

Paragraph 1.1 of the Guidelines (at page 6) sets out the meaning of a public interest disclosure. The principal focus and distinction made between that which is a public interest disclosure and that which is not is the degree of seriousness of the conduct. Whilst this is certainly one of the indications, there is no mention of the importance of the conduct being against the public interest.

It is possible to have a complaint, which is very serious in nature but does not simultaneously go against the public interest. For example, a personal relationship based complaint such as sexual harassment or bullying (unrelated to a disclosure) might be serious, but it does not fulfill the additional requirement. The public interest requirement is inherent in a public interest disclosure.

Relatedly, the use of the terminology 'serious' in paragraph 2.6 misses the point of the additional provisions in section 27(2) allowing a discloser to (in certain circumstances) go to a third party to make a disclosure. It is not the degree of seriousness that determines whether this should be done, but rather whether or not it is appropriate that the discloser use additional channels in their particular circumstances. A potential discloser should not be inadvertently misled into thinking that going to media requires an additional level of 'seriousness' than making an internal disclosure requires.

## 3 The rights of a discloser

The rights of a discloser are important to set out for their normative benefit. Making a disclosure in the public interest is a daunting task that often involves great personal risk. In the manual for the recipient of a disclosure (towards the back of the Guidelines), it is acknowledged that a discloser takes on a great degree of personal risk when making a disclosure. However, this should be included at the very front of the Guidelines. In what perhaps should be a table entitled 'rights of a discloser', it should state:

A discloser has the right to:

- make a disclosure in good faith;
- make that disclosure in a manner to be determined by them (including the media), considering all the circumstances;
- make that disclosure anonymously; and
- be afforded protection from reprisal or other detrimental action.

Additionally, a paragraph acknowledging this risk is important as well as providing the potential discloser with some comfort that their complaint will be treated with respect and dignity.

## 4 Further resources for Whistleblowers

The Guidelines, whilst making it clear that whistleblowers take on a good deal of personal risk when disclosing information in the public interest, do not provide the reader with enough additional resources of which a whistleblower should take advantage.

At the start of the Guidelines, it should be made clear that the following organisations may be contacted in the event that a whistleblower wishes to make a public interest disclosure. Additionally, it should provide commentary on why they should be contacted and the types of situations with which they may be able to assist.

(a) Whistleblowers Australia

Founded in 1993 by Brian Martin, Whistleblower's Australia is a group advocating for change to legislation and social policy whilst at the same time acting as a support network for whistleblowers or those thinking of whistleblowing. They have a chapter in each state and a national committee. Their website and contact details may be found at <http://www.whistleblowers.org.au/>.

Whistleblowers often feel alone when coming forward with a public interest disclosure. The provision of a support network can be critical in making sure that the whistleblower does not feel like this – protecting their psychological and emotional wellbeing.

Of particular note are the additional resources and contacts that Whistleblowers Australia can provide to a whistleblower, found at - <http://www.whistleblowers.org.au/resources.html> .

(b) Whistleblower Action Group

A related group is the Whistleblower Action Group (QLD), which provides a similar service and function to Whistleblowers Australia. They regularly present submissions to parliamentary inquiries or other investigations related to public interest disclosure.

We have suggested two organisations but you may know of others that would also be worth referencing. We would also recommend a list of 'Further reading'. This should not be reading of a policy or research nature, but rather provide first hand narrative based accounts of whistleblowing so that potential whistleblowers can fully understand what they can expect. You may also like to include links to documentaries or videos that can do the same. It should include a list of website for reference. The ACT does not need to endorse these sites, just to provide a small library of material, some of which may be online.

A partial list of books can be found at: <http://fairwhistleblower.ca/books/books.html>

However this is not a complete list and is quite North American-focused. Some other suggestions might for example include:

- Alford, FC 2003 . Whistleblowers: Broken Lives and Organizational Power

- De Maria, W 1999. Deadly Disclosures (Wakefield Press)
- O’Leary, R 2006. The Ethics of Dissent
- Rost, P 2006. The Whistleblower: Confessions of a healthcare hitman
- Martin, B. 1999. The Whistleblower's Handbook: How to Be an Effective Resister (Charlbury, UK: Jon Carpenter; Sydney: Envirobook,). Note: this is due to be republished around March 2013 with a major rewrite.

This section should not be an after thought tacked on at the last minute. It is potentially the most important section of the entire guideline for it will point the way to other whistleblowers’ first hand experiences. The authors of these works come from quite different perspectives in some cases, but this should not be a barrier to including them. The potential whistleblower should have as wide a library as possible to choose from to inform him- or herself.

We would like to take this opportunity to thank you again for the chance to comment on the Guidelines and encourage you to contact either one of us should you have any questions about this note or any other matter.