

February 2016

MANAGING THE RISK OF REPRISAL

Under the Public Interest Disclosure Act 2013 (PID Act), the principal officer of each agency must take reasonable steps to protect public officials from reprisal, or threats of reprisal relating to a disclosure. The principal officer of each agency is also obliged to establish procedures to assess the risk of reprisals against those officials who make a disclosure.

This information sheet provides an overview of effectively managing the risk of reprisal. The Ombudsman's agency guide to the PID Act contains more detail about this topic. Our quick reference guide also provides an overview of the stages and roles in the public interest disclosure (PID) process.

What is reprisal action?

Reprisal occurs when someone causes, by an act or omission, detriment to another person because they believe or suspect that person, or anyone else, may have made or intends to make a PID. This could include an action or omission (or threat of action or omission), or detriment, that results in:

- » Disadvantage to a person, including dismissal, injury in their employment, discrimination between them and other employees or alteration of their position to their disadvantage¹
- » A physical or psychological injury, including a stress-related injury
- » Intimidation, harassment or victimisation
- » Loss or damage to property
- » Disadvantage to a person's career (for example, denying them a reference or a promotion without appropriate reasons).

It is a criminal offence to take or threaten to take a reprisal action against anyone in relation to a PID and the penalty is up to two years imprisonment.² An official who commits a reprisal action may also be subject to disciplinary procedures, for example for breaching the Australian Public Service code of conduct.

What are the consequences of failing to manage the risk of reprisal?

In addition to criminal sanctions and disciplinary actions, failing to prevent the risk of reprisal could lead to serious consequences for individual staff and agencies, for example:

- » exacerbating workplace conflict and disagreements between staff
- » contributing to a decline in performance and productivity
- » undermining staff confidence in making other reports about suspected wrongdoing
- » loss of individual reputation, entitlement or position

¹ Section 13(2)

² Section 19

- » low morale and high rates of absenteeism in a work group
- » increased stress and anxiety and a decline in staff mental health
- » possible breach of duty of care obligations under the *Work Health and Safety Act 2011* and related legal action
- » a claim for compensation if reasonable steps are not taken to avoid a reprisal or the threat of reprisal and this results in loss, damage or injury.³

What legal remedies are available for those who suffer reprisal?

A person subject to reprisal can pursue legal action against the person committing reprisal action. They can also take action against the agency they belong to if that agency fails to take reasonable steps to protect them from detriment. The court may order a range of remedies, including injunctions, reinstatement, an apology and compensation.⁴

What are an agency's obligations?

Develop procedures

Agencies must develop policy and procedures for assessing the risk of reprisal action against disclosers and others suspected of making PIDs.⁵ An agency's procedures should:

- » enable proactive, accurate and objective assessment of reprisal risk to determine suitable strategies for controlling the risks and protecting and supporting staff
- » clearly identify who has key responsibility throughout the risk management process
- » contemplate and enable action to be taken to address reprisal and workplace conflict (where necessary)
- » nominate a position or person who is responsible for deciding whether and when to refer cases of serious reprisal to the Australian Federal Police, or to the relevant state or territory police.⁶

In developing procedures, agencies should look to its existing risk management framework and the Commonwealth Risk Management Policy⁷ for guidance.

Support the discloser

Disclosers should be provided with appropriate personal and organisational support, and advised early in the process about the available support. The discloser should also be consulted about their support needs. Consideration should be given to appointing a support person who can listen and provide counselling, and where appropriate, accompany that person to interviews and meetings related to the investigation. Support persons must adhere to the confidentiality requirements under the PID Act.

³ Section 14(2)

⁴ Additionally, disclosers have immunity from civil, criminal and administrative liability (including disciplinary action), and no contractual or other remedy may be enforced against them, in relation to them making a PID (s 10).

⁵ Under s 13, reprisal protections extend to any person who makes a disclosure, and also to those who are suspected of making a disclosure. Section 59(1)(a) requires that principal officers put in place procedures for assessing the risk of reprisal towards those who make disclosures.

⁶ For guidance, visit the Australian Federal Police website <http://www.afp.gov.au/what-we-do/referrals>.

⁷ For guidance visit the Comcover website <http://www.finance.gov.au/comcover/risk-management/>.

Maintain confidentiality

Agencies must ensure confidentiality is maintained as far as practically possible in the handling of PIDs.⁸ Failure to maintain confidentiality makes it difficult to protect the identity of the discloser (and others who are involved in a PID investigation), and prevent or contain reprisals and workplace conflict.

Take action

Reasonable action must be taken to protect public officials who belong to that agency from detriment or the threat of detriment relating to PIDs.⁹ Every allegation of threatened or actual reprisal must be taken seriously, recorded and responded to. Failure to act can lead to serious consequences, and may be seen as tacit acceptance of any poor treatment.

In some cases, where there is a serious risk of reprisal action, it may be appropriate to adjust the working and supervision arrangements to protect the discloser or other persons who are at risk of reprisal action. It should not be automatically assumed that the discloser should be the one who is moved. Agencies should carefully consider a range of options and choose the best way of managing the circumstances and the risk.

Who is responsible?

An agency's procedures should clearly identify responsibilities for particular parts of the risk management process. Where possible, agencies should ensure that those officers with responsibilities throughout the process have the requisite skills and experience for the task at hand.

The role of conducting the risk assessment may belong to a single person or be split between a number of people. For example, the authorised officer may have a role in conducting an initial assessment based upon a list of risk factors, and another officer may be charged with responsibility for review or more comprehensive risk analysis.

Although a key stakeholder in the risk assessment process, the officer investigating the PID may not be the most suitable officer to conduct the risk assessment. The investigator will, however, be able to provide useful information about the risk environment over the course of the investigation.

All those involved in handling a PID, and who are aware of the discloser's identity, need to monitor the work environment for signs of detriment, and if necessary, take early corrective action. Supervisors and managers can play a key role in managing the risk of reprisal. So can anyone else to whom the discloser has agreed to reveal their identity, or who has information about the PID for the purpose of exercising a power or function under the PID Act.

When should a reprisal risk assessment be commenced?

A risk assessment should be conducted as soon as possible after a potential PID is received by an authorised officer, or after a PID allocation is received from another agency (including the Ombudsman). Conducting an early assessment provides the agency the best chance of

⁸ Section 59(1)(b)

⁹ Section 59(3)(a) requires that the principal officer take reasonable steps to protect disclosers from detriment or the threat of detriment.

recognising reprisals and workplace conflict, and taking appropriate and proactive action before the situation escalates.

Reprisal risk must be assessed in all cases however the way in which a risk assessment is conducted may vary depending on the circumstances. The risk assessment may be a short, early process based upon an assessment of risk factors, through to a more detailed and involved assessment, where inquiries need to be made. Disclosing PID information in this context, and for the purpose of the PID Act, is allowable.

Even in the case of anonymous disclosures, there is a need to conduct a risk assessment. The risk assessment should consider whether the identity of the discloser can be readily ascertained or would likely be ascertained in the course of an investigation. The risk assessment can also focus on whether others may be assumed to be disclosers and therefore be subjected to reprisal.

Conducting a reprisal risk assessment – what is involved?

It is open to an agency to use its own process for assessing risks, however the following is suggested as a possible framework.¹⁰

Identifying the risks

The risk factors relating to a particular disclosure should be identified, taking into account the individual and organisational circumstances. An example of the types of indicators of higher risk of reprisal or workplace conflict is included at **Table 1**.

Early and open communication with the discloser is critical. The discloser should be asked who they have told about their disclosure and how they think those involved might respond. Consideration should be given to the motivation and ability of persons to cause detriment to the discloser or others suspected of making PIDs. Could those persons commit a reprisal and get away with it? What opportunity or power do they have over the discloser or suspected disclosers?

The officer conducting the risk assessment should explain why these questions are being asked. It is important that the officer seeks to understand any fears the discloser holds so that the agency can make an informed assessment of risk, and take reasonable action to protect them from detriment.

Sensitivity needs to be applied in talking about the risks with the discloser. The officer conducting the risk assessment should be alert to the possibility that the discloser may feel that the discussion of reprisal risk is intended to discourage them from proceeding with their disclosure.

A lack of evidence is one of the most common reasons why complaints about reprisal are not substantiated. Records should be kept of any allegations of reprisal or threatened reprisal, and if made orally, ensure a written version is made and agreed by the person providing the information. If that person has made their own notes, or has any other relevant evidence, a copy should be obtained as well.

¹⁰ Based on the model developed by the NSW Ombudsman, Managing risk of reprisals and conflict, Public Interest Disclosure Guideline C4, available at www.ombo.nsw.gov.au.

Assessing and analysing the risks

The officer conducting the risk assessment should consider the likelihood and consequence of reprisal or related workplace conflict occurring. For example the likelihood of a risk may be high where:

- » threats have been made
- » there is already conflict in the workplace
- » the discloser's identity would be obvious because of the nature of the disclosure.

In considering consequence, it is important to consider the discloser's immediate and long term wellbeing as well as any cost to the agency.

Controlling the risks

For risks assessed as sufficiently high, agencies must plan to prevent and contain reprisals and related workplace conflicts. Any decision affecting the discloser should be made in consultation with them and should be reasonable and appropriate in all of the circumstances.

If it has been determined that a discloser will require support, the agency should develop a strategy for providing an appropriate level of support, such as appointing a support person.

Where the discloser's identity is known or likely to become known, steps should be taken to head off potential issues. This could include reiterating the agency's commitment to the PID scheme; reminding staff that taking or threatening a reprisal is a criminal offence; and would also warrant disciplinary action.

If the situation is serious enough, protecting the discloser may require significant action such as a transfer, relocation, a leave of absence, physical protection or an injunction. The response to an allegation of reprisal should be commensurate with its seriousness, taking into account all of the circumstances.

If an allegation of reprisal is found to be substantiated through an internal investigation, the officer concerned may be subject to disciplinary action under the agency's code of conduct procedures or reported to police.

Where the allegations are of such a serious nature, that the conduct could constitute a criminal offence (noting that reprisal under the PID Act is a criminal offence), consideration should be given to reporting the matter to the police. If this is the case, caution should be applied in making preliminary enquiries or gathering information so as to not compromise the integrity of any evidence that might later be relied upon in a criminal prosecution.

Monitoring and reviewing the risk management process

Problems in the workplace can arise at any point after a disclosure has been made, including during an investigation. The risk assessment should be monitored and reviewed as necessary, including by checking with the discloser to see if reprisals have occurred or been threatened.

The agency should be proactive in reviewing and updating the risk assessment as an investigation progresses. For example, where witnesses or others are interviewed, workplace tension can result with some staff reacting positively and others negatively. Similarly, when the discloser is provided with a report about the investigation, no matter what the outcome, they may feel more vulnerable. Even after the investigation is completed, the discloser may

be at increased risk of reprisal when action is taken to address the findings of the investigation.

What is not reprisal action?

Reasonable administrative action taken to protect a discloser from detriment is not a reprisal.¹¹

In addition, managers and supervisors are not prevented from taking legitimate disciplinary or management action to address unsatisfactory performance in the workplace. If action is taken against the discloser the manager should keep appropriate documentation to demonstrate that this action:

- » was taken for a legitimate reason
- » was based on sufficient grounds for the action
- » was reasonable and proportionate
- » was not being taken because the discloser made a PID
- » complied with the agency's performance management policies.

In addition, any action taken against a discloser that is a reasonable and proportionate response to their own wrongdoing¹² or improper conduct will not constitute reprisal.¹³

What records should be kept?

In addition to documenting any legitimate disciplinary or management action to address a discloser's performance, as discussed above, agencies should ensure they maintain records of:

- » any allegations of reprisal or threatened reprisal
- » the risk assessment process – consultation (including with the discloser), considerations, findings, recommendations and any revisions
- » actions taken to address reprisal or reprisal risk.

¹¹ Section 13(3)

¹² Section 12

¹³ The agency may, however, take into account the discloser's admission as a mitigating factor when considering disciplinary action against them. This is a matter for the agency's discretion.

Table 1 — Indicators of a higher risk of reprisals or workplace conflict¹⁴

Threats or past experience	<ul style="list-style-type: none"> » Has a specific threat against the discloser been made? » Is there a history of conflict between the discloser and the subjects of the disclosure, management, supervisors or colleagues? » Is there a history of reprisals or other conflict in the workplace? » Is it likely that the disclosure will exacerbate this?
Confidentiality unlikely to be maintained	<ul style="list-style-type: none"> » Who knows that the disclosure has been made or was going to be made? » Has the discloser already raised the substance of the disclosure or revealed their identity in the workplace? » Who in the workplace knows the discloser's identity? » Is the discloser's immediate work unit small?* » Are there circumstances, such as the discloser's stress level, that will make it difficult for them to not discuss the matter with people in their workplace? » Will the discloser become identified or suspected when the existence or substance of the disclosure is made known or investigated? » Can the disclosure be investigated while maintaining confidentiality?
Significant reported wrongdoing	<ul style="list-style-type: none"> » Are there allegations about individuals in the disclosure? » Who are their close professional and social associates within the workplace? » Is there more than one wrongdoer involved in the matter?* » Is the reported wrongdoing serious?*¹⁵ » Is or was the reported wrongdoing occurring frequently?* » Is the disclosure particularly sensitive or embarrassing for any subjects of the disclosure, senior management, the agency or government? » Do these people have the motivation to take reprisals – for example, because they have a lot to lose? » Do these people have the opportunity to take reprisals – for example, because they have power over the discloser?
Vulnerable discloser	<ul style="list-style-type: none"> » Is or was the reported wrongdoing directed at the discloser?* » Are there multiple subjects of the disclosure? » Is the disclosure about a more senior officer?* » Is the discloser employed part-time or on a casual basis?* » Is the discloser isolated – for example, geographically or because of shift work? » Are the allegations unlikely to be substantiated – for example, because there is a lack of evidence?* » Is the disclosure being investigated outside your organisation?*

¹⁴ Adapted from NSW Ombudsman, *Managing risk of reprisals and conflict*, Public Interest Disclosure Guideline C4, p. 3.

¹⁵ Risks of poor treatment for reporting wrongdoing identified by research (Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp. 137-164).