



Insights paper

Bringing understanding to reprisal

This paper provides guidance to agencies about how to better anticipate and protect against reprisal, and improve the experience of those involved in whistleblowing.

It includes discussion of:

- the definition of reprisal
- the duty to take reasonable steps to protect from reprisal
- best practice examples from across the Commonwealth
- the repercussions that most often flow from whistleblowing
- the importance of support and acting in context.

Contents

Introduction	3
What is Reprisal?	4
Duty to protect against reprisal.....	6
Examples of best practice.....	7
Repercussions of whistleblowing.....	11
Repercussions.....	11
Support.....	12
Proportionate action	13
Role of the Ombudsman.....	14

Introduction

The *Public Interest Disclosure Act 2013* (the PID Act) is the whistleblowing scheme for the Australian public sector. It provides a mechanism for the disclosure and investigation of certain kinds of wrongdoing. A disclosure made in line with the PID Act is called a Public Interest Disclosure (PID).

While the PID Act offers protections for whistleblowers, it remains the case that whistleblowing takes courage. Organisations, or individual teams, may be reluctant to accept that wrongdoing may have occurred and react negatively to those who may seek to disclose it.

At the same time, serious wrongdoing within an agency is often most readily identified by its staff. It is in the interests of every agency to create an environment of psychological safety where staff see the risks of speaking up as low and are encouraged to raise concerns.

As part of our preparations for the 2024–25 PID Annual report, we surveyed agencies on how they facilitate and encourage the making of disclosures, and how they assess the risk of reprisal.

Based on this information, and complaints made to our Office about reprisal, we have prepared this Insights Paper to share examples of best practice and to support understanding among agencies of their duties to protect and support persons involved in a disclosure, and to mitigate against the risk of reprisal.



What is Reprisal?

Whistleblowers (called disclosers under the PID Act), members of their support network, witnesses, subjects, and others involved in the handling of a PID could all be subject to reprisal. This is recognised by the broad scope of reprisal in the PID Act. However, in our experience, the broad scope of reprisal is not well understood by agencies.

The definition of reprisal in the PID Act can be broken down as follows:

- detrimental action¹
- taken against a person
- because, or partially because, of
- a belief or suspicion
- that a person
- has made, may have made, proposes to make, or could make a PID.

In other words – taking detrimental action against a person because of a PID or potential PID.




It is important to understand that:

- reprisal is not solely about the discloser, it could be taken against a third party
- a PID need not have been made for the protections to apply – reprisal includes situations where someone *suspects* that a PID *could* be made.

¹ Section 13 of the PID Act defines detriment and includes a list of illustrative examples: dismissal; injury in employment; alteration of an employee's position to their disadvantage; discrimination between an employee and other employees; harassment or intimidation of a person; harm or injury to a person, including psychological harm; damage to a person's property; damage to a person's reputation; damage to a person's business or financial position; any other damage to a person.



Consider the following example:

 <p>Person A has information about serious wrongdoing by Person B</p>	 <p>Person B knows this, and suspects that Person A could make a PID</p>
<p>In response, Person B:</p> <ul style="list-style-type: none">• seeks to intimidate another employee who is a potential witness (Person C)• spreads false rumours about the potential discloser (Person A)• harasses another person at their home (Person D - a relative of Person A). 	

Each of the above actions could, with the appropriate evidence, be considered reprisal.

Note that:

- two of the people who suffered reprisal (Persons C and D) were not suspected of making a PID
- Person D may not belong to the agency.

Agencies may also need to consider risk of reprisal where Person A's concerns are investigated under another law or power (such as through a Code of Conduct enquiry) whether as a result of making a disclosure under the PID Act which is referred for investigation under another law or power, or as a result of raising their concerns according to that other law or power.

While the PID Act doesn't require agencies take reasonable steps to protect those who do not belong to the agency from reprisal, the duty to provide support covers some third parties such as witnesses. Agencies may wish to consider, when applicable, what support they can offer to those who do not belong to the agency.



- **Insight:** Reprisal can include detrimental action taken against a third party, such as a witness.
- **Insight:** You do not need to have made a PID to be protected against reprisal.
- **Insight:** It can still be reprisal if relevant action is taken against a person who does not belong to the agency.

Duty to protect against reprisal

The duty to take reasonable steps to protect public officials against reprisal rests with:

- principal officers, and their delegates, in relation to all public officials that belong to the agency;² and
- authorised officers, in relation to public officials that belong to the agency in relation to PIDs made or potentially made to that officer.

- **Insight:** The duties to take reasonable action to protect against reprisal are broad overarching obligations. To meet them, agencies must ensure they:
 - ✓ understand what reprisal is
 - ✓ have considered how those who have responsibilities under the PID Act, or assist with those responsibilities, will coordinate the performance of those duties, both as a general guide and in specific live situations
 - ✓ are proactive in their consideration of the risk of reprisal.

² Section 59(9) provides that the duty applies in relation to public officials that belong to the agency and have **or could** have made a PID to an authorised officer or supervisor of that agency. Because a public official that belongs to an agency could always have made their PID to the agency they belong to, our Office's position is that the duty still applies even where the public official has made their PID to another agency (such as to this Office or to another agency where the disclosed conduct relates to that other agency).



Examples of best practice

Agencies who meet their obligations under the PID Act, and contribute to building a pro-disclosure culture within the public sector:

- understand what reprisal is, including the range and types of detriment a person may suffer
- understand the relevant and related duties to protect and provide support
- recognise people may suffer repercussions that fall short of reprisal, but nevertheless require mitigation and support
- are proactive and flexible in how they assess the risk of reprisal and mitigate against it.

There are many ways to ensure the above goals can be met. While it is not a legislative requirement, this Office encourages the use of risk of reprisal assessments to help agencies identify possible risks, their likelihood and mitigation strategies. The Office has also [published an assessment template](#) to support documentation and record keeping of risks and actions taken to mitigate against them.

Based on the survey of agencies we conducted as part of our preparations for the 2024–25 PID report, we have included some other examples of best practice.

1. Create internal PID procedures that:

- ✓ recognise that reprisal can affect persons other than the discloser, such as witnesses
- ✓ make clear how the responsibilities of authorised officers, principal officers and their delegates to take reasonable steps to protect against reprisal will be performed and coordinated including:
 - identifying who has responsibility to assess and act on reprisal risk at each stage
 - recognising that principal officers have responsibility to encourage and support disclosers, potential disclosers, and those who provide assistance in relation to PIDs.



- ✓ encourage proactive action by:
 - requiring that the risk of reprisal be assessed, documented, and regularly reviewed throughout the handling of a PID – particularly during an investigation
 - encouraging risk assessors to independently consider risks and identify mitigation strategies, rather than solely relying on a potential victim identifying specific risks.
- ✓ explain that information which may identify a discloser may be shared with other people in the organisation (such as Human Resources staff, Harassment Contact Officers or supervisors) to help identify reprisal risk and/or mitigate it
- ✓ note that reprisal is a kind of disclosable conduct that can be investigated under the PID Act
- ✓ support the preparation of risk assessments that:
 - include the reasons for the assessment made, and any specific risks identified
 - identify actions that may help to manage those risks.
- ✓ require that a record be made if taking any action that may mitigate the risk of reprisal, or otherwise support someone involved with a PID or potential PID
- ✓ note that risk of reprisal still needs to be considered when a discloser is anonymous given:
 - reprisal can be experienced by a range of people other than the discloser, and
 - anonymity does not prevent reprisal being taken against a discloser, although it can make it more difficult to identify appropriately targeted (as opposed to general) mitigation action.

- **Insight:** Check if your PID procedures accurately describe reprisal, and clearly explain how the duties of principal officers, their delegates and authorised officers in your agency will be coordinated and performed.
- **Insight:** If there are concerns about reprisal having occurred, in some cases the scope of an open PID investigation can be expanded to include investigation of related reprisal.



2. Ensure PID investigation reports explain:

- ✓ when risk assessments were conducted and updated
- ✓ how the risk of reprisal was assessed, i.e. what led the agency to assess risk to be at a particular level
- ✓ what support, if any, was provided to those involved in the investigation
- ✓ what steps were taken to mitigate the risk of reprisal, if applicable.³

3. Develop a list of actions that may help to protect against reprisal, such as:

- ✓ de-identifying information, when possible
- ✓ taking steps to maintain confidentiality over the making of a PID and its handling
- ✓ considering how the risk of reprisal may be affected by interviewing a witness or subject, or taking particular investigative action, and if the risk cannot be mitigated discussing this with relevant parties before committing to the action
- ✓ maintaining regular contact with the discloser or other employees at risk
- ✓ making changes to work environments
- ✓ reminding specific individuals, and potentially the agency as a whole, that reprisal is a criminal offence
- ✓ appointing a support person for those who may be at risk
- ✓ referring a person to a counselling service.

Identifying appropriate mitigation action can be difficult and will depend on the particular circumstances.

- **Insight:** Disclosers should be consulted to help inform the agency's assessment of reprisal risk, but this is not a substitute for the agency's own consideration of risks to a discloser.

³ This goes further than the specific statutory requirement, but given the obligation to take reasonable steps to protect we consider assessing the risk of reprisal is required as part of an investigation and therefore a proper investigation report should include such information.



- **Insight:** Planning ahead for common risks and ways to mitigate them, as well as identifying common supports, can free up time to consider the need for more tailored mitigation strategies.



Repercussions of whistleblowing

For disclosers, witnesses, and subjects, the experience of engaging with the PID Act is often a stressful and potentially negative experience. When considering what action to take to protect against reprisal, and how to best encourage and support those involved with a disclosure, agencies should keep in mind the broad range of repercussions that can result from being involved in a whistleblowing matter, and the effect of the process on those involved.

Repercussions

Experiential research into whistleblowing⁴ suggests that the most prevalent actual or perceived mistreatment experienced by whistleblowers are informal or collateral impacts such as stress, reduction in work performance, and isolation. These experiences are likely shared by others involved in whistleblowing, such as witnesses or subjects, and at some level these experiences may be inherent to whistleblowing and not possible to entirely mitigate.

Experiences such as stress, reduction in work performance, and isolation are the kinds of repercussions that could be:

- caused by action that amounts to reprisal
- caused or exacerbated by:
 - feelings of anxiety, isolation or exposure that can accompany the making of a disclosure or participation in its investigation
 - justifiable, but perhaps ill-timed or poorly executed, management action

⁴ [Brown, A J et al, Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government](#)



- an apparent or actual lack of support or communication that can sometimes accompany the confidential handling and investigation of a PID.

For example, an agency may reasonably seek to mitigate the risk of reprisal by moving a person out of a particular work area yet at the same time this person may consider this to be reprisal.

- **Insight:** The repercussions most often experienced by whistleblowers are of a kind that necessarily means the line between reprisal, reasonable management action, and experiences that may be potentially inherent to whistleblowing, can be difficult to determine.

Support

To reduce the risk of the kind of negative repercussions noted above, agencies should:

- ✓ ensure those involved with a disclosure understand what to expect, such as:
 - It may not be possible to develop targeted mitigation strategies where a discloser is anonymous, and anonymous disclosures may also be harder for agencies to investigate
 - their possible level of involvement in the process, and who to contact with concerns or additional information.
- ✓ seek to establish the expectations listed above as early as possible in the process.

- **Insight:** The duty to support involves a larger cohort of persons than the duty to protect against reprisal, which only applies to people that belong to the agency.



Proportionate action

Individuals involved in whistleblowing may be more likely to exhibit behaviour that could be considered unreasonable or a kind of misconduct, absent of the context of whistleblowing. This can be due to the inherent stress and relative isolation of the process.

We consider agencies with best practice in providing support and taking steps to protect against reprisal will understand and recognise this aspect of the whistleblower experience. This includes being cognisant of the need to understand context and ensure proportionate responses to whistleblower behaviour given whistleblowers may be more prone to what may seem to be unreasonable conduct.

A whistleblower may be so driven to have alleged misconduct acted on that they themselves engage in unreasonable or unprofessional conduct in raising their concerns. Particularly if this conduct adversely affects other staff or the delivery of an agency's functions, performance or disciplinary action (including the potential commencement of a formal Code investigation concerning the whistleblower) may be reasonable or necessary. While such action may not be reprisal, it is a negative consequence or repercussion of whistleblowing and in some cases, it may have been that there were less formal proportionate actions that could have been taken first, such as counselling.

- **Insight:** If concerned about whistleblower conduct, consider what the best and most proportionate action may be in the circumstances by ensuring the context of the conduct is taken into account when deciding on the appropriate action.



Role of the Ombudsman

The PID Act establishes that principal officers and authorised officers have a duty to take reasonable steps to protect those who belong to their agency against reprisal.

This means for those concerned about the risk of reprisal, or of reprisal action already having been taken, we consider the agency itself to be the first port of call.

It also means that we will generally allocate a disclosure to the agency concerned for handling.

Nevertheless, the Ombudsman remains the oversight body for most PID agencies, which means:

- Agencies may contact the Ombudsman to seek information about their obligations, including mitigating against reprisal and support.
- People may make a complaint to the Ombudsman if they have raised concerns with an agency and are dissatisfied with the response.
- A person may seek to make a disclosure directly to an authorised officer of the Commonwealth Ombudsman if, because of the relative size of the agency or involvement of agency PID officers, they consider their concerns appropriate for investigation by the Ombudsman.



Disclaimer

This document is intended and suitable for public release and publication.

The Commonwealth owns the copyright in all material produced by the Ombudsman. With the exception of the Commonwealth Coat of Arms, the Office of the Commonwealth Ombudsman's logo, any material protected by a trade mark, and where otherwise noted, all material presented in this publication is provided under a Creative Commons Attribution 4.0 licence.

The details of the relevant licence conditions are available on the Creative Commons website (creativecommons.org/licenses/by/4.0/deed.en) as is the full legal code for the CC BY 4.0 licence.

The Commonwealth's preference is that you attribute this report and any material sourced from it using the following wording:

Source: Licensed from the Commonwealth Ombudsman under a Creative Commons 4.0 licence. This report is available from the Commonwealth Ombudsman website at www.ombudsman.gov.au.

Use of the Coat of Arms

The terms under which the Coat of Arms can be used are set out on the It's an Honour website www.pmc.gov.au/government/its-honour

Contact us

Enquiries regarding the licence and any use of this report are welcome at:

Commonwealth Ombudsman

Level 5, 7 London Cct

Canberra ACT 2601

Tel: 1300 362 072

Email: ombudsman@ombudsman.gov.au