

Investigation into compliance with the *Public Interest Disclosure Act 2013*

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Report by the Commonwealth Ombudsman,
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EXECUTIVE SUMMARY

In January 2021, the Office of the Commonwealth Ombudsman commenced an own motion investigation into compliance with the *Public Interest Disclosure Act 2013* (PID Act) by 4 Commonwealth agencies. The purpose of the investigation was to undertake a detailed assessment of agencies' delivery of the Public Interest Disclosure scheme (PID scheme), including their PID processes and procedures, interaction with the legal requirements under the PID Act, and how these requirements are used in practice.

The investigation provided insights into the strengths and weaknesses of the agencies' administration of the scheme. In our view, agencies' handling of the disclosures we reviewed generally complied with the PID Act. Their allocation decisions and investigative findings were largely sound and reasonably supported. However, we identified common areas in which agencies could improve their practice, including:

- the content and level of detail in investigation reports
- the content and level of detail in Authorised Officer decision records
- the handling of reprisal risk assessments
- record keeping
- communication with disclosers.

During the investigation, the agencies involved provided us with information about actions they were taking, independently of this investigation, to improve their administration of the PID scheme. For example, prior to this own motion investigation commencing, 2 agencies engaged external consultants to review their PID function and provide advice and recommendations about potential improvements to their processes. The other 2 agencies told us about internal reviews of PID processes and PID materials they had undertaken, or were undertaking, at the time of commencing this own motion investigation.

Overall, the information gathered over the course of the investigation suggested that, while the scheme is complex and there are essential areas for improvements, all 4 agencies are making genuine efforts to improve and refine the way they deliver their obligations under the PID Act and are committed to maintaining effective and compliant PID processes.

This report provides an overview of the matters we considered and issues we identified during our investigation. Based on these observations, the report sets out a series of insights aimed at supporting agencies to achieve compliance and best practice when managing PIDs.

Insight 1 – PID decision-making



If using templates to guide and record PID decisions, these should:

- use a structure that reflects the factors a decision-maker must consider under the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard)
- prompt the decision-maker to provide an appropriate level of detail about the evidence they considered, including the nature and content of the evidence and how its value was weighed
- prompt the decision-maker to provide clear and sufficiently detailed reasons for their decision.

Insight 2 – Authorised Officer decision-making

Clear instructions and guidance should be provided to Authorised Officers to ensure they:



- apply the correct threshold test in each case
- clearly document the reasons for the decision, including their regard to the availability of discretion under s 70 of the PID Act to deem a discloser to be a public official
- understand the difference between an Authorised Officer assessment and any separate obligations they may hold as a PID investigator. There should be a physical and temporal separation between the 2 functions, including separate decision documents and timeframes. Where practicable, it is preferable that an Authorised Officer does not perform the function of PID investigator in the same matter.

Insight 3 – Authorised Officer role



Procedural instructions should clearly identify where responsibility for undertaking additional PID-handling functions rests, whether with Authorised Officers or other officers within the agency.

Insight 4 – Authorised Officer appointments



Authorised Officer appointments should be reviewed regularly to ensure the number and distribution of Authorised Officers is sufficient to make them readily accessible to staff.

Insight 5 – Training



Agencies should provide:

1. Mandatory PID training for all staff and contracted service providers.
2. Initial and periodic refresher training for all PID practitioners, including Authorised Officers and PID investigators.
3. Tailored training to areas likely to receive disclosures, such as complaints teams or third-party providers, on how to identify and direct a potential disclosure

Insight 6 – Risk assessments



1. Risk assessments and mitigation strategies should be clearly explained.
2. Actions taken to implement mitigation strategies should be recorded on the file.
3. Disclosers should be contacted to seek their views on reprisal risks and proposed mitigation strategies.
4. Reprisal risk should be reviewed periodically, and the analysis and outcomes recorded on the file.

Insight 7 – Investigation reports



Investigation reports should include a clear and detailed summary of the reasons, analysis and evidence supporting the findings. It should provide sufficient detail about the evidence relied on, to enable the reader to understand how the report's outcomes were shaped by the evidence.

Insight 8 – Decisions not to investigate and referrals under another law



1. Quality assurance processes should be used to ensure decisions not to investigate are appropriate, and reasons for decisions are clearly recorded and conveyed to the discloser.
2. Decisions not to investigate, or to cease investigating, should be made early as possible in the investigation.
3. Separate templates should be available for s 51 reports and s 48 decisions, as well as a separate s 51 report template for matters referred elsewhere for investigation based on s 47(3)

Insight 9 – Timeliness



1. Monitoring arrangements should be in place to ensure extension requests are submitted sufficiently ahead of time to allow processing time.
2. Agencies should actively consult with disclosers about extension requests, inviting the discloser to respond and allowing sufficient time for them to do so prior to submitting the extension request.
3. Agencies' requests for extensions should be realistic and account for outstanding actions or issues when assessing the additional time needed, to avoid multiple requests over the life of the investigation.

Insight 10 – Communication and record keeping



1. All formal notifications and incidental communications with disclosers should be recorded on the file, including file notes of telephone conversations.
2. Agencies should provide clear advice to disclosers about the purpose and potential outcomes of the investigation.

Agencies should notify disclosers that a PID investigation may take up to 90 days and, if the investigation will take more than 90 days, an extension of time will be sought.

PART 1: INTRODUCTION

Background

1.1. The PID scheme commenced in January 2014. Established by the PID Act, the scheme provides whistleblowers in the Commonwealth public sector a mechanism to report wrongdoing. The scheme promotes integrity by protecting those who make a disclosure from reprisal. It requires that disclosures be investigated.

1.2. The Office of the Commonwealth Ombudsman (the Office) is responsible for overseeing the operation of the scheme, including:

- delivering educational and awareness programs
- reporting annually on the scheme's operation
- allocating and investigating disclosures
- investigating complaints.

1.3. The Inspector-General of Intelligence and Security (IGIS) has mirroring oversight functions in relation to the 6 intelligence agencies subject to the scheme.⁴

1.4. Through its oversight, complaint handling and education functions, the Office assists agencies and disclosers to understand their obligations under the PID scheme. The Office also investigates disclosures and reports on agency compliance.

1.5. The Office reports annually on the scheme's use – the number of PIDs made, investigations completed, and actions taken in response to recommendations – and collects information about the health of the PID scheme through complaints from disclosers about the handling or outcome of their PID. Over the past 3 years, the Office received an average of 48 complaints a year, with most centring on the reasonableness of agency decisions (including investigative findings and decisions not to investigate) and concerns about agencies' administration (for example, delays and inadequate communication).

1.6. While valuable, the information we gather from individual complaints and survey data does not provide full visibility of the lifecycle of a PID within an agency, or the processes an agency has in place to manage disclosures. The aim of this own motion investigation was to assess the management of the scheme by examining the policies, procedures and records of a small selection of agencies. The investigation complements our existing functions under the scheme and provides the opportunity to better report on whether the scheme is achieving lawful, fair and proportionate outcomes. Where we have identified systemic issues and trends, we have provided feedback directly to agencies on compliance and best practice.

⁴ Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Australian Signals Directorate, Australian Geospatial-Intelligence Organisation, Defence Intelligence Organisation, Office of National Assessments and disclosures about intelligence functions performed by the Australian Criminal Intelligence Commission and the Australian Federal Police.

Part 2: METHODOLOGY

Selection of agencies

2.1. The Office selected 4 Commonwealth agencies for this own motion investigation. The investigation focused on agencies in which the PID scheme is reasonably well-established and that have reported sufficient PID activity to allow us to gain an understanding of how the scheme functions in that organisation. The selection process also considered agencies' size, the number of disclosures they reported receiving and PID complaints the Office received.

Evidence and evaluation

2.2. The Office requested each agency provide information and records to assist with this investigation, including:

- internal PID resources, training materials and procedures
- information about appointment of Authorised Officers under the PID Act
- internal guidance documents for PID decision-makers
- procedures for managing reprisal risks
- records of disclosures received in the 2019–20 financial year, including the original disclosures, correspondence, risk management records and decision records.

2.3. The investigation examined PID records from each agency, looking at compliance and best practice at each stage of the PID life cycle. The investigation also considered whether agencies' processes and procedures, educational materials, templates and reporting practices align with the requirements of the PID Act and reflect good administrative practice.

2.4. The investigation was also guided by issues of interest we identified in the course of previous investigations, both in relation to the 4 agencies involved and issues we observe across the broader scheme.

2.5. The investigation generated an individual report for each agency, including recommendations for improvement to practice. This report distils the key issues and themes identified across the own motion investigation and makes several best practice statements designed to assist all agencies meet their obligations under the PID Act.

Part 3: ISSUES ARISING OUT OF THE INVESTIGATION

PID decision-making

3.1. The lifecycle of a disclosure under the PID Act can involve several different decision points. At the outset, a decision is made about whether a disclosure must be allocated to an agency under s 43 of the PID Act, having regard to the threshold criteria established by s 26(1) of the PID Act. If a PID is allocated for handling, a decision-maker may exercise their discretion under s 48(1) of the PID Act not to investigate it, or to cease investigating it. A decision-maker may decide to refer a PID for investigation under another law, having regard to s 47(3) of the PID Act, or they may complete an investigation and make findings in a report issued under s 51 of the PID Act.

3.2. To assist in recording these decisions accurately and consistently, some agencies have developed templates to guide decision-makers and ensure they take account of relevant considerations under the PID Act and the PID Standard.

3.3. In principle, we encourage agencies to use templates to promote consistency in process and maximise compliance with the PID Act. However, in our experience the availability and/or use of templates does not always ensure decisions are clearly explained and documented. For example, this investigation observed decisions which simply recorded that a particular legislative criterion was or was not met, without explaining why or detailing the information the decision-maker considered in reaching that assessment. We also observed, particularly in reports prepared under s 51 of the PID Act, instances where reports prepared without regard to a template resulted in a more compliant, coherent and persuasive document than those prepared using a template.

3.4. Accordingly, agencies should be careful to ensure templates used for the different stages of the PID process are clear and prompt the decision-maker to include sufficient detail and reasons for their decision; without unduly limiting the type or volume of information they might otherwise consider relevant to support their decision.

Insight 1 – PID decision-making

If using templates to guide and record PID decisions, these should:

1. use a structure that reflects the factors a decision-maker must consider under the PID Act and the Public Interest Disclosure Standard 2013 (PID Standard)
2. prompt the decision-maker to provide an appropriate level of detail about the evidence they considered, including the nature and content of the evidence and how its value was weighed
3. prompt the decision-maker to provide clear and sufficiently detailed reasons for their decision.

Authorised Officers

3.5. The PID Act requires agencies to appoint Authorised Officers to receive and assess disclosures made under the PID Act on behalf of the Principal Officer. As the entry point and effective ‘gatekeeper’ of the PID process, the Authorised Officer has a critical role in the scheme. This investigation identified several areas for potential improvement to practice in relation to their appointment, role, and decision-making.

Authorised Officer decision-making

3.6. For a report of wrongdoing to be allocated to an agency for handling, it must meet the 3 threshold criteria in s 26 of the PID Act. This assessment, undertaken by either the Principal Officer or an Authorised Officer, considers whether:

1. the discloser is, or has been, a public official (as defined in s 69 of the PID Act)
2. the information is received by an authorised internal recipient (as defined in s 34 of the PID Act) or the discloser's supervisor
3. the information tends to show, or the discloser believes on reasonable grounds the information tends to show, one or more instances of disclosable conduct (as defined in s 29 of the PID Act).

3.7. If these conditions are met, the disclosure must be allocated to an agency.

3.8. Once the Authorised Officer decides to allocate a disclosure, they must record the decision in accordance with the requirements in the PID Standard. The PID Standard requires the Authorised Officer to keep a written record of the decision and reasons for the decision, as well as a record of the notification to the discloser and the content of that notification.⁵ Under s 44 of the PID Act, the Authorised Officer must also notify the Principal Officer of the receiving agency, the Ombudsman, and the discloser of the allocation.

3.9. The selection of Authorised Officer decisions we reviewed as part of this investigation were generally sound. However, a small number of decisions appeared to be flawed or apply the wrong threshold criteria. We observed that decisions were not always adequately explained or documented.

3.10. The threshold for a PID is intentionally low, requiring only that the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, disclosable conduct. We observed one case where an Authorised Officer appeared to apply the wrong threshold test, declining to allocate the matter because the allegations did not meet the definition of reprisal under s 13 of the PID Act. This assessment went beyond the threshold assessment required of an Authorised Officer and considered whether disclosable conduct – in this case reprisal – had, in fact, occurred.

3.11. In our experience, this situation is more likely to arise where an Authorised Officer is also delegated the Principal Officer's powers to investigate or not investigate a PID. Assessing a PID both as an Authorised Officer and as an investigator creates a risk of staff conflating their 2 roles and applying a higher threshold than is required for allocating a disclosure. While agencies may find it helpful to have PID officers perform Authorised Officer or investigator functions as the need arises, it is preferable that an individual does not perform both functions in the same PID.

3.12. While aspects of Authorised Officer decision-making are often straightforward (such as determining whether a discloser is a public official), assessing whether a disclosure tends to show disclosable conduct can require a more nuanced and comprehensive assessment. We observed several cases where decisions about whether information tended to show disclosable conduct were recorded only in the affirmative or negative, without further explanation. This does not satisfy the requirement to record the reasons for the decision. To

⁵ Sections 6(1) and (2) of the PID Standard.

comply with the PID Standard, the decision record must clearly set out why the allegations meet the threshold and specify the types of disclosable conduct the information tends to show.⁶

3.13. We also observed that, in cases where it was unclear whether the discloser was a public official, Authorised Officers did not always document their consideration of the deeming provision at s 70 of the PID Act. Section 70 of the PID Act allows an Authorised Officer to deem a person to be a public official. This can be helpful in cases where a person has information about potential disclosable conduct by virtue of their position, but they are not a public official (such as a volunteer with an agency). While it will not be appropriate to deem a person to be a public official in every case, it is important that, where a person making a disclosure does not meet the definition of public official, the Authorised Officer clearly records their consideration of whether the discretion in s 70 should be exercised.

3.14. As noted above, several agencies have developed templates or checklists for Authorised Officer decisions, which represents good practice. However, noting the use of templates does not always result in clear or well-reasoned decisions, agencies must be careful to ensure delegates are guided to include an appropriate amount of detail.

Insight 2 – Authorised Officer decision-making

Clear instructions and guidance should be provided to Authorised Officers to ensure they:

1. apply the correct threshold test in each case
2. clearly document the reasons for the decision, including their regard to the availability of discretion under s 70 of the PID Act to deem a discloser to be a public official
3. understand the difference between an Authorised Officer assessment and any separate obligations they may hold as a PID investigator. There should be a physical and temporal separation between the 2 functions, including separate decision documents and timeframes. Where practicable, it is preferable that an Authorised Officer does not perform the function of PID investigator in the same matter.

Authorised Officer role

3.15. The PID Act requires that an Authorised Officer considers whether a disclosure meets the threshold requirements under the PID Act for allocation. In practice, an Authorised Officer often performs other functions in the lifecycle of a PID. For example, they may:

- undertake a reprisal risk assessment
- be a discloser’s point of contact during and after an investigation
- monitor the timeliness of investigations

⁶ For a disclosure to meet the threshold for allocation, it must give rise to one or more instances of disclosable conduct. Disclosable conduct is defined in a table to s 29 of the PID Act and includes conduct engaged in by an agency, public official or contracted service provider which involves illegal conduct, corruption, maladministration, abuse of public trust, deception relating to scientific research, wastage of public money or unreasonable danger to health or safety of one or more persons.

- monitor the implementation of recommendations.

3.16. As an Authorised Officer is ideally equipped with an understanding of the PID scheme, there are good reasons for Authorised Officers to perform additional tasks associated with a PID. However, we observed that it is not always clear in agencies' procedural instructions where responsibility for performing these additional functions rests.

Insight 3 – Authorised Officer role

Procedural instructions should clearly identify where responsibility for undertaking additional PID handling functions rests, whether with Authorised Officers or other officers within the agency.

Authorised Officer Appointments

3.17. The PID Act requires agencies to appoint a sufficient number of Authorised Officers to ensure they are 'readily accessible' to public officials belonging to the agency.⁷

3.18. During this investigation, and over the course of our broader reporting on the PID scheme, we observed situations where all Authorised Officers are appointed within a single work area, or only at the Senior Executive or Executive level. We also observed situations where agencies appoint only a small number of Authorised Officers relative to their size.

3.19. The number of Authorised Officers required to satisfy the 'readily accessible' requirement is a matter of judgement for each agency. However, the Office's [Agency Guide to the Public Interest Disclosure Act 2013](#) (Agency Guide) suggests there are number of relevant factors agencies should consider when deciding appointments, including the size of the agency, the nature of the work performed by the agency, and the geographical location of staff.

3.20. The Authorised Officer is a special role, requiring good judgment and particular skills in dealing with sensitive matters. We encourage agencies to consider establishing a network of Authorised Officers who are approachable and accessible to all staff. This may mean, subject to individual aptitude and experience, that a mixed group of APS level and management level officers could offer favourable conditions for reporting wrongdoing.

3.21. Locating all Authorised Officers within a single work area, such as a specialised PID or investigations area, may offer benefits in terms of consolidating knowledge and skills and ensuring consistency in decision-making. However, it can also present a barrier to reporting or give rise to conflicts of interest, such as where a disclosure relates to an individual within that work area or its chain of command.

Insight 4 – Authorised Officer appointments

Authorised Officer appointments should be reviewed regularly to ensure the number and distribution of Authorised Officers is sufficient to make them readily accessible to staff.

⁷ Section 59(3)(b) of the PID Act.

Training

3.22. While the PID Act does not impose explicit obligations on agencies in relation to PID training and education, it is good practice for agencies to ensure their staff and contracted service providers are aware of what a disclosure is, what action to take if they suspect wrongdoing, how disclosures will be dealt with, and the protections available to them. It is also consistent with the Principal Officer's obligations under the PID Act to establish procedures for facilitating and dealing with PIDs, ensure that Authorised Officers are accessible and known to public officials who belong to the agency, and take reasonable steps to protect public officials from detriment relating to public interest disclosures.

All staff training

3.23. Three of the agencies in this investigation told us they provide PID-specific training to all their staff. The fourth agency delivers PID awareness training as part of its broader Ethics and Fraud Awareness module. The training is mandatory at one agency and optional in the others.

3.24. Developing and delivering PID training is commendable. However, to ensure all staff are aware of their protections and the requirements of the PID scheme, agencies should consider providing mandatory PID training to all staff. Mandatory, stand-alone PID training ensures information about the PID scheme reaches all staff within the agency and is not 'lost' among training material on other integrity and compliance topics. The need for agency-wide understanding of the scheme is also reinforced by the special obligations placed on supervisors if they receive information that may constitute a disclosure.⁸

3.25. Under the PID Act, all contracted service providers (and their employees) are considered to be public officials who 'belong' to that agency.⁹ Accordingly, agencies should ideally extend this training to contracted service providers and their staff.

3.26. In March 2021, the Ombudsman's Office released a PID e-learning module for use by Commonwealth agencies, which is available in Learn Hub and on our [website](#).

PID practitioner training

3.27. All the agencies included in this investigation advised that they provided their PID practitioners – Authorised Officers and PID investigators – with some formal training, together with on-the-job learning. Often an external service provider or law firm provides this training.

3.28. We consider delivering formal training for these functions is good practice. We encourage all agencies to provide PID practitioners with periodic and refresher training, to ensure disclosures are handled properly and in accordance with the requirements of the PID Act and PID Standard.

3.29. This investigation found several instances where disclosures were received by areas not responsible for receiving PIDs. In these situations, while the disclosures were eventually

⁸ Section 60A of the PID Act requires that, when a public official discloses information to a supervisor, and the supervisor has reasonable grounds to believe the information concerns, or could concern, one or more instances of disclosable conduct, the supervisor must, as soon as reasonably practicable, give the information to an authorised officer of the agency.

⁹ Items 16 and 17 of s 69(1) of the PID Act.

referred to the PID area, we observed that greater awareness of disclosures under the PID Act and the types of matters which may constitute a disclosure, may have assisted a smoother referral of these matters to the PID area. Accordingly, where agencies have complaints or internal investigations teams which may come into contact with potential disclosures, we encourage agencies to consider also providing periodic PID awareness training to those work areas.

3.30. We also observed that one of the agencies provided staff with the option to report concerns to a third-party provider. This Office is aware of several third-party whistleblower or ethics advice services used by agencies and acknowledges these services can be a useful ‘front door’ for receiving reports. However, we suggest that agencies discuss with the service provider how potential disclosures will be handled and consider making specific guidance available to the provider’s staff on how to manage potential disclosure.

Insight 5

Agencies should provide:

1. PID awareness training for all staff and contracted service providers.
2. Initial and periodic refresher training for all PID practitioners, including Authorised Officers and PID investigators.
3. Tailored training to areas likely to receive disclosures, such as complaints teams or third-party providers, on how to identify and direct a potential disclosure.

Risk assessments

3.31. The Principal Officer of an agency must take reasonable steps to protect public officials who belong to their agency from detriment, or from threats of detriment, relating to PIDs.¹⁰ The Principal Officer must also establish procedures for assessing the risk of reprisal against disclosers and identifying the support available to public officials who make disclosures.¹¹

3.32. Our Agency Guide suggests agencies complete a risk assessment as soon as possible after a PID is allocated and re-assess and update it throughout the investigation. Where possible, the risk assessment process should be consultative. Specifically, the agency should consult the discloser about their perception of risk and record agreed strategies for managing risks as the investigation progresses.

3.33. It may be more difficult to complete a risk assessment where the discloser is anonymous, but this should still be done to the extent possible. This may be particularly important where the discloser’s identity is likely to become apparent during an investigation, or where particular staff may be at risk of reprisal due to speculation about the source of the disclosure.

3.34. In general, the agencies involved in this own motion investigation provided clear and comprehensive procedures for considering and responding to reprisal risk. However, we found the procedures were not always applied in practice and, at times, assessments were

¹⁰ Section 59(3)(a) of the PID Act.

¹¹ Section 59(1)(a) of the PID Act and s 7 of the PID Standard.

unclear and lacked in detail. There was also limited evidence of these being reviewed or monitored after the initial risk assessment was completed.

Recording risk assessments

3.35. To be effective and withstand scrutiny, a risk assessment needs to do more than identify and rate the relevant risks. The assessment should explain how the risk rating was reached and how any mitigating factors will help to manage those risks. We observed several instances where reprisal risks were identified and rated, but the assessment lacked detail about how the rating was decided.

Mitigation strategies

3.36. Similarly, we observed that, while agencies regularly identified mitigation strategies to address risks, the risk assessment often lacked detail about how the strategies would be implemented or by whom.

3.37. In our experience, agencies need to take care to ensure mitigation strategies will have the desired effect. For example, a common approach to mitigating risk is to de-identify information in a PID. However, depending on the nature of the allegations under investigation, de-identified information may still tend to expose the discloser to the risk of being identified. This is often the case where a disclosure involves allegations of bullying or other employment-related issues.

3.38. Further, agencies should take care to ensure, where mitigation actions are proposed, they are properly implemented. We observed one example where a risk assessment proposed, to mitigate risk, regular contact would be maintained with the discloser. However, there was no record of further contact with the discloser over the course of the 7-month investigation. In such cases, it may be that the agency did, in fact, action the mitigation strategy but did not make or retain relevant records. In view of the Principal Officer's ongoing obligation to protect a discloser from detriment, it is important to ensure that mitigation strategies are both actioned and recorded.

Discloser consultation

3.39. Central to conducting a robust risk assessment is the need to consult with the discloser about any risks they may perceive to be of concern. In this respect we observed that agency practices differed. We observed some evidence of good practice where an agency promptly contacted the discloser by telephone following the allocation to discuss the PID and manage reprisal risks. This approach offers multiple benefits:

- providing assurance to the discloser that their matter is being considered
- allowing the agency to clarify and confirm the discloser's allegations
- informing the discloser about their rights and obligations under the PID scheme
- identifying and discussing reprisal risks.

3.40. While direct contact with the discloser to discuss reprisal is ideal, among the cases we reviewed it appears this did not always occur or, where it did occur, was not always recorded.

Periodic review

3.41. We observed that the procedures of each agency required periodic review of reprisal risk after the initial assessment is complete. As with other aspects of the risk assessment, this was applied inconsistently. It was positive to observe that, in one case, the requirement for ongoing monitoring of risk was reflected in the risk assessment template, which included a section for follow-up and review. However, in practice we found this was often left incomplete, even where the investigation progressed well past the 90-day timeframe. In one case, a periodic review was not completed despite the discloser raising new reprisal concerns during the investigation.

3.42. In addition to the Principal Officer's obligation to take reasonable steps to protect a discloser from detriment, the PID Act requires a PID investigation report to set out any claims or evidence of detriment, along with the agency's response to those claims and evidence.¹² If an agency's processes for consulting with a discloser about reprisal, recording an assessment of reprisal issues, implementing mitigation strategies and monitoring ongoing risk are properly executed and documented, this will ensure it is able to properly discharge its obligation to detail claims or evidence of detriment when preparing an investigation report.

Insight 6 – Risk assessments

1. Risk assessments and mitigation strategies should be clearly explained.
2. Actions taken to implement mitigation strategies should be recorded on the file.
3. Disclosers should be contacted to seek their views on reprisal risks and proposed mitigation strategies.
4. Reprisal risk should be reviewed periodically, and the analysis and outcomes recorded on the file.

PID investigation reports

3.43. Once a PID is allocated to an agency it must be investigated, unless it is appropriate to exercise the discretion not to investigate in line with s 48(1) of the PID Act.¹³ Once the investigation is complete, the agency must provide a copy of the investigation report to the discloser.¹⁴

3.44. The PID Act and the PID Standard establish various elements an investigation report must include which, together, aim to ensure the purpose, methodology, outcome and basis for any findings in an investigation are clear. The PID Act requires that an investigation report sets out the:

- matters considered in the course of an investigation
- duration of the investigation
- investigation's findings
- action taken or recommended in response to the findings

¹² Section 51(2)(e) of the PID Act.

¹³ Section 47 of the PID Act.

¹⁴ Section 51(4) of the PID Act.

- claims or evidence of detrimental action against the discloser, and the agency's response to those claims or evidence.¹⁵

Separately, the PID Standard requires that an investigation report:

- identifies whether there have been one or more instances of disclosable conduct
- identifies any regulations, rules, administrative requirements or similar matters to which the disclosable conduct relates
- explains the steps taken to gather evidence
- sets out a summary of the evidence, as well as any findings and recommendations made based on that evidence.¹⁶

3.45. The PID Standard further requires that, where an investigation makes a finding of fact, the finding must be based on logically probative evidence.¹⁷ This means the available evidence tends to logically prove the existence or non-existence of a fact.

3.46. This investigation found the investigations completed by agencies were often of good quality, with well-explained findings and a clear summary of evidence. We observed the reports demonstrated agencies had a good understanding of the benefits the PID scheme can provide in identifying and addressing issues or potential trends in an agency. For example, we observed several cases where the conduct alleged did not meet the threshold for disclosable conduct, but the investigator nonetheless referred the issues to another area in the agency for investigation or review.

Summary of evidence

3.47. Several of the investigation reports we reviewed did not meet the joint requirements of the PID Act and PID Standard. Of concern were cases where the summary of evidence, required under s 13(d) of the PID Standard, was inadequate and affected the clarity and robustness of the report's findings.

3.48. A summary of evidence should provide a meaningful explanation of the evidence the investigator considered. It should enable the reader to understand the content and substance of the evidence and see how the report's findings were shaped by the evidence. A clear and detailed summary of evidence helps a discloser, as well as any third parties reading the report, to follow the investigator's reasoning and understand the basis for any findings and recommendations.

3.49. The need to prepare an adequate summary of evidence is reinforced by s 12 of the PID Standard, which requires that any findings of fact made in investigation be based on logically probative evidence. In the absence of a clear summary of evidence, it will often be impossible to conclude whether s 12 of the PID Standard is satisfied.

3.50. We observed several cases where an investigation report merely referred to a list of 'sources' or 'categories' of evidence, such as witness interviews, file notes or correspondence. While this indicates the types of evidence the investigator considered, it does not provide any insight into the content of that evidence or its probative value. In each

¹⁵ Section 51(2) of the PID Act.

¹⁶ Section 13 of the PID Standard.

¹⁷ Section 12 of the PID Standard.

of those cases, owing to the absence of evidence in the report, we were unable to critically assess the investigation's findings.

Report templates

3.51. Each agency made some use of templates to assist in preparing investigation reports, but these were not always used consistently. As discussed, the use of a template did not always correlate with a better explained or more compliant report and several did not include an adequate summary of evidence or clearly explain the basis of the report's findings.

3.52. However, having regard to the breadth of the requirements reports must meet under s 51 of the PID Act and s 13 of the PID Standard, it is clear that templates can be a useful tool to bolster the likelihood of these requirements being met. Accordingly, we suggest that investigation report templates should provide a structural outline that supports compliance with the various requirements of the PID Act and PID Standard, while also guiding investigators about the level of detail required in each section. In particular, we suggest that, in the summary of evidence and associated analysis, investigators should be guided to:

- include a discussion of the content of the evidence
- explain the investigator's assessment of that evidence (for example, whether it is credible, consistent and compelling)
- demonstrate how the evidence shaped the investigator's conclusions.

3.53. Ensuring evidence and reasons are clearly set out in an investigation report better discharges an agency's obligations under the PID Act and leads to greater transparency and accountability in the investigative process. Further, by providing a clear and comprehensible report to the discloser, the agency may reduce the likelihood of a PID handling complaint being made to the agency or to the Ombudsman. In the event a complaint is made, the agency will be well positioned to respond to questions about the reasons and evidence underpinning its approach to the disclosure.

Insight 7 – Investigation reports

Investigation reports should include a clear and detailed summary of the reasons, analysis and evidence supporting the findings. It should provide sufficient detail about the evidence relied on, to enable the reader to understand how the report's outcomes were shaped by the evidence.

Decisions not to investigate and referrals to a different investigative process

3.54. Rather than finalising an investigation with a report under s 51 of the PID Act, an investigator may decide not to investigate, or cease investigating, for one of the reasons set out in s 48(1) of the PID Act.¹⁸ Alternatively, they may conclude the investigation with a

¹⁸ Section 48 of the PID Act provides discretion not to investigate, or not to investigate a disclosure further, in certain circumstances.

report which recommends the matter be referred for investigation under another law, consistent with s 47(3) of the PID Act.¹⁹

3.55. Section 50 of the PID Act requires an agency to notify the discloser of a decision not to investigate, or to cease investigating, under s 48 of the PID Act, as soon as reasonably practicable. The notification must inform the discloser of the reasons for the decision and any other courses of action available to them. Where a PID is referred for investigation under another law consistent with s 47(3) of the PID Act, the discloser should be provided with an investigation report under s 51, finalising the investigation and explaining the decision to refer the issues elsewhere for investigation.

3.56. This investigation found that investigators were generally confident applying these discretions and in most instances their decisions appeared to be reasonable and consistent with the requirements set out in the PID Act.

3.57. We observed occasions where, despite deciding not to investigate, the investigator made recommendations to review business practices in the area to which the disclosure related. This reflects positive use of the PID scheme and acknowledges that a decision not to investigate a disclosure does not prevent the matter being considered via another process.²⁰

3.58. We did identify 3 areas of concern with this group of decisions:

1. a small number of decisions not to investigate, or to cease investigating, did not appear to be readily supported by the available evidence
2. certain decisions not to investigate, or to cease an investigation, may have been made earlier
3. there were instances of apparent confusion between the use of the discretion not to investigate (or to cease investigating) under s 48(1) of the PID Act, and referrals for investigation under another law having regard to s 47(3) of the PID Act.

Reasonableness of decisions not to investigate

3.59. We observed 2 occasions where decisions not to investigate on the basis that information did not, to any extent, concern serious disclosable conduct were not clearly supported by the evidence.²¹

3.60. Serious disclosable conduct is not defined under the PID Act, however our Agency Guide provides examples of the types of conduct that might be considered serious, including:

- conduct leading to a significant penalty or disciplinary action
- the wrongdoing was part of a series of incidents indicating a course of conduct
- premeditated or conscious wrongdoing.

3.61. In one case we examined, the allegations involved a series of incidents over several years. While it was clear the agency had acted to review the allegations and seek evidence

¹⁹ Section 47(3) provides that an investigation may include consideration of whether a different investigation should be conducted under another law of the Commonwealth.

²⁰ Section 48(2) of the PID Act.

²¹ Section 48(1)(c) of the PID Act.

from available sources, the basis for concluding the allegations did not concern serious disclosable conduct was neither apparent from the decision nor adequately explained to the discloser. While it may have been open to the investigator to exercise the discretion as they did, this was not apparent to us in the absence of clear reasons being recorded on the file or provided to the discloser.

3.62. In the second case, a decision that allegations did not concern serious disclosable conduct appeared to be at odds with the fact that the same allegations were the subject of investigation elsewhere in the agency. In that case, it may have been preferable for the investigator to rely on the discretion at s 48(1)(f) of the PID Act, which may apply where the information is being investigated under another law or power.

3.63. Relevantly, we also observed a separate case where a proposed decision not to investigate on the basis the information disclosed did not concern serious disclosable conduct became a referral for investigation under another law,²² following a second opinion about the seriousness of the alleged conduct.

3.64. These cases demonstrate the need for the investigator to ensure they correctly identify the basis for a decision not to investigate and ensure the reasons for the decision are clearly recorded and conveyed to the discloser. They also demonstrate the value that internal quality assurances processes can add, by providing objective assurance that decisions are reasonable and defensible.

Timeliness of decisions not to investigate

3.65. The PID Act requires that, if the investigator intends not to investigate a matter, they inform the discloser of this decision as soon as reasonably practicable.²³ We observed 2 examples where it may have been preferable for a decision not to investigate, or to cease investigating, to be made earlier.

3.66. In one case, the decision not to investigate occurred 10 weeks after the PID was allocated. In that case, given the investigator's decision appeared to rely solely on the discloser's initial information, the agency's procedural instructions and our Agency Guide – with no indication they sought further information – it may have been possible, and preferable, for a decision to be made sooner.²⁴

3.67. In the second case, the decision not to investigate was made 8 months after the PID was allocated for handling. This followed an Authorised Officer assessment spanning 56 days.²⁵ While we understand some of the delay in that case may have resulted from workforce disruptions related to COVID-19, the assessment appears not to have involved any substantive investigation and, in fact, the absence of evidence was a key factor in the decision not to investigate.

3.68. Accordingly, while decisions not to investigate may be complex and, in some cases, require detailed consideration of supporting information, agencies should be careful to

²² Under s 47(3) of the PID Act.

²³ Section 50(1)(b) of the PID Act.

²⁴ We note communication between the discloser's representative and the investigator, and with other areas of the agency, may have contributed to the time taken to reach a decision in that case.

²⁵ Section 43(5) of the PID Act requires that Authorised Officers use their best endeavours to decide the allocation of a disclosure within 14 days.

ensure these decisions are made as early in the investigation process as practicable, particularly where no additional information is required to reach the decision.

Identifying the correct decision

3.69. We also observed 2 cases where the outcome of the investigation – whether finalised with an investigation report under s 51 of the PID Act, not investigated under s 48(1) or referred for a different investigation under s 47(3) of the PID Act – was difficult to discern from the records.

3.70. In both cases, a report titled ‘investigation report’ was prepared and, at first consideration, the PIDs appeared to have been finalised under s 51 of the PID Act. However, in the first case, the report determined the matters were not serious, in accordance with s 48(1)(c) of the PID Act and recommended referral as a Code of Conduct matter.

3.71. There is nothing preventing an agency preparing a detailed investigation report prior to exercising the discretion to cease investigating under s 48(1). However in this case, the Ombudsman was not notified of a decision to cease investigating²⁶ and, noting the matters were also referred for investigation under another law, it was unclear on what basis the investigation was concluded.

3.72. In the second case, despite the investigation report reflecting the allegations were unsubstantiated, the report referred the issues elsewhere for investigation.

3.73. In this case, although it may have been open to the investigator to refer the matter for investigation under another law, we would not expect this to occur where they had made a finding on the allegation. The investigator’s conclusion, that there was no evidence to substantiate the disclosure, appeared to suggest they had made a finding in accordance with s 51 of the PID Act and the investigation may have been concluded on its merits.

3.74. At times, the complexities of the various mechanisms for ceasing to investigate or finalising a PID may present challenges to identifying the correct process to follow. However, noting the different notification requirements which attach to the different powers under the PID Act, agencies must be careful to correctly identify and record the basis for each decision and ensure it meets the associated notification requirements. As discussed earlier in this report, agencies may find it helpful to develop separate s 51 report and s 48 decision templates – including a s 51 report template for matters referred to another investigative process²⁷ – to ensure these outcomes are differentiated and recorded properly.

²⁶ Section 50A(1) of the PID Act requires that the Ombudsman (or IGIS in the case of intelligence agencies) is notified of a decision, and the reasons for a decision, not to investigate under s 48(1) of the PID Act.

²⁷ Section 47(3) of the PID Act enables an investigation (or reinvestigation) to include consideration of whether a different investigation (or reinvestigation) should be conducted.

Insight 8 – Decisions not to investigate and referrals under another law

1. Quality assurance processes should be used to ensure decisions not to investigate are appropriate, and reasons for decisions are clearly recorded and conveyed to the discloser.
2. Decisions not to investigate, or to cease investigating, should be made early as possible in the investigation.
3. Separate templates should be available for s 51 reports and s 48 decisions, as well as a separate s 51 report template for matters referred elsewhere for investigation based on s 47(3).

Timeliness

3.75. The PID Act requires that investigations be completed within 90 days unless the Ombudsman grants an extension of time.²⁸

3.76. Of the extension requests we reviewed in this investigation, the majority were timely and reasonable. However, we identified instances of:

- late applications (less than 10 days prior to due date)
- disclosers not being consulted, or not properly consulted, prior to an extension request being submitted
- multiple requests for additional time where fewer requests, or a single request covering a greater period, may have been preferable.

Late requests

3.77. The Ombudsman's [*Form 3 – Extension of time to investigate a PID*](#) asks that agencies submit requests for an extension of time at least 10 days prior to the existing timeframe expiring. This recognises that our Office undertakes a documented assessment of review requests, considering information provided by the agency, previous extension requests and the views of the discloser. To allow for a robust assessment process, we ask that extension requests are submitted with sufficient time to review all relevant information and, if necessary, ask further questions of the agency or the discloser.

3.78. Late requests also raise concerns about the effectiveness and rigour of agencies' monitoring arrangements, both in ensuring extension requests are made in a timely fashion and, more generally, to track the progress of investigations and ensure legislative requirements are being met.

3.79. Of the late applications for extensions of time we identified, 2 were submitted on the due date itself and one was submitted after the due date had passed.

3.80. To avoid these situations, we encourage agencies to establish monitoring arrangements to ensure they submit extension requests that are made with sufficient notice and PID investigators are aware of their obligations under the PID Act.

²⁸ Section 52(3) of the PID Act enables the Ombudsman or IGIS to grant an extension of time for agencies to investigate.

Discloser consultation

3.81. Our [extension request form](#) encourages agencies to seek a discloser’s views prior to submitting an extension request. While there is no legislative requirement for agencies to consult with a discloser prior to submitting an extension request, in our view this aligns with the general expectation that agencies will keep disclosers updated on the progress of the investigation. It also assists our Office to assess the relative merits of an extension request.

3.82. While in most cases agencies did engage in some communication with the discloser prior to submitting an extension request, we observed several examples where the consultation did not occur sufficiently in advance to allow the agency to include advice about the discloser’s response in its application. In several cases, the discloser was merely informed of the extension request and not invited to respond or provide their view.

3.83. The consultation process is an opportunity for agencies to engage with disclosers and build trust and confidence in the investigative process.

Multiple requests

3.84. In our experience, multiple requests for additional extensions of time can generate discloser dissatisfaction and distrust in the investigative process, particularly where the requests are for relatively small or limited periods of time. Accordingly, our [extension request form](#) encourages agencies to use their best efforts to estimate the additional time required, having regard to the complexity of the investigation and other relevant factors.

3.85. We observed several examples where agencies made multiple requests when a single request may have been preferable. For example, we observed 2 cases where short extensions of 14 to 28 days were sought in circumstances where significant actions in the investigation –such as witness interviews – remained outstanding. In both cases, the agencies then made further extension requests.

3.86. Accordingly, where there are significant outstanding matters in an investigation, we encourage agencies to submit extension requests which allow sufficient time to properly finalise the investigation and avoid having to submit further requests.

Insight 9 – Timeliness

1. Monitoring arrangements should be in place to ensure extension requests are submitted sufficiently ahead of time to allow processing time.
2. Agencies should actively consult with disclosers about extension requests, inviting the discloser to respond and allowing sufficient time for them to do so prior to submitting the extension request.
3. Agencies’ requests for extensions should be realistic and account for outstanding actions or issues when assessing the additional time needed, to avoid multiple requests over the life of the investigation.

Communication and record keeping

3.87. The PID Act creates various notification requirements which must be met by Authorised Officers and PID investigators throughout the PID process. These include:

- notifying the discloser of a decision to not allocate a disclosure because the disclosure did not satisfy the requirements for a PID²⁹
- notifying the discloser and the Ombudsman³⁰ of an Authorised Officer decision to allocate a PID³¹
- notifying the discloser of the Principal Officer's obligations and powers at the commencement of an investigation and the timeframe for the investigation³²
- notifying the discloser and the Ombudsman of a decision not to investigate, or to not further investigate a PID³³
- notifying the discloser of the outcome of an investigation³⁴
- notifying the discloser of the progress of an investigation where an extension of time has been granted.³⁵

3.88. Beyond these legislative requirements, we encourage agencies to maintain communication with disclosers throughout a PID investigation, both to support the discloser to understand the status of the investigation and enable the agency to properly discharge its obligations to monitor reprisal risk. Our Agency Guide relevantly provides at section 7.5.1.:

A discloser can easily become concerned or dissatisfied if they feel they are being left in the dark or that nothing is happening.

Apart from the legislative requirements, the agency should keep the discloser up to date with reasonable information on what is being done in response to their disclosure.

Any questions or concerns the discloser raises should be addressed honestly and as soon as possible. If they have not heard anything within a reasonable period, they are entitled to ask for an update.

3.89. Our investigation observed that, while agencies often appeared to have regular contact with disclosers, those contacts were not always recorded on the file. For example, we noted cases where telephone contact with a discloser was referenced in an email, but no record of the conversation appeared on the disclosure file.

3.90. We also observed that, while agencies' procedures largely reflect the need to maintain regular contact with a discloser, at times there was limited evidence of contact with the discloser beyond the formal notifications required under the PID Act. We also observed specific instances where, owing to the absence of records, it was not clear if communication with a discloser occurred. In one case, concerns raised by a discloser about

²⁹ Section 44(3) of the PID Act.

³⁰ Or the IGIS where the agency is an intelligence agency, defined at s 8 of the PID Act.

³¹ Sections 44(1A) and 44(2) of the PID Act.

³² Sections 50(1) and 50(1A) of the PID Act.

³³ Section 50A(1) of the PID Act.

³⁴ Section 51(4) of the PID Act.

³⁵ Section 52(5)(b) of the PID Act.

potential reprisal risks seemingly went unanswered. In another, there was no record of the agency considering or responding to the discloser's response to a finalised investigation report. In this respect, we note it is good practice to communicate with a discloser even after an investigation is finalised under the PID Act, to respond to any further reasonable concerns or address ongoing reprisal concerns.

3.91. In addition to maintaining regular contact with disclosers, we encourage agencies to be honest with disclosers about the nature of a PID investigation and the timeframes involved. To the extent possible, agencies should consider providing the discloser with an explanation of the purpose and potential outcomes of the investigation. Managing a discloser's expectations in this way may be particularly helpful in situations where a discloser indicates they are seeking a particular outcome, such as a personal remedy, which is unlikely to result from the investigation.

3.92. In relation to timeframes, disclosers were generally advised an investigation should be completed within 90 days. However, agencies did not consistently inform disclosers that an investigation may take longer than 90 days, in which case it would seek an extension of time from the Ombudsman. In our view, it would better manage disclosers' expectations around timeframes to advise that investigations may take up to 90 days and that, where an investigation is complex and requires additional time, an extension of time will be sought.

Insight 10 – Communication and record keeping

1. All formal notifications and incidental communications with disclosers should be recorded on the file, including file notes of telephone conversations.
2. Agencies should provide clear advice to disclosers about the purpose and potential outcomes of the investigation.
3. Agencies should notify disclosers that a PID investigation may take up to 90 days and, if the investigation will take more than 90 days, an extension of time will be sought.