

ASSESSING AND MANAGING THE RISK OF REPRISAL

1. Introduction

A key objective of the Public Interest Disclosure (PID) Scheme is to ensure public officials who make public interest disclosures are supported and protected from reprisal. Support and protection for disclosers throughout the PID process is essential as it promotes both the use and integrity of the scheme.

Your agency has a responsibility to ensure that public officials who could or do make disclosures, or who provide assistance in relation to the handling of disclosures, are protected from reprisal. Your agency is legally required to have procedures in place to assess and mitigate the risk of reprisal.¹

This document will assist your agency to design and implement such procedures, as well as assess and develop plans to manage the risk of reprisal.

1.1 Why is having processes and procedures in place to assess and manage the risk of reprisal important?

Robust and well-publicised procedures are an important part of encouraging a pro-disclosure culture. Almost a quarter of people who have witnessed but not reported wrongdoing claim that fear of reprisal prevented them doing so.² For many disclosers, the protections inherent in the PID process can provide confidence and certainty that their concerns are being taken seriously.³ Procedures should acknowledge both the overarching responsibility of an agency to protect against reprisal and define the specific processes an agency will follow to fulfil this obligation in practice. This should include guidance on how individual risk assessments and mitigation plans will be developed and reviewed throughout the handling of a disclosure to ensure any risks are managed appropriately. This is an important part of encouraging potential disclosers to come forward, and witnesses to engage, providing greater opportunities for agencies to deal with problems internally before they escalate.

1.2 What is reprisal?

Reprisal is broadly defined in the PID Act. Section 13 of the PID Act defines a reprisal as any conduct a person engages in which consists of, or results in, a threat to cause detriment to another person where that act or omission is because of a belief or suspicion that the person made, may have made, proposes to make or could make a PID.

The definition means that the person who experiences detriment may not be the discloser. They may be, for example, a witness assisting with a PID investigation, or someone suspected of making a disclosure or of being capable of making a disclosure. Similarly, the person who engages in reprisal action may not be the subject of a disclosure. What matters is that they took action against someone because they believed that person made or could make a disclosure.

The Office of the Commonwealth Ombudsman (the Office) has encountered cases involving allegations that reprisal occurred in the form of:

- bullying and harassment
- negative professional consequences such as being passed over for promotion or not having contracts for services renewed and

¹ *Public Interest Disclosure Act 2013*, s59(4)(a).

² AJ Brown (ed) *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (2008) ANU E Press, 72.

³ Review of the Public Interest Disclosure Act 2013 / an independent statutory review conducted by Mr Philip Moss AM. p.17

- threats of physical violence.

It is important to note that reasonable administrative action taken to protect a person from detriment, such as moving them or someone else to a different work area, is not reprisal. Additionally, disciplinary action taken against disclosers or suspected disclosers will not be reprisal unless it is motivated by the fact that someone has, may have, proposes to make, or could make a PID.

2. Legal obligations

The Principal Officer of an agency, typically the Agency Head or a person listed by the PID Act as the Principal Officer, is required to establish procedures for handling PIDs within their Agency.⁴ Such procedures must include mechanisms for assessing the risk of reprisal related to disclosures that concern the Agency.⁵

The Principal Officer of an agency also has a responsibility to take reasonable steps to protect public officials who belong to their agency from reprisals.⁶ The legislation is not prescriptive about how the Principal Officer should do this, but the Office suggests that without procedures – including for how the agency will identify and mitigate the risk of reprisal – it will not be possible for Principal Officers to demonstrate how they fulfil this obligation.

Authorised Officers also have a duty to protect public officials against reprisals. They must take reasonable steps to protect public officials who belong to the agency against reprisals in relation to public interest disclosures which are received by the Authorised Officer or when they suspect on reasonable grounds that someone has, may have, proposes to, or could make a PID.

As reprisal protections in the PID Act now extend to those who ‘could make’ a disclosure, and to potential witnesses and other parties, risk management plans must consider these scenarios.

2.1 Policy obligations

A relationship exists between managing and assessing the risk of reprisal and an agency’s overall risk management obligations under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The PGPA Act applies to the whole of government and requires Commonwealth entities to establish and maintain a system of risk oversight and management. The general risk of reprisal can be included in an agency’s overall risk management plan.

The Department of Finance created the [Risk Management Policy](#) for Commonwealth entities to meet this requirement. The policy explains what is expected from risk plans generally and agencies can adapt it and use it as a guideline to generate reprisal risk assessments and mitigation plans.

2.2 Who is responsible for managing the risk of reprisal?

The responsibilities associated with managing and assessing risks of reprisal are shared across an agency. The Principal Officer is ultimately responsible for ensuring PID procedures include mechanisms for assessing risk, and for protecting officials from reprisal.

However, we suggest that individual reprisal risk assessments and mitigation plans should be drafted by staff responsible for your agency’s PID function, as they are likely to be most familiar with the risks involved in handling and investigating disclosures.

We suggest that agencies consider seeking input from their human resources (HR) and legal areas when assessing risk and developing mitigation plans. Your HR area may need to manage relationships

⁴ *Public Interest Disclosure Act 2013* s59(3).

⁵ *Ibid* s59(3) and (4).

⁶ *Ibid* s59(9)(a)

between staff members involved and be aware that there may be a period of tension in the workplace, as well as enact the practical aspects of any risk management plans, such as organising staff leave or enabling secondments to different areas. Your legal area may need to check that the plan complies with the agency's legal obligations.

3. Our expectations

Based on our investigation of complaints about the handling of PIDs, and as the agency responsible for oversight of the PID Scheme, we have set out below our broad expectations of agencies when assess and managing reprisal risks. While these expectations are not binding, following them makes it more likely that you will meet your agency's legal obligation to take reasonable steps to protect staff from the risk of reprisal.

3.1 Timeliness

Risk assessments should be conducted, and mitigation plans developed, as soon as possible after a public interest disclosure is made. It is also worth noting that, while the PID Act contains timeframes for allocation and investigation of PIDs, there are no limits on the timeframe in respect of which a PID may be made. This means a discloser may make a PID about a situation that has been ongoing for some time, in which they are involved and in which they are at risk of reprisal. This makes it important that plans are developed and responses implemented as soon as possible. A risk mitigation plan which requires agencies to respond quickly and firmly to disclosures has the benefit of not only doing work to protect a discloser (or other person) but also being *seen* to be working, which, in turn, increases a discloser's confidence in the plan.

3.2 Subject matter

Agencies' reprisal risk assessment templates should include a list of potential risks against which the individual discloser's situation is assessed.

The Office has produced a list of common risk factors which can be found at **Table One**. We expect that a risk of reprisal assessment and mitigation plan will cover all these factors, as well as any risks specific to your organisation or the individual to be protected. The 'generic' risk factors outlined at Table One may be included in an Agency's PID procedures or risk assessment documentation.

Of particular importance is the relationship between the discloser and the subject of the disclosure. We expect that any risk assessment will examine, at a minimum:

- whether the discloser and the subject work together
- whether they are in each other's reporting lines or have managers or staff in common
- whether they are physically located in the same office and
- whether they socialise outside of work.

3.3 Solutions:

Our expectation is that reprisal risk assessments will support the development of plans that contain strategies to mitigate the identified risks of reprisal. In the past, the Office has seen strategies such as separating the officers in question, finding alternate work for one or both parties, and making sure the subject of the disclosure is aware of the serious criminal penalties and possible civil action for taking reprisal action. Any solution must be compatible with the confidentiality requirements, noting that these will not usually provide any impediment to actions taken to assist the discloser or the subject of the disclosure.

As well as providing concrete plans of action, the existence of these strategies can assist if it becomes necessary to defend an agency against allegations of reprisal. We have seen cases where a discloser

has been moved to protect them from reprisal. If the discloser were to subsequently allege that the move was reprisal, the Agency would be able to show that the move was in response to the risk of reprisal it identified in the assessment and managed via the plan.

While risk mitigation plans may document actions taken to manage a risk of reprisal, agencies may also find it helpful to document actions taken to provide support and protect against risk, such as providing counselling or access to a support person.

3.4 Change over time

Reprisal risk assessments and mitigation plans should be treated as living documents – that is, they are regularly referred to and updated as circumstances change. **Table Two** demonstrates how this occurs in practice. We expect that risk assessments and mitigation plans will be generated as soon as possible, and reviewed whenever circumstances change, such as upon commencing and finalising any investigation. Circumstances in a case may even change so significantly that a new risk assessment is required. For example, it is possible for a PID investigation to be finalised so that the same conduct can be investigated under another law or power, such as under Code of Conduct or fraud procedures. These separate procedures may have their own risk mitigation mechanisms or bring with them additional risks, so it is important that the reprisal risk plan is updated to reflect the changed situation.

In our experience, the best risk assessment procedures involve regular and timely assessment by officers involved in the handling of a disclosure to determine whether the plan should be updated. As well as making the document responsive, our experience is that involving and consulting with affected persons as closely and regularly as possible increases the likelihood of a positive experience of the PID process. Confidence in the process leads, in turn, to the PID Scheme being utilised more frequently.

3.5 Access and recording

Our expectation is that the assessments and mitigation plans described above are recorded in writing and accessible to relevant stakeholders in line with agencies' standard records management procedures. This ensures the situation is monitored and mitigation strategies are implemented. It also has the advantage of making plans easily available to the Office in the event we receive a complaint about the agency's handling of a PID. Good record keeping will also support confidence in the process for current or potential disclosers.

It is important to note that confidentiality requirements continue to apply to this information.

TABLE ONE: INDICATORS OF A HIGHER RISK OF REPRISAL OR WORKPLACE CONFLICT⁷

<p>Threats or past experience</p>	<p>Has a specific threat been made against the discloser?</p> <p>Is there a history of conflict between (two or more of) the discloser, management, supervisors or colleagues?</p> <p>Is there a history of reprisals or other conflict in the workplace? If so, is it likely that the disclosure will exacerbate this?</p>
<p>Confidentiality unlikely to be maintained</p>	<p>Who knows that the disclosure has been made or was going to be made?</p> <p>Has the discloser already raised the substance of the disclosure or revealed their identity in the workplace?</p> <p>Who in the workplace knows the discloser’s identity?</p> <p>Is the discloser’s immediate work unit small?</p> <p>Are there circumstances, such as the discloser’s stress level, which will make it difficult for them not to discuss the matter with people in their workplace?</p> <p>Will the discloser be identified or suspected when the existence or substance of the disclosure is made known or investigated?</p> <p>Can the disclosure be investigated while maintaining confidentiality?</p>
<p>Significant reported wrongdoing</p>	<p>Are there allegations about individuals in the disclosure?</p> <p>Who are the subject’s close professional and social associates within the workplace?</p> <p>Is there more than one wrongdoer involved in the matter?</p> <p>Is the reported wrongdoing serious?</p> <p>Is or was the reported wrongdoing occurring frequently?</p> <p>Is the disclosure particularly sensitive or embarrassing for any subjects of the disclosure, senior management, the agency or the government?</p> <p>Will these people be motivated to take reprisals – for example, because they have a lot to lose?</p>

⁷ Adapted from NSW Ombudsman, *Managing risk of reprisals and conflict*, Public Interest Disclosure Guideline C4, p. 4.

	<p>Are these people able to take reprisals – for example, because they have power over the discloser?</p>
<p>Vulnerable discloser</p>	<p>Is or was the reported wrongdoing directed at the discloser?</p> <p>Are there multiple subjects of the disclosure?</p> <p>Is the disclosure about a more senior official?</p> <p>Is the discloser employed part-time or on a casual basis?</p> <p>Is the discloser isolated – for example, geographically or because of shift work?</p> <p>Are the allegations unlikely to be substantiated – for example, because there is a lack of evidence?</p> <p>Is the disclosure being investigated outside your organisation?</p>

TABLE TWO: CREATING AND UPDATING A RISK OF REPRISAL PLAN

