

Supervisors and the PID Act

What supervisors need to know to meet their obligations under the *Public Interest Disclosure Act 2013* (the PID Act).

What is the PID Act?

The PID Act creates a framework for the disclosure and investigation of wrongdoing (disclosable conduct) in the APS. It is designed to assist in creating a pro-disclosure culture by:

- » providing public officials with a means of reporting suspected wrongdoing
- » requiring agencies to take action in response
- » protecting disclosers from reprisal

How are public interest disclosures made?

A public official can disclose information about suspected wrongdoing by other public officials to:

- » an authorised officer, or
- » to a person who supervises or manages them who may then refer this information to an authorised officer.

An authorised officer will decide whether a disclosure meets the criteria to be a public interest disclosure.

Who is a public official?

A public official includes Australian Government public servants, statutory office holders and staff of Commonwealth contracted service providers.

What is disclosable conduct?

Disclosable conduct is conduct by an agency, a public official or a contracted service provider (in

connection with entering into or giving effect to a Commonwealth contract that:

- » is unlawful
- » in a foreign country, contravenes an applicable foreign law
- » perverts the course of justice or is corrupt
- » is maladministration, including conduct that is based on improper motives or is unreasonable, unjust, oppressive or negligent
- » is an abuse of public trust
- » involves fabrication, falsification, plagiarism or deception relating to scientific research, or other misconduct in relation to scientific research, analysis or advice
- » results in wastage of public money or public property
- » unreasonably endangers health and safety
- » endangers the environment
- » is engaged in by a public official that involves or is engaged in for the purpose of abusing their position as a public official
- » that could, if proved, give reasonable grounds for disciplinary action resulting in the termination of the official's engagement or appointment.

What is not disclosable conduct

The following categories of conduct are generally not disclosable conduct under the PID Act:

- » personal work-related conduct (but see below)
- » conduct related to courts, tribunals and the Parliament

- » disagreement with government policy or expenditure related to those policies
- » activities of grant recipients.

Personal work-related conduct is an action or omission in relation to a public official's engagement or appointment and/or employment (i.e. a work-related action) that has, or would tend to have, personal implications for that public official (i.e. the action personally affects that person).

Personal work-related conduct is taken to include:

- » Interpersonal conflict, including bullying or harassment
- » Decisions about a person's employment, engagement, transfer, or promotion – including decisions to suspend, terminate, or discipline a person, or the terms and conditions of a person's employment or engagement.
- » Conduct in relation to which the public official has or had review rights under section 33 of the Public Service Act 1999 or comparable review processes.

Personal work-related conduct may be disclosable conduct if it could constitute reprisal or has other significant implications for an agency.

More detail about what is and is not disclosable conduct can be found in the Agency Guide to the PID Act available on our website.

Who is an authorised officer?

The principal officer of an agency is an authorised officer. The principal officer may also appoint other officers as authorised officers.

Most agencies publish the names of authorised officers on their intranet and external websites.

Are you a supervisor?

The PID Act defines a supervisor as a public official who supervises or manages the person making the disclosure.

This means that a public official may have more than one supervisor.

Broadly speaking, a public official's supervisor or manager is someone in their 'chain of command', and this may extend beyond a daily and direct form of supervision.

What responsibilities do supervisors have?

A supervisor who receives information from a person they supervise or manage that tends to show disclosable conduct has a legal obligation to refer the information to an authorised officer.

Supervisor's must:

- » be able to recognise when a person they supervise has disclosed information that may be a public interest disclosure
- » in applicable cases, refer information to be assessed by an authorised officer as soon as practicable (note: supervisor's should not name the discloser unless the discloser has provided consent)
- » provide advice to the discloser (see *What supervisor's must tell a discloser* and *A practical approach for supervisors* below)

Note: a discloser does not have to say they are making a disclosure under the PID Act, or be aware of the PID Act. Once a supervisor receives information, and forms the view that it concerns, or may concern, disclosable conduct, the information must be referred to an authorised officer as soon as is reasonably practicable.

The supervisor's obligation applies even if the discloser does not want the matter to be identified as a PID, or the information to be investigated. There may be some scope for the discloser's wishes to be taken into account later by the authorised officer, or by an investigator.

What a supervisor must tell a discloser

If a supervisor decides to refer a matter to an authorised officer, the supervisor is legally required to explain to the person who disclosed the information:

1. that the information will or has been referred to an authorised officer and their disclosure may be treated as an internal public interest disclosure

2. the PID process, this being initially that the authorised officer will decide whether or not to allocate the disclosure for investigation – we suggest providing clear referral to the agency’s PID procedures
3. the circumstances in which a PID must be referred to an agency, or other person or body, under another law of the Commonwealth – we suggest noting disclosures that involve suspected serious or systemic conduct will be referred to the NACC for consideration, and in applicable cases matters must be referred to the police. See our NACC factsheet and Agency Guide for more information.
4. the civil and criminal protections that may be provided (see *What are the protections?* below.)

Routine discussions

Disclosures made in the course of performing one’s ordinary functions as a public official are not disclosures under the PID Act. This means that routine discussions within an area where everyday functions involve investigation of wrongdoing do not constitute an internal disclosure and do not require referral to an authorised officer.

The exclusion does not prevent such an official from making a disclosure, however they would need to make their intention clear when communicating to their supervisor, an authorised officer, or principal officer.

A practical approach for supervisors

The supervisor’s obligation to refer information to an authorised officer is only engaged once the staff member has disclosed information the supervisor believes concerns, or could concern disclosable conduct. If the staff member has not provided any specific information about the conduct in question, the supervisor may encourage the discloser to directly raise their concerns about wrongdoing with an authorised officer and identify who the authorised officers are in the agency, and how to contact them.

If a supervisor believes they have received information from one of their staff that tends to

show disclosable conduct, they should not conduct any investigation to find out whether the disclosed information is true. We recommend supervisors:

- » provide the staff member with information about the PID scheme including the agency’s PID procedures and information about protections for disclosers
- » explain that as a supervisor they are obliged to pass the information to an authorised officer of the agency, even if the discloser does not wish to do so
- » seek the discloser’s views about which authorised officer should or should not be provided with the information disclosed
- » confirm their understanding of the information disclosed
- » seek the discloser’s consent to identify them as the source of the information when providing it to an authorised officer
- » explain to the discloser that even if they do not consent to being identified their identity may be ascertained from the nature of the information or the circumstances of the disclosure.

After an agency receives a disclosure it is required to conduct a reprisal risk assessment. When a supervisor refers a disclosure to an authorised officer we recommend they also provide the authorised officer with information about any reprisal risk for the discloser, themselves or any other public official. This would include information about any workplace conflict that might be relevant to a reprisal risk assessment.

What if you are uncertain about what to do?

It is important to understand that supervisors do not formally assess whether disclosed information is a public interest disclosure.

If you are uncertain about what to do, you should discuss the matter with an authorised officer.

What are the protections?

If an authorised officer decides a disclosure is a public interest disclosure, then the discloser and

any person assisting in the investigation of the disclosure, receives the following protections:

- » protections against reprisal – the PID Act makes it an offence to cause a person detriment or threaten to cause detriment because they suspect or believe a person has made, may have made, proposes to make, or could make a public interest disclosure. It does not matter whether the threatened or actual reprisal action is against the discloser, their supervisor or any other person, such as a witness.
- » immunity from any civil, criminal or administrative liability that would otherwise apply for disclosing the information. Such as, a breach of secrecy laws, or an action for defamation. This protection also applies to those who assist in an investigation of a PID, such as witnesses, and supervisors who act in good faith by referring information to an authorised officer. This protection does not apply to the provision of knowingly false or misleading information.
- » confidentiality – the PID Act makes it an offence to disclose the identity of an individual who makes a public interest disclosure, outside of specific exceptions including if disclosure is for the purposes of the PID Act.

Note: there are exceptions to the broad protections outlined above.

Confidentiality requirements

It is a criminal offence for anyone who receives or otherwise deals with a PID to disclose information to anyone else that might identify the discloser without that person’s consent unless:

- » the identifying information is disclosed for the purposes of the PID Act, or another Commonwealth law, to assist the Ombudsman or the IGIS perform their PID functions, or
- » the identifying information has already been lawfully published.

A supervisor who receives a disclosure from a staff member should not discuss or reveal the

information that was disclosed to them, or discuss or reveal any information that might identify the discloser, except for the purposes of:

- » advising the discloser when the information has been referred to an authorised officer, or
- » subsequently assisting someone performing a function under the PID Act in relation to that disclosure, for example, a person delegated to conduct an investigation, or an official who is conducting a risk assessment (see below “reprisal and protections”).

For further information about see www.ombudsman.gov.au.

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