

## FAQS—FREQUENTLY ASKED QUESTIONS

The following FAQs aim to assist public sector agencies and public officials in relation to the operation of the PID scheme. The answers are provided as a guide and reflect the views of the Ombudsman on aspects of the PID scheme but are not intended to constitute legal advice.

» **The PID Act specifies that principal officers are able to appoint authorised officers. How many authorised officers must a principal officer appoint?**

The PID Act does not prescribe a certain number of authorised officers. However, a principal officer must take reasonable steps to ensure that the number of authorised officers appointed is sufficient to ensure that avenues for public officials ‘belonging to’ the agency who wish to discuss or report a potential wrongdoing are readily accessible. While there is no hard or fast rule as to what constitutes reasonable steps, principal officers may want to consider a mix of contextual factors, such as the size and location of their agency and perceived or actual risk that might arise if reports of wrongdoing are made to a single area (or officer) within their agency.

» **Can a public official who is appointed as an authorised officer for an agency also be delegated authority to conduct PID investigations?**

Yes, the PID Act does not prohibit the same person being appointed an authorised officer and delegated to conduct PID investigations.

» **Are public officials who investigate PIDs required to have specific qualifications (e.g. Certificate IV qualifications in Investigations)?**

The PID Act does not specify any particular qualifications necessary to perform PID investigations. However, depending on the nature of the matter, there may be certain requirements mandated by other Commonwealth legislation or procedure. For example, where the investigation relates to fraud against the Commonwealth, the principal officer must also act in accordance with the Commonwealth Fraud Control Guidelines (see regulations made under the *Financial Management and Accountability Act 1997*) to the extent that those requirements are not inconsistent with the PID Act (s 53(4)). There are requirements within the Commonwealth Fraud Control Guidelines for investigators to hold a particular level of accredited qualification.

» **The PID Act allows principal officers to delegate their functions or powers to an official who ‘belongs to’ the agency. Does the requirement to ‘belong’ to the agency limit the ability to outsource the functions relating to PID investigations?**

A principal officer may be able to delegate their investigation functions under the PID Act to an external investigator if:

- » the investigator is an officer or employee of a contracted services provider to that agency
- » the services under the contract are to be provided wholly or principally for the benefit of the agency, and
- » the investigator provides services for the purposes of the contract.

However, whether or not a principal officer should delegate such functions to persons outside of their agency is a decision they should make with reference to their agency’s own circumstances, such as their operating environment and available human resources.

## » What is 'serious disclosable conduct' for the purpose of exercising the discretionary power not to investigate in s.48?

The PID Act does not define 'serious disclosable conduct'. The principal officer should consider all the relevant circumstances based on the information before them. Factors which might be considered could include:

- » whether the wrongdoing, if proven, involves an offence with a significant penalty or would lead to severe disciplinary or other consequences
- » whether the wrongdoing was one of a series of incidents that indicates a course of conduct
- » the level of trust, confidence or responsibility placed in a public official who is alleged to have acted wrongly
- » the level of risk to others or to the Commonwealth
- » the harm or potential harm arising from the conduct, including the amount of public money wasted
- » the benefit or potential benefit derived by the public official or others
- » whether the public official acted in concert with others, and the nature of their involvement
- » any apparent premeditation or consciousness of wrongdoing
- » what the public official ought to have done and how their conduct might reasonably be viewed by their professional peers
- » any applicable codes of conduct or policies
- » maladministration that relates to significant failure in the administration of government policy, programs or procedures.

This list is not exhaustive and the information is provided as a guide to the types of issues that might be considered when determining if disclosable conduct is serious.

## » Does a person (a discloser) need to specifically refer to making a PID for the protections and obligations under the PID Act to apply?

A person need not expressly identify their report of wrongdoing as a public interest disclosure, as they are not required to do so under the PID Act (s 28(3)). They may not even know that their information or allegations could constitute a public interest disclosure.

If a supervisor or manager identifies that a matter is a public interest disclosure, they should let the person know that their report will be treated as such and that it will be referred to an authorised officer.

## » When do protections under the PID Act finish?

The PID Act does not place any time limit on protections.

## » What are the procedural fairness requirements for investigations conducted under the PID Act?

Procedural fairness requirements may vary depending on the nature of the disclosure and, where relevant, the PID investigation.

In an administrative investigation the investigator must ensure that a person against whom allegations are made is accorded procedural fairness (also known as 'natural justice'). What procedural fairness requires varies with the circumstances, but essentially it means that the person is entitled to:

- » have a decision-maker act fairly and without bias
- » know the substance of allegations and evidence against them if an adverse finding is going to be made about their conduct
- » have a reasonable opportunity to respond.

Procedural fairness does not mean that a person against whom allegations are made must be advised as soon as the disclosure is received or an investigation is commenced. There may be good reasons to carry out certain investigations before interviewing a person who is suspected of wrongdoing, particularly if there are concerns that they may collude with others or evidence may be destroyed if they are alerted.

Procedural fairness does not equate to a right to know the identity of the discloser. However, a person may be able to ascertain the discloser's identity because the substance of the allegations makes it evident (for example, if the alleged wrongdoing was directed at the discloser, or if the discloser is known to be the only witness to an incident). If this is likely, it should be discussed with the discloser in advance (see Chapter 4 of Agency guide to the Public Interest Disclosure Act 2013).

A person does not need to be told about an allegation against them that is of no substance (for example, if the agency determines not to investigate on the basis that the disclosure is clearly frivolous or vexatious).

## » What is the intersection of the PID Act and the Code of Conduct procedures under the Public Service Act?

When a disclosure concerns the conduct of APS employees that could give reasonable grounds for investigation of a suspected breach of the APS Code of Conduct (i.e. an investigation in accordance with an agency's procedures, established under s 15(3) of the Public Service Act), an agency may have two courses of action available.

### *i. Investigation under the PID Act*

The principal officer of an agency may investigate the disclosure under Part 3 of the PID Act to assess if there is any substance to the alleged misconduct.

The PID investigation may be of short duration. This investigation may include consideration of whether a different investigation should be conducted under another law of the Commonwealth (s 47(3)) – an investigation in accordance with an agency's s 15(3) procedures is another law of the Commonwealth for this purpose). The principal officer may choose to conclude the PID investigation if he or she is satisfied that there is sufficient evidence to start a Code of Conduct inquiry under the Public Service Act. The principal officer should then prepare a report under s 51 of the PID Act.

In these circumstances, on this investigation, the principal officer's report on the PID investigation may record a recommendation or a decision that a Code of Conduct inquiry under the Public Service Act be commenced. The principal officer should record their reasons for reaching this conclusion. The Code of Conduct inquiry would be a subsequent separate investigation under s 15(3) of the Public Service Act to determine whether an APS employee has breached the Code of Conduct under that Act.

If the principal officer decides that there is insufficient prima facie evidence of the breach of the APS Code of Conduct arising from the disclosure then he or she should record their reasons for reaching this conclusion.

### *ii. Discretion not to investigate or investigate further under the PID Act*

The principal officer may determine not to investigate (or investigate further) a disclosure, if an investigation into the same (or substantially the same) disclosable conduct is already underway or has been concluded under procedures established under s 15(3) of the Public Service Act (48(1) (f-g)). If such a determination is made, the principal officer is required to notify the discloser of a decision not to investigate (or investigate further) under s 48, with reasons for the decision (ss 50(1) and 50(3) of the PID Act).

## » Does an agency need to deal with suspected wrongdoing if not reported to an authorised officer or to a supervisor?

Agencies should deal with any genuine concerns or reports of wrongdoing, so that appropriate action/s can be taken. However, for a report of wrongdoing to be considered a PID (and, consequently, be handled under the provisions of the PID Act) a disclosure must be made by a current or former public official to certain authorised internal recipients (s 34) of the agency or, in the case of a current official, the official's supervisor. Generally speaking an agency's 'authorised internal recipients' will be its authorised officers (which includes the principal officer).

## » If a matter reported as a public interest disclosure has been investigated in the past, does the PID Act require that it be re-investigated afresh?

No, in such circumstances investigation is not required. Once a matter has been considered and allocated, there are a number of reasons why a principal officer may decide not to investigate a disclosure, or to investigate further, including that the disclosure is considered the same or substantially the same as a matter already investigated or being investigated under another Commonwealth law (s 48).

## » Does a decision not to investigate under the PID Act prevent other action?

A decision not to investigate, or investigate further, under the PID Act does not prevent any other type of investigation of the matter (s 48(2)). If the requirements for making an internal disclosure were met, the discloser would still be given protection under the PID Act. The same position applies to an investigation that has commenced but later discontinued.